CHAPTER 7

The Purchaser's Inquiries and Searches

A INTRODUCTION

In the previous chapter it was seen that the law imposes on the vendor a limited duty of disclosure only. Yet a purchaser's decision to proceed with the transaction may depend mainly on information which the vendor is under no duty to disclose, such as the condition of the property, or of which the vendor is not even aware. To protect himself the purchaser needs to have the property surveyed and to make searches and inquiries not only of local authorities but also of the vendor himself. This chapter considers the nature of, and need for, the following:

(i) an independent survey of the property,
(ii) pre-contract (or preliminary) inquiries,
(iii) a search in the register of local land charges,
(iv) additional local authority inquiries,
(v) a search in the land charges register,
(vi) a search in the public index map.

There may also be compelling reasons why a purchaser's solicitor ought to inspect the property, not to check its structural condition, but to view the physical features of the land.[1] These could have important legal implications. The existence of paths may be revealed, problems relating to access discovered, projections from adjoining properties spotted, and not the least is the necessity to check the accuracy of any contract plan. The existence of vacant land adjacent to the property should prompt inquiries as to the possible future development of that land, and the enjoyment of light over it,[2] but without first viewing the property the practitioner cannot appreciate whether any need exists to raise these matters. An inspection may also disclose third party rights not mentioned in the contract, though a mere external observation is not likely

[1] *Cf.* The Law Society's Digest, Opinion No. 127, stating that though it is the solicitor's duty to satisfy himself as to the identity of the property purchased, the method of doing so is a matter for his discretion and a personal inspection of the property is not, as a rule, necessary.

[2] A contract for the sale of a house with windows overlooking land of a third person imports no warranty that the windows are entitled to the access of light over that land: *Greenhalgh* v. *Brindley*, [1901] 2 Ch. 324, at p. 328, *per* FARWELL, J.

to reveal the existence of occupational rights of third parties.[3] It is not thought that many practitioners do view their clients' properties, even where factors such as distance do not render this impossible. It therefore behoves a solicitor to ascertain as much as he can from his client about the layout of the property, its physical features and the occupation of persons other than the vendor.

B THE CAVEAT EMPTOR RULE

1 Need for Independent Survey

For many generations the law of this country has been well settled that on a contract for the sale or letting of land there is prima facie no warranty as to the habitability of the property erected on it. It is not the vendor's duty to reveal defects in the physical condition of his property, rather the purchaser's responsibility to discover them for himself. Indeed he does not need to rely on the seller's skill and knowledge. He can view the state of the property and satisfy himself of its condition, if he wishes, and judge its suitability for its intended purpose. Different considerations may arise if the vendor deliberately conceals defects, or volunteers information. In addition the Misrepresentation Act 1967, greatly increases a purchaser's rights. For statements made as to condition, if inaccurate, may have far more serious repercussions than previously, resulting perhaps in the purchaser's obtaining rescission for a non-fraudulent misrepresentation even after completion, or damages in lieu.[4]

The problems raised by the *caveat emptor* rule have been fully considered by the Law Commission,[5] and some of their recommendations have been implemented, with modifications, by the Defective Premises Act 1972, which comes into operation on 1 January 1974. In relation to the purchase of existing property the Act makes no change in the law governing the contractual position regarding defects of quality. The Law Commission considered that any alteration in the existing law would be undesirable, particularly for purchasers of residential property.[6] Such a purchaser's interests are best served by an independent survey undertaken on his behalf. A right of action against a vendor (who may in the meantime have died or disappeared) for breach of warranty as to structural condition is no real substitute for a thorough inspection of the property by a qualified person before contract. Yet many purchasers do not in fact commission an independent survey. On a purchase of fairly modern property, a purchaser often dispenses with his own survey if he is obtaining a mortgage, choosing to rely instead on the survey carried out on behalf of the mortgagee, on the basis that if there is anything radically wrong with the

[3] On the present state of the authorities it is not clear what precise inquiries should be made by or on behalf of the purchaser of persons (other than the vendor) in occupation of the property in order to ensure that the purchaser is not fixed with constructive notice of such persons' rights (if any) on account of his failure to inspect the property or enquire of the occupier. See *Caunce* v. *Caunce*, [1969] 1 All E.R. 722; *Hodgson* v. *Marks*, [1971] Ch. 892; [1971] 2 All E.R. 684, C.A. The problem is further discussed in Chap. 14, pp. 333–334, *post*.

[4] See further pp. 153–154, *post*. During the Lords' debates on the Bill, Lord UPJOHN opined that the Act would go a long way to removing the *caveat emptor* rule: H.L. Debates, 17 May 1966, Vol. 274, col. 943.

[5] Report on the Civil Liability of Vendors and Lessors for Defective Premises, Law Com. No. 40, 1970.

[6] Law Com. No. 40, paras. 17–19. The problem of newly built houses is considered later, p. 144, *post*.

property the mortgagee will either refuse a loan or require any major defects to be remedied. The cost of the mortgagee's survey is borne by the purchaser-mortgagor, but the surveyor's report is solely for the mortgagee's purposes. A purchaser has no right of action against a building society in respect of a negligent survey.[7] To confer on the purchaser a statutory right to see the mortgagee's report would be at best only a partial solution to the problem, for its primary purpose is to assess the value of the property as a security rather than to point out specific defects, though these two aspects are often closely related. Nor can a purchaser-mortgagor derive much comfort from s. 30 of the Building Societies Act 1962, whereby a building society is deemed to warrant to a prospective borrower that the purchase price is reasonable; societies generally exercise their statutory right to give the borrower written notification that the making of an advance implies no such warranty.

A solicitor should point out to his client the desirability of having an independent survey. Failure in this respect does not appear to constitute professional negligence unless he advises a survey by some unqualified person and the purchaser suffers loss by reason of a negligent survey.[8] The proper measure of damages is not the cost of repairs but the difference between the value of the property in the condition described in the surveyor's report and its value in its actual condition.[9]

2 Extent of Rule

The doctrine confers on the vendor a far-reaching immunity which is not confined merely to the structural condition of buildings.[10]

(a) Legal unfitness

The law treats legal unfitness in the same way as physical or structural unfitness. On a demise of property there is no implied condition on the landlord's part that the premises are legally fit for the purpose contemplated by the tenant and known to the landlord. In *Hill* v. *Harris*,[11] a sub-lessee was permitted by his sub-lease to use the premises for the business of a confectionery and tobacco retailer. Such user was in fact prohibited by the head lease and the head lessor refused to consent to such use. The sub-lessee was held to have no action against his landlord. Similarly, it appears to be the purchaser's duty to ascertain whether the existing use of the land is an authorised one for the purposes of the Town and Country Planning Acts; the vendor gives no warranty that it is.[12]

[7] *Odder* v. *Westbourne Park Building Society* (1955), 165 Estates Gazette 261. No action lies against the negligent surveyor, even under the principle of *Hedley Byrne & Co., Ltd* v. *Heller & Partners, Ltd.*, [1964] A.C. 465; [1963] 2 All E.R. 575, H.L., in view of the absence of the necessary element of reliance. At the most the purchaser can only be said to rely indirectly on a report which he assumes to be favourable. See *Armstrong* v. *Strain*, [1951] 1 T.L.R. 856, at p. 873, *per* DEVLIN, J.; affd. [1952] 1 K.B. 232; [1952] 1 All E.R. 139, C.A.

[8] See *Collard* v. *Saunders* (1971), 221 Estates Gazette 795 (liability admitted; plaintiff recovered damages for injury to health).

[9] *Philips* v. *Ward*, [1956] 1 All E.R. 874, C.A. Many factors come into play when fixing a price; the cost of repairing defects is only one of them: *per* DENNING, L.J., at p. 875. The cost of repairs may represent the difference in value: *Hood* v. *Shaw* (1960), 176 Estates Gazette 1291.

[10] *Cheator* v. *Cator*, [1918] 1 K.B. 247; [1916–7] All E.R. Rep. 239, C.A. (no liability for death of tenant's mare after eating overhanging branches of tree on landlord's adjoining land).

[11] [1965] 2 Q.B. 601; [1965] 2 All E.R. 358, C.A., applying a dictum of DEVLIN, J., in *Edler* v. *Auerbach*, [1950] 1 K.B. 359, at p. 374; [1949] 2 All E.R. 692, at p. 699.

[12] *Gosling* v. *Anderson* (1971), 220 Estates Gazette 1117; rvsd. on other grounds (1972), 223 Estates Gazette 1743, C.A. The purchaser's rights are often governed by the General Conditions; see N.C.S. 15; L.S.C. 2.

It does not follow that a purchaser prevented from using the property for the intended purpose is necessarily without redress. Legal unfitness stemming from an undisclosed restrictive covenant may result in a purchaser of freehold land rescinding the contract, or suing after completion for breach of the covenants for title. A purchaser of land described by the vendor as suitable for building may be entitled to rescind the contract if he later discovers the existence of an undisclosed underground culvert which renders the land unsuitable for building.[13] But provided the purchaser is not being forced to take property substantially different from that agreed to be sold, the contract may be enforced against him subject to compensation.[14]

(b) Vendor's liability for negligent work

The old cases established that a vendor was immune from liability even in respect of defects in his property rendering it dangerous or unfit for habitation, which he himself had negligently created.[15] This principle was held in *Otto* v. *Bolton*[16] by ATKINSON, J., at first instance not to have been affected by *M'Alister or Donoghue* v. *Stevenson*,[17] so that a builder of a new house was not liable to the purchaser's mother who was injured when the ceiling collapsed. Subsequent cases endeavoured to restrict the scope of the immunity to builders who were also vendors or owners.[18] The Law Commission felt[19] that this immunity, creating as it did distinctions which were capricious and difficult to justify, should be abolished. Effect has been given to this recommendation in s. 3 of the Act which in terms merely provides that a vendor's duty of care in respect of work done on land is not abated by its subsequent disposal. Section 3 is not retrospective; in the case of a sale of property it does not apply in relation to premises where the contract for sale was entered into before the commencement of the Act. As it transpires, however, s. 3 may do no more than give statutory recognition to what appears to be the true common law rule, for shortly after the introduction of the Bill in the Commons, a majority of the Court of Appeal held in *Dutton* v. *Bognor Regis United Building Co., Ltd.*[20] that the vendor's (or builder's) immunity did not in fact survive *Donoghue* v. *Stevenson*. The supposed distinction between liability for chattels and liability for real property was untenable, and *Otto* v. *Bolton* was wrongly decided.

Consequently both at common law and under the Act a vendor who executes any work of construction or repair to his property owes a duty in respect of defects caused by his careless performance of the work. The duty is owed to all

[13] *Re Puckett and Smith's Contract*, [1902] 2 Ch. 258; [1900–03] All E.R. Rep. 114, C.A.

[14] *Shepherd* v. *Croft*, [1911] 1 Ch. 512; *Re Belcham and Gawley's Contract*, [1930] 1 Ch. 56. For misdescription and non-disclosure, see Chap. 23.

[15] *Bottomley* v. *Bannister*, [1932] 1 K.B. 458, C.A. (negligent installation of gas boiler causing purchaser's death).

[16] [1936] 2 K.B. 46; [1936] 1 All E.R. 960. As to the purchaser's rights, see p. 141, *post*.

[17] [1932] A.C. 562; [1932] All E.R. Rep. 1, H.L.

[18] *Gallagher* v. *McDowell, Ltd.*, [1961] N.I. 26; *Sharpe* v. *E. T. Sweeting & Son, Ltd.*, [1963] 2 All E.R. 455.

[19] Law Com. No. 40, paras. 38–47.

[20] [1972] 1 Q.B. 373; [1972] 1 All E.R. 464, C.A. The actual decision concerned the vicarious liability of a local authority for the failure of their building inspector to carry out a proper inspection of the foundations of the plaintiff's house. The council contended that since the builder could not be liable for negligently constructing the house, the inspector was not liable for his negligent inspection. It therefore became necessary for the Court to consider the validity of the basic premise. STAMP, L.J., dissented on the question of the builder's liability, holding that it was not open for the court to question his immunity.

persons likely to be affected by such defects, the purchaser, subsequent purchasers, other occupiers and visitors, and seemingly exposes the vendor to the risk of an endless series of claims. Two considerations may operate to restrict his liability. First, by analogy with the manufacturer's duty for defective chattels, an intermediate inspection or opportunity of inspection might suffice to break the relationship between the vendor and a subsequent purchaser,[1] save as to hidden defects which a survey would not disclose. Secondly the limitation period will normally begin to run when the damage is suffered. In *Dutton's* case where the builder's negligence took the form of constructing defective foundations, Lord DENNING, M.R., took the view[2] that the damage was done when the foundations were badly constructed. This does not appear to be a rule to govern all situations. Different considerations may arise where the defective work results in personal injuries or the plaintiff is a person who purchased the property more than six years later. One point is clear. A defect covered up in the course of construction or alteration constitutes concealed fraud within s. 26 (b) of the Limitation Act 1939, and time does not begin to run until the plaintiff has, or could with reasonable diligence have (e.g. by means of a survey when he bought), discovered the defect.[3]

No duty of care is owed in respect of defects not created by the vendor, even though he is aware of their existence. The Law Commission did recommend in relation to known structural defects the imposition of a duty to take reasonable care to ensure that the purchaser (and others) were reasonably safe from injury.[4] This proposal attracted considerable criticism and, perhaps as a matter of political expediency, no attempt was made to implement it.[5]

3 Exceptions to Caveat Emptor

In some circumstances a purchaser, or lessee, may have a cause of action in respect of defective premises.

(a) Collateral warranty

A purchaser can maintain an action for breach of a collateral warranty, or contract, as to fitness. The difficulty has always been to decide when a representation made during the negotiations preparatory to the contract amounts to an actionable warranty. According to A. L. SMITH, M.R., in *De Lassalle* v. *Guildford*:[6]

"To create a warranty, no special form of words is necessary. It must be a collateral undertaking forming part of the contract by agreement express or implied, and must

[1] *Dutton* v. *Bognor Regis Building Co., Ltd.* [1972] 1 Q.B. 373, at p. 396; [1972] 1 All E.R. 462, C.A., at p. 474, *per* Lord DENNING, M.R.

[2] [1972] 1 Q.B. 373, at pp. 396–97; [1972] 1 All E.R. 462, at pp. 474–75, adopting *Bagot* v. *Stevens Scanlon & Co.*, [1966] 1 Q.B. 197, at p. 203; [1964] 3 All E.R. 577, C.A., at p. 579, *per* DIPLOCK, L.J. SACHS, L.J., expressed no concluded view on the limitation point; see pp. 405 and 482, respectively. It is interesting to note that both Lord DENNING, M.R., and SACHS, L.J., held that the defective foundations amounted to more than pure economic loss and constituted physical damage to the house.

[3] *Archer* v. *Moss*, [1971] 1 Q.B. 406; [1971] 1 All E.R. 747, C.A.; *King* v. *Victor Parsons & Co.*, [1973] 1 All E.R. 206, C.A. Fraud in this context does not necessarily import moral turpitude.

[4] Law Com. No. 40, paras. 48–55, Draft Bill, cl. 3.

[5] It may well be that much of the criticism was misguided. The duty proposed was not a duty of disclosure, but a duty to ensure reasonable safety, and in normal circumstances a vendor would have been able to discharge this duty by revealing specific defects after completion.

[6] [1901] 2 K.B. 215, at p. 221, C.A.; *Buchanan* v. *Kenner*, [1952] C.P.L. 180 (assurance that dry rot eliminated).

be given during the course of the dealing which leads to the bargain, and should then enter into the bargain as part of it."

In this case a tenant refused to sign his lease unless the landlord assured him the drains were in good order. The landlord gave the assurance; he was held liable to the tenant in damages when the drains proved to be defective. Collateral warranties have also been held to arise where a purchaser entered into a contract to buy a new house on the strength of the builder's assurance that it was very well built and there was nothing to be afraid of,[7] and where the purchaser of a building plot fronting an unmade road was informed that it would be constructed.[8] In these three instances the purchaser was entitled to recover damages after completion. In some cases the law implies a warranty upon which an action can be founded.[9]

The changes made by the Misrepresentation Act 1967, in the law relating to innocent misrepresentation will doubtless make it less necessary for a purchaser to try to establish the existence of a collateral warranty. But it is a debatable point whether the Act renders any distinction between them completely otiose, as the Law Reform Committee fondly hoped.[10]

(b) Sale of leasehold property

On a sale of leasehold property subject to a lessee's covenant to repair, a purchaser can require the vendor to repair the property in accordance with the covenant as part of his obligation to assign a good title.[11] Assuming the lease contains a forfeiture clause, any outstanding breach of covenant renders the interest defeasible at the lessor's option, and the court will not order specific performance against the purchaser. The purchaser's rights are subject to any condition to the contrary. He will not be entitled to complain if the contract incorporates the National Conditions of Sale, Condition 12 (3) of which states that a purchaser is deemed to purchase with full notice of the actual state and condition of the property.[12]

(c) Leases

Apart from any express obligations undertaken by a landlord, there is at common law an implied warranty that a furnished house is fit for habitation when let,[13] but no obligation exists to keep it habitable.[14] Various statutory provisions afford a measure of protection to tenants in certain cases by implying conditions of fitness or imposing repairing obligations on the landlord.[15]

[7] *Otto* v. *Bolton*, [1936] 2 K.B. 46; [1936] 1 All E.R. 960.

[8] *Jameson* v. *Kinmell Bay Land Co., Ltd.* (1931), 47 T.L.R. 593.

[9] See p. 142, *post*.

[10] See p. 154, *post*.

[11] *Barnett* v. *Wheeler* (1841), 7 M. & W. 364; *Re Highett and Bird's Contract*, [1903] 1 Ch. 287. The purchaser's knowledge of want of repair is immaterial. As to the obligation to show a good title, see pp. 246–54, *post*.

[12] L.S.C. 4 (2) (a) is to the same effect. See *Lockharts* v. *Bernard Rosen & Co., Ltd.*, [1922] 1 Ch. 433; *Butler* v. *Mountview Estates, Ltd.*, [1951] 2 Q.B. 563; [1951] 1 All E.R. 693.

[13] *Smith* v. *Marrable* (1843), 11 M. & W. 5.

[14] *Sarson* v. *Roberts*, [1895] 2 Q.B. 395.

[15] Housing Act 1957, s. 6 (1), (2); Housing Act 1961, ss. 32, 33; see further M. & W., 684–87. See also the Defective Premises Act 1972, s. 4, which imposes on a landlord a duty to ensure reasonable safety in certain circumstances.

4 Builder's Liability in respect of New Houses

(a) At common law

Two fundamental reasons exist why the maxim *caveat emptor* cannot apply on the sale of a house to be erected or in course of erection.[16] First, the house is uncompleted, perhaps not even built; so the purchaser cannot finally inspect it before deciding to buy. Secondly, as there is not merely a contract to sell, but also a contract by the vendor to do building work, it is only natural and proper that there should be an undertaking that the building work should be done properly. This gives rise to the rule that when a purchaser buys a house from a builder who contracts to build it, there is a threefold implied warranty:[17]

(i) that the builder will do his work in a good and workmanlike manner,
(ii) that he will supply good and proper materials and
(iii) that it will be reasonably fit for human habitation.

The decision in *Hancock* v. *B. W. Brazier (Anerley), Ltd.*[18] is one of several cases recognising this implied warranty.

A builder sold a house in course of erection to the plaintiff. He agreed to erect the house in a proper and workmanlike manner. The sale was made subject to the National Conditions of Sale (16th Edn.) so that by Condition 12 (3) the purchaser was deemed to buy with full notice of the property's state and condition. The material (hardcore containing sodium sulphate) used in laying the foundation for the concrete floors was unsuitable, causing the floors to crack, though the builder was not negligent in failing to appreciate the dangers in using the hardcore.

The plaintiff recovered damages for breach of the implied warranty of fitness of materials. Several points arose. The express term for completing the house in a proper manner only related to workmanship; it did not operate to exclude the implied warranty as to materials. Nor did Condition 12 (3) prevent recovery, for it did not apply to the contract to erect the building.[19]

Liability for breach of the warranty is contractual and only the original purchaser can sue for its breach. The limitation period will normally run from the date of the breach. In comparison the builder's liability in tort for negligently constructing a house is, as we have noticed, much wider.

(b) Exclusion of implied warranty

It by no means follows that these implied warranties operate whenever a new house or flat is bought. Where the house is complete at the time the contract is entered into, no warranty is implied.[20] The purchaser has every opportunity to have the property fully surveyed before contracting to buy. No room for any

[16] *Perry* v. *Sharon Development Co., Ltd.*, [1937] 4 All E.R. 390, C.A., at pp. 395–96, *per* MACKINNON, L.J.

[17] *Hancock* v. *B.W. Brazier (Anerley), Ltd.*, [1966] 2 All E.R. 901, C.A., at p. 903, *per* Lord DENNING, M.R.

[18] [1966] 2 All E.R. 901. *Lawrence* v. *Cassel*, [1930] 2 K.B. 83; [1930] All E.R. Rep. 733; *Miller* v. *Cannon Hill Estates, Ltd.*, [1931] 2 K.B. 113; [1931] All E.R. Rep. 93.

[19] Alternatively, the condition could be regarded as inapplicable to the contract on account of its inconsistency with the express clause, a view favoured by DIPLOCK, L.J., at first instance; see [1966] 2 All E.R. 1.

[20] *Hoskins* v. *Woodham*, [1938] 1 All E.R. 692. Representations as to the qualities of the house may constitute a collateral warranty enabling the purchaser to sue, even where the house is completed: *Birch* v. *Paramount Estates (Liverpool), Ltd.* (1956), 168 Estates Gazette 396.

implied term of fitness exists where the contract contains an express term as to the way the house is to be built and the builder complies with his contract.[1]

In the past builders have not been slow to devise means to exclude the operation of any implied warranty, but it requires very clear words to debar the purchaser from exercising his ordinary rights of suing if the work is not properly done in accordance with the contract.[2] Furthermore the courts will not construe an exemption clause as applying to a situation created by a fundamental breach of contract.[3] Many builders have been prepared to assume a contractual liability to remedy major structural defects discovered within a certain period (often six months) after completion. Undertakings of this nature afford the purchaser some limited protection but, so it was once thought, precluded complaints about other defects. However in *Hancock's* case the Court of Appeal, construing a typical defects clause, held that it did not bar the purchaser's rights in respect of defects not discoverable within the contractual period of six months. Even with regard to those discovered within six months, it only required the vendor to make defects good and did not exclude liability in damages. It is interesting to note that the court construed the clause strictly in circumstances not involving negligence on the builder's part.

As from 1 January 1974, builders of new houses will be subject to the statutory duties imposed by the Act of 1972, though the common law rules will continue to regulate their liabilities arising under building contracts entered into before that date.

(c) Statutory liability

The need to protect house purchasers from jerry-building, shoddy workmanship and sub-standard materials has been increasingly recognised over the years, and this has been accompanied by growing criticism of the law's ineffectiveness in providing a solution. Individual house purchasers have in practice been unable to negotiate better terms for themselves because of the take-it-or-leave-it attitude adopted by many developers. It has been left to an independent but Government approved non-profit making organisation, the National House Builders Registration Council, to take the initiative. This Council, comprised of members of the National Federation of Building Trades Employers and other interested organisations, was first established as long ago as 1937 to ensure a high standard of design, workmanship and materials in house-building. It is only during the past few years, however, that the Council's scheme has become widespread, due partly to the support given by the Building Societies Association. During recent years this Association has also played a part in preventing the widespread use of exemption clauses by recommending member societies to refuse to advance money on the security of properties built under agreements which preclude recourse to common law remedies.

[1] *Lynch* v. *Thorne*, [1956] 1 All E.R. 744, C.A. (rain penetrating 9 in. solid brick wall making room uninhabitable); *cf. King* v. *Victor Parsons & Co.*, [1972] 2 All E.R. 625; affd. [1973] 1 All E.R. 206, C.A.

[2] *Billyack* v. *Leyland Construction Co., Ltd.*, [1968] 1 All E.R. 783, C.A., at p. 787, *per* EDMUND DAVIES, L.J. (provision that habitation certificate to be "conclusive evidence" of completion of house no bar to complaints of structural defects); *Hancock* v. *B.W. Brazier (Anerley), Ltd.*, [1966] 2 All E.R. 901, C.A., *Perks* v. *Stern* (1972), 223 Estates Gazette 1441 (clause excluding liability for any form of consequential loss or damage held not to bar claim for damages for failure to complete house in good and workmanlike manner).

[3] *Harbutt's Plasticine, Ltd.* v. *Wayne Tank and Pump Co., Ltd.*, [1971] 1 Q.B. 447; [1970] 1 All E.R. 225, C.A.

In view of the long and loud clamour for adequate consumer protection for purchasers, it is hardly surprising that the Law Commission urged that a builder's duties in relation to the construction of new dwellings should be put on a proper statutory footing. The Defective Premises Act 1972, gives effect to their recommendations.[4]

(i) *Nature of duty.* Subject to one basic exception to be considered in the following section, the Act imposes[5] on a builder (and certain other people to be noted in para. (iii) below), a statutory duty equivalent in terms to the implied warranty existing at common law, i.e. a duty to see that his building work is done in a workmanlike manner with proper materials so that when completed the dwelling will be fit for habitation. The duty arises in relation to work done in connection with the *provision of a dwelling* whether the dwelling is provided by the erection, conversion, or enlargement of a building. It is questionable whether a mere enlargement of an existing dwelling is caught by the Act,[6] since there is no provision of a dwelling unless the result is to produce two or more separate dwellings where formerly there was only one. This statutory obligation cannot be excluded or restricted.[7] Any cause of action in respect of a breach of duty accrues at the time when the dwelling is completed, not necessarily when the first purchaser acquired his interest therein, save that time starts running again in respect of further work undertaken to rectify work already done.[8] Subject to these special rules other limitation provisions will apply in the normal way, so that in relation to hidden defects, time will not run until their discovery.[9]

Under s. 1 (3) it will be no defence for the builder to prove that he has complied with plans and specifications provided by him and accepted by the purchase if those specifications do not provide for proper materials or the house when finished is not fit for habitation. In effect this provision prevents any repetition of the decision in *Lynch* v. *Thorne*.[10] On the other hand, if the dwelling is to be erected in accordance with plans and specifications supplied by or on behalf of the purchaser, the builder is regarded as having discharged his statutory obligation if he complies with his instructions in a workmanlike manner.[11]

(ii) *Persons to whom duty is owed.* The duty imposed is of more than strictly contractual force and is owed not merely to the original purchaser but to every person who acquires an interest, legal or equitable, in the dwelling. Clearly no duty under the Act arises in favour of mere licensees, visitors, or members of a purchaser's or a tenant's family[12] nor, it is submitted, in favour of persons

[4] Law Com No. 40, paras. 20–37; Draft Bill, cl. 1.

[5] Section 1 (1).

[6] E.g. by adding a fourth bedroom to a house with 3 bedrooms. No statutory duty arises in relation to industrial or commercial premises.

[7] Section 6 (3).

[8] Section 1 (5). The Law Commission's Draft Bill contained a more elaborate provision which differentiated between cases where the dwelling was built to order and other cases (such as speculative building).

[9] *Archer* v. *Moss*, [1971] 1 Q.B. 406; [1971] 1 All E.R. 747, C.A., p. 140, *ante*.

[10] [1956] 1 All E.R. 744, C.A., note 1, p. 143, *ante*.

[11] Section 2 (2).

[12] Other than a spouse whose statutory rights of occupation under the Matrimonial Homes Act 1967, rank as a charge on the estate as if it were an equitable interest: s. 2 (1)

having rights to occupy under some contractual licence or by virtue of an estoppel interest. However these people are not necessarily without redress; the statutory obligation exists in addition to any duty owed by the builder apart from the Act[13] so that liability may be established in tort for damage sustained by the negligent construction of the property.[14]

(iii) *Persons on whom duty is imposed.* The duty is imposed on any person "taking on work for or in connection with the provision of a dwelling". It includes not only the builder, but sub-contractors, architects and surveyors, suppliers of "purpose built" components for installation in specific dwellings, developers and local authorities[15] who in the course of a business or in exercise of statutory powers arrange for others to build dwellings on their behalf. Depending upon the circumstances of the case a purchaser may often have a cause of action against more than one person. This is a most far-reaching and controversial aspect of the new statutory obligation. It does not extend to manufacturers of general building materials or mass produced components whose obligations will continue to be governed by the law relating to the sale of goods and to negligence. The exact nature of the obligation will not be the same in every case. An architect who designs houses for a particular estate will not normally be under any duty to use proper materials, but he is required to execute the work "taken on" in a professional manner and to provide designs, plans and specifications which, if followed by the builder, will result in the necessary standard of habitation.[16] A sub-contractor who undertakes work on the terms that he adopts plans and specifications provided by the builder or main contractor will under s. 1 (2) discharge his duty if he executes the work in accordance therewith, but not if he substitutes sub-standard materials which cause the premises to be defective.

One very compelling reason exists for creating such an extensive duty. Were the purchaser's only remedy limited to the builder with whom he was in a contractual relationship, the statutory provision would prove worthless where the builder became bankrupt or where the defect was not attributable to any breach by the builder of his statutory obligation.[17]

5 The National House Builders' Registration Council Scheme[18]

In a provision having no counterpart in the Law Commission's Draft Bill, s. 2 of the Defective Premises Act 1972, excludes the operation of the statutory obligation where the erection of the dwelling is covered by a scheme, approved by the Secretary of State, which confers rights in respect of defects in the state of the dwelling on persons acquiring an interest therein. As yet no scheme has been approved but the one contemplated is that operated by the National

[13] Section 6 (2).

[14] Page 139, *ante*.

[15] As to whom see s. 1 (4).

[16] See further Law Com. No. 40, para. 31.

[17] Law Com. No. 40, para. 28.

[18] See Adams, "Legal Aspects of the N.H.B.R.C. Scheme" (1967), 117 N.L.J. 1206, 1232, 1262; "The N.H.B.R.C. Scheme 1971 Revision" (1971), 121 N.L.J. 144; "The N.H.B.R.C. Scheme —1972 Amendments" (1972), 122 N.L.J. 497.

House Builders' Registration Council.[19] Where the approved scheme applies and provided there is also in existence in relation to any particular dwelling an approved document stating that the requirements as to design or construction imposed by the scheme have been complied with, no action can be brought for breach of the duty imposed by s. 1 in relation to that dwelling.[20] The intention is that every purchaser should have the benefit either of the statutory obligation or of an equivalent obligation under the N.H.B.R.C. scheme, though it will be seen that the two obligations do not correspond in several important respects.

The Council maintain a Register of House Builders willing to participate in the scheme. Only builders whose previous work has been inspected and found satisfactory are registered. Houses erected by registered builders are inspected during construction; on completion the Council issue to the purchaser a certificate of compliance with their building specifications. The issue of this certificate is a prerequisite for a builder's exemption from the statutory obligations imposed by s. 1 of the Act. Registered builders are required to offer a House Purchaser's Agreement which safeguards purchasers (including lessees) in respect of defective houses.

(*a*) *Nature of protection afforded*

This Agreement (HB5A as it is termed) contains a threefold warranty that the dwelling has been or will be built—

(i) in an efficient and workmanlike manner and of proper materials so as to be fit for habitation (an obligation commensurate with the statutory duty),
(ii) so as to comply with the Council's requirements, and
(iii) so as to qualify for the issue of the Council's certificate.

Normally the proper person to enter into this Agreement will be the vendor of the land on which the house is to be built whether or not he is the actual builder.[1] The protection which a purchaser receives under the scheme may be summarised as follows:

1. The vendor is obliged to make good at his own expense defects arising from non-compliance with the Council's requirements and reported within a period of two years. This does not extend to (i) defects arising from wear and tear or by normal shrinkage, (ii) defects resulting from faulty design where the purchaser has provided the design[2] or (iii) defects in or caused by anything not originally built into the house pursuant to the contract between the vendor and the purchaser, which seems to cover "extras" subsequently agreed upon.

2. After this initial period the Council's insurance scheme provides cover[3] for a further period of eight years against major structural damage up to a limit

[19] H.C. Debates 11 February 1972, Vol. 829, col. 1822.

[20] Section 2 (1) (a), (b).

[1] Strictly the Council require the Agreement to be made by the person or firm "who intends to construct or to arrange the construction of any dwelling." For some difficulties which this expression may create, see (1971), 121 N.L.J. 144. For present purposes it is proposed to refer to such person as the vendor.

[2] Where construction is supervised by the purchaser's own architect or surveyor, the vendor is not obliged to enter into the Agreement unless the purchaser so requires by written notice given before exchange of contracts.

[3] The Agreement establishes a contractual relationship between the Council (acting through the vendor as their authorised agent) and the purchaser.

of £10,000 per house. Broadly this part of the scheme is intended to cover such items as subsidence, settlement, collapse or serious distortion of joists or roof structure. Non-structural defects or even minor structural items are not covered, nor is damage caused by normal wear and tear and certain other specified contingencies, such as loss or damage already covered by insurance.

3. The Council undertake to honour any unfulfilled judgment or award obtained against the vendor in consequence of his non-compliance with the obligations under the Agreement.

4. Protection up to a maximum of £1,000 is available in the event of the vendor's bankruptcy or liquidation before the house is completed, including reimbursement of money paid where building work has not commenced.

The Council's obligations are conditional upon the issue by them of a certificate[4] that the house has been built according to their requirements. The vendor contracts to deliver this certificate to the purchaser on its receipt from the Council, but the purchaser (or his solicitor) should ensure that this is done. One important qualification must be noted. The Council's liability is confined to claims consequent upon the negligence of the vendor or his sub-contractor. In those many cases where the vendor is not the builder and the house is erected by a developer under contract with the vendor, no redress is available under the scheme (though liability may arise at common law) for defective work carried out by a sub-contractor employed by the developer.

(*b*) *Persons protected by scheme*

As between the Council and a registered vendor, the latter is duty bound to use the standard form Agreement. Failure to do so may result in disciplinary proceedings, but *vis-à-vis* the purchaser no such obligation exists. Consequently the purchaser's adviser must ensure that the sale or building agreement includes a term binding the vendor to enter into the Agreement. The Council recommend the following clause: "The vendor undertakes to make an irrevocable offer to enter into the form of Agreement HB5A prescribed by" the N.H.B.R.C.

The benefits of the Agreement are intended to accrue to subsequent owners, the word "purchaser" being defined to include successors in title[5] and mortgagees in possession, save that the successor cannot enforce any rights in respect of defects which should have been, but were not, duly reported before the time of acquisition or possession.[6] Considerable uncertainty exists as to the need for an express assignment of the benefit to a subsequent purchaser.[7] The Agreement itself states that the benefit of the Council's undertaking will be treated by them as passing automatically without express assignment and without notice to the Council to any person who comes within the definition of a purchaser. This provision could not be enforced by a successor, who is not a party to the Agreement, but it seems unlikely that the Council would resile from the spirit of

[4] The issue of this certificate is equally vital to the vendor, see p. 146, *ante*.

[5] It is assumed that "successors in title" is used in a non-technical sense and includes persons deriving title such as lessees (*cf.* L.P.A. 1925, s. 78).

[6] A valuable question on the printed form of preliminary enquiries seeks details of all apparent defects covered by the scheme and requests confirmation that the requisite written notice thereof has been duly given.

[7] See Aldridge, "Taking Over N.H.B.R.C. Agreements" (1969), 113 Sol. Jo. 863; see also *ibid.*, 907, 925.

the clause.[8] The better view points to the advisability of an express assignment, so as to silence any lingering doubts or objections. A simple clause in the contract between the original purchaser (i.e. the seller) and his purchaser will be effective in equity to vest the benefit of the Agreement in the latter.[9] The view that the successor takes the benefit of the Agreement under s. 56 of the Law of Property Act 1925, appears unsound. Not only is there no instrument under seal[10] but the section does not confer benefits on persons who are not known and in existence at the time of the Agreement.

(c) Other remedies

The Agreement does not abrogate the purchaser's common law remedies. His right to damages from the vendor for breach of his contractual obligations (as distinct from the right to have defects rectified) survives the initial two years' guarantee period, except that he must first pursue his remedies against the Council and redress from that source must be allowed in mitigation of damages awarded against the vendor. Similarly an action may still be maintained in tort for the negligent construction of the building[11] and in the case of a defect causing personal injuries a subsequent purchaser's sole remedy is to sue in tort. No action for breach of the statutory obligation imposed by the Act of 1972 will be possible.

(d) N.H.B.R.C. scheme compared with the statutory obligation

The Law Commission, whilst duly admitting the benefits of the Council's scheme, considered that certain limitations rendered it desirable to impose a statutory duty (of the type already discussed), not to rival, but to complement the scheme. Thus every house purchaser has the benefit of one of two mutually exclusive but not co-extensive forms of protection. The main advantages of the N.H.B.R.C. scheme can be summarised as follows:

1. It entitles the purchaser to spot checks during building operations and imposes a minimum standard of construction which exceeds the statutory duty to provide a dwelling fit for habitation.

2. Limited protection is given if the builder becomes bankrupt, whereas that event destroys any effective remedy against him under the statute, a disadvantage which is partially offset by the possibility of maintaining actions based on the Act against others who have undertaken building work.

3. Protection lasts for ten years as compared with a period of six years under the Act.

4. Provision is made for honouring unfulfilled judgments.

The statutory obligation can boast the following advantages:

1. It covers a wider range of building operations (e.g. conversions).

2. Liability is unlimited in amount.

3. Liability arises if the house is not fit for habitation. There are no excluded contingencies, though most of those excepted from the Council's scheme relate

[8] See Adams, *op. cit.*, (1971), 121 N.L.J. 144, 147, where it is suggested that in dire circumstances the Council's insurers might insist on the strict letter of the law.

[9] Written notice of assignment to both the registered vendor and the Council is required to effect a legal assignment of the benefit: L.P.A. 1925, s. 136.

[10] See *Beswick* v. *Beswick*, [1968] A.C. 58; [1967] 2 All E.R. 1197, H. L.

[11] Page 139, *ante*.

to minor matters which would not result in any breach of the statutory obligation. In particular damages for personal injuries caused by an actionable defect are recoverable under the Act, but not under the scheme. Where the latter applies, the purchaser's remedy for personal injuries lies in tort.

4. The duty embraces a wide range of persons. Under the Act actions may be maintainable against sub-contractors in circumstances not giving rise to any claim under the Council's scheme.[12]

It remains to be seen whether speculative or indifferent builders use the Act to justify their withdrawal from the scheme or claim exemption from registration. Any widespread development of this practice would be most undesirable, for on balance the purchaser's interests are best served by a scheme which affords protection that is not dependent on the continued existence of the developer[13] or his financial solvency.

C PRE-CONTRACT INQUIRIES

1 Standard Form Inquiries

To off-set the vendor's rather limited duty of disclosure it has become the practice for a purchaser, before signing the contract, to submit inquiries (termed preliminary or pre-contract inquiries) to the vendor to elicit further information to assist him in deciding whether to proceed with the transaction. The use of such inquiries has gathered momentum during the past 25 years and, doubtless, the passing of the Town and Country Planning Act 1947, played no small part in the establishment of the practice.[14] Today their use in relation to a whole host of matters has become so widespread as to make the pre-contract enquiry as important, perhaps even more so especially in relation to registered land, than the post-contract investigation of title.

Practitioners tend to use a standard printed form of inquiry published by The Solicitors' Law Stationery Society Limited. Over the years the standard forms have seen frequent revision, prompted in large measure by the criticism directed at the questions themselves.[15] The latest edition,[16] widely used by solicitors, was introduced in 1970 and contains twelve inquiries of a general nature, and several special inquiries of relevance to leasehold titles, or new properties only.

(a) General inquiries

The printed form requests information concerning the title documents, boundaries, disputes, services, adverse rights, performance of covenants, the fabric of the property, fixtures, fittings, and roads. There is also an involved question

[12] See p. 147, *ante*. The existence of an approved scheme precludes any action under s. 1 of the Act even against sub-contractors whose defective work does not fall within the N.H.B.R.C. scheme.

[13] An important consideration when a building company can be formed for the development of a particular estate and then dissolved almost overnight on its completion.

[14] And see *Goody* v. *Baring*, [1956] 2 All E.R. 11, at p. 16, *per* DANCKWERTS, J.

[15] See Wickenden and Edell, "The Practitioners' Inquisition" (1961), 25 *Conv.* (*N.S.*) 336, who, writing of the published form in vogue in 1961, alleged that the practitioner was confronted with four closely printed pages of questions on every conceivable topic and framed in such terms as to be totally unintelligible to his client and probably partially unintelligible to him.

[16] Form LH. For a critical discussion of this latest form, see Adams, "Enquiries Before Contract" 1970). 120 N.L.J. 610, 630.

relating to planning matters: the past and present use, development during the previous four years, adverse notices or proposals affecting the land and so on. Not all of these inquiries have met with general approval.[17] Some are considered objectionable because they concern matters which the purchaser (or his solicitor) should already know about (e.g. whether the property is situated in an area of compulsory registration of title), or seek information which can be more readily and reliably obtained from other sources. This is especially true of some of the planning inquiries. Fundamental criticism can also be levelled at the unfortunate, though perhaps inevitable, comprehensiveness of some questions which defy any meaningful answer. Few would deny that the majority of the questions seek information on matters about which a purchaser may properly require to be satisfied before signing his contract, but many would question whether they all concern matters which ought suitably to be dealt with by solicitors.

It is not proposed to consider individual inquiries in detail, save to mention one or two that merit some discussion. The inquiry about disputes asks whether the vendor is aware of any disputes regarding boundaries, easements or covenants. This question, though subject to attack from some quarters,[18] is one that a purchaser can fairly raise (provided the offending additional phrase "or other matters" is deleted), especially as regards boundaries which are notorious troublemakers. The suggestion that in the event of subsequent litigation, a purchaser will normally have recourse to the covenants for title is not convincing, for the vendor cannot expect the purchaser to buy a possible law-suit. Another valuable inquiry seeks information concerning rights not apparent on inspection and exercisable over the land by virtue of some informal arrangement or licence. Cases like *Ward* v. *Kirkland*[19] and *E.R. Ives Investments, Ltd.* v. *High*[20] have spotlighted the problems that can arise from that somewhat nebulous right, the equity arising by estoppel, or out of acquiescence. It is conceived that a preliminary inquiry of this kind may be the only inquiry that can reasonably be made to free the purchaser from the trammels of constructive notice, at least in relation to rights not apparent on inspection (e.g. underground drainage rights). Since rights of this nature frequently result from some informal neighbourly agreement, the chances of there being any record with the vendor's deeds are remote and consequently the contract will not normally disclose them.

Perhaps the most objectionable of all the preliminary inquiries is the one requesting details of flooding, structural or drainage defects, subsidence, woodworm, dry rot, or defective electric wiring. Inquiries of this nature first became fashionable about the time the Misrepresentation Act 1967 became law and were designed, not merely as a blatant attempt to reverse the *caveat emptor* rule, but to trap the unwary into making representations of fitness capable of grounding a cause of action under the Act if proved inaccurate. As the content of the inquiry is a matter for surveyors, rather than solicitors, many practitioners refuse on principle to give any reply, except to direct the purchaser

[17] See (1970), 34 *Conv.* (*N.S.*) 224.

[18] See Adams, *op. cit.*, p. 611. Yet the same commentator acknowledges the desirability of an additional enquiry designed to ascertain whether the physical boundaries differ from those shown on the deed or filed plan.

[19] [1967] Ch. 194; [1966] 1 All E.R. 609.

[20] [1967] 2 Q.B. 379; [1967] 1 All E.R. 504, C.A.

to rely on his own inspection. Though this appears to be the wisest course to adopt, it by no means represents the universal attitude. Some are prepared to reply on behalf of their clients with a categorical "No",[1] whilst others reply out of courtesy, adding a qualification that the reply is not to constitute any warranty or representation.

(b) Leasehold inquiries

These request details of the nature of the lease, the lessor and any superior lessor (names and addresses only), the existing fire insurance cover and the fulfilment of covenants to do work (e.g. to paint). It should, however, be unnecessary to ascertain whether the property is held under a head lease or an under-lease for the contract ought to disclose this information, and the inquiry whether the vendor will obtain any necessary licence to assign should normally be superfluous as the point is commonly regulated by the General Conditions of Sale.

(c) Additional inquiries

The need to raise further enquiries depends on the special circumstances of each individual transaction.[2] It may be necessary to elucidate, or object to, clauses in the draft contract. Additional inquiries should not be raised without good reason, yet judging by the frequency in which the standard forms are used without the addition of other questions, it is felt that solicitors may well be giving insufficient consideration to the need for extra inquiries. The printed form does not profess to be exhaustive, but all too frequently the form is dispatched to the vendor's solicitor simply as a matter of course before the draft contract and accompanying papers have been studied.

(d) Effectiveness of inquiries

Few aspects of modern conveyancing procedure have attracted as much trenchant criticism as the use of preliminary inquiries. It has been alleged that they have got completely out of hand.[3] The indiscriminate use of the printed form as a sort of safeguard against a possible action of negligence is to be totally deprecated, yet a strong feeling exists that in many cases it is the task of a secretary or typist to send out the form. All too frequently irrelevant inquiries remain undeleted (despite the reminder in bold print to strike out those that are inapplicable), and questions are asked the answers to which the solicitor should already know, were he to ask his client or check the contract or accompanying documents. Complaint is often directed at the vague and unhelpful replies that are given, though it is the comprehensive nature of some of the questions that is largely responsible for answers like: "This enquiry is too wide to admit of any useful reply." Some practitioners, adopting the philosophy that stereotyped inquiries deserve nothing better than stereotyped

[1] Yet even a simple "no" may be dangerous. A vendor who honestly believes in the truth of his denial may find himself liable under s. 2 (1) of the Misrepresentation Act 1967, if he did not have reasonable grounds to believe the condition was as stated.

[2] A printed form of inquiry exists for use when tenanted property is being acquired. In the main it seeks details of the nature of the tenancy and the extent to which the landlord or tenant has exercised his various rights, statutory or otherwise.

[3] See (1970), 34 *Conv.* (*N.S.*) 226.

answers, do not consult their clients before replying, whilst others advocate that replies might just as well be sent to the purchaser's solicitor with the draft contract, a procedure quite commonly followed on the sale of new property on a building estate.

It is, however, generally accepted even by the most ardent critics of the current practice that relevant and properly worded inquiries have an important role to play in the conveyancing process. It may be that the existence of a printed form is partly responsible for the problem and every practitioner ought to consider the desirability of drafting his own set of questions, seeking to avoid unnecessary and too-widely drawn inquiries. Unless the solicitors of both parties are willing to play their respective parts, the one by limiting his inquiries to those strictly relevant and the other by ensuring that his replies are accurate and informative, the procedure degenerates into nothing more than a meaningless and time-consuming charade. Alas it is to be feared that the recent changes in the law of innocent misrepresentation, far from improving the position, may tend to worsen it.

2 Inaccurate Replies and the Purchaser's Remedies[4]

(a) *Replies in general*

Strictly speaking, the vendor is under no legal duty to reply to the purchaser's inquiries, but it has become standard conveyancing practice to give replies to all reasonable inquiries. The vendor's solicitor may refuse to answer those which he considers are improper, or which are couched in unduly wide language (as is the case with some of the printed inquiries). He should always consult the vendor before replying to any inquiry which he cannot answer from his own knowledge, or from a perusal of the documents of title, though many a busy practitioner, anticipating his client's likely answer, is tempted to use a stock reply, such as "The vendor does not know", without taking proper steps to ascertain the exact position. It is clearly the responsibility of the purchaser's solicitor to discuss with the purchaser the answers to all inquiries which may, affirmatively or negatively, influence the signing of the contract. The general belief that frequently the replies are never communicated to the purchaser may in part be responsible for the unhelpful nature of many replies.

In the case of inaccurate replies, a purchaser need only resort to legal remedies where the falsity is discovered after exchange of contracts. So long as they have not been exchanged, the purchaser can refuse to proceed or can stipulate for better terms, if he considers the vendor's replies unsatisfactory, or erroneous. It will be helpful at this stage to outline the nature of the purchaser's rights in relation to inaccurate replies; other aspects of misrepresentation are considered in Part V of this book which deals with remedies generally.

(b) *Fraudulent replies*

Assuming the fraudulent reply constitutes a representation of fact inducing the contract, the purchaser can rescind the contract or, if completion has taken place, have the transaction set aside on the ground of fraud, or claim damages.[5]

[4] See Adams, "The Misrepresentation Act and the Conveyancer" (1970), 67 L.S. Gaz. 183, 256 and 318.

[5] *London County Freehold and Leasehold Properties, Ltd.* v. *Berkeley Property and Investment Co., Ltd.*, [1936] 2 All E.R. 1039, C.A. (damages awarded for fraudulent representation as to promptitude of rent payments).

It is immaterial whether the falsity is discovered before or after completion, except that rescission sought after completion may be more likely to be barred because of the intervention of third party rights.[6] The Misrepresentation Act 1967, does not affect the law relating to fraudulent misrepresentation.

(c) *Misrepresentation Act 1967*

Prior to this Act a purchaser seeking redress for an innocent misrepresentation contained in replies to preliminary inquiries was entitled to rescind the contract before completion, but the so-called rule in *Angel* v. *Jay*[7] precluded any remedy after conveyance. Damages were not recoverable unless either the misrepresentation had become a term of the contract or a collateral warranty could be established. There does not, however, appear to be any reported decision where a question and answer contained in pre-contract enquiries were held to constitute an actionable warranty,[8] which is perhaps not surprising in view of the court's reluctance to enable damages for innocent misrepresentation to be obtained under some other guise.

The main provisions of the Act,[9] so far as are here relevant, may be summarised as follows. Under s. 1 performance of the contract is no longer a bar to rescission for innocent misrepresentation. Section 2 (1) in effect creates a new statutory right of action for damages in respect of negligent misrepresentations inducing a contract, unless the representor (i.e. the vendor) or his agent can establish reasonable grounds for believing the facts represented to be true. A purely innocent misrepresentation (one not even made carelessly) may under s. 2 (2) be remedied at the court's discretion by an award of damages[10] in lieu of rescission. This subsection does not confer any *right* to damages. A purchaser who seeks damages as of right must prove that the representation was made fraudulently, or fell within s. 2 (1) as being negligent or had become a term of the contract. The court has no power to order rescission and award damages, save that the purchaser would still seem entitled to an indemnity in respect of liabilities necessarily incurred under the contract.[11]

The drafting of s. 2 (2) of the Act creates various difficulties. On a literal interpretation the court would appear to have no discretion to award damages in favour of a purchaser who once had the right to rescind but subsequently lost it.[12] Again the court's discretion arises where "it is claimed, in any proceedings arising out of the contract, that the contract ought to be or has been

[6] See further p. 622, *post*.

[7] [1911] 1 K.B. 666; [1908–10] All E.R. Rep. 470.

[8] *Cf. Mahon* v. *Ainscough*, [1952] 1 All E.R. 337, C.A., especially at pp. 340–41, *per* JENKINS, L.J. (untrue reply to inquiry concerning war damage); *Terrene, Ltd.* v. *Nelson*, [1937] 3 All E.R. 739, at p. 744, *per* FARWELL, J.; *Gilchester Properties, Ltd.* v. *Gomm*, [1948] 1 All E.R. 493 (erroneous statement as to receivable rents).

[9] For a detailed consideration of the Act and the problems it creates, see Treitel, *The Law of Contract* (3rd Edn.) 271 *et seq.*; Atiyah and Treitel, "Misrepresentation Act 1967" (1967), 30 M.L.R. 369.

[10] Uncertainty exists as to the measure of damages and whether it is the same as that under s. 2 (1); see Treitel, *op. cit.*, 302–6. By sub-s. (3) damages may be awarded under both sub-ss. (1) and (2), but an award under sub-s. (2) must be taken into account in assessing liability under sub-s. (1).

[11] *Whittington* v. *Seale-Hayne* (1900), 82 L.T. 49 (lease of poultry farm rescinded; indemnity recoverable for rent, rates and repairs, but not for loss of profits or poultry stock).

[12] This may operate unfairly against the purchaser where the intervention of third party rights bars the right to rescind; Treitel, *op. cit.*, 301–2.

rescinded." During the passage of the Bill through the Lords, Lord UPJOHN foresaw a "highly technical" difficulty arising after the execution of the contract which, on completion, merges with the conveyance.[13] He suggested that in relation to contracts for the sale of land, this doctrine of merger might perhaps exclude the court's discretion to award damages on the ground that there ceases to be any proceedings arising out of the *contract*. If this fear proves well founded, there may well continue to exist situations where it is desirable for the purchaser to establish a collateral warranty, which does not merge in the subsequent conveyance.[14]

(d) Purchaser's rights under the Act

The Act clearly opens up new horizons for the purchaser who later discovers that the information given to him during preliminary negotiations or in answer to some pre-contract enquiry is erroneous. The Act, though enlarging the available remedies, does not supersede the common law requirements that must be satisfied before an action can be maintained. He must still establish a representation of fact; the Act does not extend to mere puffs, representations of law, or representations as to the future. As already noted, answers to preliminary inquiries may often be vague and inconclusive. In one case where the reply was cautiously qualified by the phrase "so far as the vendor knows", ROMER, J., was not satisfied that the reply constituted a sufficiently definite statement of fact to amount to a representation.[15] In *Brown* v. *Raphael*[16] the statement, made on the occasion of a sale of a reversionary interest in a trust fund, that an annuitant was "believed to have no aggregable estate" was held by the Court of Appeal to constitute a representation of a material fact, importing a representation that there existed reasonable grounds for the belief. Mere lawyer's caution in framing replies[17] may not suffice to prevent liability arising, though a statement attached to the replies denying their status as representations may be effective.[18]

Assuming there is a representation, the purchaser must establish that he relied on it when entering into the contract.[19] A solicitor ought to inform his client of the replies given to all inquiries which may affect the purchaser's decision to buy. Normally a contracting party cannot allege that he relied on a misrepresentation of which he was unaware. However the purchaser may still

[13] H.L. Debates, 17 May 1966, Vol. 274, col. 943. For the doctrine of merger, see p. 398, *post*.

[14] *Lawrence* v. *Cassel*, [1930] 2 K.B. 83; [1930] All E.R. Rep. 733, C.A.

[15] *Gilchester Properties, Ltd.* v. *Gomm*, [1948] 1 All E.R. 493, at p. 495.

[16] [1958] Ch. 636; [1958] 2 All E.R. 79, C.A.

[17] Adams, *op. cit.*, 319.

[18] See (1967), 117 N.L.J. 975. On the effect of s. 3, see p. 155, *post*.

[19] In the only case involving the Act yet to come before the courts, the Court of Appeal in *Gosling* v. *Anderson* (1972), 223 Estates Gazette 1743, awarded damages to a purchaser for the innocent misrepresentation by the vendor's agent that planning permission had been granted for a garage. The purchaser appears to have been somewhat fortunate in this case. From the facts (see (1971) 220 Estates Gazette 1117, where the decision at first instance is reported) it seems that despite the agent's statement, the purchaser was aware when she signed the contract that the planning position was uncertain, for her solicitors were pursuing their own enquiries with the area planning officer. Nevertheless the court felt that the effect of the misrepresentation had not been nullified, and the inference was that she had acted on the representation when signing the contract.

be able to maintain an action against the vendor notwithstanding that his solicitor did not disclose the information contained in the reply, at least where his solicitor's advice to sign the contract was influenced by the representation.

(e) Excluding liability

The Misrepresentation Act 1967, forestalls any attempt to contract out of the Act by enacting in s. 3 that a provision in any *agreement* that excludes or restricts the liabilities or remedies of the contracting parties "shall be of no effect" except to such extent as the court may allow reliance on it as being fair and reasonable in the circumstances of the case. The section has not, however, thwarted attempts by lawyers to devise formulae intended to avoid the consequences of the Act. These must be briefly considered.

(i) *Contractual clauses.* Both the main sets of Conditions of Sale contain a clause which prima facie falls foul of s. 3 but in as much as the court has a discretion to allow it to operate in whole or in part, its inclusion in the contract can be justified. Condition 17 of the National Conditions[20] provides that no error, mis-statement or omission in any preliminary answer concerning the property shall annul the sale nor (save where it relates to a matter materially affecting the property's description or value) shall damages be payable or compensation allowed.[1] The expression "preliminary answer" is defined to include any statement made by or on behalf of the vendor in answer to formal inquiries or otherwise. This disclaimer does not extend to information *volunteered* by the vendor or his agent. It remains to be seen to what extent the courts will hold the condition fair and reasonable and allow the vendor to rely on it. No guidance is given for the exercise of their discretion. Clearly each case will depend on its own facts; one relevant consideration may well be the gravity of the misrepresentation.

(ii) *Other forms of disclaimer.* The printed inquiry form itself contains a warning that the replies are believed to be correct (without their accuracy being guaranteed) and do not obviate the need to make appropriate searches, inquiries and inspections. At the most this note might assist the vendor in showing that the purchaser did not rely on his misrepresentation but on the investigations which he himself undertook.[2]

Section 3 does not catch a disclaimer of liability contained in the replies to the inquiries. Whatever is intended by the use in the section of the word "agreement" as distinct from the word "contract", it can hardly be maintained that replies to preliminary inquiries constitute an agreement. Various devices have additionally been suggested in an attempt to provide vendors with a complete immunity. These may be effective since it is doubtful whether s. 3 in terms avoids clauses which seek to prevent liability arising by, for example, denying to the replies or information supplied the status of representations or requiring

[20] See also L.S.C. 13 (2); Adams, *op. cit.*, 287.

[1] Section 3 seems prima facie to invalidate the entire condition, including the provisons designed to exclude or restrict other forms of liability, e.g. misdescription (see p. 569, *post*). Perhaps the courts will permit severance of the non-misrepresentation provisions, thus allowing full effect to be given to them, otherwise they could only operate at the court's discretion.

[2] But see note 19, *ante*. Since s. 2 (1) of the Act imposes liability for negligent misrepresentations by means of a fiction of fraud, the vendor cannot, it seems, escape liability thereunder simply by warning the purchaser to test the accuracy of the statements: *S. Pearson & Son, Ltd.* v. *Dublin Corporation*, [1907] A.C. 351.

the purchaser to acknowledge that he has not relied on the vendor's pre-contract statements but on his own inquiries and searches.[3] If the courts permit clauses of this nature to flourish, s. 3 will soon pass into oblivion. The Council of The Law Society have strongly deprecated any attempt to secure for vendors a total exclusion of liability.[4] Of course a purchaser confronted by such terms can first threaten not to proceed and then withdraw from the purchase if the vendor (or more likely his solicitor) continues to insist upon the offending terms. But in days of housing shortage the vendor is often in the stronger position and the purchaser is all too easily tempted to take a chance that nothing untoward will occur.[5]

Provisions of the type just mentioned, should they ever become widespread which is a distinct possibility if the courts refuse to allow the disclaimer in the General Conditions to be effective, would obviously sound the death-knell of preliminary inquiries in their present form. No useful function would be served by raising questions; for the purchaser would clearly be unwise to rely on information supplied by a vendor immune from liability save for fraud. In a system of conveyancing which places on the vendor only a limited duty of disclosure, this would clearly work to the prejudice of the purchaser, leaving him without effective means of ascertaining essential information which perhaps only the vendor can provide. What is needed is a statutory redefinition of the vendor's duty of disclosure in terms more favourable to the purchaser, which in itself might result in the demise of the printed form of inquiry.

(f) Tortious liability

Recent developments in the law of torts as to liability for loss resulting from negligent statements[6] suggest that a duty of care is owed to a purchaser when answering preliminary inquiries. A duty appears to be owed by the vendor's solicitor, at least in respect of information which he supplies without consulting the vendor. In New Zealand an estate agent acting for a vendor of property has been held to owe a duty of care when providing information about the property to a prospective purchaser.[7] The vendor himself may well be under a similar duty of care. He possesses knowledge relevant to the subject matter of the inquiry and knows or ought to know that the purchaser is likely to act in reliance on his statement; he also has a financial interest in the transaction in relation to

[3] A common form of disclaimer printed on estate agents' house particulars reads: "These particulars do not constitute any part of an offer or contract and any intending purchaser must satisfy himself by inspection or otherwise as to the correctness of each of the statements contained herein. The vendor and his agents make or give no representation or warranty whatever in relation to this property and no responsibility can be taken for the statements contained in these Particulars which are not to be relied upon as statements or representations of fact on the part of either of them." It has been suggested that provisions like this might be caught by s. 3: Atiyah and Treitel, *op. cit.*, 380.

[4] (1968), 65 L.S. Gaz. 467.

[5] See Adams, *op. cit.*, 321 who discusses the respective bargaining powers of the parties.

[6] *Hedley Byrne & Co., Ltd.* v. *Heller and Partners, Ltd.*, [1964] A.C. 464; [1963] 2 All E.R. 575, H.L.

[7] *Barrett* v. *J. R. West, Ltd.*, [1970] N.Z.L.R. 789 (inaccurate reply given to specific inquiry about drainage); *Bango* v. *Holt* (1971), 21 D.L.R. (3d) 66.

which the information is given.[8] Liability can be avoided by making the replies "without responsibility".[9] The contractual exclusion clause considered on page 155, which denies a purchaser any right to damages in respect of errors in preliminary answers, would not save the vendor from liability for breach of a duty of care when making statements. The clause could not in any event assist the vendor's solicitor if he were sued by the purchaser.

D LOCAL LAND CHARGES

1 Need for Search

A search should be made in the register of local land charges maintained by the appropriate local authority.[10] Depending on the location of the property, it may be necessary to make two searches: one in the county council register, the other in the borough, urban, or rural district council register, as the case may be. In such cases two searches are required because registrable matters affecting the property may not be found in a single register. Where the land is situated within a county borough, a London borough, or in the City of London, only one search need be made.

The purpose of this search is to discover registered matters which do not require disclosure by a vendor because they do not constitute incumbrances. Merely because something is termed a local land charge, it does not automatically follow that it ranks as an incumbrance which a vendor is under a duty to disclose. Some by their very nature do, such as a financial charge in favour of a local authority in respect of street works expenses;[11] some do not, such as a resolution to prepare a town planning scheme,[12] whilst the status of others is uncertain. It is equally essential to make a search where the title to the land is registered. Under the Land Registration Act 1925, s. 70 (1) (i), a local land charge ranks as an overriding interest unless and until registered or protected

[8] The duty to use due care when making statements does not appear to be limited to cases where the representor possesses special skill or competence: see *Ministry of Housing and Local Government* v. *Sharp*, [1970] 2 Q.B. 223, at pp. 268–69; [1970] 1 All E.R. 1009, C.A., at pp. 1118–19, *per* Lord DENNING, M.R. *Cf.* the more restricted view of the majority of the Privy Council in *Mutual Life and Citizens Assurance Co., Ltd.* v. *Evatt*, [1971] A.C. 793; [1971] 1 All E.R. 150 where, however, Lord DIPLOCK did concede that a duty of care might arise where the adviser had a financial interest in the transaction (see pp. 809 and 161, respectively); *W. B. Anderson & Sons, Ltd.* v. *Rhodes (Liverpool), Ltd.*, [1967] 2 All E.R. 850. See also *Smith* v. *Mattacchione* (1970), 13 D.L.R. (3d) 437 (untrue statement in contract for sale that third party responsible for improvement charges; vendor liable for negligent misrepresentation under the *Hedley Byrne* principle). Compare the recent decision in *Presser* v. *Caldwell Estates Property, Ltd.*, [1971] 2 N.S.W.L.R. 471, where the New South Wales Court of Appeal, applying the *Evatt* case, held that a vendor who made inaccurate statements to a prospective purchaser as to the nature of the sub-soil of a plot of land owed no duty of care to him, since the vendor made no claim to any particular qualification to speak about the structure of the soil.

[9] But see p. 156, *ante*.

[10] Under the L.C.A. 1925, s. 15 (1), a local land charge is required to be registered by the proper officer of the local authority. The provisions of the L.C.A. 1925 as to local land charges are in the main unaffected by the L.C.A. 1972, save in relation to official certificates of search. As to who is the proper officer, see the Local Land Charges Rules 1966, S.I. 1966 No. 579, r. 3. Once the proposed reorganisation of local government takes effect, local land charges affecting land situated outside Greater London will as from 1 April 1974, be registered by the proper officer of the council of the district in which the land is situated: Local Government Act 1972, s. 212 (1).

[11] *Stock* v. *Meakin*, [1900] 1 Ch. 683; [1900–3] All E.R. Rep. 826, C.A.

[12] *Re Forsey and Hollebone's Contract*, [1927] 2 Ch. 379, C.A.; [1927] All E.R. Rep. 635. Town planning schemes were replaced by development plans, in turn replaced by structure and local plans under the Town and Country Planning Act 1971.

on the register. It may at any time be protected on the register by means of a notice, though this is unusual, and must, if it constitutes a financial charge, be registered as a charge before realisation.[13]

As indicated at the commencement of this chapter local searches are normally made before contracts are exchanged. The need to await the results of the search can delay this exchange and it has in the past been considered desirable to include in the General Conditions some provision enabling exchange of contracts to precede the making of searches, but without prejudice to the position of the purchaser who in such circumstances binds himself to buy without knowing what local land charges affect the land. The National Conditions of Sale[14] contain a provision which, if expressly made applicable by the Special Conditions, entitles the purchaser to rescind the contract should the vendor be unable to cause to be removed or cancelled certain specific matters, including most registered local land charges, affecting the property immediately before the contract is made and not disclosed by him to the purchaser. The range of specific matters is rather limited and does not extend to matters only revealed by additional inquiries. This Condition is rarely resorted to in practice.

The latest edition of The Law Society's Conditions, unlike its immediate predecessor, contains no corresponding provision. Indeed these latest Conditions go much further than previous editions by exempting the vendor from any liability to disclose local land charges and related matters. This change has already evoked criticism as being unduly vendor orientated[15] but has been defended on the ground that it does no more than recognise current conveyancing procedures.[16] The purchaser makes his local searches and inquiries before exchanging contracts and relies on these rather than on any representations given by the vendor. The effect of Condition 2, which is the relevant provision, is that the property is sold subject to (a) all matters registered with a local authority pursuant to any statute (which is not confined to mere local land charges), (b) all requirements, proposals or requests of such authority and (c) all matters disclosed or reasonably expected to be disclosed as a result of the usual local authority searches and inquiries. The purchaser is bound by all such matters and has no redress against the vendor in relation to any matter not discovered until after exchange of contracts, not even something within the vendor's own peculiar knowledge which may not be readily discoverable from the local authority (such as an infringement of the planning legislation). Should the vendor make an inaccurate statement or representation on any such matter, Condition 2 (3) requires the purchaser to rely on any information obtained or obtainable[17] from a local authority in exoneration of the vendor from liability. This clause is clearly caught by s. 3 of the Misrepresentation Act 1967, and might not be upheld by the courts. Finally as regards this controversial Condition the purchaser enjoys a limited right to rescind the contract on account of any compulsory purchase, closing, demolition or clearance order known to the vendor but not to him. This provision is apparently intended to cover cases where the order is made during the time between the purchaser's

[13] L.R.A. 1925, ss. 49 (1) (c), 59 (2), proviso.

[14] N.C.S. 13.

[15] (1971), 121 N.L.J. 5-6, 122.

[16] (1971), 121 N.L.J. 170.

[17] This at least requires that the local authority are possessed of the relevant facts.

search and exchange of contracts. Existing orders of this kind would normally be disclosed by the search and replies to inquiries.

2 What is a Local Land Charge?

As a broad generalisation local land charges fall into two main categories. First, under the Land Charges Act 1925, s. 15 (1),[18] there are financial charges in favour of local authorities for work done under various statutes relating to public health, private street works and similar statutes. Any sum recoverable by a local authority under any such Act from successive owners or occupiers of the property in respect of which the sum is recoverable is deemed to be a charge for the purposes of s. 15. Secondly there are restrictions imposed by a local authority on land use. Section 15 (7)[19] provides in relation to such restrictions as follows—

> "The foregoing provisions of [s. 15] shall apply to—
>
> (b) any prohibition of or restriction on the user or mode of user of land or buildings imposed by a local authority after the commencement of this Act by order, instrument, or resolution, or enforceable by a local authority under any covenant or agreement made with them after the commencement of this Act, or by virtue of any conditions attached to a consent, approval, or licence granted by a local authority after that date, being a prohibition or restriction binding on successive owners of the land or buildings . . . as if the resolution, authority, prohibition or restriction were a local land charge, and the same shall be registered by the proper officer as a local land charge accordingly."

Paragraph (b) includes a restrictive covenant affecting freehold land and enforceable by a local authority, which can, alternatively, be registered as a Class D (ii) land charge. The possibility of overlap is dealt with by s. 15 (7A) of the Act[20] which provides that registration in either register is adequate. Two classes of restriction are expressly excluded from para. (b), and are incapable of registration, these being (i) a restriction operating over the whole of the authority's district or the whole of any contributory place thereof, and (ii) a prohibition or restriction imposed by a covenant or agreement made between lessor and lessee.

Though in the main local land charges relate to matters enforceable only by local authorities, this is not true of all the categories. Some are enforceable by independent statutory corporations, and in one case by private individuals.[1]

Parts of the Register

Provision is made for the register to be divided into twelve numbered parts.[2] It is outside the scope of this book to consider the different parts in detail,[3] but

[18] As amended by the L.P. (Am.) A. 1926, s. 7 and Schedule.

[19] As substituted by L.P. (Am.) A. 1926, s. 7 and Schedule, and amended by the T. & C. P. A. 1947, s. 113, and Sch. 9, Part II.

[20] Added by the L.C.A. 1972, s. 18 (2) and Sch. 4, replacing the L.C.A. 1925, s. 21.

[1] See Parts 8, 9, and 11 of the register.

[2] Local Land Charges Rules 1966, S.I. 1966 No. 579, r. 5. For entries in the individual parts, see rr. 6–16 and 19.

[3] See further, Garner, *Local Land Charges* (6th Edn.); Mellows, *Local Searches and Inquiries* (2nd Edn.).

reference will be made to each to indicate the type of charge capable of being registered. It is vital to remember that many matters are statutorily made registrable in the register without constituting local land charges as defined by s. 15—a distinction of importance both as regards the effect of non-registration and the conclusiveness of the search certificate.[4] Only a reference to the relevant statutory provision will determine into which category a particular matter falls and the difficulty of picking one's way through the statutory maze is amply demonstrated by the case of *Ministry of Housing and Local Government* v. *Sharp*.[5] These resulting differences only serve to create confusion, uncertainty and anomaly and it is to be hoped that the Law Commission will be able to produce some semblance of order out of the chaos.

Part 1. General Financial Charges. Registration of such charges is governed by s. 15 (4) of the Land Charges Act 1925, and enables a local authority, having expended money on e.g. street works, or maintenance of sewers and drains, to register a charge temporarily, pending calculation of the actual sum chargeable in respect of the property concerned, when a Part 2 charge can be registered. A general financial charge gives advance warning that a specific charge for an ascertained sum will in due course be registered. Failure by the local authority to register a general charge does not preclude subsequent registration of a specific charge, but priority only ranks from the date the latter is registered.

Part 2. Specific Financial Charges. Such charges arise under several Acts where a local authority have incurred expenditure for which the owner of the premises is liable, often after he has defaulted in complying with a notice to execute certain works. A charge for street works expenses will be registered here after the final apportionment has been made in respect of the property.[6] Numerous charges of this nature exist under the Public Health Act 1936, such as the cost of providing a fire escape for high buildings.[7] Any entry in Part 2 will reveal (i) the statute, instrument or resolution under which the charge is acquired, (ii) a description of the land affected, (iii) the date of the charge, (iv) the date of its registration and (v) the amount (which will be the final amount, except where interest is payable, in which case the rate of interest is also given).

Part 3. Planning Charges. Entries in this part of the register are those most widely met in practice. They include enforcement notices, compensation notices, tree preservation orders and orders revoking or modifying planning permission. The need to obtain planning consent is not itself registrable; this is a statutory restriction, not one imposed by a local authority.

As a result of the decision in *Rose* v. *Leeds Corporation*[8] conditions attached to a planning permission are apparently not registrable. In this case it was argued that a time condition (that is, one limiting the duration of the permission to a specified period) was void against a purchaser of the land on account of non-registration, with the result that the permission became permanent and unconditional. This contention was rejected. The grant of permission is in reality the grant of a right (and in the case of conditional permission, the grant of a

[4] Pages 163 and 165, *post*.

[5] [1970] 2 Q.B. 223, especially at pp. 285–88; [1970] 1 All E.R. 1009, at pp. 1033–36, C.A. *per* CROSS, L.J.

[6] See further p. 169, *post*.

[7] Section 60; see also s. 75 (cost of providing dustbin).

[8] [1964] 3 All E.R. 618, C.A. For the grant of planning permission, see pp. 181–196, *post*.

conditional right) in alleviation of the statutory prohibition or restriction. Prior to this decision it was the practice to register in Part 3 conditional permissions. Fortunately many clerks to local authorities continue to do so.[9] Nevertheless it will be advisable for a purchaser to inspect the actual planning permission. Questions relating to conditional permission appear both in the printed form of preliminary inquiries and in the additional inquiries asked of local authorities, so that a purchaser making these usual inquiries ought to discover the existence of any conditions. Conditions imposed by the Secretary of State for the Environment on the grant of permission have never been registrable; they are not imposed by the local authority as required by s. 15 (7) (b).

Part 4. Miscellaneous non-planning Prohibitions and Restrictions. A variety of charges arising under innumerable statutes are registrable here. Demolition and closing orders under the Housing Act 1957, conditions imposed on the sale of land by a local authority under s. 104 (5) of the same Act, improvement lines under the Highways Act 1959—these are just a few examples. One of the more recent additions to Part 4 registrable charges is the control order which a local authority can make in respect of a house in multiple occupation in certain cases where it is necessary for the protection of the residents.[10] The order in effect operates as a statutory "assignment" of the property to the authority for the duration of the period specified therein, without vesting in them any interest amounting to an estate in law.[11] This order requires registration in the local land charges register[12] without its constituting a local land charge.

Part 5. Charges for Improvement of Fenland Ways. This relates to charges incurred in relation to the maintenance of private ways in fenlands.[13]

Part 6. Compulsory Purchase Orders. This contains entries relating to certain compulsory purchase orders, namely those providing for expedited completion[14] and, it appears, orders enabling an acquiring authority to proceed by way of a general vesting declaration.[15]

Part 7. New Towns Orders. The first important step in the establishment of a new town is the making of an order designating the area as a proposed new town. This designation order and the compulsory purchase orders made pursuant to it are registrable here.

Part 8. Civil Aviation Orders and Directions. In the interests of safety, the Civil Aviation Authority[16] has wide powers to make orders for the demolition of buildings, the creation of easements or other rights over land and other matters, all of which are registrable in Part 8.

[9] See further (1965), 29 *Conv.* (*N.S.*) 34, 161; Garner, *op. cit.*, 43–44.

[10] Housing Act 1964, s. 73.

[11] *Ibid.*, s. 74 (2).

[12] *Ibid.*, s. 73 (5).

[13] Agriculture (Miscellaneous Provisions) Act 1941, s. 8 (3) (d).

[14] This procedure which enabled local authorities to by-pass the usual compulsory purchase machinery (subject to ministerial consent) was repealed by the T. & C.P.A. 1968.

[15] T. & C.P.A. 1968, s. 30, and Sch. 3, para. 2 (3); Garner, *op. cit.*, 75. No rules have as yet been made prescribing the manner in which these orders are to be registered. General vesting declarations are discussed in Chap. 9, p. 217, *post*.

[16] See the Civil Aviation Act 1971, ss. 1, 14, 16; Local Land Charges (Amendment) Rules, 1972, S.I. 1972 No. 690.

Part 9. Opencast Coal Mining Orders. This covers entries relating to compulsory rights orders and compulsory purchase orders under the Opencast Coal Act 1958, whereby the National Coal Board can obtain rights to carry on opencast coal working for a temporary period.

Part 10. Lists of Buildings of Special Architectural or Historic Interest. Under the Town and Country Planning Act 1971,[17] the Secretary of State can compile or approve lists of buildings of special architectural or historic interest. A copy of so much of the list as relates to a local authority must be deposited with the clerk of the council and the copy becomes registrable in Part 10.

Part 11. Light Obstruction Notices. Readers will already be familiar with the provisions of the Rights of Light Act 1959, and no further comment will be made.[18]

Part 12. Land Drainage Schemes. The Land Drainage Act 1961, empowers certain authorities to prepare a scheme for the improvement of drainage works in certain cases. The scheme becomes registrable in this part of the register.

3 Mode of Searching

(*a*) *Personal search*

A search can be effected by the applicant attending the council offices and inspecting the register in person, on payment of the prescribed fee.[19] Personal searches are seldom made for various reasons. No protection exists similar to that arising when an official search is made;[20] the possibility of failing to discover entries is much greater (though a clerk usually supervises the search) and in many cases two searches are necessary, thus involving time and expense. Occasionally a personal search is effected when there is insufficient time to make an official one, as where a purchaser wishes to exchange contracts with the minimum of delay, or proposes to buy land at an auction.

(*b*) *Official search*

It is enacted[1] that where a person requires a search to be made of the register, he may on payment of the required fee lodge at the registry a requisition on that behalf and thereupon the registrar shall make the search and issue a certificate setting forth the result. It is the invariable practice to request an official search, except in the circumstances already mentioned. The requisition must be in Form C, signed by the applicant or his solicitor, as follows:[2]

> "An official search is required in Part of[3] the register of local land charges maintained by the clerk of the above-named local authority for subsisting entries against the land defined in the attached plan or described below up to and including . . ."

Unlike land charges, local land charges are registered against the land. The name of the estate owner is not therefore necessary. Normally the correct postal

[17] Section 54, replacing the T. & C.P.A. 1962, s. 32.

[18] See M. & W., 859–60; Cheshire, 538–39.

[19] Local Land Charges Rules 1966, r. 23.

[20] L.C.A. 1972, s. 12; Local Land Charges Rules 1966, r. 24 (7). On the nature of this protection, see the section on land charges searches in Chap. 14; p. 353, *post.*

[1] L.C.A. 1925, s. 16; Local Land Charges Rules 1966, r. 24 (1), (4).

[2] Local Land Charges Rules 1966, r. 24 (2), and Sch. 2.

[3] Usually a search in the whole of the register is required, so that the words "Part of" are deleted.

address is adequate to identify the property, otherwise a plan drawn to scale and furnished in duplicate is required. The date on which it is desired the search to be made must be added; often the date of receipt by the registrar is inserted.

Having made the search the registrar issues a certificate, signed and dated, that:

> "The search requested above reveals no subsisting entries or[4] the . . . entries described in the Schedule hereto up to and including the date of this certificate."

The entries are in fact revealed in schedules attached to the certificate, there being different forms of schedules laid down by the Rules for different parts of the register.

A composite form (known as L.L.C. 1) containing both the requisition and the form of certificate is employed; all that it is necessary for the solicitor and the registrar to do is to complete the respective parts of the form.

4 Effect of Registration

Registration of a local land charge constitutes notice to all persons (including a prospective purchaser) for all purposes connected with the land affected,[5] whether the purchaser searches or not. An important exception arises under r. 24 (6) of the consolidating Local Land Charges Rules 1966, which provides that an official search certificate shall be conclusive according to its tenor, affirmatively or negatively, in favour of a purchaser or intending purchaser as against authorities or persons interested under or in respect of *charges* required or allowed to be entered on the register. This rule does not, however, embrace all charges; control orders and charges registered in Parts 6 to 12 of the register are expressly excluded. In this way the rule maintains the distinction previously noted between local land charges by definition, and matters which by statute are required to be registered in the same register without being accorded the status of local land charges. Subject to these excepted matters, r. 24 (6) ensures that the purchaser can rely on his search certificate; he will therefore take free from a registered charge which is not disclosed by it. The remedies of an incumbrancer who suffers loss resulting from the non-disclosure of a registered charge are more fully considered in Chapter 14.[6]

(*a*) *Enforcement of registered charges*

Unless they have in the meantime been discharged or cancelled, the purchaser will on completion take subject to all registered charges revealed by his official search certificate, and to matters registered but not disclosed and as to which the certificate is not conclusive. The mode of enforcement depends in each case

[4] The inappropriate words are deleted.

[5] L.P.A. 1925, s. 198.

[6] Page 355, *post.* As to local land charges see *Ministry of Housing and Local Government* v. *Sharp* [1970] 2 Q.B. 223; [1970] 1 All E.R. 1009, C.A., where the local authority were held vicariously liable for the negligence of a clerk in issuing a search certificate which failed to disclose the plaintiff's compensation notice (see now the T. & C.P.A. 1971, s. 158) and which therefore became void against the purchaser.

on the type of charge. Thus registered financial charges take effect as if they were registered Class B land charges;[7] these take effect as if created by a deed of charge by way of legal mortgage,[8] so that the local authority can exercise the statutory powers of sale, or of appointing a receiver, without having to obtain a court order. Some charges are made recoverable from the owner for the time being of the premises, so that non-registration, whilst making the *charge* void against a later purchaser, will not prevent recovery of the sum from him as a simple contract debt.[9]

Breach of a prohibition or restriction is normally punishable by a fine, coupled with powers vested in the appropriate authority to take steps to secure compliance and to recover any expenses incurred.

(b) Discharge between vendor and purchaser

Under the National Conditions of Sale[10] the purchaser must at his own expense comply with any requirement made against the vendor by a local authority in respect of the property *after* the date of the contract. It is the vendor's responsibility to discharge or indemnify the purchaser in respect of any matter registered *before* the contract, which involves the payment of money, but only if the charge is not disclosed on the purchaser's search certificate. This provision protects the purchaser in relation to matters registered after the date of his search but before exchange of contracts, and matters registered but not disclosed which remain enforceable against the owner for the time being.[11] The vendor's liability does not depend on his having express notice of the registered charge.

The Law Society's Conditions, in keeping with their policy of imposing on the purchaser the responsibility of discovering all local authority requirements, stipulate that he must comply with any requirement, notice, order or proposal whether made *before or after* the contract and must indemnify the vendor in respect of any liability thereunder.[12]

5 Effect of Non-registration

Section 15 (1) of the Land Charges Act 1925, enacts that a local land charge shall be void against a purchaser for money or money's worth of a legal estate in the land affected unless registered in the appropriate register before the completion of the purchase. In *Wright* v. *Warwick Rural District Council*[13] an interlocutory injunction was granted restraining the council from entering upon land pursuant to a clearance order made in 1938 which was not registered at the time when a predecessor in title (the plaintiff's deceased father) purchased the land in 1939.

Avoidance on failure to register only applies to local land charges. Section

[7] L.C.A. 1925, s. 15 (2).

[8] L.C.A. 1972, s. 4 (1), replacing the L.C.A. 1925, s. 11.

[9] E.g. Highways Act 1959, s. 181 (1); T. & C.P.A. 1971, s. 91 (1), (5).

[10] General Condition 16 (1)–(4).

[11] Normally the purchaser will take free from any undisclosed local land charge by virtue of r. 24 (6), p. 163, *ante*.

[12] L.S.C. 2 (4); *cf.* L.S.C. (1953 Edn.) 20 (1) which was similar to N.C.S. 16 (3).

[13] (1968), *Times*, 14 February.

15 (1) does not extend to those matters merely made registrable in the register.[14] In relation to these, it has been suggested that avoidance might not be in the public interest and, in any event, the authority could in most cases create a fresh charge.[15] Indeed this is equally true in relation to charges registrable in Parts 3 and 4. To take the case referred to in the preceding paragraph, the council could pass a new clearance order which would ultimately bind the plaintiff, though they would have to adopt the statutory procedure, thus affording the owner an opportunity to object to the making of the order and ultimately to challenge its validity in the courts[16]—rights he would not have possessed had the order been registered in the first place. This power that the local authority have to begin again makes the avoidance provision in s. 15 (1) somewhat illusory.

6 Effectiveness of Local Search Certificates

The value of a local search certificate lies not so much in the protection that it affords the purchaser, but in the information which it reveals. Any entry in the register made after the date of the certificate does not affect the purchaser, provided completion of the transaction takes place within 14 working days therefrom.[17] This protection is rather limited for the following reasons:

(i) The search is normally made before *exchange* of contracts and generally speaking few matters are completed within the period of protection.

(ii) Although a second search can quite properly be made before completion, thus giving protection as against the local authority,[18] the disclosure of a charge registered after contract does not, where the Standard Conditions of Sale apply, entitle the purchaser to require the vendor to discharge it or give him any right to rescind.

(iii) The protection, assuming it is available, terminates on completion. A charge registered the day after will bind the new owner, though the replies to his additional inquiries may have revealed that a charge would be made in the future. Further, as already noticed, the possibility exists of an authority resurrecting some charges avoided for non-registration.

Nevertheless it constitutes professional negligence on a solicitor's part not to effect a local search, or to fail to inform his client of entries revealed by it.[19] The existence of a registered charge may be vital to a purchaser's decision whether

[14] See e.g. the compensation notice in *Ministry of Housing and Local Government* v. *Sharp*, [1970] 2 Q.B. 233, at p. 288; [1970] 1 All E.R. 1009, C.A., at p. 1036, *per* CROSS, L.J. For the tentative views of the Law Commission as regards the consequences of non-registration, see note 4, p. 165, *post*.

[15] Emmet, 616.

[16] See the Housing Act 1957, Sch. 4 and 5.

[17] Local Land Charges Rules 1966, r. 25 (6), unless registered pursuant to a priority notice which in relation to a local land charge is rarely encountered. See further, Chap. 14, p. 351, *post*.

[18] It is not usual to make a second search. The Council of The Law Society are of the opinion that a mortgagee's solicitor is well advised to make further searches before completion of the mortgage (see (1952), 49 L.S. Gaz. 501), but this is not generally done, the mortgagee's solicitor relying on the one made on behalf of the purchaser, except where there is a considerable time-lag.

[19] *Cf. Cordery on Solicitors* (6th Edn.) 196n., who suggests that many negligence claims against solicitors arise from failure to take sufficient notice of information contained in local land charges search certificates. And see *Lake* v. *Bushby*, [1949] 2 All E.R. 964 (failure to advise client of lack of planning permission).

answer merely records the present position and gives no clue as to what might happen in the future.[5]

Under the Highways Act 1959, a local highway authority may resolve to make up any private street, defined as "a street not being a highway maintainable at the public expense." The word "private" does not signify that the public have no rights over the road but merely that it is not a charge on public funds. The authority may adopt one of two procedures, known as the "code of 1875" or the "code of 1892",[6] depending on which is operative in their area. The majority of highway authorities operate the code of 1892[7] under which the authority executed the work after passing a resolution to make up the road. The authority must prepare plans and specifications and serve notice of a provisonal apportionment of costs, followed after execution of the works by a final apportionment, on the owners and occupiers of land fronting, adjoining or abutting the road.[8] On completion, the authority may declare the street to be maintainable at the public expense and must do so if requested by owners of properties which together account for more than half the rateable value in the street.[9] The street is then said to have been "adopted" and the authority can make no further claims against the frontagers in respect of street works.

(*a*) *Basis of apportionment*

The apportionment of expenses is made according to the frontage of the respective premises liable to be charged. The authority have a discretion to have regard to the degree of benefit to be derived by any premises from the proposed works, or to include in the apportionment premises not fronting the street, but which have access thereto (such as an upper maisonette) and which will be benefited by the works.[10] The power of a local authority to charge a land owner who merely has a flank or rear boundary upon a private street poses a very serious threat to such owners. They may derive little or no benefit from the street works, and yet be called upon to pay a disproportionate amount on account of having a long "frontage", without being able to challenge the basis of the apportionment if the authority refuse to operate the degree of benefit provisions in his favour.[11]

[5] The purchaser may in theory have the benefit of a covenant to make up and maintain the road but it may be worthless if the covenantor is dead, or a company no longer in existence.

[6] Derived respectively from the procedures contained in the Public Health Act 1875, ss. 150–52, and the Private Street Works Act 1892. Under the Local Government Act 1972, s. 187, county councils become the appropriate street works authority. For the position in Greater London, see the London Government Act 1963, s. 16.

[7] Under the code of 1875 the frontagers are first given an opportunity to make up the road at their own cost. This code will cease to be operative as from 1 April 1974: Local Government Act 1972, s. 272 (1), Sch. 30.

[8] Highways Act 1959, ss. 174, 175, and 180. See *Buckinghamshire County Council* v. *Trigg*, [1963] 1 All E.R. 403 (owner of first floor maisonette not a frontager).

[9] Highways Act 1959, s. 202, as amended by the Highways (Miscellaneous Provisions) Act 1961, s. 11.

[10] Highways Act 1959, s. 176.

[11] An appeal may lie under s. 207; see *post*. The authority are empowered to make a contribution in respect of premises having a rear or flank to the street; see s. 210 (2), as amended by the Highways (Miscellaneous Provisions) Act 1961, s. 12.

(*b*) *Rights of appeal*

A frontager may object to the proposed works on specified grounds.[12] One particular ground of objection is that the street is an ancient highway repairable by the inhabitants at large, that is, one dedicated to and used by the public prior to the coming into force of the Highways Act 1835, or dedicated thereafter in accordance with the procedure laid down by that Act.[13] The existence of an ancient highway may be established from ancient maps, evidence of the expenditure of public money on its repair, old deed plans, even a guide-stone on which was carved "Road to X. No thorough by."[14] Not all of such matters will necessarily be conclusive by themselves. The burden is on the authority to prove the highway is *not* repairable by the inhabitants at large.[15] If the objection is upheld, the street must be made up out of public funds. It does not constitute a ground of objection that the authority failed to exercise its discretion under section 176.[16] Objection can also be taken to the final apportionment on limited grounds, including unreasonable departure from the plans and specifications.[17]

An appeal also lies to the Secretary of State within 21 days after receipt of a demand for payment.[18] On appeal a frontager can argue that the authority should have invoked the "degree of benefit" provisions, or included other premises, or contributed towards the cost of the works. The Secretary has the widest powers on appeal.[19]

(*c*) *Recovery of land charges*

The sum finally apportioned constitutes a charge on the premises, registrable in Part 2 of the Local Land Charges register. The authority have the same powers as a legal mortgagee,[20] including the statutory power of sale.[1] The charge overrides all other proprietary interests existing in the property, such as prior mortgages,[2] but it is statutorily provided that it does not rank as a prior mortgage for the purposes of the Building Societies Act 1962, which prohibits a loan by a building society on the security of land subject to a prior mortgage (unless in favour of itself).[3]

Alternatively, the authority may recover the expenses and interest as a simple contract debt. Proceedings must be commenced within six years of the date of

[12] Highways Act 1959, s. 177. Objections are determined by the magistrates' court: s. 178.

[13] Section 23, now replaced by the Highways Act 1959, s. 39.

[14] *Huyton-with-Roby Urban District Council* v. *Hunter*, [1955] 2 All E.R. 398, C.A.

[15] *Alsager Urban District Council* v. *Barratt*, [1965] 2 Q.B. 343; [1965] 1 All E.R. 889.

[16] See note 10, *ante*. *Hornchurch Urban District Council* v. *Webber*, [1938] 1 K.B. 698; [1938] 1 All E.R. 309.

[17] Highways Act 1959, s. 180.

[18] Highways Act 1959, s. 207, unless some other procedure exists for hearing the objection (e.g. under s. 177): *ibid.*, s. 186. The functions of the Minister of Housing and Local Government have been taken over by the Secretary of State: the Secretary of State for the Environment Order 1970, S.I. 1970, No. 1681.

[19] See *R.* v. *Minister of Housing and Local Government, Ex parte Finchley Corporation*, [1955] 1 All E.R. 69.

[20] Highways Act 1959, s. 181 (3).

[1] *Payne* v. *Cardiff Rural District Council*, [1932] 1 K.B. 241; [1931] All E.R. Rep. 479.

[2] *Paddington Borough Council* v. *Finucane*, [1928] Ch. 567; [1928] All E.R. Rep. 428.

[3] Section 32 (1) and Sch. 5.

the demand for payment, but a fresh cause of action arises against a new owner who can be sued, even though an action against the previous owner is statute-barred[4] or the charge is void against the new owner for want of registration.

(d) The advance payments code[5]

This code (where applicable) is designed to regulate private street works expenses in relation to *new development*. Before any new buildings can be erected in a private street, a sum likely to be needed to cover the street works must be paid to the authority, or security given. When the development has reached a certain stage, the authority can be called upon to execute the street works and adopt the street. Payment or security does not completely discharge liability; any further sum payable after the works are eventually carried out is recoverable from the then owner under the procedure previously discussed. Conversely any excess must be repaid to the owner of the land for the time being, not the person who made the payment, who, in the absence of any contractual right, cannot recover the excess from the recipient.[6] Payment or security is not required in certain cases.[7] One such occasion arises when an agreement is entered into under s. 40 of the Act.

For the purpose of the advance payments code, a private street includes land shown as a proposed street on plans deposited in connection with an application for planning permission.[8] Consequently estate developers come within the requirement for depositing or giving security. In practice, they enter into "a section 40 agreement", under which they agree with the authority to make up the road to the authority's specification and to maintain it for a certain period (usually 12 months), after which the road becomes maintainable at the public expense. A prospective purchaser is adequately protected against the payment of road charges so long only as the developer fulfils his obligations under the agreement. If he defaults, the authority can recover the charges from the purchaser, as frontager.[9] To cover this contingency most agreements are supported by a bond given by a bank or insurance company, whereby the bondsman undertakes to pay to the authority the cost of making up the road should the developer default. Doubts have been expressed whether the authority can recover from the bondsman in the event of default, on the ground that the authority may still proceed against the frontagers and so suffer no loss. The bond, so it is claimed, constitutes a penalty and is irrecoverable.[10] This perhaps overstates the position, and in practice building societies and other mortgagees are prepared to accept a supporting bond, provided it covers the full estimated cost of making up the road. In the absence of any bond, a building society usually makes it a condition of the loan to the purchaser that the builder makes a cash deposit with the society to cover the liability, or it retains an adequate

[4] *Dennerley* v. *Prestwich Urban District Council*, [1930] 1 K.B. 334; [1929] All E.R. Rep. 647, C.A.

[5] Highways Act 1959, ss. 192–99. For the operation of this code see s. 173 (3), as amended by the Local Government Act 1972, Sch. 21, para. 65 (3).

[6] *Henshall* v. *Fogg*, [1964] 2 All E.R. 868, C.A.

[7] Highways Act 1959, s. 192 (3).

[8] *Ibid.*, s. 213 (1).

[9] Since the price for the house is inclusive of road charges, the purchaser has in effect to pay twice. The contractual remedy under the road making covenant which the builder gives in the conveyance will be valueless in the circumstances.

[10] See (1964), 108 Sol. Jo. 126, 195, 262; *cf. ibid.*, 611.

sum out of the mortgage advance, for release when the work is completed. The existence of an agreement under s. 40, and any supporting bond will be revealed in the replies to additional inquiries.

(e) Proposals for widening, improving, etc.

Other inquiries on the standard form are directed to ascertaining whether the council have approved any proposals for the improvement, or widening of any road, whether any road or proposed road in the vicinity of the property is to be made a trunk road, or whether there is any resolution to construct a subway, underpass, flyover or elevated road in the vicinity.[11] The existence of any such matters may be important to a prospective purchaser.

F LAND CHARGES SEARCH

The Law of Property Act 1969,[12] s. 24 (1) enacts that:

> "Where under a contract for the sale or other disposition of any estate or interest in land the title to which is not registered under the Land Registration Act 1925 . . . any question arises whether the purchaser[13] had knowledge, at the time of entering into the contract, of a registered land charge, that question shall be determined by reference to his actual knowledge and without regard to the provisions of section 198 of the Law of Property Act 1925 . . . ."

This provision reverses the view, founded upon EVE, J.'s much criticised decision in *Re Forsey and Hollebone's Contract*,[14] that s. 198 of the Law of Property Act 1925 fixed a purchaser with notice of any land charge registered at the time of the contract, and as a result disentitled him to rescind the contract on the ground of the vendor's non-disclosure thereof. It was therefore advisable to make a land charges search *before* contract to discover registered charges. This he could not do without the names of previous estate owners which could only be ascertained by investigating the vendor's title. But conveyancing practice dictates that a purchaser investigates the title after he has contracted to buy, not before. Not uncommonly the purchaser's rights were preserved by a contractual provision[15] enabling him to rescind if before the making of the contract an irremovable land charge had been registered of which the purchaser had not received notice in writing.

Such a search is now unnecessary. The question of the purchaser's knowledge at the time of making the contract is determined solely by reference to his *actual*

[11] See *Coats Patons (Retail), Ltd.* v. *Birmingham Corporation* (1971), 69 L.G.R. 356.

[12] Implementing the recommendations of the Law Commission in the Report on Land Charges Affecting Unregistered Land, Law Com. No. 18, para. 29.

[13] Defined to include a lessee, mortgagee or other person acquiring or intending to acquire an estate or interest in land: sub-s. (3).

[14] [1927] 2 Ch. D. 379, C.A. (resolution to prepare town planning scheme). It is commonly asserted that EVE, J.'s, comments regarding s. 198 were merely *obiter*, but it seems clear that he based his decision on two alternative grounds; see [1927] 2 Ch. D. 379, at pp. 382–83. The Court of Appeal upheld his decision on the ground that the resolution did not constitute an incumbrance without hearing argument on the notice point. See also *Re Middleton and Young's Contract*, [1929] W.N. 70. For a discussion of the problems created by EVE, J.'s, decision, see Wade, "The effect of Statutory Notice of Incumbrances" (1954), C. L.J. 89.

[15] See e.g. L.S.C. (1953 Edn.) 20 (3); N.C.S. (17th Edn.) 13. Sometimes the vendor was asked by way of preliminary inquiry to supply the names and addresses of estate owners since 1 January 1926, but often he could not go back so far.