CA - Land - Agreement for Sale - Breach - Damages: Co-owner not party to contract - Refusal of Court to grant relief of specific performance - Alternative remedy of damages - Trial Judge awarding only return of deposit $18,731 - Whether Bain v Fothergill applicable - whether plaintiffs entitled to damages for loss of bargain. APPEAL allowed - Damages for loss of bargain assessed at $260,000.

Case referred to: Bain v Fothergill [1874-80] All E R Rep 83

JAMAICA

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IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 15 of 1993

BEFORE: THE HON. MR. JUSTICE CAREY, P. (Ag.)
THE HON. MR. JUSTICE GORDON, J.A.
THE HON. MR. JUSTICE WOLFE, J.A.

BETWEEN	HOWARD LAMB	
AND	MAXINE LAMB	PLAINTIFFS/APPELLANTS
AND	HELEN COULTHARD	DEFENDANT/RESPONDENT

Gordon Robinson and David Henry for the appellants

Hector Robinson for the respondent

November 28, 29 and December 20, 1994

WOLFE, J.A.:

The respondent is the joint owner along with her daughter, Ana-Maria Sandra Coulthard, of premises No. 113 Barbican Road in the parish of Saint Andrew, being part of the land comprised in Certificate of Title registered at Volume 342 Folio 26 of the Register Book of Titles. The land was subject to a mortgage. In March 1986 the mortgagee in exercise of the power of sale decided to sell the premises by public auction.

On the 18th March, 1986, the respondent and the appellants entered into a written agreement to sell and to purchase respectively the said premises at a price of $140,000. A deposit of $18,731 was paid, the said deposit was used to liquidate the outstanding balance on the mortgage. The date for completion of the agreement was set at June 30, 1986. The completion date passed and the respondent informed the appellants that she was unable to complete as her daughter, the joint tenant, had refused to acquiesce in the conveyance to the appellants.

It must be noted that in the interim the respondent commenced proceedings in the Supreme Court seeking a declaration that she was the sole owner of the land and that her daughter was a mere trustee holding in trust for and on behalf of the respondent. These proceedings remain unresolved to this day.

At the hearing of this action before Pitter, J. he found as a fact that the respondent at no time, prior to the agreement for sale, informed the appellants that her daughter was a registered joint owner of the premises and that the appellants were only so informed two days after the agreement had been entered into. This information was imparted to the appellants by the attorney-at-law acting on behalf of the respondent. The learned judge, however, found that the appellants were grossly negligent in not investigating the title in order to discover who was the true owner of the land. This failure, he concluded, saddled them "with constructive notice of the contents of the title." Continuing, the learned judge further concluded that had the title been investigated the appellants would have been alerted to the "defect in title."

The learned judge quite rightly denied the appellants the relief of specific performance which they sought on the basis that such a decree was not available against an unwilling co-owner who was not a party to the agreement.

In addressing the alternative claim for damages, the learned judge ruled that the appellants were only entitled to the return of their deposit. As the basis for his decision, the trial judge relied upon the celebrated decision in **Bain and others v. Fothergill and others** [1874-80] All E.R. Rep. 83 in which the House of Lords held:

> "Where, on a contract for the sale of land the vendor, in the absence of any fraud and any express stipulation, is unable to make a good title the purchaser is not entitled to recover damages for the loss of the bargain. He can only recover the expenses he has incurred in investigating the title and repayment of the deposit where he had paid one."

Some twelve grounds of appeal were filed. In this judgment it is not proposed nor necessary to deal with all these grounds.

The first issue raised was whether or not the learned judge was correct in holding the appellants were under a duty to investigate the title of the respondent prior to entering into the agreement. No authority was produced, and, indeed, we know of none which supports this conclusion by the learned judge. With all credit to Mr. Robinson, for the respondent, he did not seek to support this conclusion. At paragraph 143 of Halsbury's Laws of England 4th Edition 117, dealing with Proof and Investigation of Title, the learned author states:

> "In the absence of any express stipulation as to title a contract for the sale of land implies an agreement on the part of the vendor to make a good, that is a marketable title to the property sold. He discharges this obligation when he shows that he, or some person or persons whose concurrence he can require can convey to the purchaser the whole legal and equitable interest in the land sold.

In this case the judge found as a fact that there was no express stipulation as to title.

The validity of the appellant's submission, that the Registration of Titles Act imposes no obligation on the purchaser to investigate the title of the vendor prior to signing an agreement, cannot be successfully challenged. In this regard, the learned judge was in error. He further compounded the error when he found as follows:

> "I find that the plaintiffs and their agent Mrs. Lee were grossly negligent in not investigating the Title. It was there for them to discover its defect had there been any diligence on on their part. The title being a Registered Title is notice to the whole world and the plaintiffs will not be allowed to say they had no notice of the defect."

Was this really a defect in title? There was no defect in the respondent's title. The respondent had a perfectly good title. What she was unable to do was to convey all that estate in the property which she had warranted, that she was able to convey.

Finding that there was a defect in the respondent's title, when there was none, naturally led the learned judge to hold that the principles established in **Bain v. Fothergill** (supra) were applicable in the instant case. In our opinion, the principles enunciated in **Bain v. Fothergill** (supra) were, therefore, inapplicable to the instant case. In any event, were the principles applicable, there was an abundance of evidence that the respondent had acted in bad faith.

In the proceedings seeking a declaration that she was the sole owner of the property she averred as follows, inter alia:

> "4. That I was solely responsible for the purchase of 9 Oaklawn Drive, Kingston 6, St. Andrew, registered at Volume 1003 Folio 552 of the registered book of title.
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> 5. That I alone identified the property I wished to buy, I alone negotiated the agreement and signed the agreement when I paid the deposit of Two Thousand Four Hundred Dollars.
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> 6. That I alone provided the deposit of Two Thousand Four Hundred Dollars. ANA-MARIA SANDRA COULTHARD took no part in the transaction and was not even aware of the negotiation, neither did she donate any portion of the deposit or subsequent balance of purchase price.
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> 7. The deposit of Two Thousand Four Hundred Dollars came from my personal savings account at Nova Scotia Bank, Liguanea Branch, Liguanea, St. Andrew. At that date ANA-MARIA SANDRA COULTHARD was about 17 years of age and attending St. Hugh's High School and not having any income and did not contribute anything towards the purchase of the said premises.
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> 8. That I am a dressmaker, and at the time was earning between $300.00 - $400.00 per week. I had a large clientelle and I specialised in the making of Wedding dresses.
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> 9. That after paying the first deposit, I paid the balance of the purchase price from my sole account at the then Barclays Bank situate at the University of the West Indies. That ANA-MARIA SANDRA COULTHARD at no time contributed any monies or anything whatsoever towards the purchase price of 9 Oaklawn Drive, St. Andrew.

"10. That at the time when the transfer was being prepared, I told the lawyers to add the name of ANA-MARIA SANDRA COULTHARD to the title that in the event of my death and only then would she get any interest or estate in the property and she was aware of this, as I told her the reason for putting her name on the title. I had not intended to make a will, as I do not believe in making wills, but I think that it would be easier for her at the time, if I should die to then get the premises in the absence of a will.

11. I am a sickly person suffering from Epileptic Fits and have been suffering from same, even before I purchased the property. ANA-MARIA SANDRA COULTHARD was an infant at the time of purchase of the said property being only 17 years of age when the transfer was completed.

12. That I did not intend to make a gift of the property to her at anytime whatsoever, neither at the date of the purchase of the property or before or after.

13. That at the date of the signing of the transfer of sale of the said property, I did not intend to make a gift of a half share of the property to her or any portion whatsoever, to ANA-MARIA SANDRA COULTHARD as she was then, neither have I intended to the present time to make a gift to her of any portion of the said property.

14. That I have borrowed monies after the purchase of the said property and I have been the only person who paid back the 2 Mortgages. ANA-MARIA SANDRA COULTHARD had never paid anything towards paying off any of the Mortgage, she being only a trustee holding her legal interest for me as the beneficiary.

15. That she is at all times only a trustee for me of the half share."

At the trial of this action she stoutly denied these averments and said, "The application I made to the court was not true." This was plainly evidence of bad faith.

It is evident that the dilemma with which the vendor was faced, namely, the forced sale of her property led her to enter into the agreement with the appellants without disclosing that her daughter was a joint owner of the property.

It is clear that the learned judge erred in holding that the appellants were not entitled to an award of damages for the loss of bargain.

On the question of damages for loss of bargain, there was evidence adduced from Mr. Michael McKay, a valuation appraiser, employed to C. D. Alexander & Company, that at the time of trial the property would be valued at between $950,000 to $1,050,000. This court is in as good a position as the trial court, based on the evidence before us, to assess the damages for loss of bargain. A figure in the mid range of the figures quoted by Mr. McKay would adequately compensate the appellants in damages for loss of bargain. That figure is assessed at $860,000.

It was for these reasons that we allowed the appeal on the 29th November and promised to put our reasons in writing. The judgment of the court below was varied to read:

> Judgment for the plaintiff in the sum of $860,000 with costs here and below to be taxed if not agred.