COMPENSATION FOR ERRORS OR MISDESCRIPTIONS OF THE PROPERTY IN A CONTRACT FOR SALE OF LAND

BY C. J. ROSSITER*

Clause 5 of the standard form contract for sale of land in use in New South Wales provides as follows:

> *No error or misdescription of the property shall annul the sale but compensation if demanded in writing before completion but not otherwise shall be made or given as the case may require, the amount to be settled in case of a difference by an arbitrator appointed by the parties by mutual agreement or failing agreement nominated by the President for the time being of The Law Society of New South Wales, Clause 15 hereof shall not apply to any such claim for compensation.*[1]

The aim of this article is to discuss the present function and scope of clause 5 and to compare the remedy offered by it with other legal and equitable remedies available to vendor and purchaser. A major part of the article will be devoted to an analysis of the High Court decision in Travinto Nominees Pty Limited *v.* Vlattas[2] *the effect of which is to restrict the ambit of the compensation clause considerably.*

I THE REASON FOR THE PRESENCE OF A COMPENSATION CLAUSE

Where there was a deficiency in the subject-matter of the sale due to an error or misdescription, the strict common law position appears to have been that the purchaser was always able at his option to terminate the contract.[3] It did not matter that the error or misdescription was trivial. The reason for this was that all contracts were made subject to a condition that the vendor had title to each and every part of the subject-matter and any deficiency in the subject-matter, however small, resulted in a breach of that condition. Thus, the aggrieved party was entitled to terminate the contract and sue for damages or affirm the contract and sue for damages.[4] The quantum of damages might, of

* B.A., LL.B. (Syd.); Lecturer in Law, University of New South Wales.

[1] Joint Publishing Committee of the Law Society of New South Wales and the Real Estate Institute of New South Wales, 1972.

[2] (1973) 129 C.L.R. 1.

[3] See the authorities cited in *Travinto Nominees Pty Limited* v. *Vlattas, id.*, 27 *per* Menzies J.; R. Stonham, *The Law of Vendor and Purchaser* (1964) 232.

[4] It is not conceded by all that damages would be available for breach of a condition that the vendor has a good title. The word "condition" is not free from ambiguity and it has been held by one school of thought that condition in this context means a condition subsequent which, if not satisfied, entitles the purchaser to rescind, using that word in the strict sense. Naturally, damages could not follow

course, be governed by the rule in *Bain* v. *Fothergill*.[5]

The common law insistence that the contract is subject to a condition that the vendor must have title to all of the subject-matter of the sale might be reviewed today following the decision of the English Court of Appeal in *Hongkong Fir Shipping Co. Ltd* v. *Kawasaki Kisen Kaisha Ltd*[6] where the Court suggested that whether a term of a contract be classified as a condition or a warranty might depend on the consequences of the breach. Thus, a minor deficiency in the subject-matter, even at common law, might not entitle the purchaser to terminate. This was the approach adopted by the Supreme Court of Queensland in *Liverpool Holdings Limited* v. *Gordon Lynton Car Sales Pty Limited*[7] where Kelly J. applied the general principle enunciated in *Flight* v. *Booth*[8] to determine whether a particular defect in title gave rise to a breach of a condition or warranty.

However, if the vendor sought the equitable remedy of specific performance, he may have obtained a decree in his favour notwithstanding an error in or misdescription of the subject-matter of the sale, always provided the error or misdescription was not essential. The purchaser was compelled to accept the property with compensation for the deficiency. It is important to appreciate the general jurisdiction of equity to award specific performance with compensation, for although a contract for the sale of land now always includes a compensation clause, it is not every error or misdescription that will fall within the provisions of the clause. Where the compensation clause does not apply, recourse must be had to the general equitable jurisdiction.

II SPECIFIC PERFORMANCE—NO CLAUSE FOR COMPENSATION

In the case of an action by the vendor, the early authorities suggest that an order for specific performance with compensation will only be made where the defect is trivial and compensation can be calculated readily. In *Rudd* v. *Lascelles*[9] Farwell J. stated "[i]n my opinion the Court should confine this relief to cases where the actual subject matter

after such rescission. This view is espoused by Isaacs J. in *Coronet Homes Pty Ltd* v. *Bankstown Finance and Investment Co. Pty Ltd* [1966] 2 N.S.W.R. 351. With respect, such a view is not correct. There have been many cases where damages have been awarded for failure to make title where the vendor entered into a contract with reckless indifference as to whether or not he could make title. See, for example, *Noske* v. *McGinnis* (1932) 47 C.L.R. 563.

[5] (1874) L.R. 7 H.L. 158. For a statement of the rule see text accompanying note 83, *infra*.

[6] [1962] 2 Q.B. 26.

[7] [1978] Qd.R. 279.

[8] (1834) 1 Bing. N.C. 373; 131 E.R. 1160.

[9] [1900] 1 Ch. 815.

is substantially the same as that stated in the contract".[10] Today, this view is probably too narrow. Thus, Spry states:

> [T]his view appears to be unduly restrictive, and it should not be forgotten that the basis of equitable intervention is that specific performance with compensation should generally be ordered unless, in all the circumstances, the land is so different from that contracted to be sold that it would be an unreasonable hardship on the defendant to require him to accept it.[11]

If compensation cannot fairly be assessed, specific performance will be refused as happened in *Rudd* v. *Lascelles* where certain restrictive covenants had not been disclosed and where the Court was not prepared to calculate the diminution in value of the property resulting from the presence of covenants. However, it must be remembered that today courts are more prepared to embark upon an enquiry to establish the true loss to the aggrieved party notwithstanding the difficulty of assessment.

However, specific performance at the suit of the vendor will not be awarded where the misdescription is essential, that is to say, "although not proceeding from fraud, is in a material and substantial point, so far affecting the subject matter of the contract that it may reasonably be supposed, that, but for such misdescription, the purchaser might never have entered into the contract at all".[12] This principle, known as the rule in *Flight* v. *Booth*, is discussed at greater length below.

Where it is the purchaser seeking specific performance with compensation, a court is far more ready to grant the remedy notwithstanding an essential error and misdescription, provided there is no undue hardship caused to the vendor. In such a case, of course, it is the innocent party who is seeking performance of the contract and a court will compel the vendor to give what he can of the subject-matter of the sale.

It is difficult to define hardship and probably undesirable to do so. Earlier decisions have indicated that where there was a large deficiency in the quantity of the estate, a court may not award specific performance but this is, of itself, no longer a good reason. Farwell J. in *Rudd* v.

---

[10] *Id.*, 819. A similar view was expressed by the Privy Council in *Rutherford* v. *Acton-Adams* [1915] A.C. 866, 870 where Viscount Haldane referred to specific performance with compensation "for any small and immaterial deficiency". See also W. Williams, *Contract for Sale of Land and Title to Land* (4th ed. 1975) 753.

[11] I. Spry, *Equitable Remedies* (1971) 271. See also R. Meagher, W. Gummow and J. Lehane, *Equity Doctrines and Remedies* (1975) 440.

[12] *Flight* v. *Booth*, note 8 *supra*, 377; 1162. In *Flight* v. *Booth* a compensation clause was present in the contract and the Court was concerned whether this clause should operate. It is suggested, however, that the test of essential or material misdescription formulated by Tindal C.J. in that case serves equally well in suits for specific performance of contracts containing no compensation clause; see *In re Terry and White's Contract* (1886) 32 Ch.D. 14, 22.

Lascelles refers to hardship "imposed on an innocent grantor . . . by reason of some mistake which he has made, although the other party has not contributed to it".[13] A court is more likely to refuse specific performance where the rights of third parties would be prejudiced. For example, a sale by a life tenant purporting to sell the whole fee simple might not be specifically performed if the sale would prejudice the remainderman.[14]

III SPECIFIC PERFORMANCE AND THE COMPENSATION CLAUSE

The existence of a compensation clause provides for the making or giving of compensation in an action at law although specific performance of the contract, including the clause, may still be sought. The clause has no great effect on equitable principles except that it has been suggested that if there is any doubt as to whether an error or misdescription is essential, the fact that the parties have specifically provided for compensation would sway a court in finding that it was non-essential.[15]

Of course, in applying the compensation clause, care must be taken in ascertaining what classes of error and misdescriptions fall within the clause. For misdescriptions not within the scope of the clause, specific performance with compensation on ordinary equitable principles may be sought.

IV THE RULE IN FLIGHT v. BOOTH[16]

Notwithstanding the presence of a compensation clause and the existence of an error or misdescription which is properly encompassed by the clause, the purchaser will not be compelled to accept compensation if the error or misdescription is essential. In *Torr* v. *Harpur*[17] the purchaser discovered before completion the existence of a large underground drain. Williams J. stated:

> A house in the best order and condition would be an unattractive proposition to any person who was informed that instead of being erected on land in its natural state, it was erected partly above a large tunnel in the land . . . . I think that the presence of the drain would be such a defect that it may reasonably be supposed, "that, but for such misdescription, the purchaser or mortgagee might never have entered into the contract at all."[18]

To determine whether a particular error or misdescription falls within the principle in *Flight* v. *Booth*, it is relevant to consider the

---

[13] Note 9 *supra*, 817.
[14] *Thomas* v. *Dering* [1837] 1 Keen 729; 48 E.R. 488.
[15] I. Spry, note 11 *supra*, 272, 276.
[16] Note 8 *supra*.
[17] [1940] S.R. (N.S.W.) 585.
[18] *Id.*, 593.

purpose for which the land was acquired. If the defect, even though known by the vendor, does not seriously interfere with that purpose, the purchaser will be compelled to complete and to accept compensation.[19] Thus, where two sewers vested in a local authority were positioned along the side of premises and across the rear of a yard and did not interfere with proposed alterations,[20] the purchaser was precluded from relying upon *Flight* v. *Booth*.

The test of purpose is an objective one and although it may be relevant to consider the immediate use to which the purchaser intends to employ the property, the immediate use is not the sole criterion: "The test . . . is whether, considering the whole effect of those restrictions on use, a possibility that the purchaser might not have purchased is a reasonable supposition from the nature and extent of the difference between what was contracted to be sold and what can be conveyed".[21]

V THE SCOPE OF THE COMPENSATION CLAUSE FOLLOWING TRAVINTO NOMINEES PTY LIMITED v. VLATTAS[22]

Until the decision of the High Court in *Travinto* conveyancers could be confident in recognising the types of errors and misdescriptions that would fall within the ambit of the clause. The High Court, after a review of New South Wales and other authorities, decided upon an interpretation of the clause which considerably restricts its use and, more significantly, presents the conveyancer with some difficulty in deciding whether or not the compensation clause may be used in a given situation.

The facts in the case involved exchange of contracts for the sale of premises in Marrickville Road, Marrickville, New South Wales. The property was encumbered by a lease which was registered under the Real Property Act 1900 (N.S.W.) and details of the lease and its registered number were disclosed in the third schedule to the contract. However, no disclosure was made of an option to renew contained in the lease and the purchaser claimed it was entitled to compensation for an error or misdescription of the property. In the event, the High Court did not need to decide whether a vendor is bound to disclose an option to renew a lease, although Hope J., before whom the proceedings were heard in Equity,[23] and all members of the Court of Appeal[24] found in favour of the purchaser on this point.

In the original equity proceedings, Hope J., having found there was

---

[19] *In re Belcham and Gawley's Contract* [1930] 1 Ch. 56; *In re Brewer and Hankin's Contract* (1899) 80 L.T. 127.

[20] *In re Belcham and Gawley's Contract*, note 19 *supra*.

[21] *Hamilton* v. *Munro* (1951) 51 S.R. (N.S.W.) 250, 253.

[22] Note 2 *supra*.

[23] (1970) 92 W.N. (N.S.W.) 405.

[24] [1972] 1 N.S.W.L.R. 24.

an omission in failing to describe the option to renew, had no difficulty in holding that the omission came within the compensation clause. His Honour held that the subject-matter of the sale was in part a reversion and that reversion had been misdescribed. He further held that the compensation clause was not limited to misdescriptions of the physical property and cited *Grace* v. *Mitchell*[25] in support. In the absence of argument, this matter was not pursued in the Court of Appeal but was fully argued in the High Court where two of the justices, Barwick C.J. and Menzies J. treated the point taken in their judgments.

The High Court concluded that the subject-matter of the sale was land and not an estate in land, such as, a reversion expectant upon the lease. The Court held compensation under the compensation clause was only available for errors or misdescriptions in the subject-matter of the sale and, as the physical attributes of the land had not been misdescribed, the purchaser was not entitled to compensation. The possible misdescription of the term of the lease was not a misdescription of the land. Thus, in determining the application of the compensation clause, the subject-matter of the sale firstly is ascertained and conveyancers must be aware of the distinction made by the Court between land and an estate in land. If the former, then only a misdescription of the physical attributes of the land is a relevant misdescription for the purposes of the compensation clause. Thus, for example, failure to disclose a restrictive covenant or easement burdening the title would not entitle the purchaser to compensation, even if it would entitle him to terminate the contract and to sue for damages. However, a misdescription of the physical property does include, it should be noted, a misdescription of the nature of the improvements. In *Jennings* v. *Zilahi-Kiss*[26] a contract of sale described the property as a dwelling house and flats. Approval by the local authority had never been given for use of the premises as flats and this fact, the Court held, constituted a relevant misdescription and compensation was payable under the compensation clause.

If the subject-matter of the sale is an estate in land, compensation is payable for omissions in and misdescriptions of the title. Assuming the High Court had found that the subject-matter of the sale in *Travinto* was a reversion on the expectancy of the lease, compensation would have been payable if the failure to refer to the option to renew was a relevant omission.

Of course, the obvious difficulty with the High Court's interpretation of the clause lies in the need to distinguish land from an estate in land. It is unlikely that the parties would have considered any such distinction or would have attached more significance to the physical characteristics of the land as opposed to matters of title. No convincing reason is given by the High Court for its assumption that the physical land itself was

[25] (1926) 26 S.R. (N.S.W.) 330.
[26] [1972] 2 S.A.S.R. 493.

the subject-matter of the sale in *Travinto* and that the lease and the option to renew were of secondary importance. No hint as to the true subject-matter appears from the wording constituting the description of property on page one of the contract as there are some words apt to indicate land is being sold, whilst others indicate an estate in land is being sold. With respect, it is suggested that the distinction is untenable. The feudal theory of land tenure, which is part of New South Wales land law[27] requires an acceptance of the fiction that all land is owned by the Crown and that a subject can only own an estate in land. It is impossible to convey land and the subject-matter of the contract of sale of any land must necessarily be an estate in land.

Conveyancers will note that prior to the decision in *Travinto*, the reason for ascertaining the true subject-matter of the sale was to determine whether an objection by the purchaser constituted a defect in title. No distinction was made between land and an estate in land. Thus, in *Gardiner* v. *Orchard*[28] the Court was obliged to determine whether the subject-matter of the sale was land having a frontage of 26 feet 2 inches or land actually occupied by a city bank building. If the former, the deficiency in frontage of 5 inches constituted a defect in title and might at common law have entitled the purchaser to rescind the contract. The High Court in *Gardiner* v. *Orchard* held that even if the shortage of frontage constituted a defect in title, it was a matter for compensation only. This holding is fully supported by Barwick C.J. in *Travinto*.[29] In *Gardiner* v. *Orchard*, the Court was concerned with the relationship between the compensation clause and the rescission clause (clause 15 of the standard form contract of sale) and both Griffith C.J. and Isaacs J. held that the rescission clause could not be made to defeat a reasonable claim for compensation. All justices assumed that the particular defect was covered by the compensation clause if either party sought to invoke it. Since Barwick C.J. is at some pains to observe that the decision in *Gardiner* v. *Orchard* was clearly right and that even if the subject-matter of the sale was land, a defect in title might still be within the compensation clause, it would seem that, after the decision in *Travinto*, two classifications of the subject-matter of the sale must be made. First, it is necessary to determine whether the vendor is selling land or an estate in land. Secondly, if it be the former, it is necessary to determine correctly what parcel of land is being sold in order to determine whether any deficiency constitutes a defect in title.

Since the decision in *Travinto* requires a somewhat novel approach to selection of the subject of the sale for the purpose of the compensation clause, some of the authorities relied upon and discredited by the High Court will be examined.

---

[27] *Attorney-General* v. *Brown* (1825-1854) 1 Legge 312.
[28] (1910) 10 C.L.R. 722.
[29] Note 2 *supra*, 21.

In re Beyfus and Masters' Contract[30] involved the sale of property described as being held by a 90 year lease when in part it was held by an underlease of 90 years less two days. The relevant words of the compensation clause were: "The description of the property in the particulars is believed to be correct, but if any error shall be found therein the same shall not annul the sale, nor shall any compensation be allowed the vendor or purchaser in respect thereof".[31] The Court of Appeal held that the misdescription of the title was not within the compensation clause and as Barwick C.J. pointed out, "[t]his case has been followed and has never been the subject of adverse comment".[32]

It is true that Cotton L.J. held that "property" in the condition meant "the physical thing which was sold, viz., the houses"[33] and that Bowen and Fry L.JJ. agreed. Yet, Bowen L.J. commented that the compensation clause in that case was preceded by a clause that dealt specifically with the lease and this indicated to his mind that "description of the property" in the particulars "does not include statements as to the lease itself".[34] More significantly, Bowen and Fry L.JJ. were both concerned that the clause denied any compensation at all for a misdescription and this fact indicated the true meaning of the clause. An intending purchaser could inspect the physical property before exchange of contracts but had no opportunity of perusing the title until an abstract was delivered after exchange. Fry L.J. said "we ought not to give an enlarged meaning to words which restrict the rights of a purchaser in relation to a description which he has no opportunity of verifying".[35] For these reasons, *In re Beyfus and Masters' Contract* is not compelling authority and in any case, there was no indication by the Court that the subject-matter of the sale, be it land or an estate in land, must first be ascertained before the scope of the compensation clause is known.

Debenham v. *Sawbridge*[36] is another case referred to by Barwick C.J. as indicating that a compensation clause similar in terms to clause 5 of the standard form contract does not include defects in title. The description clause in the contract included the following words: "Dwelling over no. 21, containing on the first floor a sitting room . . .".[37] A plan was annexed to the contract referring to the dwelling above number 21. After completion of the contract, it was discovered by the purchaser that the vendor had no title to the dwelling above number 21 and compensation was sought under the contract. The wording of the

---

[30] (1888) 39 Ch. 110.
[31] *Id.*, 111.
[32] Note 2 *supra*, 18.
[33] Note 30 *supra*, 114.
[34] *Ibid.*
[35] *Id.*, 115.
[36] [1901] 2 Ch. 98.
[37] *Id.*, 99.

compensation clause was quite wide and provided for compensation to be given for any error or misstatement made in the particulars of sale or the conditions of the contract. Byrne J. came to the quite remarkable conclusion that since the vendor had no title at all to part of what was being sold, this was solely a defect in title and not an error or mis-statement in the description of the property. He held that the compensation clause did not embrace defects in title. The decision is open to criticism on a number of grounds. First, it is in conflict with the High Court decision in *Gardiner* v. *Orchard* where Isaacs J. held that the subject-matter of the sale was a parcel of land having a frontage as described in the contract and that any deficiency in the frontage constituted a defect in title. Isaacs J. nonetheless held that compensation was payable. Griffith C.J., at the conclusion of his judgment, said that if he had held the deficiency to be a defect in title, he still would have considered the misdescription as falling within the compensation clause. Secondly, in *Travinto* itself, Barwick C.J. points out that if the subject-matter of the sale is land, compensation will be payable for a misdescription of the physical incidents of the land even if the misdescription does constitute a defect in title.[38] Thirdly, there have been a number of cases where a contract containing a compensation clause, similar to that in *Debenham* v. *Sawbridge*, has been considered and where a court has held a defect in title to be within the scope of the clause.[39]

Reference was made by Barwick C.J. in his judgment to *Ashburner* v. *Sewell*[40] where the compensation clause provided that any error in the description of the property would be subject to fair compensation. In that case, Chitty J. held the omission to refer to a right of way, to which the property was subject, was an error within the compensation clause. The property was described as "[a]ll that . . . dwelling house . . . and also the piece of land adjoining . . . and are more particularly shewn in the plan hereto annexed and coloured pink and green".[41] Dotted lines on the area shaded green on the plan indicated the right of way. Chitty J. held that the right of way was a latent defect in title and ought to have been disclosed. Accordingly, there was an error in the description of the property and compensation would have been payable. However, the Court permitted the vendor to avail himself of the rescission clause since the defect was one of title.[42] Barwick C.J. attempted to distinguish this case on the basis that the plan annexed to

---

[38] Note 2 *supra*, 26. See also *Ashburner* v. *Sewell* [1891] 3 Ch. 405.

[39] *Cann* v. *Cann* (1830) 3 Sim. 447; *In re Courcier and Harrold's Contract* [1923] 1 Ch. 565; *In re Jackson and Haden's Contract* [1905] 1 Ch. 603; *Curtis* v. *French* [1929] 1 Ch. 253; *Palmer* v. *Johnson* (1884) 13 Q.B.D. 351.

[40] Note 38 *supra*.

[41] *Id.*, 406.

[42] Compare cl. 15 of the 1972 edition of the standard form contract of sale and note cl. 5 and cl. 15 are mutually exclusive.

the contract formed part of the physical description of the property but apart from the artificiality of this distinction, no such emphasis was made in the case itself.

The New South Wales authorities referred to are better known. *Gardiner* v. *Orchard* has been discussed earlier. *Grace* v. *Mitchell*,[43] a decision of Harvey J., was strongly criticised in *Travinto*. The facts involved non-disclosure of a right of way and although the vendor was permitted by Harvey J. to make use of the rescission clause, had he not done so, the non-disclosure would have been a matter for compensation. So far as this latter point was concerned, the High Court has pronounced the decision erroneous. Harvey J. had relied upon two decisions of Chitty J., namely, *In re Jackson and Haden's Contract*[44] and *Ashburner* v. *Sewell*, as authority for his conclusion that a defect in title can be a matter for compensation. It is suggested *Ashburner* v. *Sewell* supports such a conclusion, and the distinction of the case by the Chief Justice in untenable. It is correct as Barwick C.J. points out that the compensation clause which was the subject of discussion *In re Jackson and Haden's Contract*, provided for compensation for any error in the particulars. Many of the English decisions dealt with compensation clauses in similar terms but there is hardly any need to exaggerate the difference between a clause that provides for compensation upon error or misdescription of the property and one that provides for compensation for errors or misdescriptions in the particulars of sale. Particulars of sale, after all, are those particulars required to adequately describe the property and include title references as well as physical dimensions. Both title particulars and physical dimensions are referred to by conveyancers under the heading "Description of property" on page one of the standard contract for sale. *Torr* v. *Harpur*[45] is a case well known to conveyancers. It will be recalled that a stormwater drain of considerable dimensions had been constructed beneath the surface of land the subject of the sale and was unknown both to vendor and purchaser at the time of sale. Upon discovery, the purchaser rescinded the contract whilst the vendor maintained the defect was one within the purview of the compensation clause. It was submitted by counsel for the purchaser that the compensation clause did not extend to defects in title but this argument was expressly rejected by Williams J. Indeed, the judgment was concerned with the application of the rule in *Flight* v. *Booth* and assumed initially that the misdescription was within the compensation clause.

The more recent decision of the New South Wales Court of Appeal in *Beard* v. *Drummoyne Municipal Council*[46] was also the subject of

[43] Note 25 *supra*.
[44] Note 39 *supra*.
[45] Note 17 *supra*.
[46] (1969) 90 W.N. (Pt 2) (N.S.W.) 163.

comment by the High Court in *Travinto*.[47] In *Beard* a 9 inch sewer main of the Metropolitan Water Sewerage and Drainage Board was situated beneath land which had been sold as a home unit site. Hardie J. before whom the proceedings were heard at first instance, held that the Board's sewer constituted a defect in title and that a defect in title could amount to an error or misdescription within the meaning of the compensation clause. This aspect of the judgment of Hardie J. was accepted by the appellant and not challenged in the Court of Appeal. The Court of Appeal was concerned with applying the rule in *Flight* v. *Booth*. In *Travinto*, Barwick C.J.[48] dismissed this case as being irrelevant to the problem there under discussion but it must be pointed out, as emphasised earlier, that the application of the rule in *Flight* v. *Booth* does not even fall for determination unless there has been an error or misdescription of the type envisaged by clause 5. It seems that, perhaps to avoid the inconsistency of the reasoning in *Beard* with the principle developed in *Travinto*, Barwick C.J. classified the subject-matter of the sale in *Beard* as a "suitable site for the construction of home unit buildings".[49] Whether such abstract classification of subject-matter will be permitted in the future to provide for the encompassing of an error or misdescription within clause 5 remains to be determined.

Whatever view the reader may take of the authorities referred to above as supporting or detracting from the High Court's reasoning, the decision in *Travinto* represents the law at present and is likely to remain so for the foreseeable future. What, however, the review of some of the authorities does indicate is that even where an error or misdescription is not one that at first would seem within the compensation clause, it may yet be if a court is prepared to be innovative in classifying the subject-matter. For example, after *Travinto*, the subject-matter in *Beard* v. *Drummoyne Municipal Council* could be regarded as a site for home unit development rather than as physical land, and the plan annexed to the contract in *Ashburner* v. *Sewell* regarded as being part of the physical description of the land.

Stephens v. *Selsey Renovations Pty Ltd*,[50] heard before Mahoney J. in the Equity Division of the Supreme Court of New South Wales, is the only case at the time of writing to deal with rights under the compensation clause decided since *Travinto*. In the contract, the property was described as

> ALL THAT piece or parcel of land having a frontage of approx. 15′ 6″ . . . being Lot F in plan F.P. 108249 (formerly Litho 51473) and being the whole of the land contained in Certificate of Title Volume 7859 Folio 209 and Lot C in Plan F.P. 108249

---

[47] Note 2 *supra*, 24 *per* Barwick C.J.
[48] *Ibid.*
[49] *Ibid.*
[50] [1974] 1 N.S.W.L.R. 273.

> (formerly Litho 51473) and being the whole of the land contained in Conveyance Registered No. 161 Book 2523 together with improvements erected thereon and known as No. 76 Mansfield Street, Rozelle.[51]

It was discovered that the frontage of the land comprised in Lots C and F was 12 feet 10¾ inches and the purchaser claimed compensation for the deficiency. In the result, she was successful.

It is interesting to note the approach of the Court with regard to ascertaining the nature of the error or misdescription that will attract the compensation clause: "[I]t was not in contest or argument that, if the deficiency in frontage was an error or misdescription which related only to title, then it was not a matter which fell within clause five of the contract: see *Travinto Nominees Pty Limited* v. *Vlattas*".[52] If Mahoney J. is stating that defects in title cannot be matters for compensation then, with respect, his suggestion is out of harmony with the judgment in *Travinto*:

> Of course, in every case the actual contract between the parties must be construed in order to decide whether the subject matter is land or some particular estate or interest in land . . . if the title to or an estate or interest in land be the subject matter of the contract, error or misdescription may relate to the title or the estate or interest rather than the land itself.[53]

It seems that the Court in *Stephens* v. *Selsey Renovations Pty Ltd* did not attempt to conclude whether the subject-matter was land or an estate in land. Indeed, the Court assumed the subject-matter was land and was more concerned with determining whether the defect was one of title using the traditional reasoning adopted, for example, in *Gardiner* v. *Orchard*.[54] Mahoney J., by regarding the words "having a frontage of approx. 15′ 6″ " as adjectival and not representing delineation of the subject-matter, was pleased to find his decision was in conformity with the approach taken in *Gardiner* v. *Orchard* and *Solomon* v. *Litchfield*[55] and concluded "I am, therefore of the view that the plaintiff is entitled to the rights conferred by cl. 5 of the contract".[56] It is to be regretted that his Honour did not find it necessary to deal with the submission of counsel for the purchaser that even if the misdescription did amount to a defect in title, it was a matter for compensation. It is suggested with respect that such a submission was clearly correct. Thus, Barwick C.J. in *Travinto* stated that "an error or misdescription which is properly within a compensation clause will not cease to be such because it also amounts to or discloses an objection to title: and it is clear that in some

---

[51] *Id.*, 275.
[52] *Id.*, 276.
[53] Note 2 *supra*, 13.
[54] Note 28 *supra*.
[55] (1916) 16 S.R. (N.S.W.) 610.
[56] Note 50 *supra*, 277.

circumstances an objection to title may be based upon an error or misdescription of the property".[57] Note also the judgment of Isaacs J. in *Gardiner* v. *Orchard*.[58]

VI RESCISSION FOR MISREPRESENTATION AND THE COMPENSATION CLAUSE

A purchaser may rescind for a misrepresentation by the vendor of a material matter concerning the property which induced the purchaser to enter into the contract. The misrepresentation may be fraudulent, negligent or innocent. In cases where the purchaser does not wish to rescind or has lost the right to rescind, it has been held that he cannot claim compensation either under the clause in the contract or on general grounds for misdescriptions collateral to the contract. In *Rutherford* v. *Acton-Adams*,[59] a decision of the Privy Council on appeal from New Zealand, the purchaser claimed that in discussions held between the parties before exchange of contracts, the vendor's agent had misrepresented the extent of fencing on the land. The Privy Council held that specific performance with compensation was only available for deficiency in the subject-matter described in the contract itself. To like effect was the decision in *Gilchester Properties Ltd* v. *Gomm*[60] where the contract contained a compensation clause.

More recently, the courts have dealt with the case where the representation made before contract is subsequently included as a term of the contract. *Simons* v. *Zartom Investments Pty Ltd*,[61] a decision of Holland J., was concerned with a representation made before contract that a home unit was being sold with a lock-up garage. This representation was incorporated into the contract as a term but the Court held this did not prevent the purchasers from rescinding for misrepresentation. The lock-up garage actually consisted of covered underground parking with a main door at the entrance to which every owner was given a key. There was no specific argument addressed to the question of whether the compensation clause precluded rescission. That is, do the words "no error or misdescription . . . shall annul" extend to misrepresentations before contract? The Court did, however, deal with a submission that the misdescription was within the rule in *Flight* v. *Booth*. In the event the Court held that it was and that the purchasers "were not limited to compensation under cl. 5 and were entitled to rescind".[62] Presumably, "rescind", having regard to the context of the argument put, means terminate at law under the contract for breach. On the other hand, it could mean rescind for innocent misrepresentation, in

---

[57] Note 2 *supra*, 25.
[58] Note 28 *supra*, 736ff.
[59] Note 10 *supra*.
[60] [1948] 1 All E.R. 493; *Corbett* v. *Jones* (1918) 37 N.Z.L.R. 956.
[61] [1975] 2 N.S.W.L.R. 30.
[62] *Id.*, 37.

which case, by applying the rule in *Flight* v. *Booth*, the Court recognised impliedly that, in the usual case, the compensation clause would have deprived a purchaser from the right to rescind for misrepresentation.

One of the issues discussed in *Jennings* v. *Zilahi-Kiss*,[63] a decision of Bray C.J. in South Australia, was whether a description of the property constituted a warranty and if so, whether action for breach of warranty was precluded by the compensation clause. The property was described in the contract as "a stone and brick . . . dwelling and . . . brick flats(5) as inspected". The flats had never been approved as such by the Council, as the vendor well knew as she had registered them as a licensed boarding house. The Court held the description of the property as flats constituted a warranty by the vendor that Council approval had been given and the property could be lawfully used as self-contained flats. His Honour then considered the application of the compensation clause and its effect on the warranty. The contract having long been completed, there was no question of compensation being awarded as compensation must be demanded in writing before completion. Once again, as in *Simons* v. *Zartom Investments Ltd*, the Court was able to avoid having to decide the issue because of the application of the rule in *Flight* v. *Booth*. The Court held the misdescription was so serious as to justify the application of the rule thereby preventing the compensation clause from having any operation at all. However, the inference from this reasoning is, that if the rule in *Flight* v. *Booth* had not been applied, the action on the warranty would not have been available. Support for this view is to be found in the judgment of Mahoney J. in *Stephens* v. *Selsey Renovations Pty Ltd*. After referring, *inter alia*, to rescission for innocent and fraudulent misrepresentation, his Honour states "therefore, if cl. 5 is seen to operate . . . to deprive the purchaser by its opening words of a right to annul the contract which otherwise the purchaser would have, the fact that it grants to the purchaser a right of compensation is understandable".[64]

VII RELIEF UNDER THE COMPENSATION CLAUSE AND DAMAGES FOR BREACH OF CONTRACT COMPARED

In *Stephens* v. *Selsey Renovations Pty Ltd*[65] Mahoney J. dealt with an argument put forward by the vendor's counsel that no compensation was payable under clause 5 unless the misdescription amounted to at least a breach of warranty. That is to say, a misdescription that would not be actionable at law, such as a mere representation concerning the property or a mere estimate that was not intended to be contractually binding, would not give rise to an action for compensation. With respect, the writer would suggest this argument is clearly correct.

---

[63] Note 26 *supra*.
[64] Note 50 *supra*, 279.
[65] *Ibid*.

The compensation clause originally was inserted to prevent a purchaser annulling a contract for any deficiency in the subject-matter. It provided for the giving of compensation for a misdescription that would otherwise have entitled the purchaser to terminate the contract for breach of a condition, implied or express. Despite the preamble to the clause, which seems to confine it to only those types of misdescription that would otherwise have led to rescission, the courts have held it applicable to misdescriptions of a less serious nature. In *Gardiner* v. *Orchard*[66] it will be remembered, both Griffith C.J. and O'Connor J. regarded the subject-matter of the sale as a city bank building and not as a parcel of land having a specified frontage. The deficiency in frontage, therefore, did not amount to a defect in the subject-matter of the sale and was not thus a defect in title. Therefore, it was unlikely that the purchaser could have terminated the contract and Griffith C.J. recognised this.[67] Nonetheless, the compensation clause was invoked. Of a similar effect is the decision in *Solomon* v. *Litchfield*.[68] However, it will be noted that such misdescriptions would have been serious enough to have amounted to a breach of warranty.[69]

In *Stephens* v. *Selsey Renovations Pty Ltd* the facts also concerned sale of land where the frontage actually available was less than that stated in the contract. Mahoney J. rejected the argument of the vendor's counsel that the misdescription must amount to at least a breach of warranty. The compensation clause was interpreted as giving a right of compensation for any misdescription[70] and was given a quite independent operation divorced from the principles to be applied when ordering specific performance with compensation. In the event, his Honour's decision on the point is obiter dictum as he held the description of the land as having a certain frontage did constitute a warranty.

VIII THE RULE IN BAIN v. FOTHERGILL AND THE COMPENSATION CLAUSE

The rule in *Bain* v. *Fothergill*,[71] also known as the rule in *Flureau* v. *Thornhill*,[72] provides that where the purchaser is entitled to terminate a contract of sale of land for a defect in the vendor's title, his right to damages will be limited to a return of the deposit and the costs of

---

[66] Note 28 *supra*, 726, 734.

[67] *Id.*, 729: "The clause assumes (rightly or wrongly) that error or misdescription might afford ground to either party for annulling the sale".

[68] Note 55 *supra*.

[69] See generally L. Voumard, *The Law Relating to the Sale of Land in Victoria* (3rd ed. 1978) 206. For the difference between common law damages and compensation which is an abatement of the purchase price see *King* v. *Poggioli* (1923) 32 C.L.R. 222 and *Curtis* v. *French* [1929] 1 Ch. 253, discussed in L. Voumard, *supra*, 206-207.

[70] Provided it was a misdescription of the subject-matter as determined by applying *Travinto*, note 2 *supra*.

[71] Note 5 *supra*.

[72] (1776) 2 W. Bl. 1078; 96 E.R. 635.

investigating the title and will not include damages for loss of bargain.[73] It is not yet clear what effect the application of the rule has on the operation of the compensation clause. If the purchaser has a right of action against the vendor for breach of the vendor's obligation to give a good title, and such breach results in a misdescription of the property, is the vendor able to insist that the rule in *Bain* v. *Fothergill* applies, thus limiting the amount of compensation payable? The issue was discussed but not finally resolved in *Solomon* v. *Litchfield*.[74]

The vendor in *Solomon* v. *Litchfield* described the property as "all that parcel of land having frontage of about 261 feet 9 inches to Gladesville Road . . . on which is erected a stone villa known as 'Nau Mai' ".[75] It was subsequently revealed that the frontage of the land available was only 216 feet and not 261 feet as described in the contract. The purchaser successfully initiated arbitration proceedings and was awarded compensation pursuant to the contract. Upon the vendor refusing to complete the contract, the purchaser brought an action for damages in the New South Wales Supreme Court. The vendor admitted having breached the contract but claimed the benefit of the rule in *Bain* v. *Fothergill* and submitted damages should not include damages for loss of bargain. The principle argument of the vendor was, of course, that his inability to complete the contract was due to a defect in title. However, the Full Court construed the subject-matter of the contract as a stone villa known as "Nau Mai" and not as a parcel of land having a frontage of 261 feet. The breach complained of was, therefore, a failure by the vendor to convey the subject-matter to which he did have a good title and the rule in *Bain* v. *Fothergill* could have had no application to such a case. To hold otherwise, the Court suggested, would allow a vendor to resort to the rule to avoid paying the compensation in the contract specifically provided. Damages for loss of bargain would have been assessed, presumably, having had regard to a contract price reduced by the amount calculated for compensation.

In *Solomon* v. *Litchfield* there was no defect in the title to the subject-matter of the sale. Is there any difference where the error or misdescription is an error or misdescription in the delineation of the subject-matter? It is submitted that there is not. When, of course, the deficiency in the subject-matter is so serious as to come within the rule in *Flight* v. *Booth*, the purchaser may choose to terminate but he is under no obligation to do this.[76] He may elect to take what the vendor has without paying for what the vendor has not. The remarks of the Full Court in *Solomon* v. *Litchfield* seem equally pertinent to this

[73] There are exceptions to the rule, as for example when the vendor enters into a contract in reckless disregard of his inability to make a good title.

[74] Note 55 *supra*.

[75] *Id.*, 611.

[76] *Beard* v. *Drummoyne Municipal Council*, note 46 *supra*.

situation. The vendor must give compensation but that simply means he must accept an abatement in the purchase price for that part of the subject-matter that he cannot convey. The rule in *Bain* v. *Fothergill* is only concerned with a limitation on a purchaser's right to bring an action for damages for loss of bargain and is not concerned with an abatement of the purchase price for a deficiency in the subject-matter of the sale.[77]

IX CONCLUSION

The presence of the compensation clause in the standard form contract is justified by preventing the purchaser from terminating for minor deficiencies in the subject-matter of the sale. It also provides a remedy for an error or misdescription of the property where the general law would not, that is to say, where the error or misdescription would not constitute a breach of warranty or condition of the contract.

The decision of the High Court in *Travinto* has unduly restricted the operation of the clause. The only judicial application of the decision since the judgment was delivered did not seem to appreciate the need to determine whether the subject-matter of the sale was the physical land or an estate in land. In any case, the distinction in practice will be difficult to make and even the draftsman conscious of the distinction may find it no easy task to describe the subject-matter of the contract as one type of interest or the other. Perhaps it is undesirable to do so in any event since the selection of one type of interest as the subject-matter necessarily excludes compensation for an omission or misdescription of the other interest.[78]

Since, to the writer, there appears to be no policy reason for denying compensation under the clause for all types of errors or misdescriptions, whether of the subject-matter as determined by application of the reasoning in *Travinto* or not, consideration should seriously be given to amplifying the present clause 5 to provide for this. In the situation where the purchaser is confronted with a serious or essential misdescription, it is suggested he is adequately protected by the rule in *Flight* v. *Booth*.

---

[77] See *McGavin* v. *Gerraty* (1911) 17 A.L.R. 85 where the vendor represented at an auction sale that he would be able to deliver vacant possession but was unable to do so because of an option to renew a lease over the subject property which the tenant exercised. The Court made an order of specific performance with compensation (there being no compensation clause), the compensation being awarded for the inability of the vendor to provide compensation. The Court refused to entertain a defence based on *Bain* v. *Fothergill* on the basis that the vendor had represented and contracted that he could give vacant possession. See also *Mortlock* v. *Buller* (1804) 10 Ves. Jun. 292; 32 E.R. 857.

[78] *E.g.*, in *Beard* v. *Drummoyne Municipal Council*, note 46 *supra*, where Barwick C.J. observed the subject-matter of the sale was a home unit development site, presumably the compensation clause would not have been available if there had been a deficiency in the area of the land sold.

As mentioned earlier, the jurisdiction of a court to award specific performance with compensation on general principles ought not to be overlooked. If a contract does contain a compensation clause which is construed too narrowly to embrace a particular error or misdescription there seems no reason in principle why a court could not decree specific performance with compensation. That is to say, a compensation clause should be regarded as providing additional and not alternative rights to those available under the general law.[79]

One might ask whether there is very much practical significance in interpreting the compensation clause in a way which restricts its scope, as was done in *Travinto*, if specific performance with compensation is still available to the purchaser on general equitable grounds. Certainly, there is one important difference between the two remedies which ought to be noted. The compensation clause (clause 5) and the rescission clause (clause 15) of the standard form contract in New South Wales are mutually exclusive. In the case of an error or misdescription which involves a defect in title and which is not covered by the compensation clause, the vendor may be able to treat a demand for compensation as a requisition or objection which he is unwilling to comply with, thus enabling him to rescind under clause 15 unless the demand is withdrawn.

To avoid the difficulty presented by the decision in *Travinto* in applying the compensation clause, the clause might be redrafted in the following form:

> No error or misdescription of the land and improvements and no error in the title to the estate shall annul the sale nor render the vendor liable in damages but compensation if demanded in writing before completion but not otherwise shall be made or given as the case may require, the amount to be settled in case of a difference by an arbitrator appointed by the parties by mutual agreement or failing agreement nominated by the President for the time being of the Law Society of New South Wales. Clause 15 hereof shall not apply to any such claim for compensation.

---

[79] See E. Fry, *A Treatise on the Specific Performance of Contracts* (6th ed. 1921) 594, Sect. 1287; *McGavin* v. *Gerraty*, note 77 *supra*; for a discussion of this case see L. Voumard, note 69 *supra*, 214. See also *In re Ridgeway and Smith's Contract* [1930] V.L.R. 111.