Note: Students should read the Chapters in Lang & Skapinker and the cases referred to in the Guide. These notes are NOT a substitute for reading the text and considering the cases.

Title defects

When we refer to a title defect we are referring to something that detracts or takes away from the unencumbered fee simple that a purchaser is expecting to acquire. It is possible to acquire a leasehold title, a Crown land title or a lesser estate such as a life interest. Nevertheless, what the purchaser expects to receive is a clear title to whatever estate is being acquired.

Examples of interests that detract from the unencumbered fee simple are leases, easements, covenants (positive and negative), a requirement to pay a Crown rent or make a capital payment to convert a Crown land title to a freehold title.

If the ‘defects’ are disclosed on the title, for example, easements or restrictions as to use set out in the Second Schedule, or a registered lease, then the title being sold is one that is affected by the disclosed matters. Because of this these disclosed matters are not ‘defects’ and the title is sold subject to them.

General law position

As with many other areas, small differences between what is described in the contract as the subject matter of the sale and what can be conveyed or transferred to the purchaser on completion gave rise to a right in favour of the purchaser to terminate the contract.

Equity

This often led to unreasonable results and over time equity modified the rigorous approach of the common law. In Flight v Booth (1834) 131 ER 1160 a contract for the sale of leasehold premises contained disclosures that the premises could not be used for the businesses of coffee-house keeper or working hatter and that no offensive trade was to be carried
on. When the lease was produced it also prevented use of the premises for:

... the trades or businesses of a brewer, baker, sugar-baker, vintner, victualler, butcher, tripe-seller, poulterer, fishmonger, cheesemonger, fruiterer, herb-seller, coffee-house keeper, distiller, dyer, brazier, smith, tinman, farrier, dealer in old iron, pipe-burner, tallow-chandler, soap-boiler, working hatter, ... or used as a shop or place for the sale of coals, potatoes, or any provisions whatever...

The purchaser intended to use the premises for the sale of vegetables which was prohibited under the lease. Could the purchaser rescind the contract for the failure by the vendor to correctly describe the property sold? Tindall C J said:

The question therefore is narrowed to the single point, whether the misdescription in the printed particulars of sale of the premises to be sold was such as to entitle the purchaser to rescind the contract altogether...

In this state of discrepancy between the decided cases, we think it is, at all events, a safe rule to adopt, that where the misdescription, 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, in such case the contract is avoided altogether, and the purchaser is not bound to resort to the claim for compensation. Under such a state of facts, the purchaser may be considered as not having purchased the thing which was really the subject of the sale.

This principle became known as the rule in *Flight v Booth*.

The 2005 Contract includes clauses 6 and 7 dealing with errors, misdescriptions and claims and clause 8 setting out the vendor’s right to rescind in certain circumstances. We will deal with those clauses shortly.

Identification of defects

In applying the rule in *Flight v Booth* it is necessary to determine whether there is a ‘title defect’. To work this out you need to ask:

1. **What is being sold?**
This calls into question the matter of the subject matter of the sale.

What title is the land? Is it Torrens, Old system, Crown land, leasehold?

Is the property tenanted under some arrangement not set out or disclosed in the contract?

Are there easements or pipes installed in the property but not disclosed in the contract?

2. **Is there a defect in title in relation to the subject matter of the sale?**

Is the defect an error or misdescription? See later in this lecture.

What can the vendor convey or transfer?

3. **If there is a defect, what remedies flow?**

Is the defect material or substantial? Is it of a minor nature?

**Remedies**

**Where the undisclosed title defect is material**

The purchaser should raise an objection to the vendor’s title. This is permitted under clause 5 of the 2005 Contract. Remember that the term ‘requisition’ includes ‘objection’.

If the vendor cures the defect then the purchaser must proceed to completion.

If the vendor is unable or unwilling to cure the defect then the vendor can give a notice pursuant to clause 8 requiring the purchaser to waive the objection. If the purchaser doesn’t then the vendor can rescind the contract.

If the vendor doesn’t rescind but doesn’t cure the defect then the purchaser can terminate the contract for breach or claim for compensation under clauses 6 and 7.

If the purchaser waives the objection then the purchaser can claim compensation under clauses 6 and 7.

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3 See Skapinker page 149
Where the undisclosed title defect is not material

The purchaser should claim compensation under clauses 6 and 7.

I have referred to claims being made under clauses 6 and 7 but they are strictly made under clause 6. Clause 7 sets out the mechanism for making a claim and how it is to be dealt with once made.

In *Lee v Rayson* [1917] 1 Ch 613 Eve J said:

I take that to mean that what the Court has to do in such a case as I have here to deal with is to decide whether the purchaser is getting substantially that which he bargained for, or whether the vendor is seeking to put him off with something which he never bargained for, and in arriving at a conclusion on this question the Court is bound to consider every incident by which the property offered to be assured can be differentiated from that contracted for. If the sum of these incidents really alters the subject-matter, then the purchaser can repudiate the contract; if, on the other hand, the subject-matter remains unaffected, or so little affected as to be substantially that which was agreed to be sold, then the purchaser must be held to his contract.

This approach was endorsed by the High Court in *Fuller’s Theatres Ltd v Musgrove* (1923) 31 CLR 524 by Isaacs and Rich JJ at 538 when they said that Eve J’s approach was ‘an accurate, and indeed, the only practical method of testing the matter’.

In *Hamilton v Munro* (1951) 51 SR (NSW) 250 Sugerman J said:

Primarily what must be considered are the terms, express or implied, of the contract, and how far what is tendered compares with the contract description (to be gathered from those terms) of what is promised.

Some possible title defects

Undisclosed easements

For land under the Torrens system title is to the land as disclosed in the Folio of the register. But you need to remember what section 42 of the Real Property Act says about the title you buy:

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4 Page 619
5 Page 253-254
...hold the same, subject to such other estates and interests and such entries, if any, as are recorded in that folio, but absolutely free from all other estates and interests that are not so recorded except:

(a1) ... omission or misdescription of an easement subsisting immediately before the land was brought under the provisions of this Act ...
(d) a tenancy (for not more than 3 years and in possession or entitled to immediate possession)

Because of section 42 it is possible even with Torrens land for there to be easements and short term leases that are known to the vendor but not noted on the title or disclosed in the contract and therefore within the ambit of a ‘title defect’. Such short term leases would generally be detrimental to a purchaser as the existence of such a lease would prevent the vendor handing vacant possession to the purchaser on completion.

The position concerning easements is not as clear, as the existence and position of an undisclosed easement may have no practical effect on the property. For example, an easement for drainage 900 mm wide adjacent to a side boundary may have no affect on the ability of the purchaser to use the buildings in existence and forming the subject matter of the sale.

While I would have maintained this position until recently, it is now possible to construct buildings up to a boundary and the existence of such an undisclosed easement could detract significantly from the ability to be able to develop and narrow block of land. Taking the views expressed in *Flight v Booth*\(^6\), *Lee v Rayson*\(^7\), *Fuller’s Theatres v Musgrove*\(^8\), and *Hamilton v Munro*\(^9\), it would seem that such a non-disclosure would amount to a defect in title sufficient for a purchaser to rescind.

**Undisclosed drains and sewers**

In addition to those pipes and drains that are covered by easements and should be disclosed on the title, there are also sewer mains that are allowed to remain on property without the benefit of any easement. They are sometimes referred to as ‘statutory easements’ but this is not necessarily correct. Sydney Water and Hunter Water have powers in their Acts giving them power to install and maintain sewer mains without acquiring easements.

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\(^6\) Page 1 these notes  
\(^7\) Page 4 these notes  
\(^8\) Page 4 these notes  
\(^9\) Page 4 these notes
Schedule 1 of The Regulation requires a diagram ‘indicating the location of the authority's sewer’ to be attached to the contract. If this document is not attached then the combined effect of clauses 19 and 20 allows a purchaser to rescind the contract ‘within 14 days after the making of the contract’.

In addition to this remedy, which only helps in the first 14 days after exchange, the warranty set out in Schedule 3 Part 1 of the Regulation provides:

The vendor warrants that, as at the date of the contract and except as disclosed in the contract:

(b) the land does not contain any part of a sewer belonging to a recognised sewerage authority, ...

The remedy for a breach of this warranty is also set out in clauses 19 and 20 although a rescission for breach of warranty is not an automatic right as it is for failure to attach documents. Rescission requires:

• a failure to disclose the existence of a matter
• the purchaser being unaware of the matter when the contract was entered into, and
• that the purchaser would not have entered into the contract had he/she been aware of its existence.

These matters are all matters of fact and in the event of a dispute careful instructions would need to be obtained. The first two matters are generally not an issue but the question of whether a purchaser ‘would not have entered into the contract’ is crucial.

Whether an undisclosed sewer poses a problem for the purchaser depends on the location of the sewer and the plans the purchaser has for the property.

It is also possible that a purchaser could argue under the rule in *Flight v Booth* that the property is materially different and that the purchaser is entitled to rescind.

What then is a material or substantial defect?
The test is clearly set out in the judgement of Sugerman J in *Hamilton v Munro* (1951) 51 SR (NSW) 250 as follows:\(^\text{10}\):

... The test here is not subjective, in the sense that it merely involves an inquiry into the mind of the purchaser as to immediate use of the property, but objective, that is whether, considering the whole effect of those restrictions on the 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 ... Primarily what must be considered are the terms, express or implied, of the contract, and how far what is tendered compares with the contract description (to be gathered from those terms) of what is promised.

**Encroachments by or upon the land**

Encroachments by buildings on the land being purchased over the boundary onto adjoining land are generally considered to be defects in title. This might not be the case if the building that encroaches does not form part of the subject matter of the sale or is of such a minor nature that the removal of the encroachment could not cause the purchaser a problem or render what is being sold materially different.

Encroachments by buildings on adjoining land onto the land being sold are also considered defects in title as they prevent the purchaser from receiving possession of the whole of the property being purchased. Both these situations should now be considered in view of the provisions of the prescribed term included in all contracts by clause 5 of the Regulation.

**1 Objections and requisitions**

Nothing in this contract or any other agreement prevents the purchaser, expressly or by implication, from making any objection, requisition or claim that the purchaser would otherwise be entitled to make in respect of:

- (a) any encroachment onto any adjoining land by any building or structure on the land, other than a dividing fence as defined in the *Dividing Fences Act 1991*, or

- (b) any encroachment onto the land by any building or structure on any adjoining land, other than a dividing fence as defined in the *Dividing Fences Act 1991*,

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\(^{10}\) Pages 253-254
unless the encroachment is disclosed and clearly described in this contract and the contract contains an express term precluding the purchaser from making such an objection, requisition or claim.

This prevents the use of a clause attempting to prevent the purchaser from objecting to matters relating to the position of improvements, at least as far as encroachments, without the vendor having to make any inquiry or obtain a survey. The regulation does not require a vendor to attach a survey to a contract but if a vendor has any doubt as to the position of improvements or it is clear that improvements might be close to the boundary then a survey may be desirable.

The term means that a vendor cannot prevent a purchaser making an objection, requisition or claim that the purchaser would otherwise be entitled to make. It does not create a new set of responsibilities.

**Errors and misdescriptions**

**General law position and in equity**

Under general law, any difference in the property as described and as available at completion allowed the purchaser to terminate the contract and recover damages for breach.

Generally this harsh approach was tempered by equity and the possibility of a vendor being able to secure an order for specific performance with some provision for compensation for the difference, provided it was not substantial, was introduced. Where the difference was material, equity would not order specific performance at the instance of the vendor even with compensation.

**What is an ‘error’ or ‘misdescription’?**

The Australian Oxford Dictionary defines ‘error’ as ‘the amount by which something is incorrect or inaccurate in a calculation or measurement’ and ‘misdescribe’ means ‘describe inaccurately’.

In *Travinto Nominees Pty Ltd v Vlattas* (1973) 129 CLR 1 Barwick CJ said:\(^{11}\):

During the course of the argument there was discussion as to the meaning of the expression “error or misdescription” as it is found in cl. 8. I agree with the submission made by the appellant that with the addition

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\(^{11}\) Page 14
of the word “error” the expression may cover more than would be coveredy “misdescription” alone: but I am unable to accept the submission that
the word “error” in the expression “error or misdescription” is unrelated
to the description of the property and that it covers any mistake in any
respect in or in connexion with the terms or conditions of the contract.

... In my opinion, in this contract the expression “error or misdescription”
of the property means error in the description, or misdescription, of the
property sold.

Contractual position

Clause 6 of the 2005 Contract says:

6  Error or misdescription

6.1 The purchaser can (but only before completion) claim
compensation for an error or misdescription in this contract (as to
the property, the title or anything else and whether substantial or
not).

6.2 This clause applies even if the purchaser did not take notice of or
rely on anything in this contract containing or giving rise to the
error or misdescription.

6.3 However, this clause does not apply to the extent the purchaser
knows the true position.

This clause and its predecessors in earlier versions of the contract have
been the subject of considerable development since the clause in the
standard contract at the time Travinto Nominees was decided. Several
issues arise from the current clause.

- any claim must be made before completion. How the claim is dealt
  with is determined by clause 7.

- the problem highlighted by Travinto as to what exactly can be
  ‘misdescribed’ has been dealt with by saying that the right to claim
  relates to:

  - the property (defined as ‘the land, the improvements, all
    fixtures and the inclusions, but not the exclusions)

  - the title

  - or anything else.
the purchaser does not need to have relied on anything in the contract in agreeing to purchase the property

but, the purchaser cannot make a claim if the purchaser knows the true position.

I have not found any cases on what this clause means in practice, and there might not have been any yet. It does seem to be a lot clearer than the earlier versions and maybe the potential for argument about what can form the subject of a claim for compensation has been clarified. No doubt there will be a case arising out of the clause at some time.

The question that will still arise is whether an error or misdescription is of such importance that it is not possible for the vendor to convey what was contracted for and the purchaser cannot be adequately compensated for the error under clause 6. In this event, it is necessary to go back to the rule in *Flight v Booth* and decide whether a claim will be made or the contract terminated.

While anything in these notes should not be used to form the basis for an opinion on a particular issue, it seems that it is always dangerous for a purchaser to terminate a contract relying on *Flight v Booth* unless the error or misdescription is so clear that the vendor has no possibility of conveying good title, or what will be conveyed is substantially different to that contracted for.

The danger is that if the purchaser determines that termination is the only avenue and the court decides that the error or misdescription was not sufficient to warrant termination then the purchaser will be found to have repudiated the contract and the vendor will be entitled to damages.

It appears to be a safer option for a purchaser to make a claim for an amount that is in excess of 5% of the purchase price (unless clause 7 has been amended) and give the vendor an option to rescind under clause 7.

If the matter is of such significance that the purchaser would not wish to complete under any circumstances then it is better to refuse to complete and either resist a suit for specific performance and seek recovery of the deposit under section 55(2A) of the Conveyancing Act, or, if the vendor terminates the contract for non completion, seek recovery of the deposit.

In any argument concerning a contract and the subject matter of it, the court only looks at this contract and its wording. It will be dealt with in isolation from any other contract as to the description. It is essential to clearly identify the subject matter of the contract to do what you can to
avoid any problems. To do this adequately requires taking clear instructions before preparation of the contract.

In *Drummoyne Municipal Council v Beard* [1970] 1 NSWR 432 the Court of Appeal was asked to consider the terms of an error or misdescription clause substantially different to the present clause 6. In this case, the Council contracted to sell land under the Real Property Act. Under the land at a depth of about 9 feet, and unknown to the vendor Council was a sewer main that substantially affected the property. When the purchaser discovered the sewer main he did not endeavour to rescind the contract but claimed compensation.

The relevant clause said:

8. 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 vendor argued that the purchaser must either complete or rescind, the amount of compensation being so large that to make the vendor complete and pay compensation would be inequitable.

Given the provisions in the Regulation, a purchaser in these circumstances would be able to rescind under the Regulation and avoid the problem of litigation.

Clause 7 of the 2005 Contract sets out the mechanism for dealing with claims. This clause needs to read carefully and understood. It provides:

7 **Claims by purchaser**

The purchaser can make a claim (including a claim under clause 6) before completion only by serving it with a statement of the amount claimed, and if the purchaser makes one or more claims before completion –

7.1 the vendor can rescind if in the case of claims that are not claims for delay –

7.1.1 the total amount claimed exceeds 5% of the price;
7.1.2 the vendor serves a notice of intention to rescind; and
7.1.3 the purchaser does not serve notice waiving the claims within 14 days after that service; and

7.2 if the vendor does not rescind, the parties must complete and if this contract is completed –

...
Many contracts are amended by either reducing the amount in 7.1.1 to 1% or deleting 7.1.1 altogether. While this might allow a vendor to rescind for either a small, or any, claim the writer does not view such amendments favourably. The standard contracts are developed after much thought and it is easy to amend one clause without considering whether that alteration will have an effect on other clauses.

In particular, it seems unreasonable for a vendor to restrict claims to either a small amount or no amount when it is a contract prepared by a vendor who has knowledge of the property. If there are problems with the subject-matter of the sale they should be disclosed.

Scott Freidman is of the view that the rule in *Flight v Booth* still applies and that a purchaser is entitled to rescind a contract for material or substantial defect in the subject matter of the sale. The clause does not purport to exclude the rule in *Flight v Booth* and circumstances could arise where a claim for compensation, although substantial, but less than 5% would not compensate the purchaser for the loss suffered as a result of the defect.

The other matter raised by the current clause 7 is what other claims can be made? The clause refers to claims including a claim under clause 6. These claims are for errors or misdescriptions, but would a claim under the Trade Practices Act or the Fair Trading Act fall under clause 7? I express no view but would be delighted to hear from students.

While the study of past cases needs to be carefully carried out when dealing with these clauses as they have changed over time, they can be helpful in considering the principles.

In *Owmist Pty Ltd v Twynam Pastoral Co Pty Ltd* (1984) NSW ConvR 55-165 Helsham J was asked to consider whether compensation for a deficiency in the area of a rural property was determined by first deducting the allowance that might be available by the description of the property as “approximately 3832 acres”. This was 104 acres more than the actual size of the property. The parties had agreed that 25 acres was a reasonable margin for error.

In his judgement Helsham said:\(^\text{12}\):

> But once the ambit of this latitude has been passed, the purchaser has his same right to compensation – i.e. the diminution in value of the property contracted to be sold. The fact that he has not received a

\(^\text{12}\) Page 57,190
property with an acreage that can be said to be properly described as “approximately” so many acres is merely the trigger that releases a contractual right to compensation.

Conveyancing (Sale of Land) Regulation 2005

When considering any question concerning whether a matter discovered by a purchaser after exchange might constitute a defect in title or a matter concerning which a purchaser might make a claim, it is necessary to consider the provisions of the Regulation.

Clause 8 of the Regulation prescribes a warranty that is included in every contract for the sale of land. The warranty is set out in Schedule 3 in the following terms:

SCHEDULE 3 – Prescribed warranties

(Clauses 8 and 15)

Part 1 - Warranty in contract

1

The vendor warrants that, as at the date of the contract and except as disclosed in the contract:

(a) the land is not subject to any adverse affectation, and

(b) the land does not contain any part of a sewer belonging to a recognised sewerage authority, and

(c) the section 149 certificate attached to the contract specifies the true status of the land the subject of the contract in relation to the matters set out in Schedule 4 to the Environmental Planning and Assessment Regulation 2000, and

(d) there is no matter in relation to any building or structure on the land (being a building or structure that is included in the sale of the land) that would justify the making of any upgrading or demolition order or, if there is such a matter, a building certificate has issued in relation to the building or structure since the matter arose, and

(e) if the land is burdened or purports to be burdened by a positive covenant imposed under Division 4 of Part 6 to the Conveyancing Act 1919, no amount is payable under section 88F of that Act in respect of the land.
In this lecture we will deal only with (d). The matters set out in the other parts of the clause are dealt with in other lectures.

The issue raised by 1(d) was considered by Campbell J in *Marinkovic v Pat McGrath Engineering Pty Limited* (2004) ANZ ConvR 413. The plaintiff vendor (Marinkovich) had constructed a factory building at Matraville with Council approval. In 1992 he subsequently constructed a first floor mezzanine area inside the factory without Council approval. After an inspection Council advised that no further action would be taken in relation to the unauthorized construction provided some additional stairs were installed. This was done and a further inspection carried out.

No application was made for a building certificate. In 2000 the plaintiff sold the property and after queries from a director of the purchaser advised that he had a letter from the Council. The letter was not produced.

In January 2001 the solicitors for the defendant wrote to the solicitors for the Plaintiff requesting details of Council approval. In February 2001 the defendant’s solicitors wrote to the purchasers solicitors rescinding the contract and requesting a refund of the deposit. The ground for the rescission was “breach of the implied warranty in Section 52 of the Conveyancing Act”.

In August 2001 both the solicitors for the vendor and purchaser applied for building certificates and both were issued. Between February 2001 and August 2001 the purchaser’s solicitors had lodged a caveat as the deposit had not been repaid. The vendor’s solicitors sought the removal of the caveat and the purchasers solicitors agreed in exchange for a bank cheque.

I will deal here only with the issue of the implied warranty.

In his judgement Campbell J referred to the warranty\(^\text{13}\) and then referred to the definition of an upgrading and demolition order in the Environmental Planning and Assessment Act 1979. He then went on to consider the provisions of the 2000 Regulation (similar to the 2005 Regulation) and referred specifically to clause 19.

He said\(^\text{14}\):
... The building of the mezzanine floor did not fit within the activities permitted without consent, nor did it fit within the activities which were prohibited. Therefore, it was an activity which required development consent.

... In the present case, the existence of the mezzanine floor was, in my view, a matter that would justify the making of an upgrading or demolition order. It had that characteristic even though the council, in its 1992 letter, had stated an intention to do nothing about the matter.

... Thus, even if that letter had been acted upon by the plaintiff, it could not estop the council from later deciding that it should require the removal of the structure that had been erected without consent. If the council issues a building certificate, however, it does so under statutory authority, and with the consequences which sec 149E Environmental Planning and Assessment Act 1979 lays down so far as fettering its future discretions is concerned.

Hi Honour then considered the evidence of Ms Seymour, a director of the defendant, concerning the anticipated use of the building and the need for the mezzanine. He looked at this because of the requirement in clause 19(3) of the Regulation.

He held that the defendant was justified in terminating the contract and was entitled to a refund of the deposit.

Hi Honour also fond that the subsequent issue of the building certificate did not retrospectively cure the problem at the date of the contract.