SUPREME COURT OF QUEENSLAND

CITATION:	*Marminta P/L v French* [2003] QCA 541
PARTIES:	**MARMINTA PTY LTD** ACN 060 701 626 (plaintiff/appellant/cross-respondent) **v** **RUSTY FRENCH** (defendant/respondent/cross-appellant)
FILE NO/S:	Appeal No 11719 of 2002 SC No 187 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Rockhampton
DELIVERED ON:	5 December 2003
DELIVERED AT:	Brisbane
HEARING DATE:	28 August 2003
JUDGES:	Williams and Jerrard JJA and Philippides J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal and cross appeal in CA No 11719 of 2002 allowed** **2. The orders numbered 1, 2 and 3, made 13 December 2002 in action number S187 of 2002 are set aside** **3. In lieu thereof it is ordered:** **(a) That the agreement by which Marminta Pty Ltd agreed to purchase from Rusty French the mortgages registered as C603556M and C595956F be specifically performed and carried into execution** **(b) That upon payment by Marminta Pty Ltd to the respondent within six weeks of the date of publication of these orders of the sum of $900,000.00 together with interest at 8% per annum on $450,000.00 from 30 April 2000 to 30 June 2000 and interest at 8% per annum on $900,000.00 from 30 June 2000 to the date of payment, Rusty French do all acts and sign and deliver all documents necessary to transfer those mortgages to Marminta Pty Ltd and to enable it to become the registered proprietor of those**

mortgages; and in the event of the default by Marminta Pty Ltd in compliance with this order number 3(b) then Rusty French be discharged from compliance with this order and his obligations under the said agreement

(c) That the parties have liberty to make written submissions within 21 days of the date of publication of these orders as to the form of the orders and to costs and that unless otherwise ordered by this court the respondent pay the costs of and incidental to the action to be assessed on a standard basis

(d) That each party has liberty to apply

(e) That the respondent pay the costs of and incidental to the appeal to be assessed on a standard basis

(f) That unless otherwise ordered by this court each party bear their own costs of the cross appeal

(g) That Queensland Premier Mines Pty Ltd be included as a party (a second appellant) to the appeal and that the respondent pay the second appellant's costs of and incidental to application number 72 of 2002 to be assessed on the standard basis

CATCHWORDS: CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – STATUTE OF FRAUDS, SECTION 4 – NON-COMPLIANCE WITH STATUTE – DOCTRINE OF PART PERFORMANCE – WHAT ACTS CONSTITUTE PART PERFORMANCE – ACTS NOT CONSTITUTING PART PERFORMANCE – where appellant entered into agreement with respondent to the effect that the respondent would sell and assign to appellant his interest as registered mortgagee in two mortgages and as unpaid creditor in the debts those mortgages secured – where parties sought to vary agreement to postpone payments due – where non-refundable deposit paid by appellant to respondent – where learned trial judge found agreement to vary contract was unenforceable – where learned trial judge found no part performance by appellant – whether appellant's acts were unequivocally and in their own nature referable to some such contract of the general nature alleged

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – DISCHARGE, BREACH AND DEFENCES TO ACTION FOR BREACH – REPUDIATION AND NON-PERFORMANCE – REPUDIATION – DELAY AND PROVISIONS AS TO TIME – where time not of the essence – where period of inactivity on both sides – whether inactivity produces the clear inference that one party does not

wish to proceed with the contract and the other consented – whether any mutual intention to abandon agreement

Property Law Act 1974 (Qld), s 59
Uniform Civil Procedure Rules 1999 (Qld), r 750

CGM Investments Pty Ltd v Chelliah (2003) 196 ALR 548, considered
Dowling & Ors v Rae (1927) 39 CLR 363, cited
DTR Nominees Pty Ltd v Mona Homes Pty Ltd (1978) 138 CLR 423, discussed
Louinder v Leis (1982) 149 CLR 509, cited
Masters v Cameron (1954) 91 CLR 353, cited
Mehmet v Benson (1965) 113 CLR 295, considered
Summers v The Commonwealth (1918) 25 CLR 144, discussed
Tallerman & Co Pty Ltd v Nathan's Merchandise (Victoria) Pty Ltd (1958) 98 CLR 93, considered
Waltons Stores (Interstate) Limited v Maher (1988) 164 CLR 387, cited
Warren v Coombes (1979) 142 CLR 531, cited

COUNSEL: D F Jackson QC, with J F Curran, for the appellant/cross-respondent
P E Hack SC for the respondent/cross-appellant

SOLICITORS: Robert Harris & Co for the appellant/cross-respondent
Hopgood Ganim for the respondent/cross-appellant

[1] **WILLIAMS JA:** All issues raised by the appeal have been comprehensively dealt with in the reasons for judgment of Jerrard JA which I have had the advantage of reading. It is not necessary for me to add anything thereto.

[2] I agree with the orders proposed.

[3] **JERRARD JA:** This matter involved two appeals, one argued in full and the other sotto voce. Appeal No 11719 of 2002 from the trial proceeding S187 of 2002 was argued in full, and it was common ground that the outcome in that appeal will determine that of an appeal from orders made in application number 72 of 2002. In the appeal argued in full, Marminta Pty Ltd appealed against orders made in this court on 13 December 2002 dismissing its application for orders for specific performance of an agreement between it and the respondent (defendant), Mr Rusty French. That agreement was that Mr French would sell and assign to Marminta his interest as registered mortgagee in two mortgages and as the unpaid creditor in the debts those mortgages secured.

[4] The judgment under appeal held that while an enforceable contract for the sale of Mr French's interest as mortgagee and creditor had been entered into in writing in January 2000, that contract had been mutually abandoned in April 2000; and that a variation of that contract in April 2000, if actually agreed upon – contrary to the view taken by the learned trial judge that there was no concluded agreement to vary – was unenforceable for want of writing. There were accordingly no enforceable contracts between Marminta and Mr French. The learned judge did order that Mr French repay $50,000.00 Marminta had paid him as a non-refundable deposit,

holding that while Mr French would otherwise be entitled by the agreement between the parties to retain that deposit in circumstances where ordinarily a deposit would be refundable, this deposit was refundable despite agreement to the contrary because there had been a total failure of the consideration for its payment. Mr French has cross appealed the order for repayment of that deposit.

[5] The second appeal arrises out of an application to set aside a statutory demand directed to Queensland Premier Mines Pty Ltd (QPM), it being the original mortgagor and debtor in respect of the secured debt owed to Mr French, and issued by Mr French in respect of that secured debt. QPM applied to set aside that demand on the footing that there had been an assignment of the mortgage to Marminta, and the same learned judge dismissed that application to set aside the demand and made the costs in it subject to the outcome of the specific performance action. The judge gave QPM leave to appeal a costs order he made against it, should the order refusing specific performance be replaced on appeal by one granting it. Leave is sought from this court under UCPR 750 to order the inclusion of QPM as the second appellant, if necessary, for the purposes of the potential appeal against that costs order.

General Background

[6] Marminta and QPM are both companies in which a Mr Frank Beckinsale and his wife Mrs Helen Beckinsale are the sole shareholders and directors. In late 1989 QPM acquired some land at Yeppoon, close to a then existing shopping area and now having potential for development for a shopping centre, and the purchase of which was financed by borrowing from a company named Seventeenth Febtor Pty Ltd. The borrowers were QPM and Mr and Mrs Beckinsale. Mortgages were given over the land to secure the repayment, but between 1989 and 2000 nothing was paid by QPM or the Beckinsales, either by way of capital repayment or for interest on the mortgage debt, nor for any rates or land tax. In or about 1992 the mortgages and the loan agreements were assigned to Mr French for a consideration of around $400,000.00, and to avoid a sale of the land by the Livingston Shire Council for non-payment of rates, Mr French paid the council a sum of $127,154.11 in 1999. He paid a further $21,734.52 on 22 June 2001, and by the time of trial (early December 2002) had paid $173,202.02 in rates. Those rates were primarily debts owing by QPM.

[7] Unsuccessful efforts were made during the 1990s by both QPM and Mr French to sell that mortgaged land. In late December 1999 and very early 2000 correspondence passed between Mr Beckinsale and Mr French in which they reached agreement that Mr French would assign the interest he held as registered mortgagee to Marminta for $950,000.00, payable by way of a non refundable deposit of $50,000.00 within fourteen days (from 4 January 2000), and then by two payments of $450,000.00 each, those being payable on or before 30 April 2000 and 30 June 2000 respectively. There is no challenge on the appeal to the finding by the learned trial judge that the correspondence between the parties constituted a concluded contract, of the first type referred to in *Masters v Cameron*[1], whereby the parties had reached finality in arranging the terms of their bargain and intended to be immediately bound to the performance of those terms, but at the same time proposed to have the terms restated in one document in a fuller or more precise way,

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1 (1954) 91 CLR 353 at 360

although not one different in effect. In fact although draft documents were prepared, they were never signed.

[8] Marminta paid the $50,000.00 deposit, described in the correspondence constituting and evidencing the contract as "non refundable", on 20 January 2000; one day after it was due. The learned trial judge held that the requirement for payment by 19 January 2000 had been waived[2], noting that since a waiver of a stipulation as to the essentiality of time for performance relates only to the mode of performance and is not a variation of the terms of the contract, an agreement to accept late payment does not need to satisfy s 59 of the *Property Law Act* 1974 (Qld).[3] There is no challenge on the appeal to those findings or observations of law.

[9] By late March 2000 Mr Beckinsale knew he could not resell the mortgaged property in time to pay the next instalment of the purchase price due, and the learned judge found that that there was little real prospect of Marminta getting the money on time otherwise. A meeting was arranged in Melbourne on 10 April 2000 between Mr Beckinsale, Mr French, and a Mr Wharton, who was a tax advisor and accountant to Mr Beckinsale's group of companies. A proposal discussed at that meeting was to vary the contract by postponing payment until the 2000/2001 financial year, with payment to be in one lump sum out of the proceeds of re-sale of the land. The learned judge was not satisfied that there was an actual agreement to that variation; and was satisfied in any event that there was no memorandum or note of that agreement capable of satisfying s 59 of the *Property Law Act* 1974. The judge held that any agreement actually reached to vary the contract would be unenforceable unless Marminta could establish part performance, and held it could not.

Part performance

[10] The appellant's (very much secondary) argument on appeal was that the learned judge erred both in holding there was no concluded agreement to vary the January 2000 contract and also in holding that part performance had not been established if there was. As to the last argument, the acts of part performance relied on were slashing the land, keeping Mr French informed as to progress in relation to the land, continued attempts by Mr Beckinsale to market it, and agreeing to release the $50,000.00 deposit to Mr French. That money had been held in the latter's solicitor's trust account. Mr French said in evidence there had been no concluded agreement, even in January, and that he was not entitled to the deposit. It was unclear why it was unreturned. In any event, release of the $50,000.00 was agreed (in April) so it could be applied to the payment of rates owing by QPM, which obligation to pay rates Marminta had assumed after April 2000 in substitution for QPM.

[11] The learned judge held that those acts of part performance failed to satisfy the relevant test, that being that such acts are unequivocally and in their own nature referable to some such contract of the general nature alleged[4]. They so failed because all those acts were done by Mr Beckinsale, who was a director of QPM, the registered proprietor, as well as a director of Marminta. Both slashing and marketing the land were understandable incidents of being the mortgagor, and

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2 At [22] of the reasons for judgment

3 The learned judge cited *Dowling & Ors v Rae* (1927) 39 CLR 363 and *McPhail v Darby* (1879) 2 SCR (NS) (NSW) 225

4 Citing *Regent v Millett* (1976) 133 CLR 679 at 683

keeping Mr French informed of progress took the matter no further, because both QPM and the Beckinsales were indebted to Mr French under their loan agreements. Finally, Mr French had paid and continued to make payment of rates owed by QPM.

[12] I respectfully consider the learned judge was correct in holding those acts did not evidence part performance of Marminta of the assertedly varied contract, and the opposite was but faintly argued by the appellant. There was likewise only a faintly pressed submission that the learned judge erred in holding no agreement to vary was reached.[5] Those particular grounds of appeal necessarily fail; and instead the evidence of the April discussions was relied on on the appeal to found a claim of equitable estoppel.

Estoppel

[13] The appellant abandoned a ground of appeal which had sought to rely on the principle described in the third edition of Meagher, Gummow and Lehane, "*Equity Doctrines and Remedies*" para [1221], namely that there is a well recognised jurisdiction preventing a defendant relying upon the *Statute of Frauds* if the execution of an agreement, which would have satisfied the Statute and bound the defendant at law, was prevented by the fraud of that party. Those learned authors described that principle applying to a plaintiff who was unable to show sufficient acts on the plaintiff's part to establish part performance, but who could establish she or he had been led to act to her or his detriment or otherwise perform their part of the bargain by the assurance of the defendant that the bargain would be reduced by the defendant to a form binding the defendant at law. In such circumstances the plaintiff may be able to obtain specific performance of that agreement (the learned authors cited *Wakeham v MacKenzie* [1968] 2 All ER 783).

[14] The appellant did press however a ground of appeal which asserted that the respondent was estopped from denying the existence of an agreement reached on 10 April 2000 to vary the contract, because of the part the respondent was said to have played in allowing the appellant to believe that that agreement had been made.[6] That ground of appeal reflected the evidence described by the learned judge, which was that whereas Mr Beckinsale and Mr Wharton gave as their impression of the outcome of the conversations held in April 2000 that an agreement to vary had been reached, Mr French accepted only that the matters were discussed, and swore that he had neither agreed nor disagreed with what was put to him. The learned judge observed that:

> "Mr French's failure to disagree with what was put to him during the conversation may well have been taken by Mr Wharton or Mr Beckinsale to amount to acceptance of the proposed variations or substitute contract."[7];

and the learned judge also accepted that Mr Beckinsale genuinely believed that he had entered into the April varied agreement with Mr French, under which the deposit paid by Marminta to Mr French was still non-refundable, and Mr French was entitled to it. The learned judge found that that belief was the source of Mr Beckinsale's instruction to release the $50,000.00 deposit to Mr French.[8] The

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5 The relevant evidence is described in [24] of the reasons for judgment

6 Relying on *Waltons Stores (Interstate) Limited v Maher* (1988) 164 CLR 387

7 At reasons for judgment [24]

8 At reasons for judgment [41]

appellant developed on appeal the argument that Mr French's silence occurred in circumstances in which Mr French must have known that the appellant was proceeding on the assumption that there was an (varied) agreement. Mr French did accept in cross examination that Mr Beckinsale may have believed after April 2000 that "he had a contract with me".[9]

[15] The appellant did not plead any estoppel with respect to the April variation based upon silence by Mr French, or conduct (including acceptance of the released $50,000.00), engaged in the knowledge that the appellant believed that a varied contract existed. It did plead an estoppel based upon the receipt of the $50,000.00, but that was pleaded[10] in reply to a defence contending that the late payment of the $50,000.00 deposit had resulted in there being no contract in January 2000, and denying the deposit was paid in accordance with any January contract. The reply and answer effectively pleads that the respondent is estopped from denying a contract in January, whereas the argument advanced on appeal would estop the respondent from denying the April variation. While senior counsel for the appellant defended the failure expressly to plead the equitable estoppel relied on at the appeal, the position remains that estopping Mr French from denying that an April variation was agreed would only help the appellant if there were acts of part performance of that agreement. There being none, this ground of appeal does not advance the appellant's position any further, irrespective of what was pleaded. It can also be dismissed.

If no abandonment

[16] This leaves what became the appellant's principal ground of appeal, namely that the learned judge erred in finding that the January 2000 agreement had been mutually abandoned. Senior counsel for Mr French readily accepted the observations of the presiding judge on the appeal that, if the finding of abandonment was overturned on appeal, then the proper finding was that the January 2000 contract remained in existence and available for enforcement (or rescission) by the parties.

[17] The learned trial judge had held that neither party was a in a position to rescind the contract, time not being of the essence in relation to the second and third payments agreed to in January 2000[11], and that since no notice to complete had ever been given,[12] Mr French could not rescind. The learned judge observed that Marminta had no basis for rescission.

[18] The respondent accepted that on those findings, not challenged, there was a contract in January, not varied in April, in which the date for payment of the money had passed without any notice being given either requiring performance by a stipulated time or for rescission in default thereof[13], and in consequence of which the contract remained on foot[14] until one party took steps to terminate it; unless otherwise terminated by mutual abandonment. If not abandoned, time – not being of the essence – had simply continued to pass, and the purchaser was ready, willing and able to complete, having itself found a purchaser.

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9 At AR 219

10 In the further amended reply and answer at AR 471

11 Citing in *Wacal Investments Pty Ltd v Hurley* [1992] 2 Qd R 455 at 456; see too *Mehmet v Benson* (1965) 113 CLR 295 at 302

12 *Louinder v Leis* (1982) 149 CLR 509 at 514

13 *Louinder v Leis* (supra)

14 *Mehmet v Benson* (supra) at 306

[19] It was common ground on the appeal that that analysis applied (in the absence of abandonment) whether there had been no agreement in April to vary, or whether there had been an April agreement but not in writing. In the latter event and in the absence of any sufficient acts of part performance of that varied agreement, the original January contract remained available for enforcement.[15] The respondent submitted that the appellant had not sought specific performance of the January agreement in its pleadings, and instead had sought "Specific performance of the agreement to purchase the above two mortgages and the debt secured thereby" which pleading, read with the pleading that there had been a variation, partly performed, was a request for specific performance of the varied but not the original agreement. With respect to the argument, the appellant's pleading is fairly capable of construction as a request for an order for specific performance of whatever agreement a court found existed to purchase the relevant mortgages and debt.

Abandonment

[20] On the issue of abandonment senior counsel for the respondent did not defend the finding that there was abandonment by mid April 2000.[16] He submitted nevertheless that abandonment should be inferred as having occurred, certainly by 30 January 2001 at the latest, since by that date nothing had happened for almost 18 months. The difficulty in supporting abandonment as at mid April 2000 includes that at that time the appellant was only in anticipatory breach of the obligation to pay $450,000.00 by the end of April. Further, what the appellant was then proposing was only a variation of the time for payment, and not of the agreed amount.

[21] The respondent's reliance on the passage of time to evidence abandonment reflects the reasoning and citation in the judgment of Isaacs J in *Summers v The Commonwealth* (1918) 25 CLR 144 (at 151-2), wherein His Honour wrote:

> "Whatever the terms of a contract may be, it is possible for the parties so to conduct themselves as mutually to abandon or abrogate it. A position not altogether dissimilar arose in the case of *De Soysa v. De Pless Pol.*[17] There, neither party had repudiated or refused to perform the contract, nothing in the nature of rescission had occurred, but, said Lord *Atkinson* for the Privy Council:- 'One party to a contract is not bound to give to the other unlimited time after a day named to do that which the other has contracted to do. There must be some point of time at which delay or neglect amounts to refusal. … In truth, the projects seem to have been to a great extent, if not altogether, abandoned by all the parties concerned.' In my opinion, that is the legal position here. Informally, but effectively, the parties have so acted in relation to each other as to abandon or abrogate the contract."

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15 *Dowling & Ors v Rae* (supra) at CLR 370, 371 (Isaacs J and Knox CJ) and 378, 379 (Powers J); *Phillips v Ellinson Bros Pty Ltd* (1941) 65 CLR 221 at 236 (Starke J) 244 (Williams J); *Tallerman & Co Pty Ltd v Nathan's Merchandise (Vic) Pty Ltd* (1957) 98 CLR 93 at 113, (Dixon CJ and Fullagar J); and see the discussion by McPherson JA in *Coghlan v Pyoanee Pty Ltd* [2003] QCA 146 at [8]-[10]

16 The finding is in reasons for judgment at [41]

17 (1912) AC 194

[22] That approach was approved in the joint judgment in *DTR Nominees Pty Ltd v Mona Homes Pty Ltd* (1977-1978) 138 CLR 423 at 434.[18] That joint judgment records (at CLR 434) that:

> "But there can be no doubt that by 5th December 1974, when these proceedings were commenced, neither party, whatever may have been their reasons, regarded the contract as being still on foot. Neither party intended that the contract should be further performed. In these circumstances the parties must be regarded as having so conducted themselves as to abandon or abrogate the contract."

I respectfully agree with the observations of Finkelstein J in *CGM Investments Pty Ltd v Chelliah* (2003) 196 ALR 548, at [18], that not only can an agreement be abandoned by conduct, but also that the question whether an agreement has been so abandoned does not require one to examine whether the party actually had the intention of abandoning the agreement; only whether their conduct, when objectively viewed, manifested that intention.[19] I also respectfully agree with his Honour's observations at [22] that to show that a contract has been abandoned by inactivity on both sides it is necessary to establish that the inactivity produces the clear inference that one party does not wish to proceed with the contract and the other consented to that situation.

[23] The correspondence between the two parties after April 2000 included requests from Mr French, addressed to "Frank", for payment of the balance of the rates previously paid by Mr French; a proposal on 6 July 2000 from Mr Beckinsale (on the letterhead of the "Beckinsale Company Group") to "settle you off the back of the pending contract" (referring to an offer to purchase the land); and the provision later in July 2000 of draft Heads of Agreement further "to our coffee afternoon talk" (the meeting in mid April 2000) which Mr Beckinsale's correspondence said would "of course" make "the other contract obsolete". Then on 4 November 2000 Mr French complained of discourtesy by Mr Beckinsale in the latter's not keeping an appointment in October 2000, of failure to pay the balance of the rates, and of non reimbursement of Mr French's solicitor's costs, and Mr French threatened that if no reply was received within 24 hours "this property will be put back on the market to recover the outstanding amount". By a response dated 13 November 2000 Mr Beckinsale asked Mr French to be patient and described steps being taken by him to obtain funds off shore.

[24] On 18 January 2001 Mr French inquired when he would receive the balance of the outstanding rates (of $77,154.11 at that date) and on 8 March 2001 advised that he was "now putting the property on the market" to "recover the outstanding debt", he having not received any return faxes, as requested by him, to his above described correspondence. On 9 March 2001 he was once again asked by Mr Beckinsale to be patient and reminded of the "arrangements last year". On 28 June 2001 Mr Beckinsale telephoned Mr French, requesting the latter to "sign off" on the January 2000 agreement; Mr French refused. It appears Mr Beckinsale had wanted this execution of documents to occur in that almost ended financial year.

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18 The learned trial judge cited and relied on both *Summers v The Commonwealth* and *DTR Nominees Pty Ltd v Mona Homes*

19 His Honour referred to the objectivist theory of contract "now irreversibly entrenched in our law:", citing *Taylor v Johnson* (1983) 151 CLR 422 and *Air Great Lakes Pty Ltd v K S Easter (Holdings) Pty Ltd* (1985) 2 NSWLR 309 at 336

[25] QPM entered into contracts to sell the property in August 2002 and unsuccessfully attempted thereafter to have Mr French release the title.

[26] With the greatest respect to the learned trial judge, I do not agree that the objectively ascertainable inference from this conduct by the parties was that it manifested any intention mutually to abandon the agreement formed in January 2000. On the evidence before the learned judge, Mr French at all times contended there had never been any agreement which bound him (because the deposit was paid late), and he had always regarded the property as on the market and available to other purchasers, although "not officially".[20] Despite Mr French's opinion about the absence of a contract, the learned judge had held that the written correspondence did establish one; and Mr French's correspondence after April 2000, in which he threatened to put the property back on the market, while not frank, gives rise to an objective inference that a contractual relationship with the appellant was acknowledged to exist which, unless properly terminated, prevented Mr French from the free exercise of rights otherwise available.

[27] Likewise, Mr Beckinsale's correspondence and actions give rise to an objective inference that he hoped Mr French would honour the agreement if ever Mr Beckinsale got a buyer, and not an inference that Mr Beckinsale consented or accepted abandonment by Mr French. An apprehension by Mr Beckinsale that French would rescind is plain enough; but acknowledging rescission could not be avoided if Mr French so chose is quite different from consenting to abandonment. Mr French did not rescind; I consider the proper inference to be that the January agreement provided a potential security neither party was prepared unilaterally to release.

[28] My respectful disagreement with the learned trial judge is only with respect to the proper inference to be drawn from the facts, either those which are undisputed or those found by the learned judge.[21] I respectfully acknowledge that the distinction between, on the one hand, abandonment as found by the learned trial judge, and on the other continued non performance and breach by both parties while each waited as time passed for the other to rescind, is a matter of degree. In that regard, in *Tallerman v Nathan's Merchandise* (supra) Dixon CJ and Fullagar J wrote of the distinction between a mere parol variation of an original contract in writing on the one hand, and on the other a parol rescission of an original contract in writing. That distinction has the result that in the former case the parol variation cannot be enforced and the original contract can, and in the latter that the original contract in writing is discharged. Their Honours described it as not being a satisfactory distinction and one which appeared to be a matter of degree.[22] Although it is perhaps an equally not satisfactory distinction in this case, I consider the appropriate finding is the one I have described and that the learned trial judge's finding must be set aside.[23]

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20 AR 224

21 See *Warren v Coombes* (1979) 142 CLR 531 at 551, discussed in *Fox v Percy* (2003) 197 ALR 201 at [25] – [26]

22 At 98 CLR 113; and see *Coghlan v Pyoanee* (supra) at [6]

23 Hopefully substituting that finding will not breach the frequent and recent observations by the High Court on errors by intermediate appellate courts in reversing trial judges: See *Fox v Percy* (supra), *Suvaal v Cessnock City Council* [2003] HCA 41, *Whisprun Pty Ltd v Dixon* [2003] HCA 48, *Shorey v PT Ltd* (2003) 197 ALR 410, *Joslyn v Berryman* (2003) 198 ALR 137, *Hoyts Pty Ltd v Burns* (2003) 201 ALR 470

[29] The appellant therefore succeeds in its challenge to the finding of abandonment. There was little opposition from the respondent to the proposition that, in that event, the appellant should have an order for specific performance.[24] The appellant presented the court with prepared minutes of the orders it sought if the January agreement was upheld and the respondent did not demur to those. I consider with respect that the those draft orders are deficient in that, while they provide for payment by the appellant to the respondent of the sum of $900,000.00 together with interest at 8% per annum thereon to the date of payment, and while they require the respondent to do all acts necessary to transfer the mortgages upon payment by the appellant of that sum with interest to the date of payment, there is no provision as to when that date should be. Those draft orders would accordingly leave matters in the same unsatisfactory state as they have been for nearly four years.

[30] I note that in *Mehmet v Benson* (at 309) Barwick CJ proposed orders allowing the respondent in that case to apply (to the State Supreme Court) for an order fixing the time and place for completion of the agreement, as soon as the decree for specific performance ordered by the High Court was passed and entered, which step the learned Chief Justice considered should occur with the minimum of delay. I consider it appropriate for this court to fix a time by which the appellant should pay the ordered sum to the respondent, in default of which payment the respondent's obligations under the contract will end.

[31] There was some other agreement as to the relevant orders in application number 72 of 2002, and an agreement in argument that the court should give leave for further written submissions on the form of the order and costs. The appellant's success in overturning the finding of abandonment of the January contract and its consequent entitlement to an order for specific performance of that agreement means that there is no need to consider the merits of the cross appeal. Mr French was at all times entitled to have and use that $50,000.00.

[32] Accordingly, I would order:

- That the appeal and cross appeal in Appeal No 11719 of 2002 be allowed and the orders numbered 1, 2, and 3, made 13 December 2002 in action number S187 of 2002 be set aside.

- In lieu thereof order:

    1. That the agreement by which Marminta Pty Ltd agreed to purchase from Rusty French the mortgages registered as C603556M and C595956F be specifically performed and carried into execution.

    2. That upon payment by Marminta Pty Ltd to the respondent within six weeks of the date of publication of these orders of the sum of $900,000.00 together with interest at 8% per annum on $450,000.00 from 30 April 2000 to 30 June 2000 and interest at 8% per annum on $900,000.00 from 30 June 2000 to the date of payment, Rusty French do all acts and sign and deliver all documents necessary to transfer those mortgages to Marminta Pty Ltd and to enable it to become the registered proprietor of those mortgages; and in the event of default by Marminta Pty Ltd in compliance with this order, Rusty

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[24] As remarked by the presiding judge during the appeal, even if the appellant had not been seeking specific performance at the appeal it could have given Mr French a notice to complete at any time.

French be discharged from compliance with this order and his obligations under the said agreement.

3. That the parties have liberty to make written submissions within 21 days of the date of publication of these orders as to the form of the orders and to costs and that unless otherwise ordered by this court the respondent pay the costs of and incidental to the action to be assessed on a standard basis.

4. That each party has liberty to apply.

5. That the respondent pay the costs of and incidental to the appeal to be assessed on a standard basis.

6. That unless otherwise ordered by this court each party bear their own costs of the cross appeal.

7. That Queensland Premier Mines Pty Ltd be included as a party (a second appellant) to the appeal and that the respondent pay the second appellant's costs of and incidental to application number 72 of 2002 to be assessed on the standard basis.

[33] **PHILIPPIDES J:** I agree with the reasons for judgment of Jerrard JA and with the orders proposed.