SUPREME COURT OF QUEENSLAND

CITATION:	*Dunworth v Mirvac Qld P/L (No 3)* [2011] QSC 27
PARTIES:	**MARIS ANNE DUNWORTH** (plaintiff) **v** **MIRVAC QUEENSLAND PTY LIMITED ACN 060 411 207** (defendant)
FILE NO:	BS4514/09
PARTIES:	**MARIS ANNE DUNWORTH** (plaintiff) **v** **MIRVAC QUEENSLAND PTY LIMITED (ACN 060 411 207)** (defendant)
FILE NO:	BS4712/09
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED EX TEMPORE ON:	7 February 2011
DELIVERED AT:	Brisbane
HEARING DATE:	3 February 2011
JUDGE:	Margaret Wilson J
ORDERS:	(1) that the order made on 10 December 2010 be varied as follows: in paragraph 3, delete "8 February 2011," substitute "8 June 2011 without prejudice to the plaintiff's right to maintain that the contract has been validly terminated pursuant to section 64 of the *Property Law Act* 1974 (Qld)"; (2) that the plaintiff file and serve a statement of claim regarding the issues raised in the application filed by her on 2 February 2011 within 14 days; (3) that the provisions of the *Uniform Civil Procedure Rules* 1999 (Qld) relating to a proceeding commenced by claim apply *mutatis mutandis* to the further conduct of the application;

(4) that the proceeding be again placed on the Commercial List; and

(5) that the costs of and incidental to both applications filed on 2 February 2011 be costs in the proceeding.

CATCHWORDS: EQUITY – EQUITABLE REMEDIES – SPECIFIC PERFORMANCE – where plaintiff agreed to purchase an apartment – where Court ordered specific performance of conveyancing contract – flood – where apartment was inundated – whether to vacate the order for specific performance

REAL PROPERTY – where plaintiff purported to rescind contract based on s 64 *Property Law Act* 1974 (Qld) – meaning of unfitness pursuant to s 64 – date when unfitness to be assessed – whether matter should proceed to trial

Buckman v Rose (1980) 1 BPR 97059, cited
Kenning Investments Pty Ltd v Rusty Rees Pty Ltd [1992] QCA 149, cited
Facey v Rawsthorne (1925) 35 CLR 566, cited
Georgeson v Palmos (1962) 106 CLR 578, distinguished
Hamdan and Widodo (No 2) [2010] WASC 6, cited
JAG Investments Pty Ltd v Strati [1981] 2 NSWLR 600, cited
Sunbird Plaza Pty Ltd v Maloney (1988) 166 CLR 245, cited
Zorbas v Titan Properties (Aust) Pty Ltd [2005] NSWSC 440, cited

Body Corporate and Community Management Act 1997 (Qld)
Building Act 1975 (Qld)
Fire and Rescue Service Act 1990 (Qld)
Property Law Act 1974 (Qld) s 64
Trade Practices Act 1974 (Cth)
Uniform Civil Procedure Rules 1999 (Qld) r 665

COUNSEL: RA Myers for the plaintiff/applicant

MD Martin for the defendant/respondent

SOLICITORS: Hall Payne for the plaintiff/applicant

ClarkeKann for the defendant/respondent

MARGARET WILSON J: The plaintiff agreed to purchase an apartment in the Softstone building, which is part of the Tennyson Reach Development, from the defendant.

The defendant was developing land at Tennyson where a community titles scheme under the *Body Corporate and Community Management Act* 1997 (Qld) was to be established.

The apartment in question is a residential apartment on the ground floor of the Softstone building; it includes car parking and storage on one of the basement levels. As well, the plaintiff was to acquire an interest in the common property, as tenant in common with proprietors of other apartments.

The community titles scheme was established on 28 April 2009. The defendant called for completion on 12 May 2009. The plaintiff alleged misleading and deceptive conduct in breach of the *Trade Practices Act* 1974 (Cth) and sought an order declaring the contract void. The defendant counterclaimed for specific performance.

On 10 December 2010 the plaintiff's claim was dismissed and an order for specific performance was made. The completion date was fixed as 8 February 2011. On 13 January 2011 the Brisbane River flooded. Both basement levels of the building were inundated. Water entered the apartment on the ground floor.

The plaintiff has deposed to being informed that it rose to a level of 605 millimetres within the apartment; however, she has not provided the source of that information and strictly that evidence is inadmissible.

The defendant is in possession of the apartment. After the flood, it removed the mud. The walls of the apartment consisted of Gyprock sheeting. The defendant removed the lower level of the Gyprock, which was flood affected. Wiring was disconnected; switches were removed and piled into a heap; appliances were disconnected. I refer to the affidavit of Georgina Louise Madsen, filed on 3 February 2011, as well as two photos of the apartment taken by the plaintiff's husband between 17 and 19 January 2011 (after the cleanup had started) which are exhibited to an affidavit by him filed on 2 February 2011.

On 24 January 2011 the defendant made an open offer to the plaintiff to clean up and restore the apartment to its original condition at the defendant's cost and to waive any right to default interest. The defendant said it required four months in which to complete that work and proposed a settlement date of 4 June 2011, with time remaining of the essence.

On 28 January 2011 the plaintiff rejected that offer and purported to rescind in reliance on section 64 of the *Property Law Act* 1974 (Qld), which provides:

64 Right to rescind on destruction of or damage to dwelling house

(1) In any contract for the sale of a dwelling house where, before the date of completion or possession whichever earlier occurs, the dwelling house is so destroyed or damaged as to be unfit for occupation as a dwelling house, the purchaser may, at the purchaser's option, rescind the contract by notice in writing given to the vendor or the vendor's solicitor not later than the date of completion or possession whichever the earlier occurs.

(2) Upon rescission of a contract under this section, any money paid by the purchaser shall be refunded to the purchaser and any documents of title or transfer returned to the vendor who alone shall be entitled to the benefit of any insurance policy relating to such destruction or damage subject to the rights of any person entitled to the insurance policy because of an encumbrance over or in respect of the land.

(3) In this section—

sale of a dwelling house means the sale of improved land the improvements on which consist wholly or substantially of a dwelling house or the sale of a lot on a building units plan within the meaning of the *Building Units and Group Titles Act* 1980 or the sale of a lot included in a community titles scheme under the *Body Corporate and Community Management Act* 1997 if the lot—

(a) wholly or substantially, consists of a dwelling; and
(b) is, under the *Land Title Act* 1994—
(i) a lot on a building format plan of subdivision; or
(ii) a lot on a volumetric format plan of subdivision, and wholly contained within a building.

(4) This section applies only to contracts made after the commencement of this Act and shall have effect despite any stipulation to the contrary.

Each party filed an application on 2 February 2011. The plaintiff sought a declaration that the contract was duly rescinded in accordance with section 64 of the *Property Law Act* 1974 (Qld) by notice from her solicitors to the defendant's solicitors on 28 January 2011, an order dissolving the decree of specific performance and the ancillary and incidental orders, or, alternatively, a perpetual stay of the decree of specific performance.

The defendant's application sought variation of the order of specific performance by replacing 8 February 2011 with 8 June 2011.

Both applications came before the Court in the Applications List on 3 February 2011. The plaintiff's counsel submitted that section 64 had been satisfied and sought orders in terms of her application. Counsel for the defendant submitted that there were factual and legal issues which could not be determined summarily, and asked the Court to extend the date for completion, without prejudice to the plaintiff's right to maintain that the contract had been validly terminated pursuant to section 64.

Upon a decree of specific performance of a contract for the sale of land, the contract continues to govern the rights and obligations of the parties, but the provisions of the order and not those of the contract regulate how the contract is to be carried out.

Once an order for specific performance has been made:

1) a party cannot rescind unless the order is vacated (*Sunbird Plaza Pty Ltd v Maloney;*[1] *Kenning Investments Pty Ltd v Rusty Rees Pty Ltd;*[2]) and
2) the Court has power to extend the time for compliance, both under its power to control the working out of the order for specific performance and pursuant to its power under *Uniform Civil Procedure Rules* 1999 (Qld) rule 665 to extend the time for compliance with an order (*Zorbas v Titan Properties (Aust) Pty Ltd).*[3]

In general, the Court has a discretion whether to vacate the order for specific performance to allow a party to rescind: see *Facey v Rawsthorne;*[4] *JAG Investments Pty Ltd v Strati;*[5] *Buckman v Rose;*[6] *Hamdan and Widodo (No 2).*[7]

Where a statutory right of rescission arises after an order for specific performance has been made, it may be that the party with the benefit of the statutory provision has an absolute right to the vacation of the

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1 (1988)166 CLR 245, 260.
2 [1992] QCA 149.
3 2005] NSWSC 440, [12] and [13].
4 1925) 35 CLR 566.
5 1981] 2 NSWLR 600.
6 1980) 1 BPR 97059.
7 [2010] WASC 6.

order for specific performance. This is a matter on which I do not express a concluded view.

Pursuant to the contract, the property was at the plaintiff's risk from 12 May 2009. This was the result of the application of clause 15.2, which provided that it should be at the risk of the seller until the Date of Possession. That date was defined in clause 17 as the earlier of the Settlement Date or the date the buyer took possession of the lot. Settlement Date was in turn defined as 14 days after the seller notified the buyer that the scheme had been established, that a certificate of classification has been issued, for the building containing the lot, and that, in the reasonable opinion of the seller, the lot was ready for occupation.

However, the contractual provision about the passing of risk is subject to section 64, which has effect despite any stipulation to the contrary.

Counsel were unable to refer me to any reported decisions on the meaning of section 64, and I have found none. There was no discussion of it in the Queensland Law Reform Commission Report which preceded the introduction of the *Property Law Act* 1974 (Qld). Indeed, the section seems to have been added to the bill after that report was finalised.

Section 64 refers to a dwelling house being so destroyed or damaged as to be unfit for occupation as a dwelling house "before the date of completion or possession whichever earlier occurs."

It affords a right to rescind, "not later than the date of completion or possession whichever the earlier occurs."

It is a moot point whether, "date of completion" means the date set for completion or the date of actual completion.

Here, the original date for completion was 12 May 2009. Pursuant to the order for specific performance the date for completion became 8 February 2011.

Counsel for the defendant submitted that it is arguable that section 64 applies only in the case of destruction or damage before 12 May 2009.

If the expression "date of completion" in section 64 means the date set for completion, I think it is more

likely that 8 February 2011 is the relevant date, because the machinery for completion is now governed by the order of the Court. However, I am not expressing a concluded view on what "date of completion" means.

The section refers to the property being "so destroyed or damaged as to be unfit for occupation as a dwelling house." I am inclined to think that on its proper construction it is referring to unfitness at the date of rescission.

Unfitness involves an assessment of the degree of damage. It may be, as counsel for the plaintiff submitted, that it does not matter whether the damage was all caused by the flood or partly by the flood and partly by work subsequently undertaken by the defendant.

Counsel for the defendant has pointed to the shortness of time available to his client to respond to the application and the absence of a full report on the extent of the damage. Whether the property was rendered unfit for occupation as a dwelling house by the time the notice of rescission was given, whether the damage is able to be rectified, and how long rectification will take are all matters which would require evidence. They are, in my opinion, matters strongly arguably relevant to the assessment of unfitness.

Counsel for the defendant submitted that his client ought to be given the opportunity to lead evidence on these matters at trial.

Counsel for the plaintiff relied heavily on *Georgeson v. Palmos.*[8] That concerned the lease of commercial premises for use as "a modern coffee shop and restaurant in conjunction with a retail business for the sale of coffee, tea and similar lines and also cakes, scones, confectionary, cigars, cigarettes, matches and tobacco and for no other purpose."

Clause 10 of the lease provided for an abatement of rent in the case of destruction or damage subject to this proviso: "provided always that in the event of the demised premises or any part being destroyed or so damaged as to be wholly unfit for occupation or use for the purposes for which the premises were demised either of the parties hereto may at their option terminate the tenancy hereby agreed to be created by giving to the other fourteen days notice in writing to that effect."

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[8] (1962) 106 CLR 578.

There was a fire in the premises. The Trial Judge found that the damage done by the fire and by the steps taken to quell it reduced the premises to such a state that for a time which could not be regarded as negligible the only purpose for which they could be occupied was to repair the damage that had been done in order to render them fit for use again, and that for that time occupation was not possible for any of the purposes for which the premises were demised.

By making some temporary repairs it was possible for the tenant to open a retail shop (a counter on the street front for restricted business) within 14 days of the fire. It was possible only to sell cigarettes and matches and the like from that counter.

The tenant refused to deliver up possession. The question before the Court was whether the premises were wholly unfit within the meaning of the proviso. It concluded that the premises were wholly unfit for occupation and use for the purposes specified, and that the applicability of the proviso could not depend on estimates of time and costs for carrying out repairs necessary to restore the premises to a state fit for such occupation and use.

While that case is helpful, particularly to the plaintiff, it may be able to be distinguished in the present case. It was concerned with a lease where the tenure was of limited duration and there was provision for abatement of the rent.

Here, the case is concerned with the sale of the fee simple in a property.

There are legal questions and related factual questions about the application of section 64, including the date at which unfitness must be established, the meaning of unfitness and the relevance, if any, of the damage being capable of repair.

In my view, these are matters which should go to trial.

Counsel for the plaintiff also told the Court that occupation of the premises at the moment would be illegal under statutory provisions relating to fire safety and other safety and health aspects. He referred to the *Fire and Rescue Service Act* 1990 (Qld) and the *Building Act* 1975 (Qld). Counsel for the defendant submitted that not

having had notice of such arguments, he was not in a position to respond to them.

In my view, these arguments really support a favourable exercise of the discretion to extend time for completion, but do not provide a basis upon which the Court could or should determine whether the contract has been validly rescinded under section 64 on this application.

At the hearing I expressed concern about the delay and costs inherent in sending this matter to another trial. I remain concerned about those matters. However, there are questions of fact and law which cannot be determined in a summary fashion. I am satisfied that the plaintiff would be adequately protected by an order extending the date for completion without prejudice to her right to maintain that the contract has been validly rescinded.

I will hear the parties on the form of the order and on costs.