SUPREME COURT OF QUEENSLAND

CITATION:	*Dunworth v Mirvac Qld Pty Ltd* [2011] QCA 200
PARTIES:	**MARIS ANNE DUNWORTH** (appellant/cross-respondent) **v** **MIRVAC QUEENSLAND PTY LIMITED** ACN 060 411 207 (respondent/cross-appellant)
FILE NO/S:	Appeal No 1363 of 2011 SC No 4514 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	19 August 2011
DELIVERED AT:	Brisbane
HEARING DATE:	25 July 2011
JUDGES:	Chief Justice, McMurdo and Dalton JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. That the appeal be allowed, the orders and directions made on 7 February 2011 be set aside, and the order for specific performance made on 10 December 2010 also be set aside;** **2. That there be a declaration that on or about 28 January 2011 the appellant validly rescinded her contract with the respondent dated 25 June 2007;** **3. That the respondent's cross appeal be dismissed; and** **4. That the respondent pay the appellant's costs of the appeal, and the hearing in the Trial Division, to be assessed on the standard basis.**
CATCHWORDS:	CONVEYANCING – BREACH OF CONTRACT FOR SALE AND REMEDIES – PURCHASER'S REMEDIES – RESCISSION – OTHER CASES – where the appellant agreed to purchase a residential apartment – where the original completion date was 12 May 2009 – where the appellant had contended she was induced to enter the contract by false, misleading and deceptive representations and had obtained an injunction on 11 May 2009 restraining the respondent from terminating and the respondent had counter-claimed for specific performance – where the appellant's

claim was dismissed on 10 December 2010 and an order for specific performance was made with a completion date of 8 February 2011 – where the apartment was flooded and damaged on 13 January 2011 so as to be unfit for occupation as a dwelling – where on 24 January 2011 the respondent made an offer to complete necessary restoration work and delay completion by four months – where on 28 January 2011 the appellant purported to exercise her statutory right under s 64 *Property Law Act* 1974 (Qld) to rescind the contract – where on 3 February 2011 the appellant applied for a declaration that the contract had been validly rescinded and for dissolution of the order for specific performance – where the trial judge extended the time for completion to 8 June 2011 and made orders to facilitate trial of the issues raised – whether the trial judge erred in failing to determine certain questions of law – whether the right of rescission under s 64 *Property Law Act* 1974 (Qld) could subsist beyond the contractually appointed date for completion in circumstances where there was a subsequent order for specific performance – whether the apartment must have been uninhabitable as at the date of rescission – whether the respondent's capacity to restore the apartment was relevant

EQUITY – EQUITABLE REMEDIES – SPECIFIC PERFORMANCE – whether rescission of a contract after an order for specific performance is made requires the leave of the court – whether rescission of a contract after an order for specific performance is made requires vacation of that order – whether a declaration should be made that the contract was validly rescinded

Trade Practices Act 1974 (Cth), s 87
Property Law Act 1974 (Qld), s 64
Sale of Land Act 1962 (Vic), s 34

Aarons v Advance Commercial Finance Ltd (1995) Aust Contract R 90-056, considered
Fletcher v Manton (1940) 64 CLR 37; [1940] HCA 32, cited
JAG Investment Pty Ltd v Strati [1981] 2 NSWLR 600, considered
Johnson v Agnew [1980] AC 367, cited
Lysaght v Edwards (1876) 2 Ch D 499, cited
Ogle v Comboyuro Investments Pty Ltd (1976) 136 CLR 444; [1976] HCA 21, cited
Singh (Sudagar) v Nazeer [1979] Ch 474, cited
Stevter Holdings Ltd v Katra Constructions Pty Ltd [1975] 1 NSWLR 459, considered
Sunbird Plaza Pty Ltd v Maloney (1988) 166 CLR 245; [1988] HCA 11, followed
Tropical Traders Ltd v Goonan (1964) 111 CLR 41; [1964] HCA 20, cited

COUNSEL:	W Sofronoff QC SG, with R Myers, for the appellant A J Myers QC AO, with L F Kelly SC, for the respondent
SOLICITORS:	Hall Payne Lawyers for the appellant Corrs Chambers Westgarth for the respondent

CHIEF JUSTICE:

Preliminary

[1] By a contract dated 25 July 2007, the appellant agreed to purchase from the respondent a residential apartment in a proposed building at Tennyson, Brisbane. The purchase price was $2.155 million. Before any completion of the contract, the by-then completed building was, on or about 13 January 2011, inundated by flood water.

[2] The ground floor unit which is the subject of the contract was flooded. It was necessary to remove the lower level of gyprock sheeting of the walls and to disconnect the electrical wiring and appliances. A measure of the devastation of the flood was that the respondent required four months to complete the necessary restoration work, which it offered to carry out. The respondent made that offer on 24 January 2011.

[3] The appellant rejected the respondent's offer to restore the unit, and on 28 January purported to rescind the contract on the ground that the unit had been rendered "unfit for occupation as a dwelling unit". The appellant thereby exercised a statutory right of rescission said to arise from s 64 of the *Property Law Act* 1974 (Qld).

[4] That section 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."

[5] The originally appointed completion date, following the establishment of the applicable community title scheme, was 12 May 2009. The appellant contended she had been induced to enter into the contract by false, misleading and deceptive representations. On 11 May 2009, the day before the originally appointed date for completion, the appellant obtained an injunction restraining the respondent from terminating for default, in order to preserve her opportunity to have the court declare the contract void under the *Trade Practices Act* 1974 should her contentions be vindicated. In the resultant proceeding, the respondent counterclaimed for specific performance.

[6] On 10 December 2010 the appellant's claim was however dismissed, and an order made for specific performance, with a completion date fixed for 8 February 2011. It was on or about 13 January 2011 that the building was flooded and damaged, and the appellant purported to exercise her statutory right to rescind on 28 January 2011.

[7] Because the sale contract was subject to the court order for specific performance, the appellant needed the court's leave to enforce her right. She therefore applied for a declaration that the contract had been rescinded and the dissolution of the order for specific performance. The learned primary Judge heard that application on 3 February 2011 and gave judgment on 7 February 2011 (completion was due under the specific performance order on 8 February 2011). The instant appeal is brought against that judgment.

The primary judgment

[8] The learned Judge extended the completion date to 8 June 2011, that is, by four months, and made procedural orders to facilitate a trial of "the issues raised in the application", and entered the proceeding on the Commercial List. The extension of time for completion was expressed to be made "without prejudice to the [appellant's] right to maintain that the contract has been validly terminated pursuant to section 64 of the *Property Law Act* 1974 (Qld)". Her Honour said there were "questions of fact and law which cannot be determined in a summary fashion".

[9] The question of fact the Judge identified was whether the premises had been damaged so as to be unfit for occupation as a dwelling, and as to the ambit of rectification. Counsel for the respondent had sought time to adduce evidence on those aspects (a position no longer maintained on appeal).

[10] As to questions of law, Her Honour considered "moot" whether in referring to the date of completion, section 64 is referring to "the date set for completion [that is, by the contract] or the date of actual completion". If the former, then Counsel for the respondent now contend that no such rescission could have been effected after 12 May 2009. Her Honour also left open whether the exercise of a statutory right of rescission after a specific performance order has been made entitles the party exercising that right to the dissolution of the specific performance order.

[11] The extended completion date of 8 June 2011 has now passed. The parties have however agreed to stay the operation of the orders made on 7 February 2011 until the determination of the instant appeal.

The parties' contentions

[12] Mr Sofronoff QC, who appeared for the appellant, submitted that the learned Judge erred in failing to determine the following issues:

1. the effect of the subsistence of the specific performance order on the exercise of the statutory right to rescind;
2. the date at which the premises must have been unfit for habitation for the right under section 64 to have been available;
3. the date of completion contemplated by section 64, in circumstances where a specific performance order was subsisting; and
4. any relevance in the respondent's capacity to restore the damage.

He submitted that until those matters of law were resolved, Her Honour had no basis upon which to determine "whether to decide the issue or issues of fact herself or send the matter for trial".

[13] Mr Sofronoff pointed to an unusual aspect of the order made by the Judge, in that "the appellant will have to perform the contract by order of the court before the court has even determined whether she was ever obliged to do so". He submitted that Her Honour's order should be set aside, and in lieu thereof, an order be made that the order for specific performance be vacated, with a declaration made that the contract was rescinded on 28 January 2011; or alternatively, in the event the respondent may wish to pursue a factual issue about habitability of the premises on 28 January 2011, that a short adjournment be granted for that purpose so that the respondent might gather and present material going to that issue. (The respondent now concedes the premises were relevantly uninhabitable.)

[14] Mr Myers QC, who appeared for the respondent, submitted that the section 64 right of rescission could only have been exercised prior to the contractually appointed date for completion, and that the appellant's case is based on "an attempt to take advantage of her own wrong" – being her failure to complete in accordance with the contract. He submitted that while Her Honour erred in making orders numbers two to four (the procedural orders facilitating a trial) and five (in relation to costs), she correctly continued the operation of the specific performance order, and he sought a further extension of the time for completion under that order. (The respondent has filed a cross appeal.)

[15] As mentioned already, Mr Myers conceded that as at 28 January 2011 the premises had been damaged so as to be unfit for occupation as a dwelling house, and that that remained the position as of 8 February 2011.

Discussion

The appropriateness of the approach taken at first instance

[16] If the questions of law should be determined favourably for the appellant, then there would be no occasion for a trial.

[17] The position now taken for the respondent invites attention to a limited question of construction, namely, whether a right of rescission under section 64 could subsist beyond the contractually appointed completion date, in circumstances where, as here, a specific performance order in effect took over. Had that issue been determined favourably to the respondent, there likewise would have been no need for a trial.

[18] It would therefore have been preferable had the Judge addressed those questions definitively, because of the consequences if determined in a particular way.

[19] The orders in fact made amounted to a deferring of the determination of issues of both law and fact, but with the unusual consequence, to which reference has already been made, of obliging the appellant to complete the contract in circumstances where a court may subsequently find that she was not in reality obliged to do so.

[20] In making the orders she made, the learned Judge was exercising a discretion. While judges may in some circumstances decline to determine questions of law summarily because of their complexity, as upon applications for summary judgment, this was a situation where determinations should have been made so that the scope of the parties' respective obligations was clarified. In my respectful view, the learned Judge erred in not determining those questions of law, and this court should now do so. I therefore turn to those questions.

The question of construction

[21] The effect of the specific performance order was to subject the future exercise of the parties' contractual rights and obligations to court control (*Singh (Sugadar) v Nazeer* [1979] Ch 474, 480-2). The contract remained in force and did not merge in the judgment for specific performance (*Johnson v Agnew* [1980] AC 367, 393, *Ogle v Comboyuro Investments Pty Ltd* (1976) 136 CLR 444, 460).

[22] Mr Myers submitted that "[t]he only agreed date of completion was that for which the contract provided and which, in accordance with its terms, was 12 May 2009", and that that is the date relevant for the purposes of section 64, rather than "a date fixed of necessity by a court because one party breached the contract".

[23] On the other hand, Mr Sofronoff primarily submitted that section 64 refers to the "actual date for completion which is current at the date of termination", including a date set by the court, although he advanced a less restrictive construction in his reply, to which I will come.

[24] Mr Myers responded that the appellant thereby asked the court to interpret section 64 to "enable her to take advantage of her own wrong", and referred to well-established authority that "a statute should not be interpreted to enable a person to gain an advantage or profit from his or her own wrong" (for example, *Bennion on Statutory Interpretation*, 5th ed, p 1141).

[25] The statutory provision accords a right of rescission where premises are rendered uninhabitable "before the date of completion or possession".

[26] Subject to the terms of the particular contract (compare cl 15.2 of this contract), a purchaser would at common law have to suffer the consequence of that loss (*Fletcher v Manton* (1940) 64 CLR 37, 45, 49; *Lysaght v Edwards* (1876) 2 Ch D 499, 507). This statutory provision ameliorates that position. (Victoria has a broadly comparable provision: s 34 *Sale of Land Act* 1962 (Vic).)

[27] Naturally read, those words in section 64 could refer to one or other of the following.

[28] First, they could refer to the currently applicable date for completion or possession as at the time the premises suffered the requisite damage. If the damage occurs prior to that date, the right of rescission arises. In that regard, it may be noted the provision does not refer to the date of completion "appointed under the contract", suggesting a date ordered by the court could fall within the ambit of the provision.

[29] Second, the words could refer to the earlier of the date of actual completion or possession, a possibility which engaged Counsel towards the end of their oral argument. Supporting that construction is the reference in section 64 to a date "of", rather than "for", completion or possession, as if referring to a date of actual completion, or the actual taking of possession.

[30] The apparent objective of this beneficial provision is to accord relief to a purchaser where, without fault on his or her own part, the subject matter of an uncompleted contract is rendered unfit for the purpose. Consistently, the second of those constructions is textually preferable: if prior to actual completion or possession the premises are rendered unfit in that way, the purchaser gains a right of rescission.

[31] As has been seen, the written submissions focused on the significance of the court's imposition of the date for completion by means of the order for specific performance, in the context of the contractually agreed date for completion. It is not necessary to analyse those competing contentions in detail because of what I consider to be the natural construction of the provision. But in deference to the arguments of Counsel, the following points may briefly be made, and they support the view that if the actual date "of" completion should yield to the current date "for" completion, the latter concept nevertheless embraces a date set by the court under an order for specific performance and is not limited to the contractual prescription.

[32] First, Mr Myers submitted that the decree for specific performance need not have specified a date for completion, reinforcing his contention as to the irrelevance of the date in fact appointed here by the court. The submission would be sufficiently answered by the fact that the court did appoint the date which thereby became the currently applicable date for the purpose of section 64. Had no date been set by the court, one party could have given notice to complete, or the parties may have agreed on a date, or the court could itself subsequently have set a date. Had no date been nominated, agreed or set in that way prior to 28 January 2011, the section would nevertheless have been engaged, because "the date of completion or possession" would, although not yet prescribed, have remained in the future.

[33] Second, the opening words of section 64(1), "[i]n any contract for the sale…", upon which Counsel for the respondent relied, would not require or suggest that the

subsequent reference to "the date of completion or possession" be limited to that contractually agreed. The opening reference to "the contract" is intended simply to signal that the availability of this right of rescission is limited to agreements for the purchase of dwellings.

[34] Third, Counsel for the appellant pointed out that the respondent could have avoided the risk of this situation arising by terminating the contract for the appellant's failure to complete, rather than enforcing the contract following the dismissal of the appellant's claim on 10 December 2010. While the respondent would thereby have avoided this risk, with the inundation occurring later, I do not consider it necessary or especially helpful to have regard to that sort of consideration in determining the natural construction of section 64: the words are clear and speak for themselves.

[35] Fourth, Counsel for the respondent provided an example of what was said to be the "capricious" operation of section 64 if the construction primarily urged by the appellant were adopted. Counsel submitted that "a purchaser who had no grounds for rescinding a contract and who was due to complete it under the contract, and who had an expectation from weather predictions that a severe flood could occur in the foreseeable future (or a damaging storm), could deliberately and wilfully breach the contract, fail to complete, and act on the chance that a court-ordered date for specific performance would post-date a flood or damaging weather event that might occur", and under that scenario derive a right of rescission. What I believe is the natural construction of section 64 should not yield to such an extreme possibility.

[36] Fifth, I would in any case accept the responding submission for the appellant, that when the court specified a new date for completion, that became in all respects the applicable date under the contract which subsisted subject to court control.

[37] But as I have said, it is compelling to conclude, and I do, that the provision should naturally be read as contemplating the actual date "of" completion or possession: if that has not arrived, in that neither completion has occurred nor possession been taken, and the requirement of the provision is satisfied (destruction or damage leading to unfitness for occupation), a right of rescission is available to the purchaser.

Conclusion

[38] It follows that because, as conceded, the unit was rendered uninhabitable by the date of the purported rescission, the appellant gained a right to rescind at any time up to the date of actual completion or possession (whichever be the earlier date).

[39] Addressing the other points left open by Her Honour, I would accept the submission that the unit must have been uninhabitable as at the date of the rescission which was effected. Also, noting that the provision gives no right to a vendor to maintain the contract in order to attempt to repair the damage, the possibility of restoration does not preclude rescission where the premise of the provision has been met, that is, the dwelling has been destroyed or damaged so as to be unfit for occupation as a dwelling.

[40] The submission that this construction rewards a wrong-doing purchaser is unfounded. The appellant had at an anterior stage suffered the consequence of her breach of contract: she was subjected to court orders adverse to her, including an

order for specific performance, the respondent having decided to enforce rather than terminate the contract. The subsequent damaging of the property was obviously entirely without fault on her part. Any benefit she gained from the exercise of her right of rescission was not consequent upon any "wrong-doing" on her part, the consequences of which had earlier been spent; it was the consequence of the operation of remedial legislation.

Appropriate relief

[41] The orders made by the learned Judge should be set aside, and the order for specific performance originally made on 10 December 2010 and varied by Her Honour on 7 February 2011 set aside.

[42] In *Sunbird Plaza Pty Ltd v Maloney* (1988) 166 CLR 245, 260 Mason CJ observed that "rescission after an order for specific performance requires the leave of the court or, more appropriately, the vacation of the order". Neither was sought in this case in advance of the purported rescission. In *Stevter Holdings Ltd v Katra Constructions Pty Ltd* [1975] 1 NSWLR 459, 469-470, Helsham J dealt with such a situation by discharging the contract. See also the approach of the New South Wales Court of Appeal in *JAG Investment Pty Ltd v Strati* [1981] 2 NSWLR 600, 603. In *Stevter*, Helsham J observed that where a rescission had otherwise been duly effected, there would ordinarily be an entitlement to the discharge of the contract.

[43] We were informed that whether the contract is discharged now, or the rescission on 28 January 2011 retrospectively authorized, has no commercial consequence. Which course is now followed is a formality.

[44] However, following the approach suggested by Mason CJ in *Sunbird Plaza*, the preferable approach in this case is probably simply to order that the order for specific performance made on 10 December 2010 and varied on 7 February 2011 be vacated. That would fall within the court's power in regulating performance by the parties under the contract, and would operate to remove, retrospectively, the fetter upon the appellant's power to exercise her statutory right of rescission when she did.

[45] There should also however be a declaration that the appellant validly rescinded the contract on 28 January 2011. With the vacating of the order for specific performance, such a declaration is strictly not necessary, but should be made lest there be any residual doubt as to the validity of the rescission. So far as necessary, the court would thereby be seen to be lending its authority to that course retrospectively.

Orders

[46] The following orders should be made:

1. that the appeal be allowed, the orders and directions made on 7 February 2011 be set aside, and the order for specific performance made on 10 December 2010 also be set aside;
2. that there be a declaration that on or about 28 January 2011 the appellant validly rescinded her contract with the respondent dated 25 June 2007;
3. that the respondent's cross appeal be dismissed; and
4. that the respondent pay the appellant's costs of the appeal and cross-appeal, and the hearing in the Trial Division, to be assessed on the standard basis.

[47] **McMURDO J**: I agree with the orders proposed by the Chief Justice and I substantially agree with his reasons.

[48] The application to the primary judge involved no factual issue of any consequence. Clearly the property was unfit for occupation when the appellant purported to terminate the contract and was to remain so for some months. But the respondent suggested to the primary judge that there was a factual question, which was whether the unfitness for occupation came from the flooding itself as distinct from what the respondent had done afterwards, such as removing all sheeting and disconnecting electrical wiring. As I read the transcript of that argument, this was the factual issue which the respondent suggested required a trial. Not surprisingly, that was not a submission repeated in this appeal. The respondent could hardly have avoided the operation of s 64 by proving that the critical damage was that which it had inflicted.

[49] The real question raised by the application concerned the proper interpretation of s 64 and, in particular, the meaning of the expression "date of completion". The appellant's principal argument is that this was the date fixed by the Court in ordering specific performance of the contract. The respondent's case is that it was the agreed date for completion, which had long passed. And ultimately the appellant further argued that it means the date of actual completion. In my view, it is that third argument which should be accepted.

[50] A difficulty in this interpretation is that s 64 does not simply refer to completion, but to the date of completion. Against that, the term is date *of* completion rather than date *for* completion. And the respondent conceded that the alternative of "possession" means actual possession, rather than an agreed date on which the purchaser would take possession, which provides some support for the interpretation which I accept.

[51] The evident policy underlying this provision is the protection of purchasers of dwelling houses from the burden of having to complete a contract where the house becomes uninhabitable by destruction or damage after the contract is made. Absent a term to the contrary, the common law position would be that the property would be at the purchaser's risk pending completion.[1] The apparent purpose of this provision is to shift that risk to vendors.

[52] The respondent argues that the legislative purpose could not have been to assist a purchaser who had failed to complete as agreed, which was the position here. However, the respondent's argument, if accepted, would also affect the position of an innocent purchaser. Upon its argument, if the agreed date for completion passed because of the default of the vendor, after which the house was destroyed but before completion, nevertheless the purchaser would be without the protection of s 64(1). That unattractive result, it is argued, would be the consequence of the purchaser's election to affirm the contract. This is difficult to reconcile with the apparent purpose of the provision. Moreover, an innocent purchaser would not be obliged to elect immediately upon the vendor's failure to complete on the agreed date,[2] so that upon the respondent's argument, a purchaser could lose the benefit of s 64 where the house is destroyed prior to an election to affirm.

[53] The most likely intention, which is consistent with the words used, is that this alteration of the risk in favour of purchasers should remain in place notwithstanding

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1 *Fletcher v Manton* (1940) 64 CLR 37 at 45.

2 *Tropical Traders Ltd v Goonan* (1964) 111 CLR 41.

the passage of the agreed date for completion. The burden of this risk upon the vendor is made an element of the contractual relationship for as long as the contract remains on foot. Where an innocent vendor affirms the contract after a purchaser's failure to complete, the contract which is affirmed retains that element. In this particular case, the innocent vendor was restrained by an interlocutory injunction from terminating the contract for the purchaser's failure to complete, although the purchaser's claim for ultimate relief, under s 87 of the *Trade Practices Act* 1974 (Cth), was for the termination of the contract. On one view, the operation for s 64 in these circumstances could appear harsh. But the particular circumstances could not have been considered to be so likely to occur that they should affect the interpretation of s 64.

[54] Central to the respondent's argument is the proposition that the contract remained unaffected by the terms of the order for specific performance. I would accept that proposition which, although not affecting the interpretation of the section, is relevant to the terms of the relief which should be granted to the appellant. The appellant applied for a declaration that she had duly terminated the contract on 28 January 2011. She also applied for an order that "the decree of specific performance and the ancillary and incidental orders made herein on 10 December 2010 be dissolved". This was consistent with the longstanding view that an order for specific performance should not be left in place if the contract had been or was to be terminated. In *Sunbird Plaza Pty Ltd v Maloney*, Mason CJ (with whom Deane, Dawson and Toohey JJ agreed) said that "…rescission after an order for specific performance requires the leave of the court or, more appropriately, the vacation of the order".[3]

[55] But according to some authority, a contract could not be terminated after a decree of specific performance without first obtaining the permission of the Court, so that it would be by the Court's order that the termination occurred. For example, in *JAG Investment Pty Ltd v Strati*, Hope JA, citing *Johnson v Agnew*,[4] said that in this context "…it is clear that the contract cannot be determined until the approval or order of the court has been obtained, and that it is the order, or something done by authority of the order, that operates to terminate the contract".[5] At the same time, Hope JA said of this jurisdiction (to set aside the order for specific performance) that its "precise nature … is not entirely clear".[6]

[56] In *Sunbird Plaza Pty Ltd v Maloney*, Mason CJ noted that a line of English authority, for the proposition that a plaintiff who has obtained an uncompleted order for specific performance cannot terminate for the defendant's subsequent repudiation, had been strongly criticised[7] and his Honour referred in particular to Meagher, Gummow & Lehane, *Equity: Doctrines & Remedies* (2nd ed 1984) [2053], pp 504-507 (a criticism maintained in the current edition).[8] Meagher JA repeated that criticism in *Aarons v Advance Commercial Finance Ltd*[9] where, after a purchaser failed to perform according to an order for specific performance, the vendor went back to Court to seek to terminate the contract. His Honour said: "…

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3 (1988) 166 CLR 245 at 260.
4 [1980] AC 367 at 394.
5 [1981] 2 NSWLR 600 at 603.
6 Ibid.
7 (1988) 166 CLR 245 at 259.
8 Meagher, Gummow & Lehane, *Equity: Doctrines & Remedies* (4th ed, 2002) [20-265].
9 (1995) Aust Contract R 90-056.

> [at] that point, in my view, the vendor could have terminated the contract without further ado. However, a doctrine seems to be prevalent that a contract cannot be terminated by the innocent party if a decree for specific performance has been made by the court. I can see no justification for any such doctrine. Once it is conceded – and all authorities do concede it – that an order for the specific performance of a contract does not cause the contract to merge in the order, no rational justification of the doctrine can be formulated: sed dis aliter visum: *Johnson v Agnew* [1980] AC 827, *JAG Investments Pty Ltd v Strati* [1981] 2 NSWLR 600".[10]

[57] That criticism has particular force, but it remains necessary to proceed according to *Sunbird Plaza Pty Ltd v Maloney*, from which it is clear that in this context, there must be some order which puts paid to the order for specific performance. Mason CJ was careful to point out that this was appropriately described as a vacation of the order for specific performance rather than the grant of the Court's permission for the termination of the contract. Here, although specific performance had been ordered, the contract retained in all respects its effect according to its terms. An order of the Court was unnecessary for the appellant to terminate this contract, as she did on 28 January. But the order for specific performance could not be left unattended, and the Court's record had to be amended to correspond with what had become the contractual position. Accordingly, the appropriate orders are those proposed by the Chief Justice.

[58] **DALTON J**: I agree with the orders proposed by the Chief Justice, and his reasons for them. I also agree with the reasons of Philip McMurdo J and the views he expresses as to vacation of an order for specific performance being the preferable course after a contract is properly terminated during the currency of such an order.

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[10] Ibid at 90,285.