

**IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY**

**CIV 2008-404-5602**

BETWEEN                      TAKAPUNA VILLAGE LIMITED  
   Plaintiff

AND                              ZAHRA SHABANI  
   First Defendant

AND                              KEVIN ABDULRAHMAN  
   Second Defendant

Hearing:            24 March 2009

Appearances: V Withy for the Plaintiff  
   No appearance for the Defendants

Judgment:        24 March 2009

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**ORAL JUDGMENT OF WOODHOUSE J**

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Solicitors / Parties:

Ms V Withy, LeeSalmonLong, Solicitors, Auckland

The Defendants, C/o Mr J Richards, Jenny Wang & Associates, Solicitors, Auckland.

[1] This is a claim for damages by the vendor of a unit in an apartment building following cancellation of an agreement for sale and purchase. The plaintiff made application for summary judgment. Judgment on liability was entered on 12 December 2008. The matter was then adjourned for trial on damages.

[2] There was no appearance by the defendants on the earlier hearing. There has been no appearance by the defendants at this hearing. The minute of the Associate Judge setting the matter down for hearing today, the affidavit evidence on quantum relied on by the plaintiff, and a copy of the synopsis of submissions for the plaintiff, have all been served at the address for service of the defendants.

[3] The agreement for sale and purchase was made on 7 July 2004. The purchase price was \$3.8 million. The property being purchased was a large apartment in a building to be constructed. Settlement was to take place five days after practical completion, or issue of title, whichever was later. Settlement was in fact required to take place on 8 July 2008.

[4] The defendants defaulted. The plaintiff cancelled the agreement on 11 September 2008.

[5] The apartment has not been re-sold. There is evidence of attempts to re-sell it. I am satisfied that there have been reasonable attempts to mitigate the plaintiff's loss.

[6] There is evidence before the Court of values at the date of cancellation and at 20 January 2009. The value at date of cancellation is assessed at \$2 million. The value at 20 January 2009 is assessed at \$1.8 million.

[7] I am satisfied that this is evidence of value which this Court can accept. It is evidence from an expert valuer fully supported by the usual valuer's report.

[8] The principal question is the date for assessment of damages for loss of bargain; that is, whether it should be assessed as at the date of cancellation in

September 2008 or effectively at the date of trial, which can be taken as being the most recent valuation in January 2009.

[9] On a contract for sale the assessment date is often taken as the date of cancellation. This is not a fixed rule: see *Johnson v Agnew* [1979] 1 All ER 883 per Lord Wilberforce at p 400-401.

[10] The primary measure is to put the plaintiff in the same position as the plaintiff would have been if the contract had been performed, so far as that is reasonably possible: see *Stirling v Poulgrain* [1980] 2 NZLR 402 (CA), *New Zealand Land Development Co Ltd v Porter* [1992] 2 NZLR 462, *McElroy Milne v Commercial Electronics Ltd* [1993] 1 NZLR 39, and *Thomson v Rankin* [1993] 1 NZLR 408.

[11] I am satisfied that in this case the appropriate date for assessing damages is what is effectively the current valuation, being that as at 20 January 2009. This is because of the state of the property market with values rapidly declining, which they have been doing at least since the defendants should have settled in July 2008.

[12] The calculation of the damages for loss of bargain is as follows:

Sale price	3,800,000.00
Less deposit	(217,917.36)
Less current value	(1,800,000.00)
	_____
Damages	\$1,782,082.64
	_____

[13] The plaintiff has not sought damages for any other losses.

[14] There will be judgment for the plaintiff for \$1,782,082.64 together with costs on a 2B basis and reasonable disbursements.

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Peter Woodhouse J