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REMEDIES WHEN A PURCHASER FAILS TO COMPLETE

In NSW, the standard terms of the Contract for Sale of Land (2005 edition) provide, in clause 9, for the Vendor's remedies if a Purchaser fails to complete, or settle their purchase, on the agreed date.

Essentially, the Vendor has two options:-

1. If the Vendor has re-sold the property under a contract made within 12 months after termination of the contract with the Purchaser, then the Vendor can sue to recover the deficiency on resale of the property. However, the deposit, which the Vendor is entitled to retain on default by a Purchaser, must be taken into account as a credit. Under this option the Vendor can also claim the reasonable costs and expenses arising out of the Purchaser's non compliance with the contract.
2. In the alternative, the Vendor may sue to recover damages under the general law for breach of contract by the Purchaser.

These principles were discussed in the recent case of *Zografakis v. McCarthy* (2007) NSWSC 144. In this case, the Purchaser failed to complete a contract on time and the Vendor terminated the contract and retained the deposit. The Vendor then went on to exchange contracts with another Purchaser for the same property. While the settlement of that alternate sale was pending, the Vendor also purchased a new

property and took out rented accommodation.

The Vendor sued the original Purchaser to recover damages on resale, interest pursuant to a special condition of the contract, various auction and advertising expenses, legal fees and rent and removal expenses.

The Vendor argued that there was really no difference between the two options contained in clause 9 of the standard contract. The original Purchaser, on the other hand, contended that by reselling the property, the Vendor had elected to proceed with the first remedy outlined above and thus certain items claimed could not be properly recovered under that option as they were only recoverable under the second option.

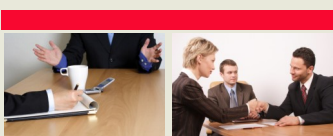
Under the first option (sue for deficiency on resale), the damage that can be claimed is the difference between the selling price on the resale and the selling price to the original Purchaser.

Alternatively, the second remedy available to the Vendor set out above provides that the amount the Vendor can claim is the difference between the sale price to the Purchaser and the market value of the land at the date of breach of the contract by the Purchaser.



The Court held that the two remedies available to the Vendor provide for different amounts that the Vendor may be able to obtain as a result of default by the Purchaser. The Vendor must choose between those two courses of action, and having chosen, cannot seek to alter the choice. The Courts, in determining whether there has been an election must look at the whole of the conduct of the parties and the circumstances relating to the case.

The lesson here is that Vendors should take special care to ensure that they obtain sound legal advice as to the most appropriate remedy having regard to their particular circumstances as the amount ultimately recoverable may differ significantly depending on the choice made. This will be the case particularly where there are consequential losses or damage flowing to the Vendor as a result of the purchaser's failure to complete.



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