IN THE COURT OF APPEAL OF NEW ZEALAND CA 286/97

DALE

V

COONEY LEES & MORGAN

Coram: Richardson P
Heron J
Doogue J

Hearing: 6 October 1998

Counsel: P J Dale for Appellant
M Corry for Respondent

Judgment: 19 October 1998

JUDGMENT OF THE COURT DELIVERED BY HERON J

This appeal from the judgment of Elias J given on 15 September 1997 concerns the actions of a solicitor in matrimonial property proceedings, in which he acted for the husband.

The case concerns the handling of proceedings which began in 1990 and were finally concluded between the parties in 1995. Due to the prolonged nature of the original proceedings between husband and wife, including three contested hearings in the Family Court and an appeal to the High Court, the narrative of events was lengthy and the record on appeal, extensive. Reflecting the extended nature of both the dispute and the hearings designed to resolve it between the parties, this court has had the benefit of a detailed analysis of the proceedings in a

long judgment by the Judge in the High Court. Both parties largely accept the findings of fact and the overall analysis of the way in which the subject proceedings took place as detailed in the judgment.

The appellant and his wife, Mr and Mrs Arthur, owned a substantial dairy farm and 15 acre run-off property. Other matrimonial property included a house in Cairns, Australia, and a dairy herd, at first sharemilkers on the property following their marriage. Mr and Mrs Arthur acquired the farm in June 1976, it previously being in Mr Arthur's family. In 1989 the parties separated with Mr Arthur remaining in possession of the farm property.

Some six years later, all matters of matrimonial property were settled. The homestead and chattels were divided equally between the parties, but the balance of the property was divided 55% to the husband and 45% to the wife. The wife had obtained the right to acquire the farm and run-off property at the sum of $515,000 in proceedings which had been determined in the Family Court in March 1991 but which did not deal with all the matrimonial property. On the basis of a dissolution date of 31 May 1991 for the farm partnership, a sum of $400,000 became payable to the husband. Included in the figure of $400,000 was an amount for interest reflecting the fact that the wife had obtained the benefit of the farm properties from 21 June 1991 when she obtained orders for possession.

In the High Court professional negligence was claimed against the solicitor in effect for the protracted outcome of the proceedings, during which time, having lost the entitlement to the matrimonial farm, an alternative like property had increased in value during the period before the case was finally settled. There were claims for other losses said to be also attributable to the solicitor but the significant head of damages and the primary issue on this appeal, is the loss to the appellant by reason of movements in the value of equivalent farm land in this area over the relevant period.

The appeal was also brought against the Judge's findings on liability in respect of heads of negligence rejected by the trial Judge. The Judge however found for the appellant on a particular head of negligence which it was not contested gave rise to the same measure of damages as if he had succeeded on other heads of negligence. Therefore it is sufficient in our view to deal briefly with those further matters which the appellant claims ought to have been decided in his favour.

Mr Casey, the solicitor, opened negotiations with a letter dated 24 October 1990, which the Judge found had been the subject of discussions between the solicitor, the appellant and his accountant. The husband was not at the time working on the farm but employed as a real estate agent, but wished to retain ownership of the farm. As an agreed and predetermined strategy, the husband offered nonetheless, to sell the farm and the run-off property to the wife, at a figure of $580,000. It was the husband and his accountant's firm view that the wife would be unable to raise the necessary finance to accept the offer. The strategy would in some way result, following acceptance of the wife's inability to purchase, in the husband acquiring the farm and run-off property. Complaint is made that the letter which contained the offer did not address all issues of matrimonial property and should have been made on terms which prevented it from being used in subsequent correspondence, or to be admitted in evidence at a subsequent hearing. It was claimed that the letter was instrumental in both the possession and subsequent vesting orders made in favour of the wife. The letter was in fact written "without prejudice" but more importantly, it manifestly displayed a willingness on the husband's part not to insist on the retention of the farm property in his hands. Complicating that consideration also was the husband's acknowledgement that the homestead, as contrasted with the farm, was properly the entitlement of the wife. It is correct that the letter undoubtedly played a part in the Family Court Judge's decision. In deciding in favour of the wife as to who could acquire the farm he said:

> Each party wishes to retain the ownership of the farm property. The wife was prepared to pay $580,000 for the farm on the basis that she would receive a 50% interest in the remainder of the matrimonial property including the Cairns house. She will not now get a 50% interest and cannot now be bound to that price. Because

> of the revised valuation at the date of hearing, each party ought to have the right to purchase at that figure. I consider that the first option should be given to the wife. Apart from the fact that the wife considers that she and the children are more emotionally attached to the farm than is the husband, it was the husband who made the initial proposal but there was no consensus on supplementary matters. That factor leads me to allow the wife the first choice of buying as well as the further consideration of the children. The two boys have apparently opted to remain with their mother and she has custody of them. They apparently wish to live on the farm where they have grown up since birth.

That judgment given on 28 March 1991 also fixed the division of matrimonial property other than the homestead and family chattels, at 55% to the husband and 45% to the wife.

As the Judge found the offer contained in the letter was not made conditional on resolution of outstanding matters of matrimonial property or upon any agreed date for payment of the farms, nor was it made conditional upon an unequal division of the matrimonial property.

The complaint made by the appellant is that all the correspondence should have been on a without prejudice basis. Plainly the initial letter was, but the real complaint is that the terms of the offer should have been tightly drafted so that there could be no acceptance without a resolution of all issues including unequal sharing and time for payment. It is said that if the offer had been made on such clearly identified terms and the wife declined, then there would be no advantage to her in producing the correspondence. If accepted it would have been a binding and enforceable agreement, and with it an early resolution of outstanding matters between them. Part of the difficulty about that suggestion of likely early finality is there were then no agreed values pertaining to the remaining matrimonial property and therefore no real information as to the ultimate financial result for the parties accordingly. The Judge in the court below described the matter in this way:

> It does not seem to me necessary to resolve whose idea the offer originally was. I consider it most likely to have been an idea which developed with input from Mr Lynch, because of his firm view that Mrs Arthur needed to have it demonstrated that she could not afford to purchase the property. The idea was a bluff intended to break what was perceived to be a log jam built around the questions of ownership of the property and its value. It was put forward without any expectation that it could be accepted. Both Mr Lynch and Mr Arthur were convinced that Mrs Arthur could

> not raise the money necessary to pay out Mr Arthur's share of the matrimonial property. ... Mr Arthur was prepared to buy at the $580,000 valuation, although recognising it to be an overvaluation, because he had family money to support him. What none of the three men realised was that Mrs Arthur was in the same position. Her family farmed the adjoining property and her father was prepared to guarantee the interest payments to the bank. That miscalculation of fact proved to be a fundamental error in the plan.

In the context of the subsequent hearing, the letter of 24 October 1990, and subsequent correspondence agreeing to extensions of the opportunity to purchase, were dealt with by the Judge in this way:

> At the time he was not farming the property himself and had indicated his preparedness to permit his wife to occupy the property on a rent-free basis for five years, in apparent recognition of the claims of his young family to continue to occupy the home. Although I consider that he expected to retain the farm properties, it is my assessment that the priority for him was to achieve a breakthrough in negotiations which would enable questions of matrimonial property to be resolved and that he was willing to risk loss of the farm to achieve that end. That assumption of risk is shown by his acknowledgement at the time that the offer could open a "can of worms". It is consistent with Mr Casey's evidence, which I accept, that Mr Arthur at the time seemed to be less concerned about securing ownership of the farm properties. Such shift in priorities is also consistent with Mr Arthur's instructions to Mr Casey to extend the time for exercise of the option. On any view, and despite Mr Arthur's confidence that his wife could not put together finance for the acquisition, the request for an extension of time showed that the offer was under serious consideration and that the risk of losing the farm properties was present. Although I accept that Mr Arthur was dismayed when the offer was accepted, and that he came to regret the strategy which led to it, I am of the view that he knowingly assumed the risk for reasons which seemed sufficient to him at the time.

The Judge thought the risks of these tactics were readily apparent to someone in Mr Arthur's position and that they were appreciated by him. As the Judge noted, although the optimism by the appellant proved misplaced, she did not think that the strategy adopted at the time was so risky as to require Mr Casey's advice that it should not be pursued. As she said, there was in fact a mechanism in place for resolving the issues namely the Family Court Judge's reservation of liberty to reapply in the proceedings which had determined the ownership of the farm and the division of the balance of matrimonial property.

We agree with the Judges reasoning that there could be no finding of negligence against the solicitor on that head. The strategy had been agreed and any

qualification put on the terms of the offer would not have lessened its eventual impact. We observe that the husband in fact received a greater than equal share.

As a second head of negligence it was said the Judge was wrong to reject the claim that the failure to prosecute an appeal from the judgment of the Family Court Judge, as discussed above, was negligent.

The Family Court's judgment itself left the timing of the acquisition of the farm property in imprecise terms. The wording was:

> The answers given to the various issues therefore are as follows:
>
> (1) The wife should have the first option to purchase and occupy the matrimonial farm at Waihi.
>
> (2) The price at which the farm and run-off should be purchased is $515,000.
>
> (3) Apart from the homestead and family chattels which are to be shared equally, the balance of matrimonial property (non-domestic property) is to be shared in the proportions of 55% to the husband and 45% to the wife.
>
> (4) The house at Cairns is not the separate property of the husband but is matrimonial property.
>
> I believe that this matter is now capable of being resolved. There would probably need to be a time limit on when the wife should complete the purchase - perhaps on or before 30 June 1991 - failing which the husband should have the same option at the same price to be exercised in the ensuing two months and in the event of neither spouse purchasing the other's share then the property should be placed on the open market for sale after 31 August next. I make no order directing compliance with such time constraints but merely suggest them as a guide to settlement.

Certainly an appeal was a way of resolving outstanding matters, even if it would be an ancillary outcome of an appeal in respect of which there was little opportunity of success as events subsequently proved. Elias J however held that the outstanding matters involved in resolving the values of the remaining property were best addressed by the mechanisms for resolution of outstanding issues by return to the Court. It was here that the appellant succeeded in his claim for negligence, the Judge finding that Mr Casey ought to have clearly spelled out and recommended that cause of action, and the failure to do so amounted to a breach of duty of care to his client.

As we discussed with Mr Dale in the course of this case, in the absence of any cross appeal, the finding of coexisting negligence on this head, namely failure to get on with the case and bring it back to the court for finality, renders a failure to undertake an appeal of the March 1991 judgment, with uncertain outcomes overall, of little consequence. The appeal would have only raised the very issue of the letter and the husband's offer to sell the farm. The important point for the purposes of the appeal against the findings on liability, is that there is now on appeal an unresisted finding of liability on the basis that the case was not returned to court as it clearly should have been, in order to resolve the outstanding issues and arrest the ongoing loss. The loss was due to the fact that Mr Arthur could not get sufficient money for him to buy a farm on a rapidly escalating market. At the material time, before the movements in value, he was entitled to receive from the pool of matrimonial property a cash sum which could be used to acquire an equivalent property.

We therefore turn to the assessment of loss, involving as it does two aspects, firstly the time in respect of which the loss of appreciation in value should be calculated, and secondly, any offset for interest or other charges against the award of damages.

The Family Court decision which determined the party who would purchase and occupy the matrimonial farm, was issued on 28 March 1991. The Judge's finding of negligence thereafter in not pursuing the case by the use of the mechanism of a return to court, in respect of those proceedings raises the question of how much time that would have occupied before resolution. The measure of that is best determined in this case by the time it actually took to settle the outstanding matters between the parties once the appeal against a vesting order was resolved. The Judge found that delays before August 1991 could not be levelled at Mr Casey because the accountants were trying to resolve the valuations and were optimistic about the progress they were making. She considered that when Mrs Arthur escalated the dispute about valuation in early August 1991, the prospects for an

agreed resolution were remote. It was at this point that Mr Casey should have advised an application to the court either to appoint an independent valuer pursuant to the leave reserved by the Family Court, or to seek to have the balance of the matrimonial property issues resolved in court. On the evidence we agree with the Judge that was an appropriate commencement date. The Judge then considered that all the remaining issues could have been resolved by court order within six months, namely by the end of February 1992, observing that it was a matter of impression.

In January 1993 Mr Casey having conferred with Mr Arthur and Mr Lynch, the accountant, agreed that he should drop out of the matter and it should be referred to Mr Lendrum, an Auckland practitioner who specialised in matrimonial property claims. Mr Lendrum took the view that the appeal against the vesting order should be pursued and that any question of an application for rehearing of the March 1991 judgment, was doomed to failure.

We refer to the judgment of the Family Court in November 1992 for reasons behind the making of the vesting order in the first place and the appeal against such order . The Judge said:

> The application itself is in reliance of a judgment of my own in this Court given on 28 March 1991 whereby the applicant was given the first option to purchase and occupy the matrimonial farm at Waihi at a price of $515,000. The respondent husband subsequently appealed against that decision but on 5 June 1992 he discontinued such appeal. The appeal was, however, out of time and an application for extension of time for filing the appeal was, by consent, dismissed by Fisher J in the High Court on 8 June 1992. The applicant, Mrs Arthur, had previously sought the making of a vesting order in terms of my judgment which I declined to issue because at that time the appeal to the High Court had not been determined nor had the question of the extension of time for appeal. In consequence I adjourned the application *sine die* to issue vesting orders. In consequence of that an application for review of my decision was made but again on 8 June 1992 in the High Court Fisher J by consent adjourned that application, so that there is now nothing in existence to hinder the implementation of the original judgment dated 28 March 1991. That judgment is now no longer appealable and as Mr de Cleene has pointed out the matter is *res judicata*.
>
> The option to purchase the property was exercised by the applicant on 16 April 1991 that is shortly after the decision was made. As I have mentioned the only application before the Court today is the application for a vesting order. There is no other application before the Court. There is an application by the respondent husband himself, the application being dated 26 November 1991 to purchase the property himself at the purchase price of $515,000 but now that application seems to

> me to have now become redundant by virtue of what has transpired: the fact that it is the wife who has exercised the option to purchase, she having the first choice.

We mention that as it happens, the vesting orders were made by consent but in the end Fisher J who heard the appeal treated it as a fully contested appeal.

The logic behind the appeal was clear. If Mr Arthur's objective was to regain the family farm, then that might be achieved by preventing Mrs Arthur from purchasing, due to a revaluation of the farm properties, and even if that was unsuccessful, a revaluation, but with Mrs Arthur still purchasing, would redress some of the imbalance that was now becoming obvious in the matrimonial division overall, due to the rise in the value of the farm properties.

The appeal to the High Court was accompanied by an application for leave to call further evidence and in particular evidence of the current valuation of the farm property. Thorp J, at a callover of the appeal, made an order that a new valuation of the properties be obtained. That valuation revealed a combined value of the farm and the run-off property at $835,000. The case was heard on 9 November 1993. The Judge found the time occupied by pursuing the appeal was nine months including a two month period allowing time for Mr Lendrum to become familiar with the file and to form a view. The period runs from January 1993 to the date of Fisher J's judgment on 11 November 1993. Isolating the time given over to the appeal, a period of approximately nine months would seem to be appropriate.

Fisher J in this judgment made several comments which were of importance to the ongoing handling of the case. He remarked that all either of the parties had to do was bring the other unresolved matrimonial property questions before the Family Court and get them resolved. He considered all outstanding matters could have been resolved instead of this "curious process" of a piecemeal approach. He said:

> I understand and sympathise with the husband's frustrations over the sequence that this case has followed. He points out that although $515,000 was fixed as the value

> for option purposes on 28 March 1991, it had risen to $675,000 by 25 November 1992, and to $845,000 by 28 September 1993. He was understandably anxious to extract his capital from the matrimonial property division so that in a time of rising values, he too could invest his money in other land or appropriate equities. The solution, however, always lay in his hands just as it always lay in the hands of the wife. All either of them had to do was to bring the other unresolved matrimonial property questions before the Family Court and get them resolved.

Apparently heeding that advice and with no other alternative, putting aside an appeal to this court, the parties then went about determining the interests in the matrimonial property not earlier dealt with. On 28 April 1994, a consent order was made appointing Mr Wilson of Tauranga to prepare dissolution accounts, and a further additional report was ordered in September 1994. Eventually the proceedings were set down for hearing in March 1995. On 23 March 1995 the hearing having commenced, the case was settled with the wife directed to pay to the husband the sum of $400,000 within eight weeks. That sum included an amount for interest on that part of the matrimonial property, principally the farm and run-off, the benefit of which he had stood out of for a considerable time. In all other respects the case was settled on the basis of a 55/45 division (excluding the matrimonial home and chattels) and a valuation of the farm property as ordered by the Family Court in 1991, of $515,000. Mr Arthur was then in a position to buy another property which he did in 1997 for the sum of $1.113 million. He wished to remain in Waihi and there were few properties available in that location.

Of most importance in this case is the calculation of the period of loss or that period when like farm properties were increasing in value. It seems to us that subject to one reservation the actual measure of time taken to resolve the case should be the same for the purposes of determining the dates when the causative negligence commences to cause loss and when that loss is finally arrested.

If we take the time from the intervention of Mr Lendrum in January 1993 until the final resolution in March 1995 (25 months) and deduct nine months being the time spent pursuing the appeal to Fisher J concluded in November 1993, a period of 16 months is reached. We think this should be the relevant time for concluding the proceedings. Although we are reluctant to say that Mr Lendrum was

not entitled to try the appeal process because it would have remedied the husband's overall concerns completely, we do not think that the total time occupied by the pursuit of these proceedings can be visited on Mr Casey. He had no part in the decision to proceed in that way. Nevertheless, we consider that the Judge's fixing of February 1992 or six months from August 1991 to remedy all outstanding matters is too short tested by the actual time taken to bring about a settlement of these proceedings having regard to the intractable nature of them and the events which occurred.

In our view the commencing period from which the escalation of farm prices is to be measured as a head of damages must be December 1992 or sixteen months from August 1991. The termination point is however complicated by the decision to appeal against the vesting orders.

It is essentially a question as to whether the conduct of the appellant was reasonable in taking the steps by way of appeal that he did. It is plain law that a duty to mitigate damages does not require the taking of hazardous or speculative litigation. See ***Pilkington v Wood*** [1953] Ch 770, 777. Having taken such litigation with a view to avoiding total loss, we are inclined to consider such action was not unreasonable and the consequential delays and resulting losses should nonetheless continue to be the responsibility of the lawyer whose conduct failed to bring the proceedings to an end, through other means at his disposal, before that time.

In refusing to allow any time for the appeal recommended by Mr Lendrum, the Judge said that it was without utility. We hesitate to take a different view from the trial Judge, but are reinforced in our view that some time for those endeavours should be allowed the appellant. To meet the client's wishes on appeal was to be seen as something of a do or die effort. The appeal did generate sympathy with the appellant's plight, as the Judge observed. New valuations obtained underscored the point and the wife had possession of the farm and had not paid her husband out. As well, the appellants had some authority in support of a reopening of the case. See

Jorna v Jorna [1982] 1 NZLR 507 where this court had suggested that S.2(2) of the Matrimonial Property Act 1976 was ancillary to the basic purpose of arriving at a fair apportionment. As Fisher J himself observed:

> At the very least, a Court would have to be persuaded as a matter of discretion that the value originally fixed should no longer be adhered to.

In Mr Arthur's eyes and arguably with some justification, a change in the value may have rendered the wife unable to complete. Failing that outcome he would receive a substantially greater share to then enable him to enter the market for a comparable farm.

We do not wish in any way to suggest that Fisher J was wrong in the view he took of the case overall, but merely to emphasise the appeal was in our view not necessarily a completely worthless exercise and not unreasonable conduct in mitigation of damages terms.

The Judge, allowing two months for a review by Mr Lendrum of the file, allowed the same period of six months she had considered appropriate in the case of Mr Casey stopping the loss period at October 1993.

We agree with the Judge that the assessment of what delay could reasonably be expected is one of impression. Further there was some opportunity for using the time involved in preparing for the appeal to advance by way of contingency and back-up, the appointment of KPMG who in the event were only appointed in April 1994. We think the focus on the appeal to the exclusion of all else and the consequential inertia with the rest of the case, should not as a matter of reasonableness in the calculation of damages, be visited entirely on the respondent. However we consider the period taken up by the appeal should be added to the 16 month period to the extent of four months only. In our view the terminating date is August 1994 for the measurement of the escalation of farm prices or approximately 20 months from Mr Lendrum's involvement.

The Judge recorded the following table in the judgment and both counsel accepted it represented a fair summary of quite detailed valuation evidence.

Date	15 Acres $	Home farm $	**Total $**
1.3.90	95,000	485,000	**580,000**
27.11.90	90,000	370,000	**460,000**
14.3.91	90,000	425,000	**515,000**
31.5.91 **[KPMG report valuation]**	90,000	438,000	**528,000**
1.2.92 [estimate]	95,000	485,000	**575,000**
1.2.92 [estimate]	95,000	510,000	**605,000**
29.2.92	90,000	530,000	**620,000**
25.11.92	(100,000)	675,000	**(775,000)** (extrapolation)
28.9.93	105,000	730,000	**835,000**
12.7.94	140,000	920,000	**1,060,000**
20.3.95	164,000	1,125,000	**1,290,000**
20.2.97	159,000	885,000	**1,044,000**

In respect of the 25 November 1992 figures we have extrapolated the 15 acre value and consequential total.

Calculation allowing appellant twenty months for completion

Nearest valuation date to December 1992	775,000
Nearest valuation date to August 1994	1,060,000
Difference in value	285,000

Having calculated the movement in values and the corresponding loss to the husband, the Judge by reference to the table referred to, and the dates she selected

made her calculation of loss of $245,000. In percentage terms it came to a 42% increase in value. She then went on to deduct from that amount a sum arrived at as she described in the following passage of her judgment.

> In order to compare this 42% with compound interest over the period, I have used as the interest rate that adopted by KPMG - namely a floating rate 3% above the base rate for the National Bank of New Zealand compounded on a monthly basis. Leaving aside the question of taxation, which needs to be further considered, this was the rate received by Mr Arthur on the basis that it was the rate applicable to vendor mortgage finance. In my view, such rate is reasonable, although conservatively on the high side, (because Mr Arthur may have been able to achieve a lesser rate on first mortgage for some of the funds) as an estimate of the rate Mr Arthur would have incurred in borrowing to fund a farm purchase and as an assessment of the income foregone if the funds had been invested elsewhere.

Then followed an annual interest rate table calculated on a monthly basis from February 1992 to October 1993, the span of time she had selected for the movement in values. The Judge had earlier signalled that the interest component obtained by the husband in the settlement was said to be inadequate compensation for his inability to benefit from escalation in farm values. As it was an interest rate component based on values which were fixed at March 1991, it could not of course play any part in compensating for the further loss due to movements in value.

It is with this aspect of the Judges calculation that we have some difficulty. Counsel agree no submissions were made at trial in respect of the deduction made. The loss by reason of movement in value before it could be arrested by having the funds to enter the market place, is not loss which would involve further borrowings. If Mr Arthur had been able to buy the relevant property in 1992, any mortgage required would be the same as that required in 1994, provided he was indemnified against increases in values in the meantime. He would have been so indemnified if the funds had been released on the dates we have discussed and so on selling his notional 1992 property and purchasing an alternative property in 1994 he would have the increased equity represented by the movement in values accordingly. What has been lost is a contractual opportunity to purchase at 1992 values and the measure of that loss is calculated at the time the loss ceases to be the fault of the solicitor, in 1994. Then the same contractual opportunity is measured in 1994

terms. That calculation of difference in value creates a capital loss and needs no allowance for any interest set off or adjustment. Obviously the amount of the calculated change in value itself cannot carry interest over the period but only when it crystallises. Interest on the sum Mr Arthur did finally receive compensates him for the loss of the use of the money represented in part by a 55% share of the farm based on the 1991 valuation of $515,000. It forms no part in compensating for the additional sum Mr Arthur has to pay for the equivalent property when those funds are finally made available.

In her judgment refusing recall on this point, the Judge said:

> I considered that a substitute or equivalent farm property was one comparable to the matrimonial farm property and so adopted the mid-point of the two valuations obtained in February 1992 to arrive at $590,000. I assessed the loss recoverable by the plaintiff at 100% of the appreciation on $590,000 over the period to October 1993, less 100% of the likely finance cost for such a property. I considered the rate adopted by KPMG (a floating rate 3% above the base rate for the National Bank of New Zealand compounded on a monthly basis) for the purposes of settlement was a reasonable rate to apply as an estimate of the rate Mr Arthur would have incurred in borrowing to fund the farm purchase or as an assessment of income foregone if he had invested his funds elsewhere. I acknowledge that the rate was conservative (an approach I considered to be appropriate given the onus on the plaintiff to establish loss). Since the rate had been adopted in the settlement it seemed to me a convenient one to adopt as being reasonable. I did not attempt, and do not consider it would have been appropriate, to use the KPMG settlement structure beyond borrowing the interest rate considered in it. There is no logic therefore in Mr Lynch's suggestion that the finance cost "should be based on Mr Arthur's net equity in the property" ($202,555 rather than $590,000). My approach was not based upon the KPMG settlement. Irrespective of the source of the funds, Mr Arthur would have foregone interest income on the money applied to buying a farm. That is what KPMG recognised in crediting Mr Arthur with interest on the settlement. Similarly, if Mr Arthur had borrowed money to acquire an equivalent property he would have paid interest. It is for that reason that in my view interest on 100% of the property value is the correct deduction to have made.

With respect, the interest income forgone had Mr Arthur purchased a farm is merely another way of measuring the loss over the period but should not be a deduction from the true measure of loss. Interest payable on any borrowings in each case would be met out of the farm income in respect of which we note no claim for loss of earnings was made.

The damages for the movement in value require adjustments on the basis of the period we have set out above and free of the deduction which the Judge made for compounding interest.

We allow the appeal and enter judgment for the appellant in the sum of:

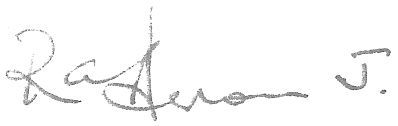
1. $285,000 for the farm value head of damages.

2. $13,463.00 for fees incurred as fixed in the court below.

3. $10,000 for general damages as fixed in the court below.

4. The date from which interest is to run at the rate fixed in the court below is likewise adjusted to run on all but the general damages from 31 August 1994.

5. Costs in this court are fixed at $5,000 to the appellant but the High Court costs must be determined, failing agreement, in that court.



Solicitors:

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