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NOT RECOMMENDED

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP 2759/89

BETWEEN

COMMERCIAL ELECTRONICS LIMITED

360

Plaintiff

A N D

McELROY MILNE

Defendant

Hearing: 15 February 1991

Counsel: G.J. Judd for the Plaintiff
P.B. Temm QC with R.W. Worth for the Defendant

Judgment: 15th - March 1991

FURTHER INTERIM JUDGMENT OF ELLIS J

In my interim decision delivered on 16 August 1990, in accordance with counsel's agreement, I reserved questions of loss other than that arising directly from the lost sale. That loss I quantified at \$1,250,000. I also concluded at page 21:

"Any damages payable calculated on the basis of total recovery would have to be discounted accordingly. No precise measure is possible. I fix the discount at 25% for all contingencies relating to the value of the guarantee."

This conclusion was to apply to all damages including the primary loss. Counsel have now been able to agree that the costs of a sale in January 1989 would have been \$118,125, so the net proceeds of sale would have been \$5,131,875.

Counsel accept that the plaintiff had to borrow the whole of this amount and that interest on it less income from the property down to the date of my judgment totals \$547,684. In addition counsel agree that the plaintiff incurred rates, land tax and insurances totalling \$33,029. These losses are the direct consequence of the defendants breach of contract and so all are recoverable subject to the overall deduction of 25% for the contingencies referred to in my judgment. It follows the plaintiff will recover:

Primary loss	\$1,250,000
Net interest	547,684
Rates etc	33,029
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	1,830,713
Less 25%	457,678
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	\$1,373,035
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There will be judgment for this amount accordingly in any event and the Registrar is directed to enter judgment for this amount as at 16 August 1990.

This leaves outstanding further claims for:

1. Whether interest on monies borrowed in excess of \$5,131,875 can be recovered.
2. Legal costs said to have been incurred in raising finance before January 1989.

3. Legal costs incurred in reaching a compromise with Imagineering.
4. Advertising costs paid to real estate agents after January 1989.
5. Accountancy costs incurred as a result of the failure to realise the sale by January 1989.
6. Whether the 25% discount is to apply to all damages calculated on full recovery.

The first and last questions follow from my judgment and ordinary principles. The interest on monies borrowed in excess of the net realisation figure cannot be recovered. The 25% reduction for contingencies applies to all heads of damage.

In my view the legal and accounting fees incurred in rearranging finance prior to January 1989 are recoverable if they were occasioned by the plaintiff being obliged to refinance because it did not have a fully let property to sell. Accountancy fees are in a similar position. I hold too that the legal costs of settling with Imagineering are properly recoverable just as the proceeds of such settlement (if any) must be brought into account in determination of the plaintiff's claim. Finally the advertising costs of trying to sell the property after January 1989 less sums recovered for such are also recoverable.

I trust that this will enable these claims to be quantified by counsel, bearing in mind that the burden of proving the amount is on the plaintiff which must present the claims so that charges can be properly identified.

The plaintiff will be entitled to costs and appropriate certificates.

This does not finalise all matters, but I am not prepared to dissect the claims for costs and advertising without affording the plaintiff the opportunity to present its claim in an easily identifiable form. Leave to apply further is accordingly reserved.

ANDREW CURRIE
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Solicitors:

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