IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

12/2

CP 37/92

41

BETWEEN

ALLAN JOHN BOWEN of Tauranga, Businessperson, KAY ELAINE BOWEN of Tauranga, Businessperson, JOHN CHARLES BOWEN of Hamilton, Company Director and MARTHA EMMA BOWEN of Matamata, Widow

Plaintiffs

A N D

PAUL DOUGLAS WILLIAMS of Haumona, Farmer

Defendant

Date of Hearing: 28 January 1993

Counsel: D M Simpson for Plaintiffs
S J Webster for Defendant

Date of Judgment: 11 FEBRUARY, 1993

JUDGMENT (NO 2) OF MASTER WILLIAMS QC

This judgment follows the interim judgment delivered by this Court in connection with the plaintiffs' (the "Bowen Partnership") application for summary judgment against Mr Williams determined on 13 August 1992. In that judgment, the Court held:

1. That the Bowen Partnership was entitled to summary judgment against Mr Williams for the amount due to the plaintiffs by Waterwide International (1991) Limited for rent, operating expenses and rates for the National Mutual Centre Building in Napier up to 13 May 1992,

payment of those sums having been guaranteed by Mr Williams. The Court was advised that counsel had agreed on the sum payable pursuant to that order and that the same had been paid.

2. The court also entered summary judgment for the Bowen Partnership against Mr Williams on liability "for the net losses incurred by the plaintiffs arising out of the forfeiture of the plaintiffs' lease to Waterwide International ... on 13 May 1992", dismissing the application for summary judgment as to quantum on that aspect of the claim and adjourning that matter for quantum trial. It is with aspects of the consequences of that order that this judgment is principally concerned.

3. The Court reserved the question of costs leaving it to counsel to file memoranda if they sought to have the costs fixed at this stage of the claim. Although an amount for costs was originally sought in the principal application before the Court on 28 January 1993, counsel accepted that that was an error and that no application has ever been made to have the costs fixed. Accordingly that part of the application was withdrawn.

There were initially three applications before the Court on 28 January 1993. They were applications for directions as to the quantum trial, an application to enlarge the time for filing affidavits by the plaintiffs in respect of the Rules 346A-J application and an application pursuant to those Rules for an interim payment by the defendant to the plaintiffs.

As far as the application for enlargement of time for filing the affidavits was concerned, that was ultimately dealt with by consent during the course of the hearing with the plaintiffs deciding not to file the additional affidavits referred to in their application and the defendant consenting to the Court reading one of the two other affidavits earlier filed but which were in contention, the remainder not being relied upon by the plaintiffs.

As far as the application for an interim payment was concerned, as RR346A-J only came into force on 1 January 1993, it was thought that this application was, in all probability, the first time that those Rules had arisen for determination.

As already indicated, the claim is one brought by the Bowen Partnership as the present owners of the Napier National Mutual Life Centre for rent, operating expenses and rates payable by Waterwide International, now in liquidation, that claim being made against Mr Williams as guarantor. The basic facts, taken from the Court's earlier judgment, are:

> "The premises were described as being part of the first floor of the building "having a certified area (which the parties accept as final and conclusive) of 538.40 square metres" plus the right to use the common areas. The lease was for nine years from 7 April 1986 at an initial rental of $44,438.64 plus 23.63% of the operating expenses and 45.52% of the air conditioning costs. The rent was reviewed as at 7 April 1989 and 7 April 1992 and at all times material to this proceeding was $5,812.49 per month inclusive of GST. Napier City rates were payable in addition and were payable direct to the local body. Pursuant to the lease the operating expenses for the building were estimated by the lessors at the commencement of each financial year on 1 April and were payable on a monthly basis over the ensuing year with the necessary adjustment being undertaken at the conclusion of the year. For the year to 31 March 1992 Waterwide was entitled to a refund of $126.75. For the year to 31 March 1993 the estimated operating expenses for Waterwide's occupation were $26,434.41 for the general expenses and $30,094.87 for the air conditioning expenses in each case plus GST. Although the lease contains the usual prohibition on sub-letting or assignment without the lessor's consent, it appears that part of Waterwide International's area was sub-let to some other tenant and that that tenant remains in occupation of that area.
>
> Mr Williams says that at the commencement of its tenancy Waterwide International provided all the internal partitioning in the area which it occupied at a cost of about $105,000.00 and he puts some of the invoices concerning that work before the Court. Clause 5.08(a) of the lease entitles a lessee to remove the partitions installed by it at the expiration of the term and clause 5.08(b) goes on to say that if the lessee does not complete such removal prior to the expiration of the term the lessor may remove and store the partitions. The clause continues:
>
> > '... the Lessor may alternatively elect not to effect such removal in which case the Lessor shall by notice in writing given to the Lessee notify the Lessee that unless the Lessee shall have effected such removal within fourteen days of the date on which such notice is given such partitions alterations or additions as have not been

removed by the Lessee shall be forfeited to the Lessor and where the Lessee fails to comply with such notice such partitions alterations and additions shall at the expiration of such fourteen days period become the property of the Lessor and no compensation therefor shall be payable by the Lessor to the Lessee.'

Clause 9.01 provides that if the lessee fails to pay the rent or goes into liquidation:

'... it shall be lawful for the Lessor ... to:

(1) Re-enter upon the Premises or any part thereof in the name of the whole and thereby determine the estate of the Lessee; and/or

(2) Remove or otherwise deal with as provided in Clause 5.08 all goods fittings fixtures and effects found on the Premises

without releasing the Lessee from any liability in respect of the breach or non-observance of any covenant condition or agreement of this Lease.'

...

Mr Williams says that from Christmas 1991 onwards Waterwide International was trying to find an assignee to take over the premises as it was then facing liquidity problems. It had instructed two real estate agents in that regard, Simkin Real Estate and Works Consultancy Services, and he says that he understood that prospective assignees were located but were deterred from taking over the premises because of the lack of a lift."

On 13 May 1992 the Bowen Partnership forfeited the lease and on 29 May gave the liquidator of Waterwide International 14 days' notice to remove the tenant's chattels or the same would be forfeited.

Amongst the defences to which Mr Williams claims arguably to be entitled was one that he was entitled to a set-off for the value of the leasehold improvements which exceeded the plaintiffs' claim plus an allegation that the plaintiffs had failed to mitigate their loss. The Court held that the notice forfeiting the chattels was properly given and that, no step having been taken in opposition,

the chattels were forfeited to the Bowen Partnership in terms of the lease. The Court continued:

> "The claimed defence of failure to mitigate must be seen in the circumstances of this matter. Waterwide International had been endeavouring to re-let the premises for about four months prior to its going into liquidation. It had been unsuccessful. The first the Bowen Partnership knew of Waterwide International's liquidation was its solicitor's letter of 28 April. Clearly the lessor required some little time to decide on the appropriate course of action. By 13 May it had sent a notice forfeiting the lease and on 29 May it gave the liquidator the notice concerning the partitions. By the date of Mr Bowen's affidavit in reply at the latest, the premises had been listed for re-letting with virtually every real estate agent in Napier. The duty to mitigate is a "relatively mild one" to act "reasonably in the adoption of remedial measures" (*Ben-Menachem v Baker*, Auckland CP 2434/88, Judgment 20.6.91, Barker J; *Benjamin v Wareham Associates (NZ) Ltd* (1990) 1 NZConvC 190.638, 190.645; *Banco de Portugal v Waterloo & Sons Ltd* [1932] AC 452, 506; *Boyer v Warbey* (1952) 1 All ER 269, 275). In the light of those authorities and in the circumstances of this matter, this Court holds that, to the date of hearing, the plaintiffs have satisfied it that they have complied with their obligation to endeavour to mitigate their loss."

As to quantum, the Court highlighted a number of areas where the proof appeared to be inconclusive or possibly exaggerated. Those are obviously matters which will need to be determined at trial.

The Bowen Partnership's application for an interim payment seeks an order directing Mr Williams to pay the plaintiffs the net losses incurred by them in respect of the forfeiture of the lease for the period 13 May - 31 December 1992. That sum was calculated by the plaintiffs' accountant, a Mr Calderwood, at $59,360.40 made up as follows:

Net loss of rent after crediting sub-tenant's rent	39,455.24
Net rates	3,781.62
Net operating and air conditioning expenses	6,768.43
Legal and related expenses	6,621.11
Compound default interest on rent	2,175.58
Compound default interest on rates	236.79
Compound default interest on operating and air conditioning expenses	321.63

$59,860.40
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Mr Calderwood said that he has sighted all the invoices on which his calculations are based - although he puts none in evidence - and he swears that "the figures contained within this ... affidavit ... are correct".

Mr A J Bowen gave evidence as to the lengths to which he and his solicitors went at the time the Bowen Partnership purchased the building to endeavour to assure themselves as to the financial stability of the tenants and he said that the partnership relies on the income, a comment which particularly applied to his mother, Mrs M E Bowen. She is apparently the life tenant in her husband's estate, put all the capital of the estate towards the purchase of the building and relies solely on the rental income plus GRI.

The evidence as to the partnership's efforts to re-let Waterwide International's space showed that the Bowen Partnership has worked through a Tauranga real estate agent, a Mr Smillie, and that their initial strategy was to instruct virtually every real estate agent in Napier to list the building. Those instructions were initially given immediately after the plaintiffs were advised of Waterwide's voluntary liquidation and were confirmed during a visit made at the time of the creditors' meeting. Certain of the real estate agents were again visited on the day of the summary judgment hearing. In mid August Mr Bowen re-visited all the real estate agents and offered "commission incentives" to four. When that strategy did not produce a tenant, the plaintiffs changed their tactics and on 7 October 1992 Mr A J Bowen and Mr Smillie cancelled all the listings then in force with the exception of the four to whom the commission incentives had earlier been offered. Mr Bowen puts in evidence an advertisement issued by one of those four which describes the space and the fact that "lease incentives" were available. The agents were again visited by Mr Bowen in late November.

As to air conditioning, Mr Bowen said that the plaintiffs cancelled their then existing contract in late 1992 and entered into a contract on 24 November with another firm, that firm later advising him that it was possible to isolate the area leased to Waterwide International and disconnect the air conditioning to that part of the building. Mr A J Bowen says that that was the first he knew of that possibility even though, of course, Waterwide International had not occupied the building for more than six months previously and its sub-tenant had vacated

on 17 August. As a result of that Mr Calderwood deducted the air conditioning charges for September - November 1992 from his calculation of the amount sought by way of an interim payment.

Mr Smillie has also filed an affidavit which largely confirms Mr Bowen's evidence as to re-letting. He said that "a number of interested parties have inspected" the premises and that the Bowen Partnership "has been prepared to negotiate favourable terms" but that nothing has eventuated. He says that every encouragement has been offered to the Napier real estate agents and that "all effort has been made by both myself and the Bowen Partnership towards the re-letting".

Mr Williams opposed the application for an interim payment on the grounds that the plaintiffs' evidence did not satisfy their obligations as regards mitigation and was insufficiently proved. In his supporting affidavit he said that he did not challenge Mr Calderwood's arithmetic but that the invoices on which it was based had not been made available to him and accordingly he was unable to accept that the calculations were properly based.

Mr Williams is also critical of the evidence as to the plaintiffs' re-letting efforts. He said that a recent rental valuation had been obtained by the plaintiffs but not put in evidence and that the, admittedly hearsay, evidence which he had obtained from one of the real estate agents was that the rental which the plaintiffs were seeking was $5,300.00 more than that payable by Waterwide International - even though Mr Williams says that his view has always been that the rental was higher than the market would bear. Mr Williams made the point that the premises were difficult to let because there was no lift and some possible tenants required such a facility. He suggests that the plaintiffs were not marketing the premises adequately in operating through a master agent in Tauranga.

Of importance in the resolution of this matter, Mr Williams repeatedly points out that the plaintiffs' evidence in support of this application gives the Court no information whatever as to the rental which they are seeking for Waterwide's premises or as to the terms on which they are prepared to let the same. He makes the point that there is little indication that the plaintiffs are prepared to negotiate about the rent or the other terms of the lease or that they are prepared to contemplate a change of usage or be less demanding than previously about

the tenant. Further, he says that if the plaintiffs are endeavouring to re-let the premises on the same terms as operated between the Bowen Partnership and Waterwide then, in today's climate, such a lease is unlikely to be regarded by prospective tenants as acceptable, particularly because the Bowen Partnership/Waterwide lease includes a ratchet clause and such a clause is no longer universal in commercial leases. Mr Williams concludes:

> "If the premises were re-let at a half to two thirds of the current rental the Plaintiffs would restrict their rent losses and my liability for loss of bargain would then be accurately quantified and would be substantially less than if the premises were to remain vacant for the full term."

Mr Williams is also critical as to the proof concerning the operating expenses, again making the point that he has not seen the invoices (notwithstanding that the absence of the same was a point of contention throughout the whole of Waterwide's occupation of the building) and suggesting that some claims such as those for electricity, gas, air conditioning and cleaning of the common area should not be charged to him since Waterwide was not in occupation.

Against the background of that evidence, the Court turns to consider the scheme of the new RR346A-J. They empower the Court to order the making of an "interim payment" by a defendant to a plaintiff, such payment being "on account of any damages debt or other sum (excluding costs) which the defendant in a proceeding may be held liable to pay to or for the benefit of the plaintiff". An application for such a payment may be made after the filing of a statement of defence or when the time for filing has expired and is required to be supported by affidavit verifying the amount sought and exhibiting "any documentary evidence relied on by the plaintiff" (R346B(2)(b)), those documents being filed and served at least 10 days before the hearing. The Court's powers to order an interim payment arise only an admission of liability or judgment for the same to be assessed or where "if the proceeding were tried, the plaintiff would obtain judgment for substantial damages" (R346C(c)). If one of those criteria is satisfied the Court may "if it thinks fit":

> "... order that defendant to make an interim payment of such amount as it thinks just, not exceeding a reasonable proportion of the damages which in the opinion of the Court are likely to be recovered by the plaintiff after taking into account any relevant contributory negligence and any set-off, cross-claim, or counterclaim on which the defendant may be entitled to rely."

Sums other than damages may be similarly ordered under R346D and R346E provides for any payment so ordered to the paid to the plaintiff or to be paid into Court. The Court has power to order payment by instalments (R346E(4)), to make directions for the future conduct of the proceeding (R346F) and is required to take the payment into account on making a final order or giving leave to discontinue (R346I). That adjustment may include "an order for the repayment by the plaintiff of all or part of the interim payment".

The new Rules are effectively identical to the British O29 rr(9)-(18) and in view of the fact that this is the first time that these Rules have arisen for discussion, it may be of assistance to record the summary of the position in England in respect of applications for interim payments appearing in the decision of the Court of Appeal in *Schott Kem Ltd v Bentley* [1990] 3 All ER 850, 856-7 (with references to the New Zealand Rules appearing in []):

> "The power of the court to order interim payments under Pt II of Ord 29 [RR346A-J] has been considered in recent years in a number of cases in the Court of Appeal, including *Shearson Lehman Bros Inc v Maclaine Watson & Co Ltd* [1987] 2 All ER 181, [1987] 1 WLR 480, *Shanning International Ltd v George Wimpey International Ltd* [1988] 3 All ER 475, [1989] 1 WLR,981, *Ricci Burns Ltd v Toole* [1989] 3 All ER 478, [1989] 1 WLR 993 and *British and Commonwealth Holdings plc v Quadrex Holdings Inc* [1989] 3 All ER 492, [1989] QB 842.
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> From the wording of the relevant rules and from these authorities the following seems clear.
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> (1) Rules 11 and 12 of Ord 29 [RR346A-J] form part of a single code: see the *Shearson Lehman* case [1987] 2 All ER 181 at 190, [1987] 1 WLR 480 at 492 per Nicholls LJ.
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> (2) Under both rules the court approaches the matter in two stages.
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> (3) At the first stage the court has to consider whether it is 'satisfied' of one of the matters set out in sub-paras (a), (b) and (c) of the rules. Thus, for example, in a case where r 11(1)(c) [R346C(c)] is relied on the court has to be satisfied -
>
> > 'that, if the action proceeded to trial, the plaintiff would obtain judgment for substantial damages against the respondent or, where there are two or more defendants, against any of them.'

In a case where Ord 29, r12(1)(c) [R346D(c)] is relied on the court has to be satisfied -

> 'that if the action proceeded to trial, the plaintiff would obtain judgment against the defendant for a substantial sum of money apart from any damages or costs.'

(4) In order for the court to be satisfied that the plaintiff would obtain judgment -

> 'something more than a prima facie case is clearly required, but not proof beyond reasonable doubt. The burden is high. But it is a civil burden on the balance of probabilities, not a criminal burden.'

(See the *Shearson Lehman* case [1987] 2 All ER 181 at 187, [1987] 1 WLR 480 at 489 per Lloyd LJ.)

...

(5) At the second stage the court, if satisfied that the plaintiff would recover a substantial sum, may then proceed, if it thinks fit, to order an interim payment 'of such amount as it thinks just'. At this stage under r11(1) [R346C] the payment must not exceed -

> 'a reasonable proportion of the damages which in the opinion of the court are likely to be recovered by the plaintiff after taking into account any relevant contributory negligence and any set-off, cross-claim or counterclaim on which the respondent may be entitled to rely.'

Under r12 [R346D] the payment order must take account of 'any set-off, cross-claim or counterclaim on which the defendant may be entitled to rely'.

(6) Where a plaintiff makes alternative claims against a defendant, eg, for rent with an alternative claim for mesne profits, or for the price of goods with an alternative claim for damages, the court can order an interim payment without reaching a conclusion at that stage as to which of the alternative claims against the defendant will succeed at the trial, provided it is satisfied that the plaintiff will recover a substantial sum under one head or the other: see the *Shearson Lehman* case [1987] 2 All ER 181, [1987] 1 WLR 480. Indeed as Nicholls LJ pointed out in the *Shearson Lehman* case [1987] 2 All ER 181 at 191, [1987] 1 WLR 480 at 493:

> '... it is apparent from the express terms of r12 that it is not intended that, as a prerequisite to making an interim payment order, the court must be satisfied in every case on the precise legal label to be attached to the sum in question.'

It would seem, however, that if there is a doubt whether the sum claimed will prove to be recoverable as damages or under some other heading the court should apply a discount when ordering an interim payment to take account of the provision as to 'a reasonable proportion of the damages' in r11(1) [R346C].

(7) Where, however, claims are made in the alternative against two or more defendants it seems that an order for interim payment cannot be made if the court is satisfied merely that the plaintiff will recover against one of these defendants but is not satisfied of recovery against any particular one. It will be remembered that it is provided in Ord 29, r11(c) [R346C(c)] that in an action for damages the power to make an order for interim payment can arise if the court is satisfied that 'the plaintiff would obtain judgment for substantial damages ... where there are two or more defendants, against any of them'. But in *Ricci Burns Ltd v Toole* [1989] 3 All ER 478 at 485, [1989 1 WLR 993 at 1992 Ralph Gibson LJ (with whom Butler-Sloss LJ agreed) held that these words -

> 'do not on their true construction permit an order to be made against one or other of two defendants on the ground that the court is satisfied that the plaintiff will succeed against one or other of them. Proof of success to the necessary standard against any defendant is required before an order can be made against him.'

And in *Breeze v R McKennon & Son Ltd* (1985) 32 Build LR 41 at 49 Croom-Johnson LJ said:

> 'What the court must be satisfied of under rule 11(1)(c) [R346C(c)] is that the plaintiff will recover substantial damages from the respondent against whom the order is made, and the damages "likely to be recovered" means recovered from that respondent and not from somebody else.'

(8) [relates only to claims for damages for personal injuries] ...

> (9) Interim payment procedures are not suitable where the factual issues are complicated or where difficult points of law arise which may take many hours and the citation of many authorities to resolve."

In addition, in *Schott Kem*, Neill LJ rejected a submission that plaintiffs must demonstrate need or the suffering of prejudice before an interim payment can be ordered, the learned Judge holding (at 858):

> "I am not satisfied ... that there is any restriction implicit in the rules which prevents an interim payment order being made in the absence of evidence of need or prejudice. By the use of the words 'if it thinks fit', both rr 11 and 12 [R346C and D] confer a discretion on the court whether to order an interim payment at all. Moreover the amount of the payment is expressed to be 'of such amount as [the court] thinks just', with the additional limitation in the case of damages that the amount is not to exceed 'a reasonable proportion of the damages which in the opinion of the Court are likely to be recovered by the plaintiff' after taking into account the matters specified. For my part I can see no basis for any further limitation on the jurisdiction of the court to order interim payments than those set out in Ord 29 [R346A-J] itself.
>
> I would therefore reject the argument that it is necessary for Schott Kem to produce evidence of need or prejudice."

The rules in the United Kingdom and New Zealand are so similar that this court concurs with the learned authors of Sim and Cain Practice and Procedure (12th ed, pp300/6C-D) that United Kingdom precedent is likely to be followed in this country but, to the criteria already set out, the Court suggests that two others might possibly be added namely:

1. That although R346B(4) contemplates a second or further applications for interim payments, the probability is that the Court would wish to discourage a series of applications by a plaintiff. Doubtless it was for that reason that the Court was empowered, when dealing with an application for an interim payment, to give directions as to the future conduct of the proceeding and as to a speedy trial (R346F).

2. The verifying affidavit should, in this Court's view, include evidence of the plaintiff's ability to repay in the event of being ordered so to do. Injustice would clearly result if a defendant were ultimately adjudged to

> have overpaid a plaintiff and were unable to recover. Presumably it was to guard against such an eventuality and to encourage a cautious approach to the quantum of interim payments that the Court's powers were limited to ordering payment of amounts "not exceeding a reasonable proportion of the damages ... likely to be recovered" and then only if the Court thinks fit and after taking account of the other matters for which RR346C and D provide.

In applying the Rules and those principles to this application, it is at once apparent that, if only for procedural reasons, the plaintiff's application cannot be granted. Although Messrs Bowen and Calderwood's affidavits verified the amount of the interim payment sought, neither exhibits the documentary evidence relied upon. That is required by R.346B(2)(b). Plainly, the ordinary rules of evidence apply as much to an affidavit filed under R346B(2)(b) as they do to any other proof of quantum. The verifying affidavit to which R.346B(2) refers echoes the standard of proof of quantum in verifying affidavits sworn in support of summary judgment applications. Both must comply with the ordinary rules of evidence so far as proof of quantum is concerned.

Here the documentary evidence on which Mr Calderwood has relied in making his calculations is not in evidence and in this Court's view, and with respect to Mr Calderwood, his sworn assertions of having sighted the relevant invoices and of the correctness of his calculations are insufficient in the light of the provisions of R346B(2)(b) and the standard of proof shown by the authorities as appropriate. That is particularly the case where, as here, certain aspects of the proof - particularly those relating to operating and air conditioning expenses - have been a vexed and contentious topic throughout the currency of Waterwide's occupation and relate to a matter where Waterwide and Mr Williams have frequently complained at the lack of documentary support for the sums claimed.

Even if the Court had not felt obliged to dismiss the plaintiffs' application on procedural grounds, the same result would have been reached on the facts of the matter seen against the background of the new Rules and the authorities.

The plaintiffs' obligation to mitigate is certainly a "relatively mild one" but, even so, and even accepting that the plaintiffs appear to have complied with that obligation so far as concerns instructing and encouraging the real estate agents

in their efforts, there is still considerable force in Mr Williams' comments that there is nothing whatever in the plaintiffs' evidence as to the rent which they are seeking for Waterwide's premises nor as to the term for which and the terms on which they are proposing to let the same nor as to their preparedness to negotiate on all those matters, particularly the rent, the term and whether or not a ratchet clause is to be included. Whether or not the plaintiffs have acted reasonably in endeavouring to re-let Waterwide's premises cannot be adequately assessed if the plaintiffs do not give the Court a basis for comparison between the terms of the Waterwide lease and the terms which they are now offering to prospective new tenants.

Therefore, though it is highly probable that, at the conclusion of this matter, Mr Williams will owe an amount of money to the Bowen Partnership for the losses which they have suffered during the period 13 May - 31 December 1992, that must remain no more than an unproved possibility at this juncture.

Mr Williams also opposed the application for an order requiring him to make an interim payment on the basis that he had a set-off, cross-claim or counterclaim arising out of the leasehold improvements effected by Waterwide International to the plaintiff's premises which he quantified in the cost price of $105,000 to which reference was earlier made. However, the Court records its view that, had the plaintiffs complied with all other criteria relating to an application for an interim payment, that matter would not have stood in the way of ordering such for the reasons, first, that the Court held in its earlier judgment that the chattels had been forfeited to the plaintiffs in accordance with the terms of the lease and, secondly, even if such had not been the case, those chattels would be chattels of Waterwide International and thus available to meet all its debts. Since the guarantee clause in this case made Mr Williams a principal debtor jointly with Waterwide International, plainly that circumstance would have affected the matter of quantum as well, perhaps, as liability. Additionally, on the question of quantum, the Court would have been required to take into account the fact that Waterwide International's assessment of the value of its "leasehold improvements" was said in its directors' statement to creditors to be $16,973 and that the directors estimated that those improvements would realise nothing. However, in view of the other findings in this judgment, no further discussion of that topic is required.

A further reason for the Court reaching the view which it has expressed lies in the lack of any proof as to the plaintiffs' ability to reimburse Mr Williams in the event of overpayment. Mr A J Bowen makes it clear that the plaintiffs all rely on the income from the building and that that applies particularly to Mrs M E Bowen. The evidence he gives concerning his mother's personal situation shows that, were she to receive her share of any interim payment ordered by this Court, the probability is that that payment would be utilised in meeting her personal expenditure and, given that she has invested all her capital in the building, may be incapable of being repaid should that become necessary. The other plaintiffs give no details of their financial circumstances. For the reasons earlier given as to the need to guard against injustice resulting from any inability to refund overpayments, this Court, even had all other matters been adequately proved, may have declined to make an order for interim payment although, given the newness of the Rules, that matter may have been capable of cure by adjourning the application and giving leave to adduce the necessary evidence. However, such is not necessary having regard to the earlier findings.

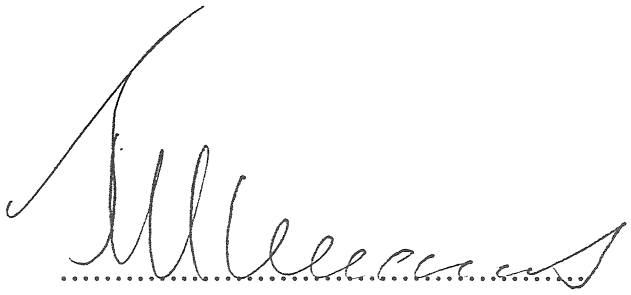
Counsel did not address themselves to the application for an order directing trial on quantum but, given that the premises have still not been re-let, it may be that the plaintiffs do not wish to proceed to trial until they are able to quantify their losses following their releasing the premises. That is a matter for them. All that this Court can do is to adjourn that application for further consideration.

In the light of all of that, the Court's orders are:

1. That the application for an order requiring the defendant to make an interim payment of the plaintiffs' net losses for the period 13 May - 31 December 1992 is dismissed.

2. That the plaintiffs' application for directions as to the quantum trial is adjourned to the first Master's Chambers List in Napier after the delivery of this judgment for the making of such orders as are then appropriate.

3. The costs of the application are reserved (hearing time 3.05-4.05pm).



Master Williams QC

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