IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO: 78 OF 2006

BETWEEN:

(1) SAGICOR GENERAL INSURANCE (CAYMAN) LIMITED
(2) THE PROPRIETORS OF STRATA PLAN NO. 151 (KNOWN AS WINDSOR VILLAGE)

Plaintiffs

-AND-

(1) CRAWFORD ADJUSTERS (CAYMAN) LIMITED
(2) BOULD PATERSON LIMITED
(3) ALASTAIR PATERSON
(4) HURLSTONE LIMITED
(5) HURLSTONE GENERAL CONTRACTORS LIMITED
(6) JOHN HURLSTONE
(7) ROBERT HURLSTONE

Defendants

-AND-

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. 573 of 2008

BETWEEN:

(1) HURLSTONE LIMITED
(2) HURLSTONE GENERAL CONTRACTORS LIMITED
(3) JOHN HURLSTONE
(4) ROBERT HURLSTONE

Plaintiffs

-AND-

(1) SAGICOR GENERAL INSURANCE (CAYMAN) LIMITED
(2) THE PROPRIETORS OF STRATA PLAN NO. 151 (KNOWN AS WINDSOR VILLAGE)

Defendants

Coram: **The Hon. Mr. Justice Henderson**

Appearances: **Mr. Michael Roberts instructed by Mr. Nick Dunne of Walkers for the 1st and 2nd Plaintiffs**

Mr. Thomas Lowe, Q.C. instructed by Mr. Christopher J. McDuff of Thorp Alberga for the 4th to 7th Defendants

Mr. Anthony Bueno Q.C. instructed by Mr. Graham Hampson, Attorney-at-Law for the 1st and 3rd Defendants

Heard **December 18, 2009**

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JUDGMENT

1. In September, 2004 the island of Grand Cayman was devastated by Hurricane Ivan. The second plaintiff, the Proprietors of Strata Plan No. 151 (known as WV), is a residential development located on the shore of the island. It suffered very extensive damage. The insurer of WV was the first plaintiff, Sagicor General Insurance (Cayman) Limited. It was known at the time as Cayman General Insurance but I will refer to it for convenience by its current name, "Sagicor". Mr. Danny Scott, the Chief Executive Officer of Sagicor, resided in one of the units at WV.

2. Sagicor hired Crawford Adjusters (Cayman) Limited ("Crawford") and Mr. Alastair Paterson, one of its principals, to adjust the loss. The second defendant, Bould Paterson Limited ("BPL"), was retained on behalf of WV as project manager for the reinstatement.

The fifth defendant, Hurlstone General Contractors Limited ("HGCL") and its principal, Robert Hurlstone (the seventh defendant), were hired to perform the construction work. The general contractor was Hurlstone Limited ("HL"), the fourth defendant, and its principal, John Hurlstone, the sixth defendant.

3. By the end of June, 2005 around CI $3,000,000 had been advanced to the Hurlstone parties (i.e., the fourth to seventh defendants) but Sagicor formed the opinion that the value of the work was roughly CI $1,300,000. It concluded that it had been defrauded by both the Crawford parties (i.e., the first to third defendants) and by the Hurlstone parties. After obtaining a report from an independent expert, Mr. Alan Purbrick, Sagicor commenced an action ("the original proceeding") in this court under cause no. 78 of 2006. After obtaining a Mareva injunction freezing the assets of the Hurlstone parties, it did little to advance its case towards trial and abandoned its claims at the last moment.

4. After dismissing the claims by Sagicor and WV, I gave judgment on December 8, 2008 on a counter-claim by the Hurlstone parties.

I awarded to HL the sum of CI $791,716.28 as the lost profit on the reinstatement and interest. I made a finding that:

> "From the failure of these plaintiffs to prosecute their case, I infer that they have never been in possession of a body of evidence capable of establishing fraud or conspiracy."

5. Because of the serious nature of the allegations which had been pleaded but not proved, I awarded indemnity costs to each defendant.

6. The proceedings did not end there. I directed an enquiry to assess the damages suffered by the Hurlstone parties as result of the Mareva injunction. The injunction contains the usual undertaking by Sagicor to compensate the respondents for any loss the court determines they have suffered. WV did not associate itself with the injunction application. I granted leave to the Crawford parties to amend their counter-claim for unpaid fees owing to them; the amount claimed was amended to CI $399,309.02 plus interest owed to Crawford and CI $71,450 plus interest owed to BPL. Since the closing arguments of the parties make no mention of

these amounts my understanding is that they are no longer an issue. If that understanding is wrong, the parties are at liberty to apply.

7. The Hurlstone parties started a new action, cause no. 573 of 2008, against Sagicor and WV claiming damages for the torts of abuse of process and malicious prosecution of a civil action. The two torts are closely related and may best be viewed as two variations on a single theme. The Crawford parties amended their counter-claim in the original proceeding to claim damages for abuse of process and defamation. The two actions were consolidated.

Windsor Village & Hurricane Ivan

8. WV is a relatively upscale strata development consisting of six two-storey blocks accommodating some thirty-five condominium units of one, two or three bedrooms. The majority of the Strata Executive Committee members were not living on the island. Mr. Scott was very active in the affairs of WV as he was one of the few who lived there.

9. After the passage of Hurricane Ivan in September, 2004, the two blocks of WV immediately adjacent to the ocean (blocks one and six) had been essentially destroyed. One had major roof damage, the other roof was totally destroyed. The foundations of both blocks had been undermined. The seawall had almost disappeared. Every unit was full of hard-packed sand, rock and stones. Pipes and conduits were broken. The other four blocks which were not adjacent to the sea also sustained significant damage. All roofs had some wind damage and there was flood damage to all interiors. Rain water had also penetrated through broken windows and roof leaks.

10. On September 24, 2004 Alastair Paterson, Mr. Martyn Bould and Mr. Jonathan Nicholson met with Mr. Scott at Sagicor. The result was an engagement from Sagicor for loss adjusting services on a number of claims including WV. After the meeting, Mr. Paterson told Patrick Harrigan, a member of the executive committee of the WV Strata, that he had been engaged as loss adjuster. BPL was established October 6, 2004. Shortly after that it began providing project management and quantity surveying services to WV. A

written contract between the Strata and BPL was signed on October 24, 2004. Mr. Paterson took on the dual roles of loss adjuster and project manager. Mr. Paterson is a surveyor and a long time resident of the Cayman Islands.

11. Mr. Scott had a chance meeting with Robert Hurlstone, whom he regarded as a "good builder", in late September, 2004. Mr. Scott was particularly keen to see the restoration move quickly. Mr. Hurlstone said he might wish to undertake the reconstruction and Mr. Scott said he would be interested in retaining him. Mr. Scott suggested that Mr. Hurlstone speak to Mr. Paterson, who had done some professional work for the Hurlstones in the early 80s, again in the early 90s, and some limited work in 2003. Mr. Hurlstone referred Mr. Scott to his brother, John Hurlstone. After John accepted the proposal, Robert agreed to involve himself in the project.

12. Although no agreement was ever signed, HGCL and Robert Hurlstone began the task of reinstating the units to their former

condition. No fixed rates were agreed by the parties for labour or materials. No fixed sum was agreed for the cost of the clean-up.

13. Around this time, Florida and the U.S. east coast suffered extensive damage from other hurricanes. This resulted in an unusually high demand for building materials. Some suppliers found themselves out of inventory. Robert Hurlstone says the cost of construction material increased by about 50% shortly after Hurricane Ivan. Local suppliers of building materials lost much of their inventory in the Hurricane. In addition, there was very little heavy equipment in working condition on Grand Cayman and a severe shortage of motor vehicles. Mr. Hurlstone managed to rent a few pieces of equipment and brought his own equipment, which was on Little Cayman, back to Grand Cayman.

14. It was very difficult to find workmen. Mr. Hurlstone says that everyone on Grand Cayman who was willing and able to work in the construction industry, including bartenders, waiters and chefs, were being offered "huge" sums of money to do construction

work. The workers were not willing to accept the same hourly rates which prevailed prior to the hurricane.

15. Mr. Hurlstone eventually found some workers and they "brought in other people". There was little accommodation on the island and food was scarce. In order to find workers, Mr. Hurlstone found it necessary to assist them with housing, food, water and transportation. The workers were usually paid in cash. Often, Robert Hurlstone gave them additional payments to assist with the difficult conditions then prevailing. Although the various skilled and unskilled workers were being paid varying hourly rates, Robert and John Hurlstone decided for convenience that all workers would be "charged out" at the same average rate on the basis of working ten hours a day. Site works were conducted for ten or more hours per day at least six days a week. The flat rate decided upon for labour for the clean-up of the site was CI $35 per hour. Mr. Hurlstone's first estimate of the total cost of the re-building was in the range of CI $5,000,000 to CI $7,000,000.

16. HL acted as the general contractor. John Hurlstone is a fifty-five year old Caymanian who worked initially in the banking industry. In 1982 he formed a general contracting construction company with his brother Robert. In 1994 he became the managing director of HL, the shares of which are held by a trust for Mr. Hurlstone and his children. HL has operated as a general contractor in the Cayman Islands since its incorporation. It has about fifty employees, including an in-house quantity surveyor, an office manager, and five other accounting and administrative positions. It has completed a number of construction contracts over the years having values in the approximate range of CI $2,000,000 to CI $12,000,000.

17. Although Robert Hurlstone and his own company, HGCL, have an office within HL's premises the two corporations are not otherwise related. During Hurricane Ivan approximately six feet of flood water devastated the HL offices. The computers and paper work stored there were destroyed.

18. Having being told by his brother that Danny Scott wanted the Hurlstones to do the reinstatement work at WV, John Hurlstone contacted Mr. Scott. The latter said that he wished to have Robert Hurlstone undertake the reinstatement works and to be on site personally to direct the re-building and the clean-up which would have to precede it. Mr. Scott emphasized that he wanted Robert to commence the clean-up immediately and that the work should be completed as soon as possible. When asked about payment, he said that funds "would not be a problem". (Mr. Scott said he gave that assurance much later on, but I prefer the evidence of Mr. Hurlstone on this point.) Since the two men were friends, John Hurlstone accepted this implicitly. Mr. Scott also confirmed that he was speaking to Mr. Hurlstone with the authority of the Strata Committee and advised him that Alastair Paterson would be in charge of the project.

19. Upon speaking to his brother, John Hurlstone was told that HGCL would need a substantial advance payment in order to mobilize further projects and would also need regular payments as the works proceeded. Robert Hurlstone was clear that he did not intend to

finance any aspect of the re-construction. In a further discussion with Mr. Scott, John Hurlstone reiterated that advanced payments on account would have to be made. He said he would make the actual arrangements for payment through Mr. Paterson, with whom he had an amicable relationship. Mr. Scott took no objection to this.

20. At an early stage, Mr. Harrigan on behalf of WV requested that a new seawall be constructed to replace the one which had been destroyed. Mr. Scott advised Mssrs. Harrigan and Paterson said that a new seawall would not be covered under the policy of insurance. However, Mr. Scott agreed that the cost of repairing the foundations for blocks one and six (the two buildings closest to the sea) would be covered. The proposed seawall was sufficiently close to the foundations that the two could be viewed as a single project. For that reason, Mr. Paterson proposed that the cost of the combined seawall and foundation restoration be split between the insurer and the insured. Plans were prepared. The agreement to split the cost was a preliminary one, to be reassessed later.

Work Starts

21. When work started, no specifications, bills of quantities, or structural surveys had been prepared. The Hurlstones found this understandable in the circumstances but also a handicap. In the absence of such documents neither HL nor HGCL could give a firm price for the cost of the work.

22. The Hurlstones agreed with Mr. Paterson that HL should bill for the demolition, debris and clean-up work on a fixed rated "day work" basis. Mr. Paterson requested a broad and preliminary scope of works which Mr. Hurlstone provided by his letter of November 4, 2004. This letter asserts that the clean-up and the re-construction works were to be addressed separately. He estimated the cost of the reinstatement work at CI $5,565,000. The letter confirms that this was a preliminary estimate and would need to be reviewed and adjusted subsequently when professional reports had been prepared. Mr. Scott said that neither he nor anyone else at Sagicor had seen the letter of November 4, 2004: "this document was never presented to us." Again, I accept the evidence of Mr. Hurlstone in

preference to that of Mr. Scott on this point. Much of Mr. Scott's evidence was inconsistent and self-contradictory.

23. Robert Hurlstone requested an advance payment of CI $1,250,000 to buy necessary building materials, pay deposits to sub-contractors, and to mobilize his workforce. He also requested architectural, electrical and mechanical drawings and says these were needed as soon as possible. It was expected that a formal written contract at a fixed price would be negotiated and agreed upon in due course.

24. On the following day Mr. Paterson wrote to John Hurlstone promising that a contract would be signed and requesting him to commence work immediately. He said that CI $250,000 was being paid in advance for "initial expenses".

25. John Hurlstone wrote again to Mr. Paterson on November 9, 2004 reminding him that the Hurlstones would not finance the cost of re-construction and requesting again that the advance be in the amount of CI $1,250,000. He also said that advance payments needed to be

made twice monthly as the project progressed. He described his understanding of the contract which would be signed:

> "We are proceeding with the work as per your instructions in the understanding that the contract is the CASE standard form of contract 1994 (without quantities) and is a fixed price sum based on our budget previously presented with a contract term of twelve months from the date of our company being given possession of the site. The term price and scope of the contract is to be extended to include any works necessary to complete the re-instatement of the project and any additional works instructed by yourselves or directed by the project engineers."

26. There was no direct response to this letter. Neither Mr. Paterson, Mr. Scott nor anyone on behalf of Sagicor or the Strata appears to have questioned the intent set out in the letter. Mr. Hurlstone considered that his letter of November 9th embodied the agreement until a more formal contract could be executed.

27. In a letter dated December 1, 2004 John Hurlstone warned that the clean-up was taking longer than anticipated. He confirmed that the billing would be on a separate invoice based on a fixed rate per hour for manpower and equipment. He again requested an advance payment of CI $1,250,000.

28. APEC Consultants, a firm of engineers, prepared the necessary structural report and drawings for the reconstruction of the buildings and the seawall. Robert Hurlstone was responsible for ordering and purchasing materials, engaging sub-contractors, and ensuring that all the work was carried out in an efficient and workman like manner. John Hurlstone and HL were responsible for administration of the project, including making payments and contractual arrangements.

29. The site could not be cleaned up until damaged furniture belonging to the owners was removed from the buildings. There was no space on the island to store them, so Robert Hurlstone obtained nine storage containers and used these. He charged rent for the containers. They were eventually sold, apparently without authority, by Mr. Frank Delessio in 2006.

30. The absence of a detailed scope of works was troublesome throughout. Robert Hurlstone agreed with his brother that an initial payment on account of CI $1,250,000 and regular fortnightly payments thereafter would be reasonable. It was a concern to him

that the initial payment was never made. Given his view about the initial payment, Robert Hurlstone was always of the opinion that Sagicor was "behind" in their payments and needed to "regularize" their account. He says he proceeded with the works because of his long term relationship with Danny Scott and Mr. Scott's assurances that they would be paid.

31. The Hurlstones began working on the site around October 21, 2004. Robert Hurlstone had regular site conferences with Alastair Paterson. He provided Mr. Paterson with information upon request. Mr. Hurlstone says it was "impossible" to keep any proper record of the workers' hours and to calculate overtime. An initial effort was made but abandoned. He was "constantly" on site and knew that the workmen were there at least ten hours per day and sometimes more for six days a week. Some work was also done on Sundays. He considered it reasonable to assume that the workers would be paid for ten hours per day six days per week.

32. Mr. Jonathan Nicholson designed a loss adjusting report form and issued a blank template of it to Mr. Paterson. By the end of

November, 2004 Ken Osborne of Sagicor had seen the reporting format and said it was not detailed enough. Mr. Nicholson explained it was intended for interim reports; the final report would take a more detailed form.

33. Around December 3, 2004 Crawford Adjusters received an instruction from Sagicor to stop working on all of the files. After a meeting, the instruction was revoked but further concerns were expressed by Ken Osborne about the lack of detail in the reporting template.

Mr. Paterson's Role

34. Mr. Scott said that Alastair Paterson told him in 2003 that Crawford would be providing loss adjusting services on Grand Cayman "on behalf of Crawford and Company", a large international firm. An email from Mr. Paterson states that "all claims which [Sagicor] may require can now be provided by local Crawford representation". Mr. Scott saw this as significant because he felt the local Crawford directors were not sufficiently qualified and experienced to

undertake complex loss adjusting work. By virtue of their relationship with the well know firm of Crawford and Company, they would be in a position to offer the necessary expertise. When Sagicor retained Crawford to provide loss adjustment services on about four hundred claims, Mr. Scott says no one advised him that there was no actual affiliation between Crawford and Company and Crawford. I am satisfied from the evidence of Mr. Paterson and Mr. Jonathan Nicholson that there was an informal arrangement (only) for consultation and advice and Mr. Scott was told of that during a meeting in January, 2005.

35. All the advances were made on Mr. Paterson's recommendation. Sagicor expected its loss adjuster, Mr. Paterson, to establish the amount at which the claim should be settled and prepare appropriate reports, to make recommendations regarding the amount of advances, and to review the work at the site in order to ascertain that the advances had been applied properly before recommending further advances. Because of the large number of claims which followed Hurricane Ivan, Sagicor staff could not review every claim with the degree of detail they would normally

undertake. As a consequence, a greater degree of trust was reposed in the skill and integrity of the loss adjusters.

36. In a letter to WV, BPL as described the duties it would undertake as project manager. It agreed to:

i. Advise on all financial implications of the project;

ii. Prepare an outline of the construction program;

iii. Prepare an outline cash flow of the financial requirements;

iv. Prepare outline budgets for all aspects of the work to be carried out;

v. Monitor and control cost throughout the program;

vi. Assist in financial control and liaising with owners and bankers;

vii. Monitor progress of the project;

viii. Monitor the performance of the various parties;

ix. Maintain financial control of the project.

37. Mr. Patrick Harrigan was Chairman of the WV Strata Executive Committee. He retained BPL as project manager. He says he was

not monitoring the payments to the Hurlstones and relied "heavily" on Danny Scott and Alastair Paterson. He was usually advised of the payment later on. He never saw invoices.

38. As a loss adjuster, Mr. Paterson is appointed by and paid by the insurance company. He regarded his mandate as one that required him to ensure that a fair settlement within the terms of the applicable policy was reached. He functioned, he says, as a "completely independent professional."

39. Mr. Paterson would not describe the fact that he was both loss adjuster and project manager as a conflict of interest. He denied that a loss adjuster is the agent of the insurer and said his obligation was to settle the claim fairly on behalf of both parties. He conceded that as property manager he represents the insured "to a certain extent". He agrees that he was not keeping a record of costs or taking copies of invoices. He says he felt "very comfortable" with the advances he was recommending and could have produced a detailed accounting if asked.

40. Based upon Mr. Scott's instructions, Mr. Paterson understood that he was to establish the amount of the loss at WV, recommend reasonable advance payments to the contractor on a regular basis to ensure sufficient cash flow and to allow good progress to be made, and to ensure that the advances did not exceed Sagicor's liability under the policy. It was clear to him that Crawford was not responsible for checking the quality of the work. Its duty was to ensure that progress was being made and that it bore a "not unreasonable" relationship to the advanced payments to the Hurlstones.

41. Mr. Paterson says the job of a project manager is to "assist the loss adjuster" by obtaining quotes, prices and scopes of work. The advances were just that; they were not intended to be accurate certifications. Mr. Paterson says it was never intended that he would certify the works in the ordinary way and Sagicor was always well aware of his methodology. He did not perform the detailed investigation which would be expected and required if he was presenting a formal certification.

42. It was made clear to everyone that the Hurlstones were not prepared to finance the ongoing cost of the reinstatement; they needed to have regular cash advances for the purchase of materials in the United States and to pay their ongoing costs. Many building materials were not available locally, especially after the destruction caused by the hurricane. All materials and equipment of any consequence had to be brought in from overseas and had to be paid for in full prior to shipping. Advance payments were necessary for this purpose. Mr. Paterson says it was clear from the beginning that advances were "not tied to the actual work done."

43. Robert Hurlstone made it clear to John Hurlstone and to Danny Scott that he was only prepared to undertake the project if he was paid a substantial mobilization fee. He did not intend to finance any part of the construction himself. He anticipated that it would be difficult to secure the needed building materials and that substantial deposits would have to be paid to suppliers when the orders were placed.

Expert Evidence on Loss Adjusting

44. Mr. Michael Thomas, a chartered quantity surveyor and qualified loss adjuster and the managing director of JEC Property Consultants Ltd. in the Cayman Islands (a leading firm of chartered surveyors), gave expert evidence on loss adjusting. He noted that Mr. Paterson (through BPL) was also the project manager. He said this was a "major" conflict of interest. The loss adjuster represents the insurer: a project manager is appointed by the insured to represent their interests. A project manager is expected to verify the quality and value of work undertaken by the contractor and of materials delivered, certify these, and then present the certified payment request to the loss adjuster. It was Mr. Thomas' opinion that the conflict of interest arose at the very start of the project and remained in existence until the defendants were discharged.

45. Mr. Thomas said that in his experience a loss adjuster will recommend advances based upon estimates which are not necessarily "finalized" but which fall within the reserve set by the loss adjuster. Mr. Paterson made a settlement recommendation to

Sagicor on June 15, 2005. The recommendation includes a schedule listing "elements" of the work, a recommended settlement amount for the element, and a column headed "To Date". When Mr. Thomas saw the column headed "To Date" in the report he understood it to represent Mr. Paterson's opinion of the value of the work executed to that date. Mr. Paterson says that this column was not a representation concerning the value of the work done but was only a statement of the amount the Hurlstones were claiming for it. BPL never certified any work or payments. Mr. Paterson says he made that clear to Mr. Delessio.

46. Mr. Richard Purdom is a civil engineer with training as a quantity surveyor who gave evidence on behalf of the Hurlstone defendants. He has had experience in the construction industry in the Cayman Islands and was working here in the period following Hurricane Ivan. He says that in the case of a fixed price contract an interim claim for payment would be certified on a "percentage complete" basis. The percentage is based upon an estimate and not a precise figure. Invoices would be examined but the primary basis of the estimate would be a measurement of the work done.

47. On a fixed price contract, Mr. Purdom would not expect the contractor to keep records in sufficient detail to account to the employer for the manner in which costs had been incurred. Historic cost accounting is not a concept used on a fixed price contract although it becomes important on a "cost plus" contract. The latter are rare. They are expensive to administer because the contractor is required from the very start of the project to make a detailed allocation of all costs incurred on the particular project. Details of costs would need to be provided for labour, materials, equipment and plant hire, and incidentals. A representative of the employer would conduct a continuous review of the cost allocations.

48. Given that the Hurlstones and Mr. Paterson expected to enter into a fixed price contract, Mr. Purdom would not have expected them to keep the sorts of records necessary to a cost plus contract. Moreover, it would have been "very likely" that no accurate historic cost accounting could have been produced by June, 2005. Mr. Purdom felt it would be natural for the necessary records to be

unavailable, given the expectation at the outset. Hence, the request for such an accounting would have been unreasonable. That would have been apparent to any experienced surveyor or loss adjuster who was familiar with the project.

49. Mr. Purdom interpreted the "To Date" column in the settlement recommendation as being an assessment of the percentage of work carried out to that date. He also said the column might include anything which had been ordered even if not installed. The custom of the trade is to include the cost of the materials ordered in a column of that sort.

Events of January, 2005

50. A total of CI $2,900,000 was advanced by Sagicor to the Hurlstones. Mr. Scott sets out the following table of advance payments made:

Date	Amount (CI$)	Balance (CI$)
22nd October 2004	250,000	250,000
26 November 2004	250,000	500,000
31 January 2005	500,000	1,000,000
2 March 2005	400,000	1,400,000
23 March 2005	500,000	1,900,000
25 April 2005	500,000	2,400,000
27 May 2005	500,000	2,900,000

In January, 2005 Mr. Stuart Dack, the CEO and President of Cayman National Corporation (which is the parent company of Sagicor), met with Alastair Paterson, Jonathan Nicholson, Danny Scott and others. He said that the insurance claims arising from the Hurricane threatened the long term viability of both Sagicor and its parent company. He emphasized that outstanding claims needed to be adjusted expeditiously and fairly so that a realistic understanding of the exposure could be arrived at. He did not say that claims had to be reduced by any arbitrary methods but emphasized the need to arrive at realistic estimates. In his

experience, reserves tend to be set at a higher level than the actual settlement amount and he wished that the settlements be reached quickly or an accurate reserve set. A reduction of 15% was mentioned. He requested that the adjustment work by Crawford be reviewed by Sagicor before a settlement offer was made to WV. Mr. Paterson was instructed to economize on settlements at every possible opportunity. The meeting left in Mr. Paterson's mind some doubt about the solvency of Sagicor.

51. At this meeting the participants were also told that all of the Sagicor policies were indemnity policies and not based upon reinstatement. As a consequence, settlements would have to take depreciation into account. Owners would receive the actual value of the lost property not the cost of reinstating it to its former condition. This came as a surprise because Sagicor in the past had treated their policies as reinstatement policies. In addition, some losses from Hurricane Ivan had already been settled on a reinstatement basis.

52. Mr. Nicholson (a Crawford principal) was surprised that Sagicor's policies were actually indemnity policies not reinstatement policies. He says that Crawford had been approaching claims on the basis that these were reinstatement policies. At the same time, he heard Mr. Scott speak of Sagicor's precarious financial position. Mr. Dack said that there was a likelihood Sagicor would be considered insolvent if the reserves remained at the current levels; they had to be reduced. Someone asked if a 15% reduction would be enough and he confirmed that it would be.

53. The initial advance payment of CI $250,000 was considered by John Hurlstone to be a payment on account in respect of the clean-up work. No estimate on the clean-up had been provided; the preliminary document prepared by him simply said that it was to be assessed later. The reason for that was an instruction from Mr. Paterson that heavy machinery could not be used during the clean-up because it was necessary to avoid damaging underground electrical and plumbing fixtures. In his report of January 15, 2005 Mr. Paterson said that he had reviewed the clean-up expense and

costs to date and was satisfied that the funds were being applied properly.

54. John Hurlstone repeatedly made his concern over the lack of timely advance payments known to the insurer and to Mr. Paterson. This is evident in his letters of December 20, 2004, January 17, 2005 and March 1, 2005.

55. Mr. David Hambly is a director of Charles Taylor Consulting Plc, who are loss adjusters and risk consultants. Shortly after the hurricane he came to Grand Cayman to adjust certain claims including approximately two hundred for Sagicor. He had been brought in from Europe to assist Sagicor in settling the many hurricane claims it was facing.

56. Mr. Scott instructed Mr. Paterson to review all details of the claim with Mr. Hambly in January, 2005. Mr. Hambly met with Crawford to assist them with understanding how to make an allowance for depreciation for claims under Sagicor's indemnity policies. Then, Mr. Hambly attended at Crawford, reviewed the

files, and expressed himself satisfied that the reserves were reasonable.

57. From January on, Mr. Paterson discussed the various Sagicor claims with Mr. Hambly on a regular basis. When advances were made to the Hurlstones in February, March, April and May 2005, Mr. Hambly gave his prior approval to each. Mr. Paterson describes Mr. Hambly as "very professional".

58. In January, 2005 Sagicor became concerned that Mr. Paterson may have a conflict of interest in acting as loss adjuster and as project manager. Sagicor advised him that he must step down as project manager. At the beginning of February, Mr. Scott was advised that Mr. Paterson had stepped down. Mr. Scott referred to an email of February 15, 2005 from Mr. Paterson to Mr. Harrigan saying "I am not your project manager, I am the loss adjuster." In an email of March 8, 2005 Mr. Paterson asserted that Malcolm Stephenson was the project manager. On January 25, 2005 Mr. Paterson wrote to John Hurlstone telling him that the Strata was reluctant to sign a formal contract until their financial exposure could be established

with certainty. He also told them that Malcolm Stephenson had been appointed as "project overseer" for a period of some sixty days. Finally he assured him that:

> "You will be continued to be advanced funds on a monthly basis by Sagicor Insurance until such times as the claim is finalized. Sagicor will approve and certify the payments."

Nevertheless, in other correspondence Mr. Paterson described taking steps which would ordinarily be taken only by the project manager. By April 19, 2005 BPL was again acting in a formal capacity as project manager. Mr. Paterson (in a progress report of April 19, 2005) said there "had" been a conflict of interest but that the insurance claim had been substantially calculated with the result that the conflict had disappeared.

59. Mr. Paterson says BPL served as project manager until about January 18, 2005 at which time Malcolm Stephenson was appointed in its stead. Around the beginning of April, 2005 BPL was asked to take on the administrative role again. Mr. Stephenson's involvement was brought to an end. Mr. Paterson says that Mr. Stephenson was appointed to assist him.

February to May, 2005

60. Mr. Hambly was not at Sagicor when the request for payment of CI $400,000 was made on February 14, 2005. The request also contained a promise to establish a definitive value of the loss by the end of March.

61. Prior to the March 2, 2005 payment, Mr. Paterson said that the project was progressing satisfactorily. A letter dated March 19, 2005 from Mr. Paterson requested a further payment. The letter promises to conclude the claims settlement by the end of March. Mr. Paterson made the same assertion prior to the March 23, 2005 advance. The claim was not settled.

62. Mr. Hambly authorized a further payment in response to a letter dated April 20, 2005 from Mr. Paterson which represented that the work was still progressing satisfactorily and that money was needed for kitchens, roofing materials, windows and doors. The letter

promised a final report from Mr. Paterson by the end of May. Mr. Hambly expressed concern to Mr. Scott about the lack of detail, which Mr. Scott shared. Mr. Paterson assured him that he was "working on" a more detailed report and was "very close" to finalizing the claim.

63. Mr. Scott trusted Mr. Paterson and continued to make the advances. There was a meeting in April, 2005 between John Hurlstone, Mr. Paterson and Mr. Scott to discuss payments. Mr. Scott said enough to give Mr. Hurlstone the impression that the insurer's financial position was deteriorating. It was now "obvious" to John Hurlstone that the failure to make timely advance payments was caused by Sagicor's poor financial situation.

64. In May, 2005 Mr. Paterson told John Hurlstone that he could finish adjusting the claim within a few weeks. He said he would require some additional information from the Hurlstones. John Hurlstone agreed to provide it. Robert Hurlstone says he provided cost information to Mr. Paterson whenever it was requested.

65. On May 26, 2005 Mr. Paterson requested another payment. The letter did not say what work had been completed since the previous advance and what the new advance was required for. Mr. Hambly discussed this request with Mr. Scott and authorized the payment.

Events of June, 2005

66. Robert Hurlstone asked for a further advance of CI $750,000 in early June. Mr. Paterson explained that he was reviewing the entire loss with a view to obtaining an overall settlement.

67. Mr. Harrigan thought they were close to a settlement by this time. As at June 9, he would have settled for the suggested amount of CI $5,500,000.

68. Mr. Scott asked Mr. Paterson on numerous occasions to reach a final settlement on the claim. On 9th June, 2005 Mr. Paterson sent Sagicor an email suggesting a settlement. Mr. Paterson says that he reached agreement with Danny Scott and David Hambly on June 9, 2005 on the amount of the settlement. The figures he advanced

were discussed in detail and then agreed upon and approved by both Mr. Hambly and Mr. Scott in a meeting. Mr. Hambly signed the document as "agreed with Alastair Paterson" and Mr. Scott initialed it. Not unreasonably, Mr. Paterson took this to mean that the figures were approved by Sagicor, whose maximum exposure would be CI $5,500,000. The total loss was calculated at approximately CI $6,500,000. The difference comprised the deductible portion of the policy, uninsured items and additional work and upgrades requested by owners. The cost of the seawall, the clean-up and demolition was not yet the subject of an agreement. It was also agreed on June 9th that no more advances would be made to the Hurlstones until a total contract price had been agreed upon.

69. Mr. Scott says he felt that the final settlement would be in the region of CI $4,500,000 so he asked Mr. Paterson to look at the claim again. On June 15, 2005 Mr. Paterson sent a further report recommending a reserve of CI $5,494,851. This report also said that the sum of CI $3,735,518 had been spent "To Date". In his first witness statement, Mr. Scott refers to the column headed "To

Date" in the report. He interprets the figures for air conditioning, electrical work and plumbing under that column as representing work which had been completed at that point.

70. Between June 9 and June 18 Mr. Paterson continued to work on some remaining pricing issues. By June 15, 2005 advances in the total amount of CI $2,975,000 had been made. Mr. Paterson says, however, that "all of these figures were subject to final discussions and negotiations with all parties ...". The Hurlstones at this point were claiming approximately CI $3,700,000. Mr. Paterson had refused to authorize any further advances until a definitive settlement was arrived at. There was still no agreement on a number of individual items. Since final agreement on the seawall/foundation question had not been reached by June 9, 2005, Mr. Paterson included the cost of that work in his loss estimate but split the amount in dispute equally between the insurer and the owners. He explained this to Mr. Hambly and to Mr. Scott and they each accepted his reasoning when they approved his draft report. It was understood, however, that there were to be further negotiations on this issue.

71. Around this time, Mr. Frank Delessio arrived at Sagicor and soon thereafter expressed concern about the lack of progress and the lack of documentation to justify the advances. Sagicor refused to make any further advances "until there was a full accounting of the advances up to May 27, 2005". Mr. Scott was expecting an audit by his re-insurers in the near future and, for that reason, it was critical that claims files were documented properly.

Frank Delessio

72. Mr. Frank Delessio, who figures prominently in this narrative, passed away before the second trial. Although the trial bundles contain a witness statement by Mr. Delessio I am advised by counsel that it was not submitted as evidence of the truth of its contents.

73. Mr. Scott first met Frank Delessio in 2001. He knew him as an experienced loss adjuster with a good knowledge of the Cayman Islands and the Caribbean area. In 2005, Mr. Scott offered Mr.

Delessio the job of Senior Vice President and consultant at Sagicor. Around June 15, 2005 he joined Sagicor. Mr. Scott said Mr. Delessio was given a great deal of autonomy at Sagicor. He occupied the boardroom. He was a very competent loss adjuster.

74. Mr. Paterson first met Frank Delessio in the 1990's when Mr. Delessio came to Cayman as a director of a loss adjusting organisation. Mr. Paterson was the local agent for that organization. Mr. Paterson says he found Mr. Delessio to be aggressive and confrontational. Clearly, the two men were not fond of each other.

75. By 2001, Mr. Paterson had left the firm for which Mr. Delessio was working and become managing director of Deloitte & Touche Property Management. He says that that Mr. Delessio was "touting for work" on Grand Cayman. Mr. Paterson wrote to the Immigration Department to ask if Mr. Delessio had the proper work permit. He says that Mr. Delessio had been doing work for the private sector although his reason for being permitted to work here was a mandate from the Cayman Islands Government. After Mr.

Paterson's inquiry of the Immigration Department, he believes Mr. Delessio formed the view that Mr. Paterson was solely responsible for these problems. The relationship deteriorated further.

76. Mr. Nicholson attended a meeting with Alastair Paterson, Danny Scott, and Frank Delessio. He said that Mr. Paterson was treated by Mr. Delessio with "total disdain" during the meeting. At one point Mr. Delessio said to Mr. Paterson that Paterson "was not a loss adjuster and never had been."

77. Mr. Harrigan dealt primarily with Mr. Delessio after June, 2005. He says that Mr. Delessio appeared to familiarize himself closely with all of the work being done at WV and was an experienced loss adjuster. He made it "patently clear" to him on various occasions that he did not like Mr. Paterson. This dislike was displayed prior to and subsequent to the commencement of the original proceedings. On several occasions, Mr. Harrigan heard Mr. Delessio state that he intended to destroy Mr. Paterson and BPL. Mr. Harrigan cannot recall the exact words used, but says it conveyed the impression to him that Mr. Delessio intended to drive

Mr. Paterson out of business and destroy him professionally. Mr. Harrigan found Mr. Delessio to be aggressive, agitated, and extremely unpleasant on occasions. He characterized him as "obsessed by a desire to damage Mr. Paterson."

78. BPL sent an invoice to WV in the amount of approximately CI $79,000 for professional fees. It was the insurer's obligation, according to Mr. Harrigan, to pay them. When the invoice was first presented to the Strata Committee Mr. Delessio said that BPL would not be paid because "professional fees were required to be paid to a professional" and, in his view, Mr. Paterson was not a professional. He threw the invoice into a waste paper basket.

79. Mr. Purdom worked closely with Mr. Delessio. He said Mr. Delessio asked his opinion of the value of the work done and "pressed me hard" for an answer. Mr. Purdom was unable to comment. He found Mr. Delessio to be experienced and competent. He had a "vast" amount of experience covering disaster situations.

80. One of Mr. Delessio's first tasks was to perform a detailed review of all claims files which remained open. He focused much of his attention upon the WV project. He would have found an instruction on file from the President of the WV Strata to Sagicor to make cheques payable directly to the Hurlstones as instructed by Crawford. He appears to heve become concerned that the documentation was insufficiently particular.

81. Shortly after the site visit Mr. Delessio discussed his concerns with Mr. Scott and, with his agreement, asked Mr. Harrigan to revoke the authorization for payments to the contractors. Mr. Scott then met with Robert and John Hurlstone and said there would be no more advances until there had been a full accounting of the monies advanced.

82. Mr. Paterson was instructed immediately to deal only with Mr. Delessio instead of Mr. Scott and Mr. Hambly. A letter from Mr. Delessio to Mr. Paterson dated June 20, 2005 asserted that Mr. Delessio had commenced "a full review of the file and settlement options which you outline in your email of 9th June 2005".

83. Mr. Harrigan gave some scope sheets to Mr. Delessio; he had obtained them from Mr. Ulrich, their author, who worked for Crawford and BPL for a short time. They were date stamped June 13, 2005. These scope sheets showed a total estimate for the cost of repairs of CI $4,777,742.20. This amount was well below the settlement recommended by Mr. Paterson in the amount of CI $5,494,851.

84. Mr. Delessio wrote to Mr. Paterson requesting a unit by unit, line by line breakdown of the damages. He advised Mr. Paterson that the June 9 summary was not sufficiently detailed. He asked for a full report outlining all "costings" by June 30, 2005. Mr. Delessio wrote again to Mr. Paterson two days later saying he could not reconcile the figures in the June 9 email. He questioned how the cost of the roof had been calculated. He asked for a meeting.

85. The response from Mr. Paterson was that the claim was essentially agreed; the implication was that there was no need to discuss the issues raised by Mr. Delessio at this juncture. Moreover, Mr.

Paterson said that the contractor "should not have to further validate any of his contractual costs either current or future as he has a lump sum fixed price contract and his contract is with the Strata". There was no lump sum fixed priced contract in existence yet. The contractor had been paid a substantial amount of money. The Scott Schedules filed in this proceeding by the defendants assert that CI $3,056,436 worth of work had been completed by this date.

86. From June 18 to June 29, 2005 Mr. Paterson was away on vacation. Upon his return, he met with Mr. Delessio. Mr. Paterson had been asked to bring a copy of the scope sheets to the meeting. Although Mr. Ulrich had been asked to prepare the draft scope of works on a computer he produced a handwritten document. Mr. Paterson determined that some major elements had been omitted from the estimate including clean-up, demolition, the re-building of the seawall, storage containers, fees and items such as hurricane shutters and landscaping. There were, said Mr. Paterson, "numerous errors." As a result, Mr. Ulrich's estimate for the total

loss was inaccurate. Mr. Paterson estimates that the total value of the omissions in Mr. Ulrich's assessment was CI $1,781,376.

87. Given the errors, Mr. Paterson did not wish to submit the scope sheets to his client. When Mr. Delessio asked him to bring the scope sheets to the meeting on June 29th, he found himself with a hand written document which would be difficult to photocopy and which showed erroneous pricing for many items. He instructed a secretary to redact the prices and notes using white out to paint over them. It was this redacted document which he presented to Mr. Delessio and which Mr. Paterson intended to treat as a "working document" to which he would add his own assessment of values.

88. Mr. Scott says he recalls two meetings with John Hurlstone, one of which was on June 18th. He asked for an accounting or a release from liability. Sagicor was willing to proceed on either basis. Mr. Scott said that the re-insurers were not willing to put up their share of the loss because they would not accept Mr. Paterson's documentation. They needed a proper accounting. It was because the re-insurers wanted the documentation that Mr. Scott asked for

them. That was his only motivation. Mr. Harrigan had already said he would sign a release but did not do so.

89. Mr. Scott claims that he was assured on June 18, 2005 by John and Robert Hurlstone that "a full set of accounts had been given to Mr. Paterson and would be delivered to Sagicor". He never received them. Robert Hurlstone denies telling Mr. Scott at anytime that he would deliver "a full set of accounts" to Sagicor. He is unaware of which accounts Mr. Scott may have had in mind. John Hurlstone denies having had any meeting at all with Danny Scott on June 18, 2005. He has produced clear documentary evidence to show he was in Europe at the time of this meeting. When confronted by Mr. Hurlstone's passport entries, Mr. Scott said he must be wrong about the date.

90. Mr. Scott contradicted his own evidence in a number of important ways. At one point he said his witness statement was "entirely incorrect". He said he was not worried about how much money had been paid to the Hurlstones. The only reason he needed an accounting was for the benefit of the re-insurers. He denied that he

had decided to fire Mr. Paterson. He said the witness statement was written years afterwards by the attorneys. He agreed with the suggestion that portions of his witness statement amounted to "fiction". Essentially, he says he never read documents, affidavits or expert reports until the time of the first trial.

91. While I accept some portions of Mr. Scott's evidence on other matters, I am not satisfied that he had either of the two meetings with John Hurlstone. I am satisfied that, as John and Robert Hurlstone have said, no request was made to them for documentation of the work already completed.

Disagreement

92. Mr. Paterson recalls sitting down with Mr. Delessio "to explain the figures" before the end of June. He envisioned a fixed price contract and therefore felt that it did not matter how much the Hurlstones had actually spent to date. He concedes that he was aware the insurers wanted to know how much that was. He considered that he had finished his task as loss adjuster. Mr.

Hambly had approved his figures. What the Hurlstones had spent the money on was not a "major concern" of Mr. Paterson. He agrees that he never did provide cost accounting documentation. He did not provide Mr. Delessio with what he asked for in writing but he did so verbally. He says he gave him as much clarity as he could. He tried very hard to satisfy Mr. Delessio but it was impossible. He also says that he could only provide "very approximate" figures of what had been spent. Mr. Delessio actually wanted an accounting on a cost plus basis which would have been a long and costly exercise.

93. Mr. Paterson was rather contradictory about whether he could or could not have provided Sagicor with what they wanted. At one point he says he could have done what Mr. Delessio wanted but it would have taken about two weeks. He also agrees that he would have had time to do what Mr. Delessio wanted by mid-August. In re-examination he said he was very doubtful he could have estimated the value of the work on a cost plus basis. It was not a realistic exercise. The distinction is between a full historic cost accounting (which was likely impossible at this stage) and

providing a reasonably detailed summary of what had been spent on the various components of the project (which could have been accomplished with some difficulty).

94. Mr. Scott has said that Sagicor never received the clean-up invoice and that he and Mr. Delessio were unaware the clean-up represented a major part of the cost. Mr. Paterson says he did pass it on to Sagicor. Mr. Delessio's file has never been disclosed by Sagicor, who say it no longer exists. It is clear that he kept one and that the cleanup invoice would be in it if it was provided to Sagicor. In light of this (and other) failures by Sagicor to make proper disclosure, I draw the inference against them that Mr. Paterson is correct. He did provide the cleanup invoice to Sagicor and Mr. Delessio was aware of it by July 5, 2005 at the latest.

95. Mr. Hurlstone was away from Grand Cayman on June 28 and 29, 2005 for medical reasons. He then went to Little Cayman to secure his apartment there in the face of another advancing hurricane. Upon his return to Grand Cayman he found that he and his workers had been shut out of the construction site. He met Frank Delessio

for the first time when Mr. Delessio arrived at the site and told Robert Hurlstone that he had been fired and was not allowed to remove his construction equipment and tools. Later, he was permitted to remove them. Mr. Delessio had no authority to bar HGCL from the job site.

96. At the time of being barred from the site, Robert Hurlstone says he had completed about 50% of the work and expected to finish in December, 2005. He expected the final cost to be around CI $6,500,000.

97. A document entitled "Hurlstone anticipated contract" was submitted by Mr. Paterson to the Hurlstones on July 25, 2005. It contains Mr. Paterson's own assessment of what would constitute a reasonable contract sum although, even at this point, some of the figures were still open to negotiation and debate. The contribution by Sagicor on this analysis was to have been CI $5,358,173.

Attorneys Are Consulted

98. Mr. Scott said that because of his growing concerns he and Mr. Delessio approached the law firm of Quin and Hampson "with a view to clarifying the legal position". (Quin & Hampson became the firm of Mourant during the progress of the litigation but I will refer to it consistently as "Q&H".) By early July he had been told by Mr. Delessio that the value of the work done was around CI $1,300,000. Without the knowledge of Mr. Scott, Mr. Delessio arranged for Mr. Paterson to be placed under surveillance by private investigators in early July.

99. The first meeting with Q&H was on July 5, 2005. Mr. Scott says that the possibility of a criminal offence having been committed was "determined" and a meeting was arranged with the head of the Financial Crimes Unit of the Royal Cayman Islands Police Service. That meeting took place on July 7, 2005.

100. Mr. Charles Quin, Q.C., a partner in the firm of Q&H, and Mr. Delessio attended the meeting. Mr. Scott also says he advised the

head of the Cayman Islands Monetary Authority of the situation because they regulate the insurance industry.

101. Mr. Scott says he left the entirety of the file with Mr. Delessio as he did not want to deal with it due to a conflict of interest. Once Q&H had been instructed, "Frank Delessio was responsible for dealing day-to-day with Sagicor's attorneys". When asked if Mr. Delessio had told him about the fraud allegation, Mr. Scott replied that he was making an accusation and "I had to let it run its course". Mr. Dack agreed that considerable trust had been reposed in Mr. Delessio. In particular, he was trusted to deal with the lawyers and to provide them with accurate information.

102. Robert Hurlstone says that his company did all of the purchasing of materials. He kept copies of the invoices. There are no pay slips issued to workmen although he did record their times. A lot of the workmen were paid in cash. These employees were not necessarily construction workers; a majority were not. He charged weekly for the rental of his equipment.

103. Before each payment, Mr. Paterson would come to the office and look at the invoices. If someone had requested an accounting of him, he would have given them all the information he had. No one did. Mr. Hurlstone says he never understood that Sagicor wanted to know what the money advanced to him had been spent on. He had the invoices in a filing cabinet. His brother never asked to see these documents. Mr. Paterson never told him that Sagicor wanted some sort of accounting. Mr. Paterson had free access to the office. He reviewed the work carefully and thoroughly. However, if Mr. Hurlstone had been asked for a detailed cost accounting, he thinks that would not have been possible. In any event, it would have taken about two to three months and could have not been 100% accurate.

104. Robert Hurlstone was asked why he did not produce the invoices when the lawsuit first started. He says simply "I wasn't asked." He believes he gave the documents to his lawyers three or four months later. They were eventually produced to Sagicor in September, 2008. Mr. Hurlstone says that he was not aware at any material time of any dispute about the value of the work done or any interest

on the part of Sagicor or WV in determining its value. Even after the August 4th meeting, he was not told that Sagicor wanted an accounting. I found Mr. Hurlstone to be a reliable witness and I accept this evidence.

Alan Purbrick

105. Mr. Purbrick is a Chartered Surveyor practicing in England, a member of the Royal Institution of Chartered Surveyors, and a member of the Association of Building Engineers. He qualified as a Quantity Surveyor in 1989. He worked on another reinstatement project (Ocean Club) on Grand Cayman as loss adjuster. Mr. Delessio asked him to come to Grand Cayman to assess the work done at WV.

106. Mr. Purbrick describes Frank Delessio as a business acquaintance. He had encountered Frank Delessio in the course of his work before coming to the Cayman Islands. He found him loud and brash.

107. Upon arrival Mr. Purbrick met Mr. Delessio for breakfast and then the two men went to the job site. Mr. Delesssio made it clear that he wanted to challenge the Hurlstones and that he was contemplating a court case. Mr. Delessio did not tell him at this point that he was putting together a case of fraud. He was not told that the matter had been reported to the police.

108. Mr. Delessio did say to Mr. Purbrick that there was a big disparity between the amount paid and the value of the work. He told Mr. Purbrick not to speak to Mr. Paterson or to the Hurlstones. Mr. Purbrick got the impression that Mr. Delessio was not on the best of terms with Mr. Paterson. When Mr. Purbrick was asked why he did not contact Mr. Paterson, he said it was because he was asked to write a totally independent report. When Mr. Delessio told him not to make inquiries of the Mr. Paterson and the Hurlstones, he said "it will not get you anywhere".

109. After receiving his instructions, Mr. Purbrick walked around the site with Mr. Delessio. Mr. Purbrick claims he spent five days conducting a "detailed measurement and assessment" of the project.

Mr. Delessio was not involved. The report, he says, reflects Mr. Purbrick's own independent conclusions. He denies categorically that Mr. Delessio told him his own opinion of the value of the work done.

110. He did ask Mssrs. Delessio and Ulrich for drawings, which were not provided to him. When asked why he did not contact the engineers to obtain drawings, he said "I just didn't". Mr. Purbrick only became aware of the existence of drawings at the meeting of experts in this case. Mr. Purbrick repeatedly asked for documents like sub contracts, invoices, day work sheets, and cancelled cheques to subsidiaries. He never received any.

111. Patrick Ulrich provided his scope sheets to Mr. Purbrick. The two men compared the Purbrick valuation of the work against the estimates in the scope of works. Mr. Ulrich also gave him the costing of the seawall. Mr. Ulrich told him that the strip out was carried out by another contractor.

112. Mr. Purbrick excluded the clean-up costs from his evaluation because Mr. Delessio told him to do so. Mr. Scott's understanding, which he believes Mr. Delessio shared, was that the clean-up had been largely undertaken by WV itself and not by the Hurlstones. Mr. Scott believed that the only clean-up obligation which was the responsibility of the Hurlstones was for the communal areas. Invoices produced by the Hurlstones just prior to trial show that they had in fact done clean-up work in the units themselves.

113. Mr. Purbrick obtained his rate for concrete from Mr. Ulrich. However, he also said that Mr. Ulrich provided him with a rate of CI $170 and he reduced that to CI $150 because he "felt" Ulrich's figure was too high.

114. When Mr. Purbrick was asked if he had enough information to value everything, he said he did. When pressed about the labour rates, he said that he does not have documentary evidence to back up most of them. He was never given any labour rates to use by Frank Delessio. He also said that he did not think it was necessary to check with a local quantity surveyor concerning costs or rates.

He added that he had costs which had been used by other loss adjusters.

115. Significantly, he said that had he known that there was a system of "on account" payments it would have explained some of the discrepancy. No one told him at any time that advance payments had been made. When asked why he did not contact the sub contractors and suppliers he said he did not have enough time.

116. Mr. Purbrick described his first report as a preliminary one which was intended to be a guide to inform a further investigation by Sagicor. He would have taken the position that further investigation should be done before a fraud allegation was made in a lawsuit.

117. Mr. Scott says that Mr. Purbrick's conclusions were "consistent with both my own perception with the extent of works completed at the site and that of Frank Delessio." When he received Mr. Purbrick's report Mr. Scott was very angry at its findings. He concluded that Sagicor had been defrauded.

118. Andrew Moran, a London barrister, was asked for an opinion. It reinforced Mr. Scott's view and a decision was taken by Sagicor's board of directors to initiate formal legal proceedings. He says this step would not have been taken but for the advice of Mr. Purbrick and the attorneys.

Expert Opinion on the Purbrick Report

119. Mr. Purdom was retained by Sagicor to assist in assessing insurance claims on Government properties here. He has studied the report of Mr. Purbrick and provided expert opinion evidence on it on behalf of the defendants. He also attended the experts' meeting in London.

120. Mr. Purdom commented on the major flaws in Mr. Purbrick's valuation.

121. When asked how he would have gone about evaluating the work, Mr. Purdom said he would have asked for drawings and the scope

of work and then interviewed the contractor. He believes the drawings would have made a "huge difference" to Mr. Purbrick if he had obtained them. He said one should discuss with subcontractors what materials they have ordered. Mr. Purbrick failed to refer to the APEC drawings or any relevant rate schedule and did not consult anyone locally to ascertain costs. Mr. Purdom says "it would have been very easy" to obtain an accurate rate for labour locally.

122. Mr. Purbrick's labour rate of CI $14 per hour was far below the rate considered by Mr. Purdom to be reasonable, i.e., CI $34.80 per hour. Mr. Purbrick failed to account for the fact that there was double boarding in the ceilings in order to comply with fire regulations; he assumed it was single boarding. He used the rate of CI $150 per cubic yard for concrete for the seawall but a rate of CI $250 per cubic yard is necessary to include the cost of placing it. Mr. Purdom estimates that the stripping out of the units would take a total of 3,917 man hours; Mr. Purbrick estimated 1,462 man hours. The cost of the initial clean-up is estimated by Mr. Purdom at CI $526,792, far higher than Mr. Purbrick's estimate but

significantly less than what was charged. With respect to the seawall, Mr. Purbrick used an incorrect measurement for the amount of concrete required, failed to incorporate the cost of rebar in his estimate, and failed to take account of the full cost of shuttering. His estimate was far lower than Mr. Purdom's estimate of CI $325,052.

123. Other significant differences in the two estimates included the cost of installing timber floors, windows and doors, ceilings, and roofs. With respect to mechanical, electrical and plumbing costs, Mr. Purbrick estimated the value of the work at CI $90,339 while Mr. Purdom found it to have a value of CI $315,700. There were also significant difference in the costs of "preliminaries", overhead and profit, and materials left on the site. Mr. Purbrick's figure for overhead and profit was 10%, which Mr. Purdom said was "was extremely low" and unreasonable. In the local market, 20% would be appropriate.

124. Mr. Purdom, unlike Mr. Purbrick, examined the invoices and payments made to the relevant subcontractors. He said that Mr.

Delessio should have required an explanation for the discrepancy between the valuation and the amounts advanced.

125. Mr. Purdom attended a meeting of the expert witnesses in this case in London on September 17, 2008. He says he was "genuinely astounded" to learn that Mr. Purbrick, who also attended the meeting, had failed to obtain "critical information" from the consultants employed in the reconstruction works at WV. In particular, Apex Engineering should have been consulted. He said that Mr. Purbrick failed to ascertain the strength of the concrete used in the reconstruction and, although he made an estimate of the amount of steel reinforcement used, based his rates for that estimate on U.K. construction rates as opposed to those in Cayman. The weight of the evidence in this case establishes that Cayman rates are likely to be significantly higher than those prevailing in the United Kingdom and are bound to be so in the aftermath of a hurricane.

126. Mr. Purdom described three major deficiencies in the report of Mr. Purbrick. First, it made no allowance for the cost of cleaning up the

site. At the experts' meeting, Mr. Purbrick told Mr. Purdom that he had been instructed by Mr. Delessio to refrain from taking the clean-up cost into account.

127. Second, Mr. Purdom found it difficult to understand why Mr. Purbrick had not consulted the drawings of the seawall or made arrangements to discuss the construction of the seawall with its architect, Mr. Sabti. Mr. Sabti is an engineer with offices on Grand Cayman. At the experts' meeting, Mr. Purbrick confirmed that he had not seen the drawings but had simply relied on his own experience and measurements.

128. Third, Mr. Purdom took issue with Mr. Purbrick's labour rates. He said that Mr. Purbrick relied upon his experience of labour rates in the United Kingdom as well as the rates for the Ocean Club restoration. Mr. Purdom relied upon local labour rates and invoices from local suppliers.

129. He concluded that the Purbrick report was "fundamentally flawed." Since Mr. Delessio was a very experienced and competent loss

adjuster, Mr. Purdom said that Mr. Delessio "should have realized immediately on reading the report" that it was deficient in these respects.

130. Mr. Thomas, who estimates that he spent around 600 hours analyzing the evidence in this case, gave expert evidence on Mr. Purbrick's opinion. Mr. Thomas formed his own opinion of the value of the overall loss and estimated it at CI $6,935,551. That figure is quite close to Mr. Paterson's assessment.

131. Mr. Thomas made a number of points which serve to illustrate why Mr. Purbrick's estimate was so low. He says the rate for labour "almost doubled" for the first six months following the hurricane. There was general agreement in the industry that the cost of construction work increased by 20% to 25% after the storm; these increased costs remained in place for about 18 months. There was a huge demand for construction work by the reputable larger contractors.

132. Nevertheless, Mr. Thomas found the Hurlstone's labour rate of CI $35 per hour to be unreasonably high and said it was higher than the established norm for unskilled labour after the storm. He thought the proper range was CI $20 to CI $25. (Mr. Paterson used a rate of CI $22.50 per hour.)

133. Mr. Thomas estimated the value of the work completed by August 2005 at CI $2,769,223. With respect to Mr. Ulrich's detailed scope of works, Mr. Thomas notes that when adjusted to include the cost of site clearance, the seawall, and preliminaries is approximately CI $6,611,250. Taking all this into account, Mr. Thomas considered the recommended settlement figure of CI $5,500,000 to be within the range of reasonableness.

134. Mr. Thomas said that the Purbrick report contained "glaring errors which any professional in the field should have seen and questioned". He continued:

> "4. …From examination of Mr. Purbrick's reports and photographs it was evident that there were errors in the form of the items missing from his assessment of what work had been completed. One such error was notably a

huge underestimate of the cost of the site clean-up and demolition works.

5. It was also immediately obvious that the rates used by Mr. Purbrick in his calculations were severely understated and any professional in the field at that time should have questioned these.

6. After reading the reports I consider that his methodology was flawed and some of his opinions should have been questioned at the outset and a second opinion sought.

7. My own expert's report comments in detail on all of these issues and my opinion is that the Plaintiff should have employed a local professional Chartered Quantity Surveyor to give a second opinion on Mr. Purbrick's report as he clearly did not have the local expertise to accurately value the work.

8. It was also apparent that the Plaintiff's Expert witness had not conducted the necessary due diligence in gathering information for his September 2005 report. His overall assessment of the value of the sea wall for example was wrong because he made incorrect assumptions about the specifications when detailed information was available. He then failed to carry of [out] the necessary inquiries to obtain the required information to correct his errors in his February 2006 report.

9. I find it incomprehensible that given the various glaring errors that Mr. Delessio and/or Mr. Scott with years of experience in insurance and loss adjusting did not question the aforementioned issues and did not seek second opinions before making the accusations of fraud."

135. Mr. Damian Waters is a quantity surveyor and a member of the Chartered Institute of Building and a fellow of the Chartered Institute of Arbitrators. He gave expert evidence on behalf of the Hurlstone defendants. Mr. Waters does not have the benefit of previous experience in the Cayman Islands.

136. Mr. Waters formed his own estimate of the value of the work completed and placed it at CI $3,056,436. He expressed a number of fundamental disagreements with Mr. Purbrick's report.

137. Mr. Waters said that Mr. Purbrick's failure to examine the available drawings was a serious one because at the time he made his visual inspection he would not have been able to see all of the work undertaken. Mr. Purbrick assigned to the Preliminaries a value of CI $71,018. The result is that Mr. Purbrick is asserting that the Hurlstones are entitled to be paid only CI $1,972.74 per week for the cost of site management and supervision, site accommodation, power, lighting, fuel, tools and scaffolding. Mr. Waters said that was grossly unfair and unreasonable. His own estimate for the

preliminaries was CI $254,468.88 which represents a payment of CI $21,205 per week.

Events to February, 2006

138. A meeting was held on August 4, 2005 and attended by Mssrs. Harrigan and Coles for WV, Mssrs. Scott and Delessio for Sagicor, John Hurlstone and Alastair Paterson. The purpose of the meeting was to attempt to resolve the difference which had emerged.

139. Mr. Scott says there was no agreement that Hurlstone would be paid additional sums as a re-mobilization fee or that a memorandum of agreement was a pre-condition to work commencing again. He says John Hurlstone agreed unequivocally that he would begin work again on the site on August 8, 2005.

140. Mr. Richard Coles is an attorney and a former Attorney General of the Cayman Islands. He owned a unit at WV at the time of the hurricane.

141. Mr. Coles attended the meeting on August 4, 2005. He was the only person present with legal training. He recalls that the focus of discussion was on how the CI $2,900,000 that had already been advanced was spent. He recalls John Hurlstone saying that he would work with Mr. Paterson to account for the money spent and would provide a final cost estimate for the reinstatement works. Sagicor agreed that they would settle the claim within fourteen days of the documentation being provided. John Hurlstone said he would mobilize his workforce and return to work on the following Monday as a gesture of good faith.

142. Mr. Coles took a contemporaneous note of the proceedings. He says there was no agreement reached to pay Hurlstone a mobilization payment. On the contrary, Mr. Scott said that no further payments would be made until proper documentation for the work already completed had been provided.

143. Mr. Coles disagrees with John Hurlstone's interpretation of what had been agreed at the meeting. He says there was no agreement that he or anyone else would draft a memorandum and that John

Hurlstone had promised to return to work without attaching any conditions to that. I accept Mr. Coles' recollection as the most accurate description of the meeting.

144. On August 8, Sagicor received a letter from John Hurlstone asking for a mobilization fee and saying that work would commence again seven days after a memorandum of agreement had been executed. Mr. Paterson told Mr. Delessio on August 9, 2005 that he had agreed upon the terms of a memorandum of agreement. He said that work would begin again when the memorandum was signed. Mr. Delessio protested in writing that this was not what had been agreed at the meeting.

145. On August 19 a more satisfactory response was received by Mr. Delessio but, by then, he had instructed Mr. Purbrick to examine the job site and prepare his valuation of the work completed. On September 9, 2005 Mr. Delessio instructed Crawford Adjusters to stop working on the WV file. He asked for the entire file contents. Crawford replied that Mr. Delessio already had all the relevant

documents and "there is nothing left to send you." In September he instructed Crawford to stop work on all Sagicor files.

146. Shortly after this meeting M & J Construction was hired to complete the construction in the place of the Hurlstones. M & J's contract provided for payment to it of its cost plus a profit of 25%. The total cost of the M & J project came to CI $5,052,814.

The Original Proceeding

147. Mr. Simon Dickson is an attorney working at Q&H. Mr. Quin was the senior partner in charge of the litigation department until he left in 2007. Mr. Morrison had day-to-day conduct of the file until he left in April 2006. He was a senior associate specializing in litigation.

148. Mr. Dickson was aware that Sagicor was an important client of the firm and had the impression that Mr. Delessio was "extremely senior". Mr. Dickson visited the job site around the time the Hurlstones were locked out. He described Mr. Delessio as the

dominant personality at the scene. Mr. Delessio insisted that he was in sole control of the site. Mr. Dickson described him as fairly abrasive. He took instructions directly from Mr. Delessio, who said he had a lot of experience with litigation in the United States. Mr. Morrison also obtained his instructions from Mr. Delessio and worked very closely with him.

149. Mr. Dickson said that right from the start Mr. Delessio alleged dishonesty. He was adamant that Robert and John Hurlstone and Alastair Paterson had perpetrated a fraud. It was likely Mr. Delessio who suggested going to the police. He said he "had" surveyed the site and evaluated the work at CI $1,300,000. He seemed convinced of his opinions.

150. The redaction of the scope sheets was recounted to Mr. Dickson as an act of deceit by Mr. Paterson. Mr. Delessio said the sheets provided evidence of fraud.

151. The Purbrick report was presented to Mr. Dickson as a thorough examination of the site which could be relied upon to prove value.

Mr. Dickson says the attorneys were happy with the Purbrick report and did not look behind it or consider getting a second opinion.

152. As for the reports of Alastair Paterson, Mr. Dickson said he understood that the payments were being made for work already done. He was never told that the payments included or represented advances. At none of his meetings with Mr. Delessio was anything said to suggest that the discrepancy could be explained by goods bought but not yet used in the project.

153. When Mr. Moran's opinion arrived on January 11, 2006, it said that there was no explanation for the discrepancy in figures other than dishonesty. Mr. Dickson consulted Mr. Delessio to obtain his instructions.

154. Mr. Dickson learned only after the Writ had been issued that the WV Strata did not wish to be a Plaintiff in the action. Mr. Coles was not consulted at any stage. Mr. Coles first became aware the proceedings had been started in the name of WV Strata after everything had been filed. He was very angry as he knew the Strata

had not authorized the proceeding. Patrick Harrigan had no authority to authorize it on his own initiative. At a minimum, the Strata Executive Committee would have had to agree and, in all probability, the matter would have been put to a vote of all the owners. The WV Strata distanced itself from the proceeding as much as possible.

155. Although president and Chief Executive Officer of Sagicor, Mr. Scott asserts that the decision to initiate litigation is one that "must" be taken by the board of directors rather than by himself or by an employee.

156. Mr. Dack has reviewed the minutes of Sagicor's board meetings. There was no one on the board with legal training. He says that Mr. Scott advised the board of concern that the work at WV did not justify the amount of money which had been paid. The board was told of Mr. Purbrick's opinion on November 28, 2005 and told that London counsel had been asked for an opinion. No decision was taken then to initiate litigation.

157. At the February 20, 2006 meeting of the board, Sagicor considered the opinion of Mr. Moran dated January 11, 2006. The board agreed that it had "no alternative" but to commence litigation. Mr. Dack has no recollection of Mr. Delessio attending any of the board meetings. Mr. Dack left the board after January, 2008.

The Mareva Injunction

158. The Mareva injunction was obtained on February 28, 2006 on an *ex parte* basis, supported by the affidavits of Danny Scott and Patrick Ulrich and two reports by Mr. Purbrick. It was served the next day. Sagicor applied for the injunction on its own behalf, without any consent by or participation of WV.

159. In his affidavit in support of the Mareva injunction, Mr. Scott described the scope sheet incident involving Mr. Delessio and Mr. Paterson and their conversation at the end of June. After describing the Purbrick report Mr. Scott said there were two possibilities: Mr. Paterson had failed to inspect the site properly or he was in collusion with the Hurlstones to request money for work which had

not been done. He then referred to Mr. Purbrick's conclusion that the discrepancies were so large that they could not be attributed to error or incompetence. Mr. Scott asserted that there was "strong evidence" of fraud by all defendants.

160. The evidence of possible dissipation of assets was found in a winding-up proceeding against Hurlstone Construction Ltd. commenced by a third party in 1997. The Official Liquidator who was appointed concluded, according to Mr. Scott's affidavit, that this entity had been insolvent from 1992 onwards. Nevertheless, in February, 1993 it entered into a contract which obliged it to pay a subcontractor some CI $257,000. The Liquidator determined that large amounts of money had been withdrawn by John and Robert Hurlstone from this company and commenced proceedings against them. The claim was eventually settled by the payment of US $750,000. This evidence convinced the Court of a risk of dissipation by the Hurlstones.

161. Sagicor also requested a Mareva injunction against Alastair Paterson, Crawford and BPL. Mr. Paterson was accused of

falsifying the scope sheets in an attempt to deceive Sagicor. Mr. Scott presented no evidence of potential asset dissipation by Mr. Paterson. As a result, the Mareva injunction was issued only against the Hurlstone defendants and not against the Crawford parties.

162. No attempt was made by the Hurlstones to have the injunction discharged. Sagicor did consent to a number of amendments to the injunction at the request of the Hurlstones.

The Newspaper Article

163. On two occasions Mr. Delessio told Mr. Harrigan that he was going to "plant" an article in the press about the lawsuit. He said his girlfriend was going to try to plant it. Mr. Harrigan asserts that "prior to the article about this case that appeared in the Caymanian Compass in March of 2006, Mr. Delessio told me that an article would be appearing". Mr. Harrigan does not know who planted the article in the paper.

164. Mr. Alan Markoff is a journalist working for the Caymanian Compass. In March, 2006 he wrote an article about the lawsuit. He would not name his source in evidence, but said that the source was an owner of a unit at WV. Danny Scott was not the source. Mr. Delessio was not the source either, and nobody asked Mr. Markoff to refrain from mentioning Mr. Delessio in the article. Mr. Markoff never discussed his story with Mr. Delessio.

165. Mr. Coles was outraged over the press article about the action. He said it was very clear that Mr. Delessio and Mr. Paterson did not like each other. Mr. Delessio, in his view, was a fairly aggressive individual who was not conciliatory but abrasive.

The Case Collapses

166. The case was set for trial in December, 2008. Mr. Dickson says that after a time the file "went quiet". At the order of the Chief Justice, a Scott Schedule was prepared. After the pleadings were filed and the injunction obtained, there was only sporadic activity in

the action until September, 2008. It was in that month that Q&H obtained its own client's documents and witness statements.

167. At this point, Mr. Dickson had to struggle with Mr. Delessio to get him to disclose the needed information. By this time Mr. Dickson was finding it very hard to even get instructions from Mr. Delessio. When asked why he did not send a letter at an early stage demanding disclosure of invoices and other documentation from the defendants, Mr. Dickson said he did not because Mr. Moran had not suggested it.

168. Both parties served lists of documents on or about September 9, 2008. The Hurlstone defendants provided their documents on September 17, 2008 and the Crawford defendants provided theirs on October 7, 2008. The Hurlstones disclosed a series of invoices purporting to show work and materials supplied to WV by sub-contractors and material suppliers. Sagicor had not seen these before.

169. When he saw the disclosure, Mr. Dickson became concerned by the invoices which he was reading for the first time. He was surprised that the clean-up costs had not been taken into account and noticed other signs that the Purbrick reports had not been put together carefully.

170. Mr. Dickson then requested specific disclosure of certain classes of documents. He asked the Hurlstone defendants for specific discovery of additional records supporting the charge of CI $392,000 for clean-up representing 11,200 man hours at $35 per hour. He also requested further detail with respect to the hourly rate. He asked for cancelled cheques or other documentary evidence of payment to the workers, bank statements, documentation relating to food, accommodation and transport (which were components of the hourly rate) and documentation showing whether each worker was entitled to a pension and vacation pay. He asked for time sheets and the names and "other relevant details" of the workers who worked at the WV site. He demanded disclosure of records which have to be kept as a matter of Cayman law, including work permits and pension policies. With

respect to construction materials, Mr. Dickson asked for cancelled cheques paid to suppliers and related documentary evidence, including bank statements.

171. On October 17, 2008 Mr. McDuff, on behalf of the Hurlstone defendants, responded:

> "We can confirm that our clients have disclosed all of the documentation relating to these matters which is or has been in their possession, custody or power. The documentation that you seek (such as further payroll records beyond those already disclosed, time sheets and details of workers) simply do not exist.
>
> In making your request, you appear to overlook the conditions which existed on Grand Cayman in the aftermath of Hurricane Ivan and the manner in which business and banking was then conducted. Amongst other things there was an extreme shortage of paper and stationary, such that documentary records were not routinely kept. This practice was particularly prevalent in the building trade in which work was required to be done on an urgent basis. Most transactions, in particular the payment of workers took place on a purely cash basis without written receipt or record in the absence of a normal banking system. The same practice often applied in respect of the payment of suppliers. We can confirm that our clients' own offices were destroyed by Ivan and that thereafter they were unable to create or store written records in an orderly manner thereafter.
>
> Our clients, Mr. John Hurlstone and Mr. Robert Hurlstone, have, however, made inquiries with their

> banks to obtain statements showing withdrawals and payments made during the period in which they were on site at WV. In any event these will not show you how the funds were dispersed and can only be of marginal relevance to the exercise you have in mind."

Mr. McDuff did provide to Mr. Dickson copies of the bank statements for HL and HGCL but due to the absence of detail these were of limited value.

172. A second demand was made for names and details of the workers, documentation which had to be kept on file as a matter of Cayman law, any documentation relating to the provision of food, accommodation and transport for the workers; and documentation demonstrating which workers were entitled to a pension and vacation pay. No reply was made to this letter.

173. Robert Hurlstone says that he has produced a schedule containing a list of payments made in respect of WV which has been created by examining his cheque books. This schedule was misplaced but he found it around November 10, 2008, after which it was disclosed. However, the schedule does not show the specific work for which

the payment was made, the labour rate applied, or how the rate was calculated. The schedule shows a total expenditure of CI $2,637,717 between October 2004 and July 2005.

174. Mr. Dickson sent everything off to Mr. Moran, who advised that he felt the case had been compromised. In particular, he no longer had confidence in Mr. Purbrick's opinion.

175. On November 7, 2008 Mr. Moran advised Q&H that "the plaintiffs are unable any longer properly to advance a case based on dishonesty and conspiracy to defraud…". The primary reason was the likelihood that Mr. Purbrick would be regarded as an unreliable witness. On November 12, 2008 he said that as "a matter of professional obligation no case based on fraud can now be presented and that the existing case must be withdrawn." He advised the pursuit of a dignified exit from the proceeding.

176. Despite this advice, attorneys for the plaintiffs initiated a meeting with their counterparts for the defendants on November 17, 2008 and offered to settle for a payment by the defendant's of CI

$1,175,000. The offer was not accepted. Nothing was said at the meeting to suggest that the claims would be abandoned unconditionally, a position which was announced on the following day.

177. Sagicor confirmed their intention to abandon their claims against all defendants in correspondence on November 21, and 24, 2008. However, on the first day of trial, December 1, 2008, Sagicor recanted and obtained leave to withdraw its application to discontinue. Two days later on December 3, 2008, Sagicor abandoned the claim and consented to judgment against it in favour of all defendants.

LIABILITY

Agency of Frank Delessio

178. The Crawford and Hurlstone defendants say that the evidence establishes liability for one of two alternate (and closely related) torts: abuse of process and malicious prosecution. The definition of each focuses critical attention upon the state of mind of the alleged

wrongdoer so I must begin by determining whose state of mind is material.

179. The grounds for attributing an individual's intention or state of mind to a corporation were set out by Lord Hoffmann in *Meridian Global Funds Management Asia Ltd v Securities Commission [1995] 2 AC 500*. Where an individual represents the "directing mind and will" of the company, his intention or state of mind should be attributed to the company. The individual concerned need not be the central directing mind and will but may instead be the person whose functions within the company lead in all the circumstances to the conclusion that his actions or state of mind must be regarded as that of the company. This will usually depend upon the particular task or duty under consideration.

180. In *El Ajou v Dollar Land Holdings plc [1994] 2 All ER 685 at 695-696*,

Nourse LJ stated:

> *"This doctrine, sometimes known as the alter ego doctrine, has been developed, with no divergence of approach, in both criminal and civil jurisdictions, the authorities in each being*

cited indifferently in the other. A company having no mind or will of its own, the need for it arises because the criminal law often requires mens rea as a constituent of the crime, and the civil law intention or knowledge as an ingredient of the cause of action or defence…

The doctrine attributes to the company the mind and will of the natural person or persons who manage and control its actions. At that point, in the words of Millett J ([1993] 3 All ER 717 at 740): 'Their minds are its mind; their intention its intention; their knowledge its knowledge.' It is important to emphasise that management and control is not something to be considered generally or in the round. It is necessary to identify the natural person or persons having management and control in relation to the act or omission in point."

A corporate entity may also be liable for the acts of its employee on the basis of vicarious liability.

181. An employer is liable for the wrongful acts of an employee authorised by it or for the wrongful carrying out of an authorised act: *Poland v John Parr & Sons [1927] 1 KB 236 at 240*. The liability of an employer extends to all torts committed by its employee when purporting to act in the course of its business because the employee was authorised or held out as authorised to transact business for his employer. This may include fraud*: Lloyd v Grace, Smith & Co [1912] AC 716 at 725*. An employer may also

be vicariously liable for an employee's torts if the wrongful act is "*so closely connected with his employment that it would be fair and just to hold the [employer] vicariously liable*": *Lister v Hesley Hall Ltd [2002] 1 AC 215*. Malicious prosecution is a tort which may be committed by a corporate entity: see *Cornford v Carlton Bank [1899] 1 QB 392*. The editors of *Clerk & Lindsell on Torts* (19th Ed) say at para 16-16) that

> *"A defendant may be liable in this as in other torts for acts done with his authority or subsequently ratified. If an agent institutes a prosecution within the scope of his employment and in pursuance of a general authority, any malice or unreasonableness which may actuate him in so doing is imputed to his principal".*

182. Lord Nicholls has said in *Dubai Aluminium v. Salaam [2002] UKHL 48* that "the court makes an evaluative judgment in each case, having regard to all the circumstances …". An employer will not necessarily be liable for acts of vengeance or spite which are entirely personal. I must determine whether the Mr. Delessio's acts were so closely connected with his employment that it would be fair and just to hold Sagicor vicariously liable.

183. Mr. Delessio was a senior executive ("Senior Vice-President") and given a considerable degree of responsibility and autonomy. Mr. Scott placed him in charge of the WV claim. Instructing the attorneys was left almost entirely to Mr. Delessio, at least until shortly before the first trial. Mr. Scott attended the first meeting with Quin & Hampson but believes he left early. His own consciousness of a conflict of interest (because he lived in the development) caused him to be less involved than might otherwise have been the case. Mr. Scott said that once Q&H had been instructed, "Frank Delessio was responsible for dealing day-to-day with Sagicor's attorneys". When asked if Mr. Delessio had told him about the fraud allegation, Mr. Scott replied that he was making an accusation and "I had to let it run its course". Mr. Dack agreed that considerable trust had been reposed in Mr. Delessio. In particular, he was trusted to deal with the lawyers and to provide them with accurate information.

184. Mr. Dickson had the impression that Mr. Delessio was "extremely senior". He took instructions directly from Mr. Delessio, who told Mr. Dickson he had a lot of experience with litigation in the United

States. Mr. Morrison also obtained his instructions from Mr. Delessio and worked very closely with him.

185. Given the impression I have gained from the evidence which is set out below, I am satisfied that Mr. Delessio's motivation in initiating the law suit and seeking an injunction was not entirely personal and unrelated to his employment. He formed an impression that his employer had been defrauded; coming to such a decision was well within the scope of his employment. His dealings with Mr. Paterson, Mr. Purbrick and the attorneys were in the course of carrying out his loss adjuster function at Sagicor. His dislike of Mr. Paterson manifested itself in the course of (and during) a business relationship with him which arose from his employment. I am satisfied that Mr. Delessio's actions and state of mind were so closely connected with his employment that it would be fair and just to hold Sagicor liable vicariously if liability is otherwise established.

186. It is true, as Mr. Scott said, that the consent of the Board of Directors was required before the Writ could be issued. Mr.

Delessio provided virtually all of the instructions to the attorneys which preceded the commencement of the action and the obtaining of the Mareva injunction. The Board, which had no member with legal training, acted solely upon the advice of Mr. Scott and, in particular, of Q&H. It made no independent investigation or inquiry of any kind. Its deliberations appear to have been cursory. Few questions were asked. Mr. Scott relied almost entirely upon what Mr. Delessio told him, as did Q&H and Mssrs. Dickson and Morrison. The Purbrick report was, of course, influential in the decision to start an action and seek an injunction. Mr. Moran based his advice upon it. Mr. Delessio selected Mr. Purbrick, provided him with his instructions, and supported his conclusions actively.

187. I am satisfied that Mr. Delessio was the directing mind and will of Sagicor with respect to the law suit from the time he first spoke to Q&H until well after the Mareva injunction had been obtained and served. I have no hesitation in finding that his state of mind in the latter half of 2005 and the first part of 2006 represented that of Sagicor. When assessing purpose, intention and motive, it is his state of mind which must be examined.

Abuse of Process and Mailicious Prosecution of a Civil Action

188. These two heads of claim are closely related and can be considered together conveniently.

189. Abuse of civil process appears to have been first recognised as tortious by the Court of Exchequer Chamber in *Grainger v Hill (1838) 4 Bing. N.C. 212*. In that case, the plaintiff used the process of *capias ad respondendum* (which permitted the arrest of the defendant to bring him before the court to hear judgment pronounced) for the entirely ulterior purpose of seizing from his possession a ship's register to which he was not entitled. The Court held that, unlike an action for malicious prosecution, abuse of process did not require proof of success in the original proceedings and lack of reasonable and probable cause for initiating those proceedings.

190. The components of the tort are summarised by the Court of Appeal in *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc [1990] 1 QB 391*. Slade LJ (at 469) stated:

> *"…certain features of the legal constituents of the tort as appearing from the judgments in Grainger v Hill must be noted, namely:*
>
> *(1) It consists of an abuse of the process of the law "to effect an object not within the scope of the process"…*
>
> *(2) Since this is the nature of the tort, the plaintiff does not have to show that the suit in question has terminated in his favour…*
>
> *(3) Neither does he have to show want of reasonable and probable cause for it…*
>
> *(4) However, a person alleging such an abuse must show that the predominant purpose of the other party in using the legal process has been one other than that for which it was designed and that as a result he had caused him damage…". (underlining added)*

191. There are three elements in the tort of malicious prosecution of a criminal case. First, the prior proceedings must have been determined in favour of the plaintiff. Second, the proceedings must have been instituted without reasonable and probable cause. In *Herniman v Smith [1938] AC 305*, the House of Lords approved the

definition of reasonable and probable given cause by Hawkins J in *Hicks v Faulkner (1878) 8 QBD 167, 171*:

> *"An honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances which, assuming them to be true, would reasonably lead any ordinary prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed."*

Third, the proceedings must also have been instituted with malice. In *Gibbs v Rea [1998] AC 786 at 797*, the Privy Council said:

> "*Malice in this context has the special meaning common to other torts and covers not only spite and ill-will but also improper motive*."

192. The same view was expressed recently by the Supreme Court of Canada in *Kvello v Miazga [2009] SCC 51*.

193. English law has never accepted that the mere commencement of an unmeritorious and malicious civil action is actionable. What is needed is an additional element: the use of the legal process itself in an illegitimate manner outside its proper scope. This has been

accepted since the decision in *The Quartz Hill Consolidatred Gold Mining Co. v. Eyre (1883) 11 QBD 674 (CA)* .

194. The rule has been reaffirmed clearly in *Metall und Rostoff, supra*, in these words:

> *The substance of the complaint against the defendants is that they abused the process of the court by adducing false evidence and submitting a false case for the primary purpose of defeating claims by M. & R. in the proceedings to the return of their metal and other assets and to prevent the defendants from dealing with such assets in the meantime.*
>
> *No doubt the adduction of false evidence and the submission of a false case for the purpose of sustaining or defeating a claim in legal proceedings may subject the guilty plaintiff or defendant (as the case may be) to sanctions by way of a penal order for costs or even a prosecution for perjury. In our judgment, however, it does not expose him to an action from damages in tort under the principle of Grainger v. Hill, 4 Bing. N.C. 212.*
>
> *No authority has been cited to us which satisfies us that it does. If the use of court process is to expose a party to liability under this principle, the process must, in our judgment, have been used for a predominant purpose "outside the ambit of the legal claim upon which the court is asked to adjudicate ..." compare Varawa v. Howard Smith Co. Ltd. (1911) 13 C.L.R. 35, 91, per Isaacs J. Relief in tort under the principle of Grainger v. Hill is not, in our judgment, available against a party who, however dishonestly, presents a false case for the purpose of advancing or sustaining his claim or defence in civil proceedings. This may well cause hardship to an injured party who cannot be*

sufficiently compensated by an appropriate order for costs. However, if there is a gap in the law it rests on sound considerations of public policy, as does the rule of law which gives immunity to witnesses against civil actions based on the falsity of evidence given in judicial proceedings. If the position were otherwise, honest litigants might be deterred from pursuing honest claims or defences and honest witnesses might be deterred from giving evidence: compare generally Business Computers International Ltd. v. Registrar of Companies [1987] Ch. 229, 234, per Scott J. and the cases there cited.

In short we agree with the judge, for much the same reasons as his, that the facts relied upon do not raise an arguable case that there was an abuse of process falling within the Grainger v. Hill principle, 4 Bing. N.C. 212. (underlining added)

195. The traditional rationale for the unavailability of a general tort of malicious prosecution of a civil (as opposed to criminal) action is stated by Buckley LJ in *Wiffen v Bailey & Romford Urban District Council [1915] 1 KB 600 at 607* in this manner:

"So the exception of civil proceedings, so far as they are excepted, depends, not upon any essential difference between civil and criminal proceedings, but upon the fact that in civil proceedings the poison and the antidote are presented simultaneously. The publicity of the proceedings is accompanied by the refutation of the unfounded charge, if it be unfounded, which was made."

196. This reasoning was repeated by the Privy Council in *Mohamed Amin v Bannerjee [1947] 1 AC 322*:

> *"The reason why the action does not lie for falsely and maliciously prosecuting an ordinary civil action is that such a case does not necessarily and naturally involve damage to the party sued. A civil action which is false will be dismissed at the hearing. The defendant's reputation will be cleared of any imputations made against him, and he will be indemnified against his expenses by the award of costs against his opponent."*

Actions for abuse of process or malicious prosecution of civil proceedings have been confined to a few special categories. These special categories include:

(1) the malicious institution of bankruptcy or winding up proceedings: see *Johnson v. Emerson and Sparrow (1871) LR 6 Exch. 329*; *Quartz Hill Consolidated Gold Mining Co v. Eyre (1883) 11 QBD 674* ;

(2) malicious arrest: see *Roy v. Prior [1971] AC 470*;

(3) the malicious procurement of a search warrant: see *Gibbs v. Rea [1998] AC 786*; and

(4) the malicious arrest of a ship: see *The Walter D Wallet [1893] P. 202*;

(5) malicious attachment: see *Congentra AG v. Sixteen Thirteen Marine SA (The Nicholas M)* [2009] 1All ER (Comm) 479.

197. Recently, the House of Lords reconsidered the question and for "essentially practical reasons" rejected the argument that the tort of abuse of process or malicious prosecution can be extended to civil proceedings in any general way. Under the heading "The extension of the tort to civil proceedings", Lord Steyn (with whom the other Law Lords agreed) said in *Gregory v Portsmouth City Council* [2000] 1 AC 419:

> *My Lords, it is not necessary for the disposal of the present appeal to express a view on the argument in favour of the extension of the tort to civil proceedings generally. It would, however, be unsatisfactory to leave this important issue in the air. I will, therefore, briefly state my conclusions on this aspect. There is a stronger case for an extension of the tort to civil legal proceedings than to disciplinary proceedings. Both criminal and civil legal proceedings are covered by the same immunity. And as I have explained with reference to the potential damage of publicity about a civil action alleging fraud, the traditional explanatio,n namely that in the case of civil proceedings the poison and the antidote are presented simultaneously, is no longer plausible. Nevertheless, for*

essentially practical reasons I am not persuaded that the general extension of the tort to civil proceedings has been shown to be necessary if one takes into account the protection afforded by other related torts. I am tolerably confident that any manifest injustices arising from groundless and damaging civil proceedings are either already adequately protected under other torts or are capable of being addressed by any necessary and desirable extensions of other torts. Instead of embarking on a radical extension of the tort of malicious prosecution I would rely on the capacity of our tort law for pragmatic growth in response to true necessities demonstrated by experience.

198. The traditional rationale was found wanting in a modern context. On this subject Lord Steyn said:

"The traditional explanation for not extending the tort to civil proceedings generally is that in a civil case there is no damage: the fair name of the defendant is protected by the trial and judgment of the court. The theory that even a wholly unwarranted allegation of fraud in a civil case can be remedied entirely at trial may have had some validity in Victorian times when there was little publicity before the trial: see Little v. Law Institute of Victoria (No. 3) [1990] V.R. 257. However realistic this view may have been in its own time, it is no longer plausible. In modern times wide dissemination in the media of allegations in litigation deprive this particular reason for restricting the tort to a closed category of special cases of the support of logic or good sense."

199. One recent incremental extension of the tort to an *ex parte* attachment has been accepted in *Congentra, supra* [2009] 1 All ER (Comm) 479,488 by Flaux J. In rejecting a submission that the

category of cases in which a claim for the malicious institution of civil proceedings may be brought is closed, he stated:

> *"The effect of Mr Swaroop's submission based on this passage is that the law only recognises these closed and anomalous categories of "civil malicious prosecution" and that since wrongful arrest does not encompass wrongful attachment, there was no cause of action recognised by English law in the present case. In my judgment, this is an unduly restrictive approach. Lord Steyn was giving instances of cases where the English courts had recognised "malicious prosecution" as a tort in the civil context. It was not intended to be an exhaustive list, nor was he excluding the possibility that English law might develop incrementally beyond these instances."*

200. The tort of abuse of process is recognised in a more general form in other common law jurisdictions. *The Restatement of the Law, Torts* (2nd ed.) section 682 provides:

> *"One who uses a legal process, whether criminal or legal, against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process."*

In *Varawa v Howard Smith Co Ltd [1911] HCA 46*, Isaacs J sitting in the High Court of Australia stated:

> *"The appellant urges that this may be regarded as an action for abuse of process. Such an action is well*

known. In the sense requisite to sustain an action, the term "abuse of process" connotes that the process is employed for some purpose other than the attainment of the claim in the action. If the proceedings are merely a stalking horse to coerce the defendant in some way entirely outside the ambit of the legal claim upon which the Court is asked to adjudicate, they are regarded as an abuse of process for this purpose ..."

In *QIW Retailers Ltd v Felview Pty Ltd [1989] 2 Qd 245 at 258*, Macrossan J stated:

"In the present case, if the real object of Boles in commencing proceedings was to force the directors of the plaintiff company to negotiate that was not an end which the law would enforce. If to achieve the collateral object Boles launches winding up proceedings, even if it be assumed that the winding up order might have been available in the circumstances, that order was nevertheless not something which fundamentally he sought. If his strategy was to bring pressure to bear simply or predominantly to force the directors to negotiate with him over his demands he would be abusing the process of the court."

In Canada the tort is also recognized. In *Tsiopoulos v Commercial Union Assurance Co (1986) 57 O.R. (2d) 117; 32 D.L.R. (4th) 614*, Henry J. said:

> *"It is well settled that there is at law a tort known as abuse of process. This cause of action arises when the processes of law are used for an ulterior or collateral purpose. It is defined as the misusing of the process of the courts to coerce someone in some way entirely outside the ambit of the legal claim upon which the court is asked to adjudicate. It occurs when the process of the court is used for an improper purpose and where there is a definite act or threat in furtherance of such purpose…"*

201. The continuing usefulness of the traditional view that there is no general right to damages for malicious prosecution of a civil action has been questioned by Professor Fleming in the *Law of Torts (9th ed., 1998)* at p. 675:

> *"Extending the action to wrongful civil proceedings has encountered anything but enthusiastic response. Admittedly, there is nothing in the history of the action nor any pronouncement of binding authority to suggest that the action is confined to criminal proceedings. Yet in practice this came close to being the case in consequence of so interpreting the conventional requirements of legally recognised damage. First of all, it has been peremptorily denied that commencing civil proceedings could possibly expose the person sued to scandal, save bankruptcy and winding-up petitions which stand in singular need for a deterrent against the abusive practice of extorting the payment of debts by means of proceedings aimed at wrecking credit. The distinction was justified on the specious ground that, whereas in bankruptcy proceedings and criminal prosecutions injury to credit is done before the accused has a chance to dispel the false imputation, in an ordinary civil action it is not the bringing of the suit that does the harm but the*

publicity of the proceedings, and the fair fame of a person improperly maligned is supposedly cleared in open court by a determination in his favour. In the one, it is said, the poison comes before the antidote and mischief may be wrought before it can be undone; in the other poison and antidote are presented simultaneously. Though this would not be true if the charge is only refused on appeal, it may have been linked to 19th century procedure which minimised the chance of publicity prior to the hearing. Hence the Victorian Supreme Court, on appeal recently found itself free to hold that this assumption no longer applied under modern conditions such as public access to pleadings and wide dissemination of publicity by the media. It accordingly held that a malicious injunction restraining a solicitor from practising could qualify as scandalous as well as causing pecuniary damage to his professional practice."

202. In the case alluded to by Prof. Fleming, *Little v Law Institute of Victoria (No 3) [1990] VR 257*, the Court of Appeal of Victoria said:

"...However, in our view, it does not follow that at the present time proceedings, tainted with malice and brought without reasonable cause, might not affect adversely the reputation of a defendant or respondent to the proceedings for the reasons stated by their Lordships. In modern society the quick and wide dissemination of publicity relating to litigation, both pending and current, by radio, television and news print might injure the fair fame of an accused person who subsequently was found to be not guilty, or of a defendant who later has had judgment entered against him set aside on appeal. At the present time it is rare that the poison of and antidote to malicious proceedings are simultaneous."

Kaye and Beach JJ concluded that this was

> *"...no longer justification for confining to a bankruptcy petition and an application to wind up a company the remedy for malicious abuse of civil proceedings where the damages claimed is to the plaintiff's reputation."*

203. The Hurlstone parties submit that the categories of permissible abuse of process cases should be extended to include the malicious obtaining of a *Mareva* injunction. (Since an injunction was never granted against the Paterson parties, this particular argument is not available to them.) It is submitted that there is no good justification for not extending the categories mentioned above to include the malicious obtaining of a *Mareva* injunction especially where claims of fraud are made. The very obtaining of such an injunction brings with it immediate damage to the respondent. The Hurlstone parties say that such damage is not remedied merely by the conclusion of the proceedings in the respondent's favour or by an award of costs.

204. A prominent characteristic of the categories in which a claim for abuse of process has been permitted is that an *ex parte* legal process

was invoked which caused immediate and unjustified harm to the plaintiff. The obtaining of a Mareva injunction without reasonable and probable cause and maliciously is similar in form and effect. The existence of the injunction implies necessarily that there is a real risk of the respondent dissipating his assets and being unable to satisfy any eventual judgment. Further stigma attaches where allegations of fraud or theft are made. The arrest of a ship and the attachment of goods, to take two examples, are invocations of a process against the assets of a respondent which are indistinguishable for all present purposes from the freezing of assets by injunction.

205. However, it seems to me that the case of a Mareva injunction is a paradigm example of what Lord Steyn had in mind when he said in *Gregrory*, *supra*, that "the general extension of the tort to civil proceedings has [not] been shown to be necessary if one takes into account the protection afforded by other related [remedies]". The Hurlstone parties have always had the protection of Sagicor's undertaking as to damages. Below, I award damages to them for all

of the loss which can reasonably be said to have been occasioned by the injunction. As in many cases, the allegations in the injunction mirror those in the Statement of Claim. The damage to reputation was caused by the allegations of fraud and conspiracy without differentiation in the public mind between what was pleaded and what was asserted on the *ex parte* application. Indeed, the issuance of the injunction implies an additional factor - it represents a judicial finding that the Hurlstones were likely to dissipate their assets to avoid satisfaction of a judgment against them. There is no real advantage to the Hurlstones in my recognition of an additional category of the tort of malicious prosecution of a civil action.

206. I have not overlooked the principle (pressed heavily by Sagicor) that compensation under the undertaking can be awarded only for damage which is proven to have been caused by the injunction and not by the action itself. Here, there is little distinction to be made between the two. The evidence satisfies me that the injunction itself was a substantial contributor to the harm caused.

207. It is also the case that the evidence of causation should not be subjected to a minute and rigorous scrutiny. I adopt the following comments from the authorities as representing the proper approach:

1) The comments of Norris J in *Les Laboratoires Servier v Apotex Inc [2008] EWHC 2347 (Ch)*:

> *"Third, whilst it is for Apotex to establish its loss by adducing the relevant evidence, I do not think I should be over eager in my scrutiny of that evidence or too ready to subject Apotex methodology to minute criticism. That is so for two reasons, quite apart from an acceptance of the proposition that the very nature of the exercise renders precision impossible. (a) Whilst, in order to obtain interlocutory relief, Servier will not have had to persuade Mann J that it was easy to calculate Apotex loss in the event of the injunction being wrongly granted, it will have had to persuade him that that task was easier than the calculation of its own loss in the event that the injunction was withheld. The passages I have cited from its skeleton argument and evidence show that it did so. Having obtained the injunction on that footing it does not now lie in Servier's mouth to say that the task is one of extreme complexity and that the court should adopt a cautious approach. Having emphasised at the interlocutory stage the relative ease of the process, it should not at the final stage emphasise the difficulty. (b) In the analogous context of the assessment of damages for patent infringement, in General Tyre [1976] RPC 197 at 212 Lord Wilberforce said:-*
>
> *"There are two essential principles in valuing the claim: first, that the plaintiffs have the burden of proving their loss:*

second, that the defendants being wrongdoers, damages should be liberally assessed but that the object is to compensate the plaintiffs and not to punish the defendants."

The principle of "liberal assessment" seems to me equally applicable in the present context. Although a party who is granted interim relief but fails to establish it at trial is not strictly a "wrongdoer", but rather one who has obtained an advantage upon consideration of a necessarily incomplete picture, he is to be treated as if he had made a promise not to prevent that which the injunction in fact prevents. There should as a matter of principle be a degree of symmetry between the process by which he obtained his relief (an approximate answer involving a limited consideration of the detailed merits) and that by which he compensates the subject of the injunction for having done so without legal right (especially where, as here, the paying party has declined to provide the fullest details of the sales and profits which it made during the period for which the injunction was in force)."

2) The comments of Sir Richard Scott V-C in *Berkeley Administration Inc v McClelland [1996] I L Pr 772 at 787-788*:

"In pursuing its remedy under the cross-undertaking Maccorp is put in the position, brought about by the injunction, of having to base its case on hypothetical speculation, i.e. what would have happened if the injunction had not been granted. Clear proof of what would have happened if an historical fact had not taken place is obviously very difficult; sometimes it is impossible. The court should, in my opinion, bear this difficulty in mind and bear also in mind that it is the fault of the respondent, of Chequepoint, that the claimant is in this difficulty. A fairly relaxed approach to the balance of probabilities, is, in my opinion, therefore justified."

3) The comments of Mason, J in *Air Express Ltd v Ansett Transport Industries (Operations) Pty Ltd* (1981) 146 CLR 249 at 331:

> *"Unless the circumstances indicate otherwise, when it appears that damage flows from the non-performance of an act and the performance of that act has been restrained by an interim injunction, the inference will generally be drawn that the damage has been occasioned by the injunction."*

208. The claim of the Hurlstone parties will be assessed below within the context of my enforcement of Sagicor's undertaking as to damages.

209. The Crawford parties have pleaded that Sagicor and WV initiated the fraud and conspiracy action with these motives and for these purposes:

1) "to destroy or injure the reputations of" the Paterson parties;

2) "to cause or threaten harm to them";

3) "to exert pressure upon them to pay and/or settle [the fraud and conspiracy] claim" Sagicor and WV were making.

In addition, they have adopted the particulars provided by the Hurlstone parties, which are to this effect:

1) "to destroy personally or professionally" the Paterson parties;

2) "as a means of avoiding payment" of the claim and professional fees;

3) "as a means of avoiding [paying for] the true loss";

4) "to cause or threaten harm to" the defendants and "to exert pressure upon them to pay and/or settle [the fraud and conspiracy] claims".

There is no reliable evidence of any overt act such as a threat by Sagicor to Mr. Paterson or an attempt to exert pressure upon him in connection with the original proceeding.

210. Insofar as this pleading suggests that malice can be found in an intention to use litigation or the threat of litigation simply to bring about a settlement of that same litigation, it is misguided. It is an

everyday occurrence that plaintiffs commence litigation with the hope and intention of causing a settlement. A meritorious claim cannot be rendered less so by the desire to bring about a settlement and one lacking any merit does not become any the more objectionable because that is the goal.

211. There is no cogent evidence that Sagicor or its parent, Cayman National Corporation, intended at any time to avoid its obligation under the WV policy of insurance. It is not credible that Mr. Delessio would start an action in fraud and conspiracy simply to avoid payment of that amount. There is no evidence of any general intent by Sagicor or by Mr. Delessio to avoid the company's obligations generally to its clients. The understandable desire, expressed by Mr. Dack in January, 2005, for a close examination of the reserve amounts cannot be equated with an intention to avoid payment by commencing unmeritorious litigation.

212. Mr. Paterson's true case is that the original proceedings were brought for revenge, with the intention of destroying him

personally. In closing, Mr. Bueno made the following assertions relevant to Mr. Delessio's motive and purpose:

1) "the entire case [was] the dishonest creation of the late Frank Delessio";

2) the attorneys were "deliberately misled by Frank Delessio";

3) the proceedings were "founded upon deliberately false or recklessly formulated allegations of fraud";

4) "The original proceedings were brought with the real intention of destroying Alastair Paterson's personal and professional reputation and the businesses of his two companies";

5) "The only possible explanation is that Frank Delessio, on his arrival at Sagicor on 15 June 2005, determined to make life as difficult and unpleasant as possible for Alistair Paterson. He determined to discredit his work and to settle old scores. He had a visceral dislike of Alistair Paterson …";

6) "His actions can only be explained on the basis that his true objectives were to destroy Alistair Paterson, personally and professionally, and inevitably the Hurlstones, also. He wanted his revenge for his earlier immigration problems."

The Crawford parties say that the improper object or purpose was, essentially, the destruction of Mr. Paterson. There is no allegation that the legal process itself was used in some way for which it was not designed. The gist of Mr. Paterson's case is that the

commencement of the action and everything which followed was an abuse because Sagicor never had and never believed that it had a viable case of fraud or conspiracy. It is said that the object which was "not within the scope of the process" was the destruction of Mr. Paterson by the pursuit of the action itself.

213. The submission of the Crawford parties appears to confuse motive and object. The object of Sagicor, in the sense I draw from the authorities, was simply to invoke the legal process in accordance with the Rules of Court. The object was not "one other than that for which [the civil process] was designed". If this object was pursued in the hope that one result would be the destruction of Mr. Paterson, that is a disagreeable and unworthy motive. However, it is not an "object" of the sort contemplated by the authorities as it is not a distortion of the legal process itself. To use legal process in the manner for which it was designed but with an improper motive is not tortious behaviour.

The distinction between object and motive is captured in this passage by Brennan, J in *Williams v. Spautz 107 ALR 635 (HCA)* which was cited with approval in *Land Securities v. Fladgate Fielder [2009] EWHC 577 (Ch):*

> *There is no impropriety of purpose (whatever may be said of motive) when a plaintiff commences or maintains a proceeding desiring to obtain a result within the scope of the remedy, even though the plaintiff has an ulterior purpose or motive which will be fulfilled in consequence of obtaining the legal remedy which the proceeding is intended to produce.*

In *Westjet Airlines Ltd. v. Air Canada [2005] OJ 2310 (Ont. SCJ)*, Nordheimer, J made these observations on the distinction:

> *"19. The improper purpose relied upon by WestJet as part of the necessary foundation for its claim is that Air Canada set out to damage and ultimately "destroy" it. It is not clear to me that by simply employing a relatively pejorative term such as "destroy" one can satisfy the requirement of a collateral and improper purpose. It must first be recognized that there is a difference between purpose and motive. Many actions may result in the extinguishment of a defendant because the defendant does not have the resources available to answer any judgment that may ultimately be rendered. It may also be the case that actions are commenced by one competitor against another with the view to not only obtaining the relief sought in the claim but also the possible elimination of that competitor, whether directly or indirectly. While that may be an improper motive, that is*

> *not necessarily the same thing as being an improper purpose. If the action itself is trumped up or completely spurious, the institution of the action for the goal of driving a competitor out of business might well be found to be instituted for an improper purpose since there would be no associated valid basis for the claim. However, if there is some basis for the claim, it seems to me that it then becomes difficult to characterize the action as having been instituted for an improper purpose just because a by-product of its successful prosecution may be the elimination of the defendant as a competitor. Rather, such situations would appear to fall into the category of claim where, as the quotation in Metrick v. Deeb, supra, observed, there is no liability when the defendant properly employs the legal process but with bad intentions.*

Some of the authorities speak of a requirement that there be proof of an "overt act" which confirms the improper object or purpose. Nordheimer, J continued:

> *20. Assuming, however, that the facts of this case would satisfy the requirement of a collateral and improper purpose, there is nothing in the pleaded facts that would satisfy the second requirement of a definite act or threat in furtherance of a purpose not legitimate in the use of the process and outside of its scope. This requirement has been variously referred to in the cases as a "threat", "coercion", "a club" or other like expressions. Whether, as Mr. Justice Sharpe says, it is necessary for the act to rise to that level, it is nevertheless clear from the cases that there must have been some overt act done by the defendant to effect a purpose that is outside of the scope of the action. In other words, there must be an identifiable objective that the defendant wished to achieve that it could not achieve through the action itself.*

> *This requirement is described in Fleming on Torts (9th ed., 1998) at p. 688, in the following terms:*
>
> *"In addition to the improper purpose, there must be some overt act or threat distinct from the proceedings themselves, in furtherance of that purpose, such as in the abovementioned case the extortion accompanying the capias. Were it otherwise, any legal process could be challenged on account of its 'hidden agenda[2]'."*
>
> *21. I am unable to find in the statement of claim any such overt conduct by the defendants that would satisfy this second requirement. The acts complained of by WestJet are all acts that the defendants were entitled to engage in. The executives of Air Canada are entitled to speak to the press about the Air Canada action. Indeed, they may have an obligation to do so in certain circumstances. Air Canada is entitled to claim whatever level of damages in that action that it wishes to. Air Canada can add parties to the litigation as long as it can plead a proper cause of action against those parties."*

214. Sagicor says that reliance upon abuse of process in the present case is misconceived because the tort is limited to the pursuit of objects lying outside the remedies available legitimately in pursuit of the claim. The English authorities quoted above confirm the accuracy of that submission. The purpose or object of the defendant must be shown to have been "not within the scope of the process" and "one other than that for which [the civil process] was designed" (*Metall und Rohstoff, supra*). Such a purpose is a necessary element. The

need for this element is made apparent particularly by the lack of any requirement in an abuse of process action that the earlier action was wholly without merit or that the defendant lacked reasonable and probable cause to initiate it. If the need for an object outside the scope of the process were to be removed, a plaintiff with a meritorious claim who pursues it out of spite and not for an award of damages could be liable in damages for abusing the process of the court. A significant number of claims which are fairly arguable are no doubt brought for personal reasons, in whole or in part. Any relaxation of the requirement to show an object outside the scope of the process would open the judicial system to a flood of counterclaims requiring an examination of the subjective intentions of the plaintiff. An action brought dishonestly and based upon false evidence is not, without more, an abuse of the process of the court: *Metall und Rohstoff, supra*.

215. There is one external or collateral act which merits consideration: the tip given to Alan Markoff which resulted in the newspaper article. Mr. Harrigan says that on two occasions Mr. Delessio told him that he was going to plant an article in the press about the

lawsuit. He said his girlfriend was going to try to plant it. Mr. Markoff wrote an article about the case in March, 2006 which was based upon the content of the court file. He was told by someone, whose name he would not reveal, of the existence of the action. He did say that the source was an owner of a unit at WV. He said that neither Danny Scott nor Frank Delessio was the source. Mr. Markoff never discussed his story with Mr. Delessio. The tenor of Mr. Markoff's evidence was that the law suit was common knowledge around WV and all owners would have known of it. Given the evidence of Mr. Harrigan, which I accept on this point, I find that Mr. Delessio was instrumental in some undisclosed manner in causing the story to appear although he did not himself communicate with Mr. Markoff.

216. Mr. Bueno does not say that the newspaper article was itself a wrongful object or purpose outside the scope of the process. He says the appearance of the newspaper story is evidence of malice. In my view, he is correct on both counts.

217. Insofar as the claim is framed as an abuse of process, it cannot succeed because the need for proof of an object not within the scope of the process cannot be satisfied.

218. If the claim is viewed as one for malicious prosecution of a civil action, it cannot succeed without a wholesale extension of the law which applies the tort to civil proceedings "generally". The Crawford parties do not have the benefit of an undertaking as to damages. Any injury caused to them arises not from the Mareva injunction application but from the initiation and prosecution of the action itself. In effect, they ask this Court to bring about a general extension of the tort of malicious prosecution of a civil action and hold that it permits a recovery in any case where an unmeritorious civil action is commenced maliciously. While this Court is not bound strictly to follow a decision of the House of Lords its decisions are, of course, of very high persuasive value. The judgment of the House of Lords in *Gregory* contains a considered pronouncement on a question of broad policy. It establishes that no extension of the tort of malicious prosecution to civil actions generally is necessary or desirable. I would not decline to follow

such a decision except in rare and compelling circumstances which are not present in the case at bar.

219. The boundaries of these two closely related torts cannot be extended to the degree necessary to accommodate Mr. Paterson's claim. I conclude that my award of indemnity costs to him and to the other Crawford parties is the limit of what the present state of the law will allow. For these reasons, the claims framed as abuse of process and malicious prosecution of a civil action are dismissed.

Findings of Fact on Malice

220. Since further proceedings may arise from this action, I shall now consider certain findings of fact requested by the Crawford parties.

221. In a claim of malicious prosecution, the prior proceedings must have been determined in favour of the plaintiff. The Crawford

parties were wholly successful in the original proceeding so this element is established.

222. The prior proceedings must have been instituted without reasonable and probable cause. Viewed objectively, and without consideration of Sagicor's state of mind or intention, this element has been established. Sagicor has never possessed a body of evidence capable of proving it was defrauded or was the victim of a conspiracy. Its law suit was wholly misguided.

223. I am satisfied that the Crawford parties have suffered damage. The evidence of that is reviewed below.

224. The only remaining question, if an award of damages for malicious prosecution of a civil action were possible at all, would be the question of malice.

225. There is ample evidence that Frank Delessio harboured a marked dislike of Mr. Paterson at all material times. I am satisfied that Mr. Paterson's evidence about reporting Delessio to the Immigration Board is reliable and that it provides an explanation for the ill will. A number of witnesses have testified to the animosity. Mr. Nicholson observed Mr. Delessio treating Mr. Paterson with total disdain during a meeting; at one point Mr. Delessio said that Mr. Paterson "was not a loss adjuster and never had been." Because of Mr. Harrigan's ongoing feud of a personal nature with Danny Scott, his evidence must be approached with some caution. Nevertheless, I am satisfied that he did observe resentment on the part of Mr. Delessio toward Mr. Paterson and did hear the former say that he would drive the latter out of business and destroy him professionally or words to that effect. I accept that those words were said and are an accurate reflection of Mr. Delessio's state of mind in June and July, 2005.

226. I am satisfied that Mr. Delessio was instrumental, as I said earlier, in causing the adverse publicity which appeared in the article in the Caymanian Compass. Mr. Delessio told Mr. Harrigan that such an

article would appear prior to its publication. Other witnesses also testified to Mr. Delessio's dislike of Mr. Paterson. I am therefore satisfied that Mr. Delessio's resentment of and dislike for Mr. Paterson was a substantial motivating factor in his putting forward the case of fraud and conspiracy. No other conclusion would be reasonable on the evidence.

227. A more difficult question is whether personal dislike and a wish for revenge was Mr. Delessio's sole motivation. Mr. Delessio told Mr. Scott and the attorneys at Q&H that, in his opinion, about CI $1,300,000 worth of work had been done by the Hurlstones. It appears he had been told something of the sort by Mr. Ulrich, an employee of BPL for a period of time and entrusted by it with the task of preparing scope sheets. Mr. Delessio conducted his own inspection of the project. There is nothing in the extensive evidence of Mr. Dickson from which I can infer that Mr. Delessio did not believe that Sagicor had been overcharged.

228. It is clear and not open to debate in this proceeding that the actual value of the work done was in the area of CI $3,000,000. The

question becomes one of whether Mr. Delessio held a genuine but entirely mistaken view of the discrepancy between value and cost or whether he was lying about his own opinion on the subject. Mr. Delessio was a highly experienced loss adjuster, a fact which suggests that he would have known that more than CI $1,300,000 worth of work had been done. He was also, I find, a somewhat impetuous personality with a strong belief in the correctness of his own position. That suggests that he might have simply jumped to a conclusion which was unwarranted but nevertheless a conclusion in which he had a genuine belief.

229. In addition to what he observed on the job site, Mr. Delessio would have understood (correctly) that Mr. Paterson was in a position of conflict of interest. I am satisfied from the evidence of Mr. Thomas that the obligations of a loss adjuster are in conflict with those of a project manager and cannot be reconciled. This conflict of interest was entirely excusable in the immediate aftermath of the hurricane when it would have been difficult to obtain a second professional, as Mr. Coles observed. It became much less so by January, 2005 when Sagicor asked Mr. Paterson to rectify the situation. These

facts would have been known to Mr. Delessio and would have had an influence on his opinion.

230. It is true, as Mr. Lowe has argued, that Sagicor never brought home to Mr. Paterson their unhappiness at the lack of detail in his reporting. Sagicor was essentially overwhelmed with claims in the months following the hurricane and had little time or inclination to go behind the opinions of its loss adjusters. As a consequence, it may have been reasonable for Mr. Paterson to submit his reports in the brief and conclusory format in which they were written. The lack of detail, however, is not characteristic of the way in which most loss adjusters presented their reports to Sagicor and may have engendered some suspicion in the mind of Mr. Delessio when he reviewed them. Had the reports contained more detail, they might have conveyed to Mr. Delessio a reasonable explanation for a substantial disparity between the value of the work and the amount of money spent: that a substantial amount of Sagicor's money had been spent on the purchase of materials which had not yet been incorporated into the buildings.

231. Mr. Paterson, on behalf of BPL, was project manager throughout. BPL agreed in writing with Sagicor to provide it with a number of analyses to "monitor and control costs throughout the program", and to "maintain financial control of the project." These contractual terms make it hard to accept Mr. Paterson's assertion in terms that he had no obligation to monitor the cost in any detailed manner. BPL billed its client a substantial sum for its services as project manager. After all, no fixed price contract had been signed and Mr. Paterson would or should have been aware that the value of the work might have to be assessed essentially (as in fact it was) on a quantum meruit basis. As project manager, if not as loss adjuster, Mr. Paterson needed to have a reasonable understanding of the value of the work which had been done. Since Sagicor was making payments direct to the contractor and not to its customer (WV), it had effectively stepped into the shoes of the insured and had a genuine and reasonable interest in confirming that the value of the work completed was in proportion to the money it had spent. All of this would have been in Mr. Delessio's mind as he reviewed the file and would have had some impact upon his conclusion about the value of the work.

232. Commencing upon receipt of Mr. Delessio's letter of June 20, 2005, Mr. Paterson must have realized that his client wished to have more information than it had been given. That letter asks for detail on "costings".

233. I accept that the contract was never meant to be a cost plus contract and could not be converted into one after the fact. I acknowledge that to do a full historic cost accounting in June or July, 2005 would have been next to impossible. However, I am satisfied that more information could and should have been given to Sagicor than was actually provided. For example, Mr. Delessio's enquiry of June 22nd about the reason for the cost of the standing seam roof was answered by Mr. Paterson in a detailed manner in his email of June 27, 2005. In the same email, Mr. Paterson says that "our negotiations, costs, estimates, etc. are transparent and will be made available to you". It was not. If that information was available, it should have been provided to Sagicor upon request.

234. The same email asserts that "the contractor should not have to further validate any of his contractual costs either current or future as he has a lump sum fixed price contract and his contract is with the Strata." What had been conveyed to Sagicor up to that point did not amount to a "validation" by the contractor of any of his costs. No lump sum fixed price contract was in existence. Mssrs. Scott and Hambly had expressed their approval of a settlement in the amount of CI $5,500,000 but it was open to them to change their mind at any time. As project manager if not as loss adjuster, Mr. Paterson should have been somewhat more receptive to Mr. Delessio's demands than he was and should have tried to accommodate them. He says he explained his calculations to Mr. Delessio orally. The failure to commit them to writing likely encouraged Mr. Delessio's suspicions.

235. Much has been made of the fact that Mr. Paterson produced scope sheets to Mr. Delessio with the prices concealed by whiteout. This incident seems to have given rise to suspicion through a simple lack of communication. Mr. Paterson could perfectly well have said to Mr. Delessio that the scope sheets had been prepared by his

employee Mr. Ulrich, that they contained a number of omissions which had to be rectified by Mr. Paterson, and they were not yet ready for presentation to a client. Mr. Delessio viewed this incident as further evidence of fraud. His opinion was unreasonable, but we are not concerned here with the reasonableness of his view but with what he actually thought.

236. Very soon after arrival at Sagicor Mr. Delessio revoked Mr. Paterson's authority to approve the payment of advances. No doubt his dislike of Mr. Paterson contributed to this decision. However, Mr. Scott had by this time formed the view that no further advances should be made until the contractual position was clarified. Mr. Paterson's assertion in terms that the claim had already been settled by June 15th is a definite overstatement. Mr. Harrigan may have said that he would accept a CI $5,500,000 settlement but it does not appear that he was entitled on this point to speak for the WV Strata Executive Committee. No enforceable contract was in existence. I do not consider the revocation of authority to have been motivated solely by a desire to destroy Mr. Paterson; Mr. Delessio had a genuine concern to protect the financial interests of his employer.

237. Mr. Delessio arranged for private investigators to conduct surveillance on Mr. Paterson commencing July 1, 2005. That can be seen as evidence of the depth of his dislike of Mr. Paterson but can also be seen as evidence of a conviction that his company had been the victim of a fraud.

238. Sagicor has never produced Frank Delessio's file in this proceeding. They say it cannot be found. Mr. Delessio would not have had authority to remove this file from Sagicor; it belonged to the insurer. I have inferred that there was such a file, that it contained the cleanup invoice, and that Mr. Delessio was aware of this invoice. Thus, he must have known that the amount paid to the Hurlstones included about $640,000 for cleanup yet he told Mr. Purbrick to exclude that from the evaluation. Mr. Delessio was aware that Mr. Purbrick's labour rates were "low" but, as he said, not unreasonable. If one were to include the cost of the cleanup in Mr. Purbrick's estimate and adjust his labour rates upward to, for example, the $18 per hour figure paid by another large contractor at the time (McAlpine) or to the $22 per hour figure adopted by Mr.

Paterson, a discrepancy between value and payments would remain but it would not be sizeable enough to support claims in fraud and conspiracy.

239. In summary, Mr. Delessio experienced and observed a number of events which might, to the reasonable and objective observer, have seemed somewhat suspicious. Coloured by his strong dislike of and pre-existing suspicion about Mr. Paterson, they were interpreted by him as evidence of fraud. He knew the Purbrick report was badly flawed and not a proper basis in itself for the commencement of a fraud and conspiracy action. He concealed that from the attorneys. He also had his own (inaccurate) opinion, fortified by his aggressive personality and excessive self-confidence in his own ability as a loss adjuster, that the work he had observed at WV was not worth $3,000,000. His dislike of Mr. Paterson and desire to harm him was the dominant factor which led him to present what should have seemed like an ordinary case of overcharging as one of fraud, but I cannot conclude on the evidence that the destruction of Mr. Paterson personally was the sole reason for the litigation. Mr. Delessio's unreasonable but genuinely held

belief that Sagicor had been defrauded was also a contributing factor of significance.

240. If the "tort" of malicious prosecution of a civil action were a part of our law, I would hold that Mr. Delessio's dislike of Mr. Paterson and intent to harm him, when viewed in the light of his failure to warn the attorneys of the deficiencies in Mr. Purbrick's opinion, amount to proof of malice.

Other Findings of Fact Requested by Crawford Parties

241. Mr. Bueno has asked that I make a finding of fact about the reason for the expulsion of the Hurlstones from the job site and the dismissal of Mr. Paterson by Sagicor. The former was a result of Mr. Delessio's dislike of Mr. Paterson in combination with his impression that Sagicor had been overcharged and his (erroneous) understanding that the Hurlstones had abondoned the site in any event. The latter was a result of Mr. Delessio's dislike of Mr. Paterson in combination with his suspicion that Mr. Paterson had allowed Sagicor to be overcharged by the Hurlstones. I agree that

the Hurlstones and Mr. Paterson were excluded from the site "very aggressively" and that imputations of dishonesty were made.

242. I am asked to find that Mr. Delessio's actions "can only be explained" by a desire to destroy Mr. Paterson. In aid of this submission, particular findings of fact are requested.

243. I accept that the revocation of Mr. Paterson's authority over payments to the Hurlstones was motivated largely by a dislike of and distrust of Mr. Paterson.

244. I do not accept that Mr. Delessio "demanded the impossible" of Mr. Paterson, i.e., a detailed historical cost accounting. He appears to have wanted more detail about cost, including details which would have been difficult to provide, but his demand was not as extreme as has been suggested in argument.

245. I am asked to find that Mr. Delessio knew the $1,300,000 valuation by Mr. Purbrick was "false". I have found that Mr. Delessio knew

that Mr. Purbrick had not taken the cleanup cost into account so the valuation was deficient and gave a false impression of value.

246. I accept that Mr. Delessio gave instructions to fraud investigators to conduct surveillance on Mr. Paterson.

247. There is insufficient evidence to support a conclusion that Mr. Delessio "sabotaged" the attempt to have the Hurlstones finish the project. I am asked to find that Mr. Purbrick was a "tame" expert and hired for just that reason. I am satisfied from all of the evidence, including my observation of Mr. Purbrick under cross-examination, that he acted as an independent expert who formed his own opinion and did not simply say what Mr. Delessio no doubt wanted to hear. On the other hand, Mr. Purbrick's ability to reach a proper opinion was fettered severely by the instruction from Mr. Delessio that he should not contact the Hurlstones or Mr. Paterson.

248. I am satisfied that a desire to avoid paying the WV claim, or the balance of the claim, at a time when Sagicor was experiencing financial difficulty played no part in Sagicor's motivation.

249. Overall, I have found Mr. Delessio's dislike of Mr. Paterson and desire to harm him to be the dominant factor which led him to present what should have seemed like an ordinary case of overcharging as one of fraud, but I have not concluded that the destruction of Mr. Paterson personally was the sole motivating factor.

Defamation

250. The only other tort pleaded by the Crawford parties is defamation. The Amended Counterclaim of the Crawford parties alleges in para. 8 – 10 that the filing and "use" of the Statement of Claim constituted a "publication" of the allegations in it. The tenor of the pleading alleges that the allegations were false. Malice is alleged. Paragraphs 22 and 104 assert that the "defamatory" allegations caused damage to the reputations of these parties.

251. The Defence says that the filing of the Statement of Claim was an occasion of absolute privilege because it was a step taken in the course of a judicial proceeding. Proof of malice does not defeat the defence. Those propositions are supported by ample authority. The cases are collected in *Clerk & Lindsell on Torts*, 19th ed., at para. 23-91 et seq. The claim in defamation also must be dismissed.

DAMAGES

Crawford Parties

252. Mr. Paterson is sixty-one years of age. When the action against him was commenced he was fifty-eight and, he says, at the height of his professional earning capacity and potential. He qualified as a Chartered Surveyor in 1971 in Scotland. In 1983 he was elected a fellow of the Royal Institute of Chartered Surveyors and in 2000 became a member of the Chartered Institute of arbitrators.

253. When he first arrived in the Cayman Islands he worked for a large local construction company as an in-house quantity surveyor until 1978. He then joined a firm of local architects again working as an in-house quantity surveyor. In approximately 1980 he started his own business as quantity surveyor and valuer. He employed one other valuer for over twenty years and an office manager. All of his historical financial records were destroyed in Hurricane Ivan. Mr. Paterson says that from about 1995 on his earnings were always in the range of CI $200,000 to CI $250,000 per year.

254. In 1998, Mr. Paterson became an employee of Deloitte Property Consulting and merged his own practice with theirs. His remuneration remained in the range of CI $200,000 to CI $250,000. By 2004, Mr. Paterson decided he wished to return to private practice. About one week before Hurricane Ivan, he left Deloitte with a view to re-establishing his own business which would include a close working relationship with Crawford International. He formed Crawford Adjusters (Cayman) Limited but the close relationship implied by the corporate name never became a reality.

255. After Hurricane Ivan there was an abundance of work for loss adjusters. Mr. Paterson was drawing approximately CI$20,000 per month (in total) from Crawford and from BPL. Around March, 2005 he received a dividend from the two businesses in the total amount of US $200,000.

256. The article entitled "Windsor Village Lawsuit Accuses Many" was published on the front page of the Caymanian Compass on March 22, 2006. It quoted the Statement of Claim as asserting that in light of the gross disparity between the advances to the Hurlstones and the value of work actually completed at WV, the representations by Crawford, BPL and Mr. Paterson are "incapable of an honest explanation and must have been made with knowledge of or recklessness as to their falsity." The article added: "a similar statement is made with regard to Hurlstone and/or Hurlstone Contractors." Mr. Paterson says that the effect of this unwanted publicity was "catastrophic" and says friends and business associates shunned him because of the negative publicity.

257. Recently, Mr. Paterson's health has deteriorated. He attributes that to the stress caused by the lawsuit and the newspaper article. He suffered a heart attack and underwent some heart surgery. He was treated by his doctor for anxiety and depression. He is also a diabetic, and the strength of his medication for that condition was doubled. Dr. John Addleson is Mr. Paterson's family doctor. He confirmed Mr. Paterson's evidence about the effect of the litigation upon his health, including the level of stress which caused insomnia and required a prescription and anti-anxiety medication. Dr. Addelson said he only learned of the lawsuit ten days before testifying.

258. Mrs. Paterson corroborated her husband's evidence concerning the emotional and financial effects of the litigation. She said that the stress imposed by the fraud allegations and the slow progress of the litigation caused her husband to lose interest in his former friends and avoid social engagements. Almost all of the money the couple had saved was spent on legal expenses. When the allegations were withdrawn in November, 2008 "it was though a

huge weight had been lifted from him and almost overnight the pain and suspicion were gone from his face."

259. Mr. Derek Haines confirmed the fact that knowledge of the fraud allegations was widespread in the local community and the subject of gossip.

260. Mr. Bould left BPL and Crawford as of June 30, 2006. Mr. Paterson attributes the departure of Mr. Bould to the lawsuit.

261. By August, 2005 the flood of work caused by Hurricane Ivan was diminishing and Mr. Patterson was taking steps to market his claims adjustment and risk assessment work. The allegations of fraud publicized in the Caymanian Compass put an end to these efforts. He says that even after the lawsuit was withdrawn in December, 2008 it proved impossible to resurrect his business.

262. By necessity, Mr. Paterson began to look for work in other Caribbean jurisdictions. He did obtain some fee paying work, particularly in St. Maarten. He was also able to obtain two

valuation jobs on Grand Cayman in 2008. Mr. Joel Tranchecoste is the financial comptroller of a condominium development in St. Maarten. He said Mr. Paterson has been working there about three to six days per month for his enterprise since July, 2007. He has been paid US $10,000 per month plus his out-of-pocket expenses. I am satisfied that Mr. Paterson made a reasonable effort to mitigate his loss by seeking and finding what work was available to him, principally in St. Maarten.

263. Mr. Liam Day is a director of BCQS Ltd., a company engaged in quantity surveying, valuations and property management in the Cayman Islands. In his opinion, directors and partners of property consultancies such as his would earn approximately US $300,000 dollars per year inclusive of bonuses, profit sharing, and other standard benefits.

264. Mr. Thomas has known Mr. Paterson since the early 80s and says that he is qualified as an expert in the field of quantity surveying, project management and valuations. In Mr. Thomas' opinion, a small to medium sized firm providing those services would

produce approximately CI $250,000 in remuneration for its directors. After Hurricane Ivan, the level of profit owned by such firms increased substantially for a period of over three years.

265. Mr. Alvin Aaron is head of corporate banking at First Caribbean International Bank (Cayman) in George Town. BPL was an approved valuer on the Bank's panel of valuers from January, 2006. After the fraud allegations were publicized, the Bank made a "business decision" to stop accepting valuation reports prepared by Mr. Paterson's firm for its customers. Mr. Aaron's best guess is that if Mr. Paterson reapplied to be listed he would be successful.

266. Mr. John Calhoun is the owner and lead broker of Coldwell Banker Cayman Islands Realty on Grand Cayman. Customers often ask his business to provide referrals to licenced appraisers. For many years, Mr. Paterson had been providing some of those services. After the fraud allegations were publicized in the Caymanian Compass, Mr. Calhoun decided to stop referring customers to Mr. Paterson "in the interests of protecting our own good name". Mr.

Calhoun confirmed that he would now refer customers to Mr. Paterson.

267. Mr. Colin Luke has been active in the insurance business for a considerable time on Grand Cayman. He has regularly used the services of Mr. Paterson and says he has been impressed by Mr. Paterson's knowledge and diligence. He considers him to be honest and beyond reproach. Mr. Luke confirmed that the fraud allegations caused a "marked deterioration" in Mr. Paterson's demeanour and a significant rise in his level of anxiety. Mr. Luke says that local banking and other professional firms avoiding using Mr. Paterson's services while the litigation was afoot.

268. The effects of the litigation and the injunction were felt equally by Crawford Adjusters and by BPL.

269. After Hurricane Ivan, Crawford International lost interest in a business relationship with Crawford Adjusters because, apparently, they felt that the changing business climate made it unnecessary to have a local office. Mr. Patterson then decided to proceed

independently using the company (Crawford Adjusters) which he had already formed.

270. After publication of the newspaper article, "all local banks" were reluctant to instruct either BPL or Mr. Paterson. It was Mr. Nicholson's job to maintain the accounts of Crawford and BPL. After the law suit was commenced, the companies' cash reserves were used to pay legal fees and experts and much of the professional time was spent preparing the defence. He confirmed that "new work began to dry up" as a result of the allegations of fraud and conspiracy.

271. Had I found that the Crawford parties had established a liability to them for abuse of process or for malicious prosecution of a civil action, I would have awarded to them the sum of $1,300,000 as special damages. That amount has been agreed to by the parties and their experts, without allocation between the three Crawford parties.

272. I accept the submission by Mr. Bueno that general damages would fall to be assessed in the manner such damages are assessed in successful defamation actions. Mr. Paterson is entitled to receive compensation for damage to his reputation and for the distress, hurt and humiliation he has suffered: *John v. MGN Ltd.* The lack of any apology to him from Sagicor should be taken into account: *ibid.*

273. The award of special damages would compensate Mr. Paterson in large measure for the damage to reputation. Had liability been established, I would have awarded to him the additional sum of $35,000 by way of general damages.

Damages Pursuant to the Undertaking

274. To obtain the Mareva injunction, Sagicor gave its promise that it would compensate the Hurlstone parties for any loss caused by the order if it was discharged. Such damages are to assessed on much the same basis as damages for breach of contract: *F. Hoffmann La-Roche& Co A.G. v. Secretary of State for Trade and Industry*.

That is common ground between the parties. The Hurlstone parties are entitled to be put as nearly as possible "in the same position as [they] would have been if [they] had not sustained the wrong for which [they are] now getting compensation or reparation:" per Lord Blackburn in *Livingstone v Rawyards Coal Company (1880)* 1 App. Cas 25, at 39.

275. Since WV was not a party to the injunction application the liability is Sagicor's alone. The injunction was not granted against the Crawford parties so they have no entitlement under the undertaking.

276. Sagicor raises two questions of law on this branch of the action: causation and the duty to mitigate.

Causation

277. Sagicor argues that any loss suffered by the Hurlstone parties was caused by the existence of the proceedings as much as by the injunction itself. On this basis, it is alleged that, since the

Hurlstone parties would still have suffered the same loss had the proceedings been pursued without a Mareva injunction, they cannot recover on the undertaking.

278. The burden of proof rests with the Hurlstone parties to establish that any damage they say they have suffered was indeed caused by the injunction and not by any other event or circumstance. Having said that, I adopt as a useful guide the words of Mason, J in *Air Express Ltd v Ansett Transport Industries (Operations)Pty. Ltd* (1981) 146 CLR 249, 322:

> *"Unless the circumstances indicate otherwise, when it appears that damage flows from the non-performance of an act and the performance of that act has been restrained by an interim injunction, the inference will generally be drawn that the damage has been occasioned by the injunction."*

279. Sagicor argues that the Hurlstones must show that the Mareva injunction was the exclusive cause of the loss that they suffered. This argument is based in part upon the *Air Express* decision. All four judgments which dealt with the question of causation adopted a "but for" test. What had to be shown was that *prima facie* the loss would not have happened without the injunction. The High

Court did not suggest that the injunction had to be the *exclusive* cause. Gibbs J said at p. 313:

> *"The party seeking to enforce the undertaking must show that the making of the order was a cause without which the damage would not have been suffered.“*

Stephen J said at p. 320:

> *"From this it can be seen that it will only be if damage is suffered because of the grant of the injunction, and would not have been suffered but for it, that the court should compensate a defendant who claims damages under the undertaking. Its grant must be shown to be the causa sine qua non of the damage complained of before the defendant can be entitled to be compensated for what turns out to be the erroneous grant by the court of the injunction against it."*

Mason J said at pp. 324-325:

> *"The object of the undertaking is to protect a party, normally the defendant, in respect of such damage as he may sustain by reason of the grant of the interim injunction in the event that it emerges that the plaintiff is not entitled to relief. It is no part of the purpose of the undertaking to protect the defendant against loss or damage which he would have sustained otherwise, as for example, detriment which flows from the commencement of the litigation itself. That is loss or damage which the defendant must bear himself, as he does when no interim injunction is sought or granted. Consequently, it is for the party seeking to enforce the undertaking to show that the damage he has sustained would not have been sustained but for the injunction*."

It can be seen therefore that the test in *Ansett* was a "but for" test. In *Tharros Shipping Co. Ltd v Bias Shipping Ltd (The Griparion) (No. 1)* the Court of Appeal essentially approved a passage by Saville J which said:

> *"I find [the reasoning of Mason J in Air Express] convincing. However, in my view this approach does not mean that a party seeking to enforce an undertaking must deal with every conceivable or theoretical cause of the damage claimed, however unlikely this may be. Once a party has established a prima facie case that the damage was exclusively caused by the relevant Order, then in the absence of other material to displace that prima facie case, the Court can, and generally would, draw the inference that the damage would not have been sustained but for the order. In other words, the Court seeks to approach and deal with this question of causation in a commonsense way."* (underlining added)

280. The Air Express test did not require a claimant in an inquiry to demonstrate that the injunction was the *exclusive* cause of the damage. The appearance of the word "exclusively" in *Tharros* is advanced by Sagicor in support of its argument that the "but for" test "may well" not be sufficient in law. I do not think it was intended to have that effect.

281. In contract it is recognised that two equally effective causes might both qualify as "but for" causes: see *County Ltd v Girozentrale Securities [1996] 3 All ER 834*. Where there are two approximately equal causes of loss, the contract-breaker is liable so long as his breach was an effective cause of the loss. The Court need not determine which cause was the more effective. At 846, Beldam LJ stated:

> *"Causal expressions used in the law whether couched in classical or modern language are redolent of difficulty, but I take the judge to have used the expression 'causa sine qua non' in the sense not just of a necessary step in the sequence of events leading to the loss but of an event which with others combined to cause the loss, otherwise he could have no basis for comparing the potency of each in causing the loss. But if he used the expression in this sense, his approach of discarding one of the causes because he regarded it as less effective in causing the result than the others meant that he could have rejected an effective cause merely because he considered another cause had had a greater effect. Such an approach is in my view incorrect."*

The purpose of "but for" causation is to eliminate irrelevant causes. In *BHP Billiton Petroleum Ltd v Dalmine SpA [2003] EWCA Civ 170*, Rix LJ said:

> *"...In this connection we think that the role of the "but for" test should not be exaggerated. As the learned authors of Clerk & Lindsell stated at the beginning of the passage cited above, the purpose of that test is to*

> *eliminate irrelevant causes. The point is emphasised again later on in the same paragraph, where the text continues – "It is worth bearing in mind that the "but for" test functions as an exclusionary test, i. e. its purpose is to exclude from consideration irrelevant causes"."*

282. My approach towards causation cannot be an overly rigid application and must rely upon a common sense assessment of the evidence. If the Mareva and the proceedings were both contributors to damage that was suffered, I will not exclude that damage from consideration but ask whether the injunction was a "significant determinant" or operating cause of it. This is the test adopted by the Court of Appeal of New Zealand in *Bonz Group (Pty) Limited v Bonz Group (NZ) Limited*. It is consistent with the approach in contract to concurrent causes which examines whether a cause was an "effective" or "operating" cause. The Court concluded:

> *"In part, the decision to close the business may have been motivated by the need to devote time and money to the litigation, which was complex and expensive. But we are of the view that Hansen J was right to conclude that a significant determinant of that decision was the injunction …"*

283. If a plaintiff obtains an injunction fraudulently or maliciously the court should hold that person responsible for all loss caused directly by the injunction. The measure of damages should be the same as for the intentional torts and it is just that in such circumstances the plaintiff should bear all the loss: see *Smith New Court Securities Ltd v Citibank NA [1997] AC 254*.

Failure to Mitigate

284. Sagicor argues that the Hurlstones failed to mitigate their loss because they should have applied to discharge the injunction or sought a variation of its terms. There is no decided case in which a claim to damages pursuant to an undertaking has been reduced because of a failure to mitigate. Nonetheless, I accept that in principle the claimant is under an obligation to do what is reasonable in all of the circumstances to reduce the magnitude of the loss to the same extent as in a breach of contract action.

285. The burden of proving a failure to mitigate rests with the party alleging it: see *BHP Billiton Petroleum Ltd v Dalmine SpA, supra*. The party with the benefit of the undertaking is under no obligation to do anything other than in the ordinary course of its business: *British Westinghouse Electric and Manufacturing Company Limited v Underground Electric Railways Company of London Limited*. It is well established that a claimant is not to be judged too rigourously on this question. Lord MacMillan in *Banco de Portugal v Waterlow and Sons Limited [1932] AC 452 at 506* said:

> *"Where the sufferer from a breach of contract finds himself in consequence of that breach placed in a position of embarrassment the measures which he may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the instance of the party whose breach of contract has occasioned the difficulty. It is often easy after an emergency has passed to criticize the steps which have been taken to meet it, but such criticism does not come well from those who have themselves created the emergency. The law is satisfied if the party placed in a difficult situation by reason of the breach of a duty owed to him has acted reasonably in the adoption of remedial measures, and he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken."*

Accordingly a claimant is under no duty to embark upon complicated and difficult litigation. That principle emerges clearly from the decision of Harman J in *Pilkington v Wood [1953] Ch 770 at 777*:

> *" ... I am of opinion that the so-called duty to mitigate does not go so far as to oblige the injured party, even under an indemnity, to embark on a complicated and difficult piece of litigation against a third party. The damage to the plaintiff was done once and for all directly the voidable conveyance to him was executed. This was the direct result of the negligent advice tendered by his solicitor, the defendant, that a good title had been shown; and, in my judgment, it is no part of the plaintiff's duty to embark on the proposed litigation in order to protect his solicitor from the consequences of his own carelessness."*

It is also true that if the injunction was obtained maliciously or deceitfully a failure to mitigate has no place in an inquiry as to whether the order caused the loss: see *Smith New Court Securities Ltd v Citibank NA [1997] AC 254, at p. 285.*

Aggravated or Exemplary Damages

286. Aggravated damages are awarded as

> "*additional compensation for the injured feelings of the plaintiff where his sense of injury resulting from the wrongful physical*

act is justifiably heightened by the manner in which or motive for which the defendant did it." Cassell & Co Ltd v Broome [1972] AC 1027 per Lord Diplock.

Aggravated damages are compensatory and have been awarded for malicious prosecution: see *Thompson v Commissioner of Police of the Metropolis [1998] QB 498.*

287. It appears that exemplary damages may not be available to punish a defendant for his anti-social behaviour towards a plaintiff in the obtaining of a Mareva injunction: *see Al-Rawas v. Pegasus Energy Ltd. [2009] 1 All ER 346.* I need not consider the question further as I am satisfied that my award of damages under other heads carries with it an adequate punitive effect.

Damages: HL & John Hurlstone

288. Before making any personal expenditures exceeding CI $250, John Hurlstone was required by the injunction to notify the plaintiffs' attorneys of the amount to be spent, the purpose of the expenditure and the source of the funds. He was restricted to spending CI

$1,000 per week. Both Mr. Hurlstone and his company were obliged to disclose their assets.

289. On March 16, 2006 the parties agreed to vary the terms of the Mareva injunction to allow John Hurlstone to spend up to CI $35,000 per month and to allow HL to spend up to CI $5,000 in a single transaction without approval. He did consider asking the court for a variation of the terms of the injunction but was told that Sagicor's position was that they wanted him to post CI $7,000,000 worth of land as security. His own attorneys said this was not a viable approach.

290. Some consideration was given to applying to have the Mareva injunction discharged. That was never done. The injunction had been obtained largely upon the basis of the opinion evidence of Mr. Purbrick. To obtain a discharge, it would be necessary to tender expert evidence challenging his views. Mr. Hurlstone was advised that the resulting credibility dispute could be resolved only after cross-examination of the experts, a process which would have been expensive and difficult to attempt at an interlocutory hearing.

291. As the rumours circulated, Mr. Hurlstone says he found that longstanding acquaintances were avoiding him.

292. After the injunction was issued, the HL accounting department was required to ask Q&H for approval before it could pay its sub-contractors. Delay inherent in this process began to have negative effects. The problem was particularly acute with respect to "labour only" sub-contractors. Cheques to these employers should have been issued on Fridays, taking into account the net value of the work done during the week. Because of the approval process, the cheques were issued the following Monday or Tuesday. This caused discontent among the subcontractors.

293. On March 2, 2006 Mr. Hurlstone was advised by ScotiaBank that the HL accounts had been frozen. A process was created whereby the accounting department of HL would prepare a list of payments which needed to be made. The list was sent to Q&H and, usually within about two days, approval for the payments was obtained. In correspondence, Q&H were advised of the administrative and

reputation difficulties the injunction was likely to cause and were advised that the damages, if the injunction were to be discharged eventually, "will be in the many millions of dollars".

294. On March 3, 2006 a number HL employees went to the ScotiaBank to cash their weekly payroll cheques. A Bank employee announced publicly to everyone in the bank that persons holding HL's cheques could not cash them because of a court order so the cheques should be returned to the company. This caused obvious embarrassment. Rumors concerning HL's ability to honour its obligations circulated through the small Grand Cayman business community. Some suppliers and subcontractors expressed reluctance to honour purchase orders unless payment was made in advance. The Bank of Butterfield, HL's second bank, also refused to honour its cheques.

295. On March 9, 2006 an official at ScotiaBank told John Hurlstone that a "watch" had been placed upon Construction Equipment Services Limited, an unrelated company in which the Hurlstone

brothers had an interest. The assets of this company were not caught by the Mareva injunction.

296. Many payments HL intended to make in the ordinary course of its business were approved (after some delay) by Q&H but some were not. For example, a request to transfer CI $165,000 from HL's account from the Butterfield Bank to its account at the ScotiaBank was refused initially (and permitted subsequently). Even cheques under the CI $1,000 limit were not honoured by ScotiaBank unless they appeared on a list approved by Q&H.

297. HL was in the habit of submitting bids for construction projects within both the private and public sectors. An officer at ScotiaBank advised John Hurlstone that the bank could not consider extending any more credit to HL until the injunction had been discharged. This request was made repeatedly and refused repeatedly. An official of the Bank of Butterfield took the same position: it, also, would not extend financing until the injunction had been lifted. John Hurlstone says that when requests for

financing were refused, the injunction was always mentioned as the reason for refusal.

298. During the period the injunction was in force, HL made a number of unsuccessful bids on projects ranging in value from around CI $50,000 to a contract for some CI $10,500,000. In general terms, Mr. Hurlstone says HL was just as busy after the Mareva as before. However, this was a boom time and they expected to have a higher volume of work. They had more than fifty employees during the WV project, but less than forty before the hurricane.

299. Mr. John May owns and operates Capital Realty Ltd. in George Town. In early 2007 he was planning the construction of a four storey building on Seven Mile Beach known as Park Place. HL submitted the lowest bid. Mr. May was familiar with John Hurlstone and considered him to be a builder of good quality projects. However, HL advised that it would require a mobilization payment of 10% of the tender offer (which was approximately CI $8,690,000) before commencing work. That was of major concern to Mr. May. Around that time, it came to his notice that allegations

of fraud and conspiracy had been made against John Hurlstone and HL by Sagicor in relation to the WV reinstatement. For these reasons, Mr. May's company decided not to enter into a contract with HL.

300. A bid upon a project known as Cayman Falls was successful despite the existence of the injunction. This was a contract valued at CI $10,813,245 for the building of a forty-eight unit development of high end two and three bedroom apartments.

301. HL's inability to obtain financing caused significant delay to its Cayman Falls project which is expected to result in substantial liquidated damages. Some sub-contractors reduced their labour force because of late payments and eventually stopped work at the site. The project was delayed. The contract provides for liquidated damages caused by delay of CI $3,683 per day. As of July 31, 2009 those damages amounted to CI $1,016,508.

302. A claim to recover the liquidated damages owing on the Cayman Falls project has not been pleaded and has been addressed only in

passing by counsel. The expert evidence does not throw any light on the issue either. I make no award of damages to compensate for the payment of these liquidated damages.

303. Mr. Gibb was the in-house accountant of HL from November, 2006 on. He says that the accounts were in a "slightly haphazard state" when he first arrived. They were being prepared by a bookkeeper without accounting experience. In particular, there were no construction accounting principles being applied. Normally, a construction company would record revenue and cost as either a "percentage of completion" or as a "completed contract". Mr. Gibb employed a percentage of completion approach because the completed contract basis is used ordinarily in smaller jobs. Mr. Gibb checked each balance sheet account for the period 2002 to 2006 to ensure that they were accurate.

304. On many occasions Mr. Gibb requested ScotiaBank to provide a reference letter addressed to the Central Tendering Committee of the Government. He asked that the Bank assert that it would continue to help HL in their financing requirements. ScotiaBank

was willing to provide just two types of letters, neither of which fully met the requirements. He submitted these letters with the tenders because he could not obtain anything more useful.

305. Mr. Joe Chiazza is the in-house quantity surveyor of HL. He described the tendering process for government contracts. Bids are assessed on a points system. A bidder will be awarded fewer evaluation points if it wishes to receive a mobilization payment. Prior to the Mareva injunction, HL was able to submit competitive tenders which would seek to maximize the points available because they could finance the cost of the initial stages of the project through bank overdraft facilities and loans.

306. Some private sector projects are awarded with a mobilization payment but other private sector clients will not accept that. Prior to the injunction, HL was able to finance the initial stages of a private sector project where the client was unwilling to make a mobilization payment.

307. In addition, most government tendering requires the contractor to provide proof of financing. Typically, HL would obtain a separate bank reference letter for each tender. Since the injunction, HL's bankers have only been willing to provide relatively vague letters of reference. For example, one letter asserted only that HL "operates current accounts with combined average credit balances maintained in the low six figure range" without any reference to the bank's willingness to advance financing to HL.

308. Performance bonds are sometimes required by clients in both public and private sectors. These would normally be obtained from a financial institution or insurance company. However, John Hurlstone testified that HL had obtained no performance bonds from 2003 to 2006.

309. Mr. Chiazza provided a list of projects for which HL made a successful bid in the last few years. Prior to service of the injunction, HL bid successfully for a variety of construction projects ranging from CI $39,000 to CI $7,900,000 in value. There were twenty such projects from January, 1999 onwards.

310. After service of the injunction, HL was able to obtain four private contracts and one government contract. Four of the five contracts are for relatively small amounts: CI $7,500, CI $52,000, CI $69,000, and CI $786,000. The company was successful in obtaining one large private contract, the Cayman Falls project. The company also carried out some work after the injunction on projects in which Mr. Chiazza was not involved. He listed these but did not provide evidence of their values.

311. At the time of the injunction, the construction industry was still "buoyant" because of the continuing reinstatement work available related to hurricane damage. Mr. Chiazza says the company did not receive the number of invitations or opportunities to tender for private sector projects which it had received in previous years. It appeared to him that HL may have been excluded from tendering on a significant number of private sector projects.

312. Mr. Chiazza described the necessary changes to the company's payment procedure to subcontractors brought about by the need to

have Q&H approve the payments. Although the time needed for approval was only two working days, some sub-contractors were unhappy with this because they were accustomed to being paid weekly or fortnightly. HL would not know the amount of the required payment (in the typical case) until Friday. In the past, it would have issued the cheque that day. Because of the approval process the cheque would likely be issued on the following Tuesday. This brief delay troubled the "labour only" subcontractors in particular. The effect, particularly with respect to the Cayman Falls project, was to cause delay and disruption because subcontractors who were unhappy with the delay in payment would reduce their labour force owing to their own inability to pay wages in a timely manner.

313. Mr. Chiazza gave evidence of a number of projects for which HL was unable to tender, although it would have done so prior to the issuance of the injunction. These were government projects for which HL could no longer provide the necessary proof of its ability to finance the early stages. These projects included the East End seawall, the Drug Task Force building, the airport expansion

project, the Mosquito Research Unit facility, the George Town Primary School, the Government Administration Building, the West Bay High School, the Frank Sound High School, and a Camana Bay multi-assembly building.

314. A number of unsuccessful tenders were made. Mr. Chiazza listed the Harquail Theatre refurbishment (for CI $2,400,000), the Park Place project (for CI $8,690,000), a boxing gymnasium in George Town (for CI $1,500,000), a new vehicle licensing centre (for CI $2,068,000), and the Car City facility (value not given).

315. Mr. Hurlstone also had certain personal projects he intended to pursue. Morningside Plantation was a development of about seventy-two condominium units. The financial projection shows a total cost of CI $20,971,240 to build the project with at a net profit of CI $5,840,760.

316. A second proposed development was the Belgravia project in the prospect area. This was a large commercial development

comprising shops and offices for rent as well as condominium suites. The land was owned indirectly by the Hurlstone brothers. It was anticipated that the project would cost CI $28,755,000 to build and produce a net projected profit of CI $12,495,000.

317. In mid 2007, John Hurlstone was approached by Frank Hall, a prominent developer on Grand Cayman. Mr. Hall proposed that the two organizations enter a partnership on an equal basis to develop and sell some land owned by his group. The development was to have twenty-two "elegant" three and four bedroom beachfront residences with many associated amenities. The projected cost was CI $55,450,000. This project is referred to as "Starfish Cay". Mr. Hurlstone says the net loss of profit to HL and himself was US $11,875,000 with a further loss of opportunity for investment profit to himself as a 50% investor in the joint venture.

318. A further development planned by HL and John Hurlstone was the Elysium Condominium project. The proposal was to build thirty-six "very large and luxurious condominium residences" to be operated as a private spa resort. Many amenities would be included

within the development including two restaurants, a spa service, tennis and squash courts, a gymnasium, and a private recording studio. The proposal was that HL would design and build the project and would own 25% of it in partnership with Renaissance Technologies, a Florida developer. The projected financial information anticipates that a net profit of some US $41,162,500 could have been earned by Mr. Hurlstone. When he disclosed to his prospective partner the existence of the Mareva injunction and the lawsuit, Renaissance Technologies said they were not prepared to go ahead.

319. In December, 2008 Mr. Hurlstone was refused bank credit unless it was fully secured because of past delinquency problems. He admitted that he "forgot" to make payments for three to four months on a previous loan facility before the Mareva injunction. When asked if he had been refused other credit facilities as well, he responded: "I would say yes".

Expert Evidence on HL's Loss of Profit

320. Mr. Stuart Sybersma gave expert opinion evidence on behalf of the Hurlstone parties concerning loss of profit caused by the injunction. He is a chartered accountant, a chartered insolvency and restructuring professional and a certified fraud examiner. He is also a partner of the firm of Deloitte and Touche in the Cayman Islands.

321. Mr. Theo Bullmore is a chartered accountant and a former senior partner of KPMG in the Cayman Islands. He is also a fellow of the Institute of Chartered Accountants in England and Wales. He testified on behalf of Sagicor.

322. The ultimate conclusions of the two experts differ dramatically. Mr. Sybersma calculates HL's loss of profit at CI $11,563,440. Mr. Bullmore puts it at CI $1,643, 474.

Agreement on Some Issues

323. Mssrs. Sybersma and Bullmore have agreed upon the following points:

> "2.1 Mr. Sybersma and Mr. Bullmore agree that an appropriate methodology to calculate the losses suffered by HL as a result of the Mareva Injunction is to estimate the revenues that HL might have been expected to achieve in the absence of the Injunction and to then calculate the resultant expected net profit by applying to this estimated revenue an estimated net profit margin percentage ("NPM").
>
> 2.2 It is agreed that the financial periods during which such losses were suffered and for which calculation of loss should be performed are:
>
> 2.2.1 The 6 months ending December 2006;
> 2.2.2 The 12 months ending December 2007;
> 2.2.3 The 12 months ending December 2008; and
> 2.2.4 The 12 months ending December 2009.
> (Together these periods are collectively referred to as the "Loss Period")
>
> 2.3 It is agreed that in order to estimate the revenues that would have been achieved by HL in the Loss Period in the absence of the Injunction, it is appropriate to measure the revenues earned by HL in the period prior to the Loss Period against an external benchmark of the construction industry in the Cayman Islands and then to assume that the revenues of HL would have changed in the Loss Period in proportion to changes in that benchmark.
>
> 2.4 It is agreed that the estimated NPM is to be applied to the estimated revenue for the Loss Period is 15%."

They do not agree upon:

- "The specific benchmark or statistical indicator that should be used as the basis to estimate HL revenues for the Loss Period.

- The base period (before the imposition of the Mareva Injunction) that should be utilized in calculating the market share of HL against the above benchmarks.

- Whether any dilution of the above noted market share is necessary taking into account new construction companies entering the Cayman Islands market place after Hurricane Ivan."

324. Mr. Sybersma considers that the most appropriate benchmark to use to estimate what HL revenue would have been in the loss period is the dollar value of building permits issued. He does not consider that any dilution of the market share is warranted under his approach; Mr. Bullmore agrees with this last point.

325. Mr. Bullmore considers that the most appropriate benchmark to use is the dollar value of construction material imports. He also feels that there should be a 20% reduction in the estimated market share to reflect the dilution of the market as a consequence of new construction companies entering after Hurricane Ivan. Mr. Bullmore bases his opinion on the estimated market share of HL

upon the company's performance in the year ended June 30, 2004. Mr. Sybersma takes into account the three year period ending June 30, 2006. Mr. Bullmore considers that the period following Hurricane Ivan was not a typical one for the construction industry and should not be used as a basis to extrapolate the revenues.

326. Mssrs. Sybersma and Bullmore agree that the loss suffered by Robert Hurlstone by virtue of his lost salary is in the amount of CI $576,922.50. Mr. Sybersma considers that an amount representing the loss relating to the rental of construction equipment owned by Robert Hurlstone should be added to this. Mr. Bullmore considers that nothing should be added because Robert Hurlstone should have mitigated the loss by renting out the equipment or taking alternate employment. Mr. Sybersma is of the view that Mr. Hurlstone's activities from July 24, 2008 on amount to evidence of an attempt to mitigate the loss.

Evidence of Mr. Sybersma

327. Mr. Sybersma has assumed that the financial periods ending June 2004, June 2005 and June 2006 were "normal operating years." Due to the lead time between tenders being submitted and the work commencing, the fact that the injunction was in place for the last four months of this period would not change the assumption. He also assumed that the Mareva injunction would continue to affect the company after it was lifted, the effect ending only on December 31, 2009.

328. As a statistical indicator of activity in the construction industry and revenue available to the Hurlstones, Mr. Sybersma used the value of building permits issued. This value more than doubled in 2005 as one would expect because of the need to repair hurricane damage. Mr. Sybersma asserts that the revenue a company generates in a particular period as a percentage of the total building permits granted can be viewed as the company's share of the market. He adjusted the building permit figures to accord with the

fiscal period of HL. These adjusted figures and Mr. Sybersma's estimate of HL's market share is:

TABLE D

Hurlstone Ltd. – Revenue as percentage of CI Building Permit Value

(Fiscal Period)

	12 Mths to Jun 2004 CI $	**12 Mths to Jun 2005**	**12 Mths to June 2006**	**6 Mths to Dec 2006**	**12 Mths to Dec 2007**	**12 Mths to Dec 2008**
Hurlstone Revenue	4,829,740	15,041,595	15,627,328	2,337,824	8,268,788	6,613,106
Building Permit Value	173,874,327	172,800,000	425,500,000	235,900,000	446,300,000	502,341,845
Hurlstone Market Share	*2.78%*	*8.70%*	*3.67%*	*0.99%*	*1.85%*	*1.32%*

Source: ESO reports/Hurlstone Financials

329. There was a back log and a delay for issuing building permits for some months after the passage of the hurricane. In many cases,

particularly with respect to private residences, construction and repair work was done without the benefit of any building permit. In some cases, no building permit is required for repairs to a private residence. The result is that there was a significant increase in construction activity after the hurricane without a corresponding increase in the number of building permits granted. As a result, Mr. Sybersma concedes that his market share calculation (8.70%) for the twelve months ending June, 2005 is likely overstated. However, for corresponding reasons, the market share for the following year (3.57%) may be understated. For these reasons, Mr. Sybersma calculated the average market share over the three year period ending June, 2006. This was 4.60%. Mr. Sybersma recognized the "potential" of the new market entrants to dilute HL's market share but discounted the impact of that because he has "assumed the majority of new entrants were relatively smaller companies that would not have competed on the larger scale projects that a large construction company like Hurlstone would do". He concluded that HL's market share would have ranged between 3.67% and 4.60% had it not been for the Mareva injunction.

330. After normalizing the calculation of HL's profit margin (for the year ended June, 2005, in a manner accepted also by Mr. Bullmore), Mr. Sybersma calculated the loss of profit as the difference between the net income actually realized in the loss years and the net income projected to have been realized.

331. Mr. Sybersma's calculations do not include any allowance for liquidated damages suffered in relation to the Cayman Falls project.

332. Mr. Sybersma said that the building permit indicator may actually be an understatement of the market because of the existence of change orders and work caused by overruns. He said he thinks the Hurlstone organization was well positioned to participate in large contracts and could have done, for example, the work on the high schools which was done by TJI. He acknowledged that performance bonds are now required more often than they were in the past. He called 2005 the "stockpiling year" because the import duty on construction materials had been waived for a period of

time. Such materials represent 20% to 30% of the total cost of a construction project.

333. Mr. Sybersma estimated the loss of salary suffered by Robert Hurlstone as a result of the injunction at CI $576,922.50.

334. After holding meetings with Mr. Bullmore, Mr. Sybersma filed a second expert report. He said again that the value of building permits issued is a "far more appropriate" benchmark than imported construction material. In the sixteen reports published by the Economics and Statistics Office of the Cayman Islands between 2002 and 2008, the statistical indicator used in the commentary about the construction industry is consistently the value and number of building permits issued. The construction material import figures were not used once as an indicator.

335. Mr. Sybersma points out that construction materials only account for a portion of the total costs of the industry. Other elements include labour, administrative costs, pensions, margins, health insurance and profit. These could account for more than 50% of

the total cost. He feels it is inappropriate to estimate the total size of the market by reference to a statistic representing only a fraction of the economic activity within it. Building permit values represent the total projected contract value, not just the direct cost of materials.

a. Mr. Sybersma acknowledged an element of over estimation in the use of building permits because some permits are purchased but not used. Given the cost of the permits, he thinks this will be infrequent. Moreover, there are some projects which do not require a building permit at all.

b. Mr. Sybersma objects to Mr. Bullmore's use of a single one year period as a base period. Hurricane Ivan had a profound and ongoing impact and the higher level of activity caused by it was sustained throughout the loss period. Mr. Sybersma points to building permit values for this conclusion. The construction material imports figures also show a marked increase in activity after the hurricane.

c. Mr. Sybersma objects to Mr. Bullmore's opinion that a 20% reduction in projected revenue should be applied to represent market dilution. With reference to Tom Jones International ("TJI"), a large company which entered the market just after the hurricane, he says the theory that it would have diluted HL's market share is pure speculation. It is more likely that HL's reduced role in the market place provided the opportunity and conditions for TJI to move in. Moreover, TJI subcontracted a lot of work and HL could well have obtained subcontracts from it.

d. Mr. Sybersma accepts that many smaller construction companies entered the market after the hurricane. He says their impact in the marketplace is already reflected in the building permit figures for the years ended June 30, 2005 and 2006.

e. Mr. Sybersma considers that the 15% net profit margin should be applied against the total projected revenue. The resulting amount would represent the net profit that HL could have expected to earn. The actual loss of profit would then be

determined by calculating the shortfall between this estimated net profit and that actually achieved by HL in the loss period. Further, Mr. Sybersma considers that the actual net profit achieved by HL should be adjusted for unusual events such as salary paid to the Hurlstone parties at levels in excess of normal market rates. (Mr. Bullmore agrees that if the Court accepts Mr. Sybersma's approach this adjustment should occur.)

f. Mr. Bullmore considers that the 15% net profit margin should be applied only against the difference between the projected revenue and the actual revenue earned by HL in the loss period. This approach does not acquire any adjustment for "normalization". Mr. Sybersma disagrees because in his view "the net profit margin during the loss period was also affected by the Mareva." Mr. Bullmore says that HL should have been capable of earning the normal 15% net profit margin during the loss period by reducing its general overheads (i.e., selling, general and administrative expenses). The primary factor for the net profit margin was the "clear failure of HL to reduce its S, G and A expenses in response to decreased revenue in the

post Ivan boom years". Mr. Sybersma responds that HL experienced considerable and serious difficulties in operating their business due to the injunction. He does not see how HL could have reduced the S, G and A expenses significantly. "Such a reduction would have been equivalent to closing down".

Evidence of Mr. Bullmore

336. Mr. Bullmore begins his opinion regarding the effect of the injunction upon HL by stating that the project files which he has reviewed for 2004, 2005 and 2006 show no project for which bank financing was obtained or where a performance bond was required. He questions why Mr. Sybersma has accepted, at least, implicitly, that bank financing and performance bonds hindered the performance of HL after the injunction was in place.

337. He also says that Mr. Sybersma's methodology fails to take into account any factors other than the injunction which may have affected HL's revenues. Mr. Bullmore says that other factors must

be considered: the effects of the hurricane, the entry of new competitors into the construction industry and the likelihood that HL lacked the capability to tender for larger projects.

338. Mr. Bullmore makes four objections to the use of building permits as an indicator of activity in the market. He points out that projects span two or three years and in the latter years there is no link between the work done on the project and the building permits granted that year. There is construction work for which no permit is needed, which was of particular importance immediately after the hurricane. Building permits are issued in cases where the construction does not take place. Mr. Sybersma has assumed implicitly that building permits are homogenous and that HL had an equal chance of obtaining larger and smaller projects. However, in the years reviewed by Mr. Bullmore, HL undertook no large, complex projects. Mr. Bullmore agreed that neither benchmark is a perfect correlation. He said a high percentage of Hurricane Ivan work had been completed by 2006.

339. Moreover, Mr. Sybersma's own figures show the lack of a correlation. The building permits figures for 2004 and 2005 were virtually identical, yet HL's revenues more than tripled from June 30, 2004 to June 30, 2005. This variability led Mr. Sybersma to average the percentages he had calculated.

340. Mr. Bullmore says that the value of construction materials imported more accurately reflects the size of the construction market in a particular period. These were:

Year	**Value of Construction Imports**	**% Change**
2002	CI $7,900,000	N/A
2003	CI $27,160,000	244%
2004	CI $66,500,000	145%
2005	CI $160,500,000	141%
2006	CI $91,100,000	-43%
2007	CI $98,500,000	8%

341. Mr. Bullmore's construction material import statistics for 2008 are an estimate; he postulated a 10% increase over 2007. For 2009,

Mr. Bullmore predicted that the figure would be 50% of his 2008 estimate.

342. Mr. Bullmore objects to Mr. Sybersma's exclusion of the financial performance of HL for the year ended June 30, 2003 from his analysis. After certain accounting adjustments, the company lost CI $2,170,664 in that fiscal period. This loss was sufficiently large that on average over 2003 and 2004 HL was not profitable at all. In Mr. Bullmore's opinion, HL was insolvent as at June 30, 2004.

343. Mr. Bullmore estimates that 70% of the construction work carried out in the Cayman Islands in 2005 and 2006 was hurricane reconstruction work. Of that figure, he estimates that about CI $1,000,000,000 worth of work was carried out by construction companies. HL's share of this reconstruction work was to the value of CI $17,100,000 representing less than 2% of all the work carried out. An important factor in his estimate is that no building permits were required for repairs for private housing. The total damage to housing has been estimated at CI $1,445,000 or 64% of the total damage to buildings.

344. In Mr. Bullmore's opinion, the fiscal periods ending in June 2005 and June 2006 were abnormal because of the high demand for construction work. He considered it necessary to assess the normalized net profit by removing the impact of Hurricane Ivan from HL's operating result for these two periods. He used these normalized revenue figures to determine HL's market share. He also excluded the years 2005 and 2006 from his analysis as he considered them aberrations.

345. In the result, Mr. Bullmore determined that the normalized revenue of HL in 2004 represented 6.2% of construction material imports that year. The same percentage of construction material imports in 2007 would have given HL normalized revenue of CI $6,093,198. For 2008, the figure would be CI $6,702,518. In fact, HL earned considerably more than their estimated share in 2007 and just CI $89,412 less than their calculated share for 2008. In 2009, HL earned CI $501,259 less than its predicted market share.

346. Overall, Mr. Bullmore says that HL made a normalized net profit during the analyzed years of 7.30% and, as a consequence, it is his opinion that the Mareva injunction had no effect on its ability to earn income.

347. In his second report, Mr. Bullmore provided new calculations made necessary by his agreement with Mr. Sybersma that it is reasonable to assume a net profit margin prior to the Mareva injunction for HL of 15%. He also considered the dilution of market share which would have occurred because of the new entrants setting up business in the Cayman Islands after the hurricane. He estimated that HL would lose 20% of its market share for that reason. He corrected a previous error and estimated that HL's revenues for the year ended June 30, 2004 represent 10.31% of the estimated construction imports for that period. On this analysis, the results were as follows:

Period	**Estimated Revenue Share**	**Reported Revenue**
July 1, 2006 to Dec. 31, 2006	CI $3,756,964	CI $2,337,824
January 31, 2007 to Dec. 31, 2007	CI $8,124,280	CI $8,268,788
January 1, 2008 to Dec. 31, 2008	CI $8,936,708	CI $6,613,106
Jan. 31, 2009 to Dec. 31, 2009	CI $4,468,354	CI $2,850,000

348. The result is that a total of CI $5,216,588 in revenue was lost because of the effects of the injunction and, at the agreed normalized net profit margin of 15%, the estimated lost profit is CI $782,488.

349. Further, Mr. Bullmore does not agree on how the NPM should be applied. He says the primary factor was the failure of HL to reduce its selling, general and administrative expenses in response to its decreased revenue in the post hurricane boom years. He does accept that the injunction would have had some effect and concedes

that it may have reduced the net profit margin by 5% for the period December 31, 2008. He therefore adds 5% of the gross revenues earned in this period to his damage calculation, in the amount of CI $860,986. Ultimately, Mr. Bullmore supports an award of damages in the amount of CI $1,643,474.

350. With respect to Robert Hurlstone, Mr. Bullmore accepts that his total lost salary during the period of the injunction would have amounted to CI $576,922.50. However, he says that Mr. Hurlstone had potential weekly income from renting out his equipment of CI $8,475 which, in the result, would have mitigated entirely his loss of income.

Award to HL

351. The evidence establishes to my satisfaction that the Mareva injunction was not only a significant contributing cause but the predominant cause of the loss of market share suffered by HL after its issuance. It restricted HL's right to spend more than $5000 without Q&H's approval. It created delay, which caused concern

among subcontractors and suppliers. ScotiaBank refused on one occasion to honour HL's cheques because of the injunction. In this small community, the difficulty caused by the injunction became common knowledge rapidly. I am satisfied that HL's bankers were unwilling to make advances to it which, before the injunction, they likely would have made.

352. Both experts have had to rely (unavoidably) upon a number of assumptions which may be questioned. The use of building permit values as an indicator fails to account for permits purchased but not used and projects for which no permit was necessary or simply not obtained. Moreover, a permit is issued in a given year but many projects take two or three years to complete. The adoption of construction material imports fails to account for "labour only" projects and represents only a portion of the entire value of the market. The stockpiling of construction materials during the period of time when the import duty waiver was in effect will have skewed the figures. Mr. Bullmore's import figures for 2008 and 2009 are merely estimates. Mr. Sybersma was compelled to average HL's estimated market share for the periods ending in June, 2004, 2005

and 2006 to make sense of an anomalous market share figure (8.70%) in his estimate for the 2005 period. Mr. Bullmore has omitted HL's actual performance in 2005 and 2006 entirely on the ground that these results were skewed by the post-hurricane boom in construction. Mr. Sybersma assumes that the net profit margin during the loss period was adversely affected by the injunction to the same degree as revenue. Mr. Bullmore accepts there was some impact but also assumes a failure to mitigate during the loss period by failing to reduce the SG&A expenses in line with the company's decreased activity.

353. I am satisfied that the value of building permits issued, while imperfect, is a better indicator than the value of construction material imports. The Economic & Statistics Office has always used building permits as their own measure of construction activity. I find that persuasive. I am also satisfied that the base period data should be taken from three years of activity rather than one, notwithstanding the distorting effect of the hurricane. As a result, I take Mr. Sybersma's estimate of lost profit - CI $11,563,440 – as my starting point. However, the collective impact of the

uncertainties mentioned above makes it reasonable for me to reduce his final estimate of lost profit with a view to adopting a figure closer to the estimate of Mr. Bullmore.

354. I accept that there has been a dilution of the market commencing after the hurricane and increasing in the loss period. Not all of the reduction in market share would have been preserved "but for" the injunction; some would have been lost to increased competition. Mr. Bullmore's allowance for dilution of 20% was a generalized estimate; there is no evidence which permits anything more precise. I accept also that some reduction in the SG&A expenses to reflect reduced activity would have been a reasonable step to take in mitigation; the evidence does not permit any more specific conclusion. During the loss period, permits were issued for a number of larger projects, some of which were beyond the reach of HL. That also should be taken into account. The report on the Royal Watler tendering process likely had some effect on HL's ability to bid successfully.

355. Mr. Sybersma's conclusion is that HL would have earned revenue as follows during the loss period:

6 months to Dec. 2006	$10,844,876
12 months to Dec. 2007	$20,522,054
12 months to Dec. 2008	$23,093,832
12 months to Dec. 2009	$17,320,374

These figures are well in excess of what HL earned during the 3 years preceding the effect of the injunction, which was:

12 months to June 2004	$4,829,740
12 months to June 2005	$15,041,595
12 months to June 2006	$15,627,328

The evidence does not satisfy me that the company would have exceeded its past performance but for the issuance of the injunction. To reflect that conclusion and the uncertainties referred to above, I would reduce Mr. Sybersma's final figure by 40%. I

find that HL suffered a loss of profit because of the injunction of CI $6,938,064.

Damages for Loss of Opportunity

356. John Hurlstone gave evidence of four projects which he characterized as opportunities which were lost to him personally because of the Mareva injunction. HL was to act as contractor and Mr. Hurlstone expected to be a major investor. All four were to be larger projects than HL had ever undertaken in the past. Mr. Hurlstone would have had to obtain financing in amounts exceeding what lenders were prepared to provide to him in the past. His evidence on all 4 projects was brief and conclusory. None of these projects proceeded past the initial planning stage. In my award of damages to HL for loss of profit and market share I have assumed that it would have been working at full capacity during the loss period, and so would have no real ability to undertake an additional very large project. I find that Mr. Hurlstone has not established any realistic possibility that any of these four projects

would have come to fruition, and award no damages under this head.

Failure to Mitigate by Applying for Discharge

357. The Hurlstone parties sought and obtained some relatively minor variations of the injunction in their favour. They did not at any time seek to have the injunction reviewed by the Court and discharged. Sagicor characterizes this omission as a failure to mitigate damages.

358. The case for the applicants on the ex parte application was a simple one on its face. The evidence showed that, in Mr. Purbrick's opinion, the work done on the reinstatement had a value less than one-third the amount paid to the Hurlstones upon the recommendation of Mr. Paterson. The apparent disparity was so large as to invite an inference that the insurer had been defrauded. Essentially, a good arguable case was established on Mr. Purbrick's opinion alone.

359. To obtain a discharge of the injunction, the respondents would have had to demonstrate on the balance of probabilities that Mr. Purbrick's opinion was, in substance, wrong. They consulted their attorneys and were advised that expert evidence would be required and that it was unlikely the Court could have come to a conclusion about which expert opinion to prefer without observing the experts under cross-examination. They were told that a hearing of that sort was likely to be long and costly. This advice was given to the Hurlstones by their attorneys shortly after the injunction was obtained. It seems unduly pessimistic. The Hurlstones must have known from an early stage that the cleanup cost had been excluded from Mr. Purbrick's calculations and that his labour rates were unreasonably low. Nevertheless, I consider that they have discharged their mitigation burden by taking legal advice as they did. Commencing an application to set aside the injunction which appeared (to them, at the time) to be a lengthy and costly undertaking was not a reasonable measure they were bound to pursue. It is not unreasonable for the subject of an injunction to refrain from what promises to be a drawn out and costly legal process after having been so advised by an attorney.

Aggravated Damages

- The duty of an applicant for *an ex parte* order is to make full disclosure of all material facts, particularly facts which would reveal infirmities or deficiencies in its own case. The Hurlstones say that a number of material pieces of information known to the applicants at the time of the injunction application were deliberately concealed from the Court. As a result, they say they are entitled to aggravated or exemplary damages. I will deal with most of their allegations briefly.

- They say that the Court should not have been told that Mr. Scott met John Hurlstone on June 18, 2005 and requested an accounting. It is now clear that such a meeting did not take place on that date. I do not consider that that would have been material to the Chief Justice's decision.

- The Hurlstones say the Court should not have been told that they "walked off the site rather than give an accounting".

Whether they walked off the site or were locked out was, at that stage, a point of controversy. Ultimately, I found they had been locked out. Sagicor cannot be criticized for characterizing this event in the way they understood it at the time.

- The Hurlstones say that the Court should have been told that Mr. Delessio had been in Sagicor's office for no more than one day before he told Mr. Harrigan to write the letter revoking Mr. Paterson's authority. This would have led to an inference that Mr. Delessio had not had time to form an opinion on the value of the work. In light of the conclusion in the Purbrick reports, the opinion of Mr. Delessio about value was of little importance on the application.

- It is said that the Chief Justice should have been told that there had been no dispute about the total cost of the work prior to Mr. Delessio's arrival. I consider that to be of little importance given that the case was based upon expert evidence. The application had to stand or fall on the basis of the reports.

- A complaint is made that the Chief Justice was not told that Mssrs. Scott and Hambly had agreed to the proposed settlement by Mr. Paterson. I consider their agreement to the proposed settlement (which was given in complete reliance upon Mr. Paterson's representations) to have little evidentiary significance in the face of the Purbrick reports.

- The Hurlstones complain that the Court should have been told that the allegation of fraud had been made as long ago as July, 2005 to police and to the Monetary Authority. They say this was "highly material" but do not explain why. I consider the point immaterial.

- An additional complaint is that the Court was told that negotiations for a settlement had continued until the end of August, 2005. The Hurlstones say these negotiations were not "meaningful". The distinction is unimportant.

- The Hurlstones say that the Court should have been told that there was "no site review" by Mr. Delessio which prompted his letter of June 16th. In reality, the reason for his letter was not of any importance on the application.

- There is a complaint that the affidavit of Mr. Scott which was used on the application makes no mention of Mr. Hambly vetting the costs and payments. Mr. Hambly would have relied upon Mr. Paterson, who was both the loss adjuster and the project manager. There is no reliable evidence that Mr. Hambly carried out his own independent assessment of the loss.

- A similar criticism is that Mr. Scott failed to mention the meeting of June 9, 2005. Again, I do not consider that a material omission.

- The Chief Justice was told that Mr. Purbrick had experience of "projects" in the Cayman Islands. In reality, he had substantial experience with respect to one project – Ocean Club – and

some very limited contact with others. His experience was of course material to the weighing of his opinion. Use of the word "projects" is an exaggeration but I do not think it can be characterized as a deliberate misstatement.

- Mr. Purbrick met Mr. Ulrich several times on the job site and obtained rate information from him. It is alleged that the Chief Justice should have been informed of that. However, Mr. Ulrich was an employee of BPL, the project manager, for a short period of time and could be expected to have some knowledge of appropriate rates. The fact that Mr. Purbrick obtained some information from Mr. Ulrich would not, in the Chief Justice's mind, have weakened the case for the applicants.

- The Hurlstones complain that the Chief Justice was not told that Mr. Purbrick used a lower rate for concrete than the one given to him by Mr. Ulrich. Mr. Purbrick was an independent expert and, from the point of view of the Chief Justice, would be entitled to use whatever rate he considered appropriate.

- A number of other points are made about Mr. Purbrick and his two reports. Many of them are debating points which could usefully be put in cross-examination but I do not accept that they are subject to a compulsory disclosure obligation on an *ex parte* application. The duty of the applicant is to disclose facts which are material to the application, not to air every possible argument which might be mounted against the validity of some part of the expert's opinion.

- On the other hand, there are three facts of considerable significance which were not revealed.

- First, the Chief Justice was not told that Mr. Purbrick was told by Mr. Delessio that the clean-up had been done by a different contractor and therefore had excluded this cost. That fact, of course, was highly material and would have weakened Mr. Purbrick's opinion had it been disclosed. As I have found earlier, Sagicor and Mr. Delessio knew by February, 2006 that the Hurlstones had carried out the cleanup at a cost of some

$640,000 but Mr. Purbrick had omitted it from his report. They allowed the Chief Justice to be misled on this material point.

- Second, counsel did not tell the Chief Justice that Mr. Purbrick had failed to make any verifying enquiries at all of the Hurlstones or Mr. Paterson and had failed to obtain structural drawings and other documentation. That fact was known to Mr. Delessio, and hence to Sagicor, at the time of the application. Indeed, instructions to this effect were given by Mr. Delessio. If the Chief Justice had appreciated the atypical methodology used by Mr. Purbrick his reports would have seemed less convincing.

- Third, there is evidence that Mr. Delessio told Mr. Dickson that he knew Mr. Purbrick's labour rates were "low" although not unreasonable. By February, 2006, Mr. Delessio would have examined Mr. Purbrick's rates and would also have acquired an intimate familiarity with the rates used by contractors on Grand Cayman after the hurricane. They were not using rates as low as those adopted by Mr. Purbrick. To allow the Purbrick

opinion to stand alone and unqualified without any warning about the "low" labour rates was an act of material non-disclosure.

- These three factors satisfy me that the injunction could have been set aside at a review hearing. They also justify an award of aggravated damages to compensate the Hurlstone parties for the highhanded and oppressive manner in which this injunction was obtained. I award the sum of $50,000 to each of the Hurlstone parties as aggravated damages.

- Finally, the Hurlstones say that they are entitled to aggravated or exemplary damages because of a "failure to prosecute the action expeditiously." The Chief Justice ordered that a Scott Schedule be prepared. The initial Schedule was served in February, 2008 with further Schedules delivered in June, 2008. None of the parties to the litigation did substantial work on the case until September, 2008. As a result of the inactivity, Sagicor and WV had to file a notice of intention to proceed before applying for directions. This desultory pace was

acquiesced in by the Hurlstone and Crawford parties. The crucial disclosure of invoices by the Hurlstones which convinced Sagicor to abandon its case was made only shortly before trial. It could have been made much earlier. Robert Hurlstone says he gave the documents to his attorney within four months of being served with the Writ. The case came to trial two years and ten months after the Writ was filed. At the time, the case appeared to involve a number of factual issues concerning the cost of construction which were complex in their points of detail. I am not persuaded that Sagicor and WV proceeded in such a dilatory fashion as to attract a further award of aggravated or exemplary damages.

Damages: HGCL & Robert Hurlstone

360. Robert Hurlstone is a fifty-four year old Caymanian citizen. He has a long history of experience in the construction industry in the Cayman Islands. In 1982 Robert Hurlstone went into business with his brother, John. They formed a construction company known as Hurlstone Construction Ltd.; the two brothers owned all of the

shares in equal portions. John Hurlstone devoted his time to the administrative duties of running the business while Robert Hurlstone was in charge of the actual construction activities. The company worked on a considerable number of projects on Grand Cayman and was the builder of the first phase of Windsor Village during 1989 and 1990. In 1997 Hurlstone Construction Ltd. was placed in provisional liquidation. Robert Hurlstone formed HGCL in the following year. He owns all of the shares in that entity. When he formed his new company, Robert Hurlstone decided that he no longer wished to be involved with major construction projects; he would now concentrate on small to mid-sized projects.

361. Since its incorporation, HGCL has worked on phase three of the Sunrise Town Homes, a development consisting of twenty-eight two, three and four bedroom "high end" apartments; on phases one and two of the Windsor Lakes Development, which consisted of seventy-eight one and two bedroom medium priced apartments; and a church on Little Cayman. The company has also done work on various private homes.

362. In 2003 Robert Hurlstone suffered a heart attack. As a result, he decided to limit his work to "smaller manageable" projects and to do just one project at a time.

363. Robert Hurlstone was prevented by the Mareva injunction from spending more than CI $1,000 per week for personal purposes. He had to notify Q&H before spending any amount above CI $250. These limits were raised slightly by agreement later on.

364. HGCL had to obtain approval for payments made by it. One payment by it in the amount of $25,000 to Robert Hurlstone was not granted approval. This caused him a difficulty in meeting his everyday expenses.

365. Robert Hurlstone has in the past earned income from three sources: his salary from HGCL, fees generated from the hiring out of equipment owned by him, and profits from investment in development projects. He agrees that 2006 to 2008 was a busy time in the construction business. He obtained no new construction contracts although he made a few attempts to find work. He spoke

to architects and asked them to send him bid material. He did some consulting work for his brother. He did not approach any large contractors for subcontracting work. He did rent out some of his equipment.

366. Mr. Wilbur Thompson is a director of Thompson Shipping Ltd. He purchased a piece of land in Little Cayman with Robert Hurlstone and began to discuss the development of it in 2005. The plan was to build forty-eight apartments at a total cost of US $10,080,000. The project was expected to yield a net profit to each man of about US $2,760,000. HGCL was to carry out the construction work.

367. Mr. Thompson and Robert Hurlstone had discussions with various government officials, including members of the planning board. Plans were drawn up for the project. The development was expected to begin around the middle of 2006 and to be completed around the middle of 2008. The two men planned to sell apartments before the development had been completed. Mr. Thompson says they received a lot of interest in the project from

potential purchasers and he was confident that the units could be sold.

368. The two men were equal partners and each was expected to provide some of the initial construction cost. Around March 2006 Robert Hurlstone said he could not obtain financing for his portion of that cost.

369. Mr. Thompson was also planning another project on Little Cayman in association with Robert Hurlstone and Dr. David Wolfe. Plans for this project were well advanced by March, 2006. Plans and financial projections had been drawn up. Again, significant interest had been received from potential purchasers. The total cost of the project (which was to build six apartments) was to be US $4,300,000. Each of the three partners expected to earn a net profit of US $900,000. Dr. Wolfe said the net profit to each partner would be about $738,000. As with the previously mentioned project, the partners expected to begin work in mid 2006 and complete the work after about two years. The intention, again, was to sell units before the construction was completed. The same

problem arose with respect to the initial construction costs. Robert Hurlstone was unable to make a commitment to provide his share of the financing because of the Mareva injunction which prevented the banks from lending money to him.

370. In late March, 2006 Mr. Hurlstone asked his relationship manager at ScotiaBank for a loan for the financing. Mr. Scott said that because of the Mareva injunction the Bank would not provide any assistance. Mr. Hurlstone assumed from this response that he would get a similar answer at any other lending institution. Since Mr. Thompson was not willing to finance the entirety of either project, neither one went ahead.

371. With respect to the six unit development, Mr. Hurlstone said they would have needed purchase commitments from three purchasers together with deposits of 10% of the sale price. Even if Mr. Hurlstone were to give up the profit he would ordinarily make on the construction, that would not be equivalent to the financing he was supposed to provide.

372. Mr. Thompson thinks they could have sold three units on Little Cayman leaving the other three in inventory. There was never an agreement on how many purchasers would be needed under contract before the contract would proceed. He thinks that number would be four. It was intended that what the purchasers paid would service a loan for the building costs. He expected they would have to borrow the entire building cost. The plan was to sell four units at a time. Real estate agents were saying the units would be easy to sell.

373. Mr. Purdom has said that the square foot cost estimated for the two developments on Little Cayman (CI $175 dollars per square foot for the forty-eight unit development and CI $250 dollars per square foot for the six unit development) are fair and reasonable. He agrees that the construction industry was very buoyant in the years from 2005 to 2008.

374. Scotiabank did lend to loan Robert Hurlstone CI $225,000 after the injunction as he put up security for it. He opened a cigar store on Grand Cayman with the funds.

375. In July, 2008 Mr. Hurlstone succeeded in obtaining a contract for the development of the Carib Sands project. The contract was in the amount of CI $2,400,000. From this point on, he makes no claim for loss of profit caused by the Mareva injunction.

376. HGCL has kept no business records so Mr. Sybersma has not presented the sort of loss of market share analysis presented on behalf of HL.

377. Mr. Hurlstone and HGCL were largely inactive from July, 2005 until July, 2008. The first 8 months of that period preceded the injunction. The following evidence of Mr. Hurlstone under cross-examination describes this period of time:

> Q. Fine. So after you left the site, put it neutrally, at Windsor Village --
> A. Yes, sir.
> Q. -- you didn't, between that period, between June of that year, and March of the following year, you did no work?
> A. No, sir.
> Q. Why not?
> A. I think it was largely because of these, these proceedings. And the events before the actual

proceedings. In other words, the lock-out at Windsor Village and all of the negative publicity. That had a lot to do with it. That was the reason why I was trying to get the two projects in Little Cayman, to create work.

…

Q. What attempts did you make to find work?
A. What attempts did I make to find work?
Q. Yes.
A. Well, sir, I made a few different attempts. Normally, as I explained before, I don't solicit work. I get my work through referrals, but in this instance, when I found out that I wasn't getting any referrals, I was not able to pursue my own projects because of the Mareva. I spoke to some architects that I knew, and I asked them to send me any bids for any tenders, for any work that they might have. So I made every reasonable effort that I could to obtain work. Unfortunately I didn't obtain any until the 18th of July in 2008, so that was a little more than three years. And I attribute that solely to the Windsor Village project, starting from the lock-out in 2005, followed on by the Mareva injunction. People here did not want to do business with people that are thrown off of jobsites and accused of fraud, and accused of stealing people's money. Before that, I did not have that reputation, sir. And I had been working here since 1977.

…

Q. Are you saying that you were unable, before then, to get any work?
A. I'm saying that after I was locked out of the Windsor Village site, there was a lot of accusations being put against me, and I think that is the main reason why I did not get any more work after that.
Q. It's an interesting thing you say that, because when you went offsite, okay, you say you were locked out.
A. Yes, sir, I was locked out.

Q. And was that public knowledge that you were locked out?
A. Yes, sir.

…

It seems from what you said yesterday that you only made inquiries of about two individuals or two parties to get work after the Mareva; is that right?
A. Could you repeat that?
Q. You only sought work from, I think, two organizations, or individuals after the Mareva?
A. You mean for me personally or equipment?
Q. Your company.
A. No, sir. I think I said three.
Q. That was the extent of it?
A. Yes, sir.

378. I am unable to find that the injunction was a substantial cause of this period of inactivity. It is more probable that the circumstances in which the WV project was terminated combined with Mr. Hurlstone's predisposition to reducing his commitment to construction work deprived him of the motivation to find new work. For that reason, I make no award of damages to HGCL or to Robert Hurlstone for general loss of profit or salary.

379. Mr. Hurlstone also gave evidence of two specific projects in which he was planning to participate as contractor on Little Cayman.

These opportunities are still available to him so any loss of opportunity he has suffered would be measured by the cost to him of being deprived of the resulting profit for the time during which the projects are delayed.

380. To pursue the projects, Mr. Hurlstone would have had to borrow sums substantially in excess of any of his previous borrowings. There is no reliable evidence from which I can infer that, but for the Mareva injunction, these sums would have been advanced. He was refused a loan at ScotiaBank in 2006; the reason given, according to Mr. Hurlstone's evidence, was the injunction. However, when he sought to borrow a more modest sum ($225,000) to open a cigar store the same Bank provided the funding.

381. There were indications in the evidence that the planning for the projects was not far advanced. Dr. Wolfe seemed unclear on an important aspect of the plan. He contradicted the evidence of Mr. Hurlstone by saying that he did not expect HGCL to make a profit on the construction:

Q. All right. But would the business have been profitable business for Hurlstone General Contractors?

A. I'm confident it would have been profitable for both me and Hurlstone General Contractors.

Q. What I'm trying to get at is the fact that, would Robert Hurlstone, then, have made a profit not only from the sales of the, of the buildings, but also from monies earned by his company; is that right?

A. The profit along the way would have been marginal at best. He would be paying, most of the money received would have been paid to subcontractors, or supplies and equipment that were necessary to complete the project. We would anticipate the profit to be at the end when these units were sold, and we would divide that profit.

...

Q. Would it have been a surprise to you to have learned that Robert Hurlstone had been given a wage for the work, the construction work that he did for Hurlstone General Contractors if he carried out this project? Would it have surprised you?

A. If he had been given money to --

Q. Yes.

A. -- to construct this project?

Q. Yes. If he, himself, had worked on the project --

A. Yes.

Q. -- and of course there would have been subcontractors. Would you have been surprised if he had given himself a wage for doing the work he was himself doing?

A. Absolutely, yes.

Q. You would have been surprised?

A. Yes, I would have been surprised.

(Evidence of Dr. Wolfe)

382. Overall, I am not satisfied that Robert Hurlstone has proved an entitlement to damages for loss of the two opportunities to build projects on Little Cayman.

Equipment Rental

383. Mr. Hurlstone did not advertise the availability of his equipment during the period of the injunction and made only a minimal effort to interest prospective renters. The evidence contains no convincing explanation for the reason a customer who was minded to rent a piece of equipment from Mr. Hurlstone or one of his companies would be discouraged from doing so because of the Mareva injunction. It did not prohibit transactions in the ordinary course of business. I award no damages under this head.

384. There is one possible exception. Robert Hurlstone is claiming a total rental for the containers provided to WV from 2nd December, 2005 to 1st December, 2008 in the amount of CI $128,250. He also asks for interest on that amount. I see no mention of this claim in the closing arguments so it may have become the subject of an

agreement. However, if it has not been paid I would award that amount plus interest on it at the Court Rates.

General Damages: John & Robert Hurlstone and HGCL

385. General damages have been awarded in England pursuant to an undertaking: *Al-Rawas v. Pegasus Energy Ltd. and others [2009] 1 All ER 346 (QB)*. Since the injunction was obtained against John and Robert Hurlstone personally, they are entitled to be compensated in damages for all loss suffered by them in their personal capacities. I am satisfied that the injunction caused damage to each of their personal reputations which was more than trivial and should be recognized. The lack of any apology to them from Sagicor should be taken into account. I award to each of John and Robert Hurlstone the additional sum of $35,000 by way of general damages. I do not award any additional amount for distress, hurt and humiliation as any such damage was no more than trivial.

386. While I have found that HGCL has not proved an entitlement to damages for loss of and profit or loss of opportunity, it is still entitled to compensation by a general damages award for damage to its business reputation. The evidence demonstrates that knowledge of the injunction and the reason for its issuance was widespread within the construction industry in the Cayman Islands. I award to it the sum of $70,000 under this head.

Interest

387. HL is entitled to interest at the Court Rates on my award to it. If there is disagreement over how the interest should be calculated the parties are at liberty to apply.

Costs

388. The parties are at liberty to apply on the question of costs.

Draft & Final Versions of This Judgment

389. This judgment was prepared in draft and delivered to the parties initially in that form. As a result of their comments, substantial changes were incorporated into this final judgment. The result has not changed. In making my changes, I have been guided by the comments of the Court of Appeal in *Robinson v. Fernsby & Scott-Kilvert [2003] EWCA Civ. 1820*.

390. There were two changes of major importance. First, the section on the legal elements of abuse of process and malicious prosecution has been expanded to address more fully the arguments of the Crawford parties and their requested findings of fact. Second, the witness statements of several prospective witnesses were presented in evidence but the witnesses were never produced for cross-examination. I understood initially that a certain order at a case management conference meant that the statements would stand as evidence in the trial. The parties did not have the same understanding. I am now persuaded that my initial impression may have been incorrect and that, in any event, it would be unfair to take

the evidence into consideration. All reference to it has been omitted.

Summary

391. In summary, I award the following in damages:

1) to HL, the sum of CI $6,938,064 plus interest for loss of profit and loss of market share;
2) to HGCL, the sum of CI $70,000 in general damages for loss of business reputation;
3) to John Hurlstone, the sum of CI $35,000 in general damages for loss of personal reputation and the sum of CI $50,000 as aggravated damages;
4) to Robert Hurlstone, the sum of CI $35,000 in general damages for loss of personal reputation and the sum of CI $50,000 as aggravated damages.

392. The liability is Sagicor's alone as WV was not a party to the Mareva injunction application.

Dated this 14th day of February, 2011

Henderson, J.
Judge of the Grand Court