

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN
CAUSE NO. 103/94

14-10-94

IN THE MATTER OF HURLSTONE INVESTMENTS LTD.
(In Voluntary Liquidation)

AND IN THE MATTER OF THE COMPANIES LAW (Revised) AND
RULE 4:83 OF THE INSOLVENCY RULES

BETWEEN:	ROBERT E. HURLSTONE	APPLICANT
AND:	MICHAEL AUSTIN (as liquidator of Hurlstone Investments Ltd.)	RESPONDENT

For the Applicant: Mr. Richard Mahfood Q.C. instructed by Mr. Tim Shea of Hunter & Hunter.
 For the Respondent: Mr. Andrew Jones of Maples & Calder
 For Mrs. Hurlstone: Mr. Nicholas Mostyn instructed by Mrs. Angelyn Hernandez of Paget-Brown, Quin & Hampson.

BEFORE: SMELLIE J.

JUDGMENT

The applicant seeks to set aside the decision of the respondent by which the respondent rejected in toto the applicant's proof of debt, submitted in the above-mentioned liquidation, in the amount of USD 386,800.00.

The matter comes before this court by originating application as an appeal by way of rehearing and it is acknowledged that this court

approaches the matter de novo, on the basis of all the evidence put before it and is not confined to dealing with the matter only as an appeal on the record from the liquidator.

This procedural and jurisdictional principle is clearly enough established from dicta in Re Kentwood (1960) 2 ALL E.R. 655 agreed on all sides to be applicable here:

"It was not merely the function of the court to say that a decision (of the liquidator) was right or wrong; it might vary the decision in any way that it thought necessary in the light of the evidence before the court. The court must approach the question de novo and determine to what extent the creditor ought to be allowed to rank as a proving creditor."

Reference is also made in Re Kentwood to Rule 108 of the Companies Winding-up Rules 1949 which, for present purposes, is in terms the same as Rule 4:83 of the Insolvency Rules 1986 (Part 4 Chapter 9) and which adopts the wording of the earlier rules, expressing the court's power to "reverse or vary" the decision of the liquidator. Rule 4:83 of the Insolvency Rules is relied upon by the applicant.

Background

The matter arises against the background of the faltering relationship of the applicant and his estranged wife Harriet Hurlstone. They are, in equal shares, the only shareholders of Hurlstone Investments Ltd, now in voluntary liquidation (HIL).

HIL was placed into liquidation by resolution of the shareholders at a meeting on 31st August 1993.

The respondent, at their behest, then assumed the responsibilities of liquidator.

The principal asset of HIL was the former matrimonial home, a residence of substantial value, located at Governor's Harbour, Grand Cayman. It was constructed between January and December 1988. The building contractor was Hurlstone Construction Limited (HCL), a company owned jointly by the applicant and his brother John. They are also the directors of HCL.

The house has since been sold in the course of the liquidation on the open market for a price of USD 900,000.

The grounds of the applicant's claim

The applicant's proof of debt submitted in the liquidation comprises his claim against much of the remaining proceeds of sale. It is on the basis that HIL is indebted to him in respect of costs incurred by HCL in the construction of the house and that he in turn is indebted to HCL, by virtue of a director's loan, commensurately for that amount.

In order to establish that liability of HIL to himself, the applicant seeks to rely on an oral agreement said to have been reached between himself and his wife, as the directors of HIL, to the effect that the costs incurred by HCL on his account would be repaid by HIL.

He also relies, as evidence of that agreement, upon a balance sheet of HIL's assets and liabilities which purports to reflect the indebtedness and which the applicant contends, was signed and initialled by Mrs. Hurlstone and himself as being a true record of the indebtedness and of HIL's financial status at the time.

The applicant's grounds, as disclosed by his affidavits and testimony, are in the alternative. It is submitted on his behalf that the respondent erred in rejecting the balance sheet as conclusive evidence of the debt owed to him. He also submits in that regard that Mrs. Hurlstone should be estopped from denying the balance sheet not having raised any objection to it at the meeting at which HIL was put into

voluntary liquidation.

In the alternative the applicant seeks to establish his entitlement to recover the alleged debts on a quantum meruit; on the basis that the work was done by HCL, the expenses incurred by HCL on his account by way of the director's loan and that there was an understanding, albeit unwritten and tacit, between himself and Mrs. Hurlstone as directors and shareholders of HIL, that the debt would be repaid to him on account of that director's loan.

The amounts claimed by the applicant and the Barclays Guarantee

The debt of USD 386,800 claimed is said to comprise two main elements.

Firstly the amount of USD 334,800, being the HCL subvention as is allegedly reflected in the HCL director's loan account in the name of the applicant. That amount comprises three separate subtotals which appear in the director's loan account at different stages and which will be considered in further detail below.

Secondly, the amount of USD 52,000 which is said to represent the applicant's cash contribution (won on a gambling trip to the Bahamas) to the purchase of a Lexus motor car which was registered upon importation into the Islands, in the name of HIL. The applicant seeks recovery of that amount on the basis that the transfer of the car to HIL was by way of a loan of its asset value to HIL. That also is to be further examined below.

Both amounts appear in the balance sheet under "liabilities" in the global sum of USD 386,800 described as "shareholders loans" and, in the notes to the balance sheet, are explained as relating to "two loans to the company by Robert Hurlstone."

Apart from the HCL subvention of USD 334,800 claimed by the applicant, it is significant that HCL also claims to have incurred certain other costs in the construction of the house. Those are said to have

amounted to USD 337,500 and are comprised as follows. USD150,000, said to have been paid to the applicant as salary as a director of HCL during the construction period of the house and during which period HCL claims he was exclusively there engaged on site. Plant hire of HCL's equipment which should have been, but was not charged, in the amount of \$40,000. Finally, an "overheads" charge of \$147,300 (being 15% of \$982,000 - the amount which the applicant contends is shown, ex post facto, to have been the actual cost of construction of the house). See page 6 of the applicant's first affidavit.

In the course of the liquidation, the respondent has already redeemed a guarantee given by HIL (secured by a second charge over the house) to Barclays Bank in favour of HCL in the amount of CI\$250,000. (USD 301,800). This security was redeemed from the proceeds of the sale of the house.

The applicant and HCL (by separate correspondence to the respondent from their attorneys Myers and Alberga) assert that the Barclays guarantee was given by HIL in consideration for HCL having assumed those other construction related costs on HIL's behalf.

Mrs. Hurlstone maintains however that the security and, in particular, the second charge on the house, was signed by herself on behalf of HIL at the applicants' insistence, in order to provide security for HCL, which was in dire need of refinancing from its bank, Barclays.

She denies it was ever suggested to her that there were any outstanding liabilities to HCL in respect of the construction of the house.

She has not asserted that the amount paid off on the Barclays liability should be regarded as one and the same the construction debt which is now being claimed by the applicant in the form of the HCL subvention said to have been provided on his behalf as a director's loan.

I regard the redemption of the Barclays liability in the amount of CI\$250,000 as of evidential relevance to the question of what agreement, if any, the applicant and Mrs. Hurlstone may have reached on HIL's behalf and, in particular, as to whether there was consensus ad idem as to the liabilities shown in the balance sheet signed by the applicant and Hurlstone.

The Barclays liability will also be of evidential import as to the proper estimate of the true costs of construction of the house, that is: as taken with the rest of the evidence in that regard.

Mrs. Hurlstone's submissions

On Mrs. Hurlstone's behalf the submissions which have been made generally in the case, the Barclays guarantee aside, are as follows.

That the debts claimed by the applicant as shown in the balance sheet have not been factually established. They are contrived and are a transparent device to deprive her of her interest in the principal matrimonial asset. That the court should find that there was never a concluded agreement for their creation between herself and the applicant (in their capacities as directors of HIL) and that the evidence on which the applicant seeks to rely to establish the relevant figures is unreliable.

She also submits that the real costs of construction of the house was in the order of 700,000 USD - the amount actually expended by herself and the applicant through HIL and that she was never made aware of any arrangement by which HCL was required to provide a subsidy for the construction of the house.

In any event, when the amount of the Barclays Guarantee (USD 301,800) is added to what is known to have been actually expended, the total of nearly 1,000,000 USD matches even the applicant's estimates of the costs. That there is therefore no basis for his claim for a further \$334,800 USD.

Further submissions on her behalf as to the "inappropriateness" of these proceedings can be briefly dispensed with here. Notwithstanding that the matrimonial proceedings are still pending before the Court, the parties had chosen to use of a corporate vehicle (HIL) by which to vest ownership of the matrimonial assets. It has become necessary to dissolve the company and and these proceedings, undesirable and regrettable though they may be, have arisen as a consequence and the matter is properly before the court.

The balance sheet and the alleged agreement

The balance sheet was drawn up by a Mr. Shaun Dunne and is dated 31st January 1993.

Mr. Dunne is employed, and was at the time, as an accountant to HCL. In his report on the balance sheet he states that it was prepared from information supplied by the Directors of HIL. In fact that information was provided by one director only, the applicant himself.

Although, as already noted, the balance sheet contains express reference to the debt claimed by the applicant, it does not expressly relate any part of it to the purported HCL subvention nor to the cash used by the applicant to purchase the Lexus motor car.

It also entirely excludes any reference to the Barclays Bank securities in the amount of CI\$250,000 notwithstanding that in January 1993, the date of the balance sheet, that liability was still outstanding and, from the evidence, was likely imminently to be called.

The circumstances under which Mrs. Hurlstone's signature came to be appended to the balance sheet are very much in dispute. She claims the applicant exerted pressure on her to sign; that she was at the time still hopeful of salvaging their foundering marriage; that she signed without having an opportunity to properly consider the contents of the document, relying instead on her established trust of the

applicant in financial affairs. However, as to the accuracy of the document and, more to the point of whether she intended her signature to be evidence of her acceptance of the debt shown in it as due to the applicant; that she signed only with the intention that the document would be presented to the bank to obtain a loan for a project on Little Cayman in which HIL was to become a joint venture partner. That project is referred to as the "Neptune's Berth" project.

In short, her account of how her signature came to be on the balance sheet raises the pleas of non est factum and undue influence.

The applicant, on the other hand, insists that Mrs. Hurlstone had been provided with an advance copy of the balance sheet and would have had ample opportunity to consider and question any aspect of it and that when she signed it, she did so as a director of HIL on behalf of the company in affirmation of the pre-existing oral agreement upon which he relies.

Moreover, he asserts that the balance sheet was presented at the liquidation meeting of 31st August 1993 and discussed in her presence but not challenged in any particular by Mrs. Hurlstone.

Conclusions on the balance sheet

While I find compelling that aspect of Mrs. Hurlstone's account that she signed the balance sheet out of a sense, at the time, of wifely loyalty and for the sake of procuring the finance for the Neptune's Berth project, I am unable to accept her pleas of non est factum and undue influence.

This is so particularly in light of her failure to raise any objection to the balance sheet itself at the liquidation meeting of the 31st August 1993.

It is clear from the notes taken by the respondent at that meeting that the various items of the balance sheet were discussed in some

detail.

Had she then been truly ignorant or misinformed of its actual contents, it is inconceivable that she would not have voiced some objection to what it purported to establish.

I take this view having regard to her admitted background as a businesswoman of some experience and sophistication and from my own impression of her in the witness box.

From that impression I am also unable to accept that, as alleged, she had been simply embarrassed or coerced by the applicant into signing the balance sheet. It is clear from the evidence, that when she thought it appropriate to do so, she was quite able to oppose the applicant.

Accordingly, and in the absence of any exceptional circumstances which could give rise to the conclusion that Mrs. Hurlstone had made a fundamental mistake as to the character or effect of the document she signed; I reject her plea of non est factum. (See Saunders v. Anglia Building Society (1977) A.C. 1004 and Chitty on Contracts 26th Edition Volume I para 365).

As to the plea of undue influence: on the basis of the foregoing findings and as there is no presumption that undue influence arises simply because of the nature of the marital relationship (see Howes v. Bishop (1909) 2 KB 390) - I am unable to conclude in favour of Mrs. Hurlstone. While I recognise that a presumption of undue influence can arise as between husband and wife in respect of dispositions made in his favour and where there is a customary unquestioning reliance on and faith in his conduct of their joint financial affairs - (See Barclays Bank PLC v. O'Brien (1990) 4 ALL E.R. at page 443) - I do not accept that there is a factual premise for either limb of that proposition in this case.

In the first place I do not find that the balance sheet is to be

properly regarded as a "disposition in favour of the husband" in this case. Rather, I conclude, and certain other consequences will flow from this conclusion; that the balance sheet was intended by Mrs. Hurlstone, if not by the applicant as well, to be only a representation, to the prospective lender bank, as to the financial status of HIL and for the purposes of securing financing.

Fortunately, no issue arises in this case which calls for any closer scrutiny of the manner in which both the applicant and Mrs. Hurlstone purported to discharge their responsibilities of full and frank disclosure to the bank in that context.

Suffice it to say that I do not accept that Mrs. Hurlstone signed the balance sheet as a result of duress or in ignorance of, or by deception about, what it contained.

What I do accept is that she signed only on the basis on which the balance sheet was presented to her by the applicant for her signature, that is, for the purpose of raising facilities from the bank.

Legal effect of the balance sheet

To the extent that I have found that Mrs. Hurlstone signed the balance sheet for the aforementioned purposes, I also conclude that she did not address her mind to and did not intend to endorse the balance sheet as proof of any indebtedness of HIL to the applicant. Nor did she, in my view, intend to affirm by so doing, the existence of any agreement by which HIL would pay such debts to the applicant.

It is in this context that I find her willingness to accommodate the applicant's objectives for the sake of their marriage becomes a relevant consideration, even though she would have been aware of the contents of the document. Those objectives being, as represented to her, the raising of finance for the Neptune's Berth project and to ensure his continued employment in construction.

Moreover, like the respondent, I have formed the view that the balance sheet is an inaccurate and unreliable document and must, in any event, be assessed in that light from the point of view of what Mrs. Hurlstone may have intended.

It was created at the applicant's behest by Mr. Dunne, HCL's accountant and upon the applicant's instructions. Insofar as it purports to show liabilities of HIL to the applicant, the balance sheet reflects information which only he provided and data which he helped to generate about those liabilities within the records of HCL. See the letter of 22nd August 1994 from Sean Dunne to the applicant.

At best therefore, the balance sheet is nothing more than an unaudited statement of HIL's assets and liabilities as the applicant would wish to have them presented.

That being the case, Mrs. Hurlstone, while not protesting the contents of the balance sheet at the meeting of 31st August 1993 would, nonetheless, have been entitled to expect that the liquidator (the respondent) in the proper execution of his duties would set about ascertaining the real financial status of HIL before any final distribution of assets.

It is clearly established from the evidence that prior to and up until that meeting, Mrs. Hurlstone and the applicant were in disagreement over the management and affairs of HIL and that "deadlock existed" between them. As much is acknowledged in the letter of 16th July 1993 from the applicant's attorneys to Mrs. Hurlstone's attorneys. That deadlock was the proximate reason for putting HIL into liquidation, against, no doubt, the background of the parties foundering personal relationship.

It is against that background also that the applicant had set about obtaining the preparation of the balance sheet. It is clear he was then mindful to secure that it reflected the most favourable possible position to himself as creditor, if not also as shareholder and, I am

satisfied, not at all concerned to ensure that it reflected, as fairly as possible, Mrs. Hurlstone's position.

A further compelling factor as to where the true probabilities lie in this regard is the manner in which the "asset" the Lexus motor car is treated in the balance sheet. The applicant admitted in cross-examination that at the time of purchase there was no agreement that he would be owed the sum of money he expended to purchase the car. Nonetheless, it is shown as having an asset value of USD\$56,000, the amount of the original landed costs. USD\$52,000 of that amount is claimed by the applicant and reflected as a debt owed to him by HIL.

Yet the final value was but a fraction of that amount, at only some \$5000, even on the basis of his own evidence in cross-examination. At sale it realised even less, (less than one-half that sum). That diminished value is the result of an accident with the car involving the applicant and which I find is relevant to this cause irrespective of the circumstances surrounding the accident.

In those circumstances, it is self-serving in the extreme that the applicant should seek to claim the full original value of that asset to himself. Moreover, given the dispute over its ownership by which Mrs. Hurlstone claims it was bought from the proceeds of their gambling holiday in the Bahamas and as a gift to her, I am unable to accept that her signature on the balance sheet should be taken as evidencing her agreement that HIL was liable to reimburse nearly the entire original value to the applicant.

As to the sum of the HCL liabilities claimed by the applicant, I am also satisfied that Mrs. Hurlstone would not have been able to properly verify or refute that sum, even had she been minded to do so. For, as the applicant admitted in testimony, the sum was merely his estimate based in part upon his recollection of what was expended on the construction of the house and of what would have been owed to HCL on his director's loan account.

No evidence has been presented from which it may be concluded that Mrs. Hurlstone had personal knowledge of what comprised the sum of the debt shown in the balance sheet, (as distinct from knowledge that the debt was shown in the balance sheet).

Nor is it suggested that the accounts within HCL, which reflect the amount of the director's loan to the applicant, were ever shown to or discussed with her.

Moreover, and perhaps most telling of all, when pressed in cross-examination; the applicant was unable to recount any details of the purported discussions with Mrs. Hurlstone which he alleges were the basis of the pre-existing oral agreement and of which the balance sheet is said to provide evidential confirmation.

The exclusion from it of reference to the Barclays guarantee is also to be considered in arriving at any conclusion on the evidential validity of the balance sheet.

A different scenario may well have emerged had the balance sheet purported to include all outstanding major liabilities said to be specifically attributable to the construction of the house and described as such (ie. USD 880,000: being \$334,800, \$245,000, and \$301,800). It is to be borne in mind that \$500,000 of the parties funds from the sale of their first home had also been used. That would be a total purported cost of \$1,380,000 as against the value of only \$1,200,000 shown in the balance sheet. Mrs. Hurlstone, as a shareholder, may well have been more likely than not to call for a verification of the liabilities, in those circumstances.

Accordingly I am unable to conclude that the exclusion of reference to the Barclays guarantee in no manner influenced her willingness to sign the balance sheet, even under the circumstances which I found - that she freely and voluntarily did so to accommodate the applicant's stated objectives at the time.

No acceptable explanation has been given by the applicant why the liabilities now being claimed by him in respect of the construction of the house were not taken into account at the same time as the other construction related debts were being accounted for and reflected in the Barclays guarantee sum.

All that has been offered is the improbable explanation that most of those debts had not yet been identified in the books of HCL and remained unsegregated until the applicant sought to segregate them based on his recollection of the real costs incurred in building the house.

Against all this background I find that explanation extremely tenuous when the balance sheet as presented to Mrs. Hurlstone, omits all reference to the guarantee but includes, without specifying them, the newfangled debt, allegedly associated with the construction.

Accordingly, I reject the contention that her signature on the balance sheet, along with that of the applicant, should be taken as evidencing, on behalf of HIL, an agreement that it owed the sum of USD 334,800.00 to the applicant as costs associated with the construction of the house.

I also reject the applicant's assertion that there had been discussions and a specific agreement between himself and Mrs. Hurlstone on behalf of HIL, that he would be free to incur such liabilities, to be repaid by HIL, by way of a director's loan account with HCL.

In the absence of the balance sheet there is only the applicant's bare assertion as evidence that this agreement was reached. The applicant was unable to give any details of the discussion lead to this agreement or of the circumstances surrounding it.

For reasons which will become plain later on, the reconstructed

director's loan account now existing within HCL's account may not, in my view, be taken as evidencing the agreement which the applicant seeks to advance.

It is trite that without such an agreement involving the consensus ad idem of its directors or shareholders, HIL could not be bound, as a matter of contract, in the liabilities being alleged.

Estoppel

The applicant pleads estoppel to estop Mrs. Hurlstone's denial of the balance sheet on the basis that he relied on her acquiescence and implied acceptance of it at the liquidation meeting of the 31st August 1993 and would not otherwise have agreed to put HIL into liquidation.

In light of the foregoing findings it follows that no plea of estoppel can arise as the plea of non est factum and undue influence were found not to be substantiated in the first place.

I have found the document to be her document but not as having the evidential significance advanced by the applicant.

To the extent that the applicant is asserting a plea of estoppel in any event (and in this regard the submissions are unclear) on the basis that the balance sheet should in any event be deemed a sort of proof or templet for the liquidation, I should make my views explicitly clear in that regard.

As already observed, it was fundamental to the liquidation that the liquidator should be himself satisfied about the financial status of the company, of its true assets and liabilities. He was duty bound and the shareholders would have expected him to go behind the balance sheet. Why else appoint a liquidator?

Any suggestion that the applicant should be entitled to have the balance sheet accepted on the face of it, as evidencing proof of the

debt to himself, must be fundamentally wrong.

Moreover the applicant cannot be heard to say that he should be allowed to rely upon the balance sheet with its patent inaccuracies and omissions by way of precluding Mrs. Hurlstone's or the liquidator's (the respondent's) rejection of that balance sheet.

The applicant was the predisponent of those inaccuracies and omissions. (See Porter v. Moore (1904) 2 Ch. 367).

As already stated, I am satisfied that Mrs. Hurlstone, as a reasonable and experienced businesswoman would not have accepted the balance sheet with its inaccuracies and omissions, had she been aware that the balance sheet was being presented for signature as conclusive proof of debts owed to the applicant or to HCL in respect of the construction of the house.

Moreover, I also find that the applicant has failed to establish that he would be materially prejudiced by the rejection of the balance sheet.

No evidence supports his assertion that he agreed to put the company into liquidation only because he had been led to believe that his claim would not be challenged. The independent evidence suggests that the liquidation was inevitable because of the "deadlock" between the shareholders.

As already observed, in the ordinary course he would expect to be required to present in the liquidation acceptable proof of debt in support of his claim..

Whether he has succeeded in so doing apart from the balance sheet is a matter to be separately examined, but for reasons already explained, he cannot now be heard to say that the balance sheet was conclusive in that regard.

Were he able to present proper proof, the liquidation would have proceeded inevitably to his benefit, not to his detriment, and it is to be noted that the guarantee to the bank which has been redeemed by HIL in liquidation, resulted in the extinguishment of the debt of \$250,000 (USD 301,800) which HCL, a company of which he is 50% owner, owed to the bank.

A proper plea of estoppel by conduct may not succeed where the party raising it is unable to show that he has suffered material prejudice as a consequence of that conduct. (See Fung Kai Sun v. Chan Fui Hing and others (1951) A.C. 489 per Lord Reid at page 506) and Phipson on Evidence 14th Ed. page 107).

The Motor Car

The alleged debt in respect of the Lexus motor car, if it is to be recoverable at all, must also fall to be considered in light of the finding that the balance sheet evidences no specific oral agreement that the car would be treated as an asset on loan to HIL.

As I understand the remaining footing of that aspect of the claim, it is that there can be no presumption of a gift of the car to HIL, even in the absence of an agreement of the sort rejected. Furthermore, there was no evidence that HIL held the car in trust for someone else. Accordingly it must be treated as a loan to HIL now to be repaid in the liquidation.

I can shortly dispose of this aspect of the claim.

I am satisfied that the transfer of the car to HIL was a matter of the unilateral act and decision of the applicant.

There was no intention of HIL, by both its directors at that time, that it should become an asset of the company on loan to be repaid at some future indeterminate date.

I am satisfied, that to the extent the matter received the joint

blessing of the applicant and Mrs. Hurlstone; it was with the intention that the car be held by the company for their use as a family car - the manner in which it was in fact subsequently used and, in the main, by Mrs. Hurlstone.

I reject the submission that arising from the transfer of the car to the company, a legal obligation would have arisen whereby the company should repay very much its full original value to the applicant notwithstanding that it had been almost destroyed as a result of the accident.

From all the evidence, I will accept nonetheless, that beneficial title remained in the applicant and on that basis I conclude that he should be allowed to claim in the liquidation the value of the motor vehicle realised at the time of the liquidation, there being no presumption of a gift to the company.

That, from the evidence, is the amount of CI\$2439.02 (see page 234 of the green bundle).

Quantum meruit

Having rejected the applicant's claim based on the purported oral agreement, with Mrs. Hurlstone on behalf of HIL, and as purportedly evidenced by the balance sheet, the question remains whether the evidence establishes a debt to the applicant on the basis of a quantum meruit.

In the absence of a finding of a specific agreement, the applicant's claim on a quantum meruit is put on the following basis. That the house was constructed by HCL based on an understanding that the applicant would be accountable to HCL for its contributions and that HIL would in turn be responsible to him and that those contributions would be treated as a director's loan to the applicant from HCL. That the absence of a written agreement does not negate the existence of such an arrangement and that it is perfectly normal for shareholders in family businesses to treat financial arrangements in that way.

In Re Kentwood (supra) was cited as an instance of an award on a quantum meruit for work done, in the absence of a specific written contract, but where the court found that there must have been an oral agreement nonetheless.

This basis of the claim is not without its difficulties as, given the background to the action, it is unclear what the scope of the action becomes.

The "arrangement" to which the applicant refers in this sense, at first glance seems predicated on there having been an oral agreement. But as already noted there is no evidence from which such an agreement can be found. Moreover, in effect, the terms of that arrangement being contended for would imply carte blanche to HCL and the applicant in relation to the expenses to be incurred.

In the absence of a written agreement such a term would have to be implied to be relied upon.

I have already expressed reasons for my finding that there was no specific discussion or agreement to that effect.

It would be even more unreasonable to conclude that there was a tacit understanding to that effect, particularly in light of the carte blanche which it would imply and because, as Mrs. Hurlstone testified and as I accept; she, at any rate, had identified a budget of some \$700,000 for the acquisition of the house and was never of the understanding that any major subsidy would be provided by HCL.

But that is not an end to the matter.

The applicant submits nonetheless that the quantum meruit arises on the further basis, as I understand it, that the work was in fact done and neither he nor Mrs. Hurlstone, as directors of HIL could have expected a house which costed some \$1,120,000 (his estimate) to be built for \$700,000.00 (the amount, including the Bank of Nova Scotia

funds, actually put in by the parties) and that the liabilities to him should be met by HIL in order that he might in turn honour this debt to HCL.

Accordingly the claim must also be considered against the background of Mrs. Hurlstone's certain knowledge, prior to the construction that HCL would be engaged on the project and in the absence of an express contract setting a fixed contractual price or an express agreement to repay whatever the actual costs might have been; an implied term of the arrangement should be that HIL would repay the reasonable expenses incurred above and beyond the funds made available by HIL.

I accept that in such latter circumstances the law would imply a promise to pay on the part of the person who requested the services to be performed. This in the nature it seems, of a quasi-contract. (see William Lacey (Hounstlow) Ltd v. Davis (1957) 1 W.L.R. 932 and Chitty on Contracts, General Principles, 26th Edition paragraphs 2144-2145, Chapter 29).

I now turn to consider the applicant's claim, in respect of the liabilities said to be owed to HCL, on that basis.

It is important to note that the burden of proof of the quantum as well as of the reasonableness of the quantum must rest firmly with the applicant - there being no strict contractual basis for repayment of whatever sums may have been charged or expended. And, I might add, irrespective of whatever contractual arrangement may have existed between HCL and the applicant by way of the director's loan account.

In that context I also take the view that the amount of CI250,000 (USD 301,800) paid to Barclays Bank by HIL on account of HCL's indebtedness should also be taken into consideration now as that sum was ostensibly claimed by HCL and, in effect paid, as part of the construction debt.

The court has been invited to accept, as global evidence of what the

real costs of construction must have been, the findings in two quantity surveyors' reports submitted in the action.

One report, that of J.E.C. Building Consultants Ltd gives the estimated costs of construction as CI\$847,500 (USD 1,017,000). The other, that of Alastair Patterson proffers the sum of CI\$907,235 (USD 1,088,682).

The applicant's figures, arrived at from his own global calculation based, according to him, on his recollections and later confirmed by the records of invoices of the "hard costs" incurred (as well as of equipment rental and salary paid to himself by HCL and 15% "overheads" costs), was USD 1,129,300 - a figure closely resembling that of the quantity surveyors.

No attempt has been made to present evidence to the court by reference to invoices kept by HCL of the segregated amounts said to be associated to the various "hard costs" of construction or to the amounts for salary, overheads or equipment rentals.

Yet folders of documentation were exhibited (Exhibits 16,17, and 18) en masse, said to contain records of the hard costs.

Instead of that strict proof, the applicant seeks to rely on the quantity surveyors' examination of those records, said to have been incorporated into the result of at least one report - that of JEC consultants.

That, to my mind, does not provide a satisfactory reason for failing to produce to the court the very documentation, in a segregated form, said to have been relied upon by the applicant himself in the reconstruction of the debt of USD\$ 334,800 now shown to be existing in the HCL director's loan account in his name. That is the very sum of the construction debt being claimed.

His unequivocal testimony was that each element of that debt was

reconstructed from actual invoices and other records identified by himself and Mr. Sean Dunne from within HCL's records as relating to the construction of the house.

Notwithstanding the court's clear indication that it would wish to see those records, particularly as they were said to have been already at some stage identified and segregated, no attempt was made to present them.

I am therefore left to take a view of the evidence of the alleged debt, not from proof of the specifics but, instead, from a view of the global generalities available.

For a number of reasons, I conclude, as did the respondent in his rejection of the proof of debt, that the state of the evidence provides a wholly unsatisfactory basis upon which to sound reasonable proof of the liabilities claimed.

A brief excursion into the constituents of the global figures readily demonstrates their unreliability.

While the quantity surveyors' estimates approximate to that of the applicant the former both include sizable sums for "profit", an element which the applicant, in his evidence, said was not taken into account by HCL. This is as distinct from "overheads" which are separately considered.

The sum of USD 147,300 as an element of the Barclays guarantee is said to have related only to "overheads". Accordingly, if the amount included by the quantity surveyors for "profits" is deducted, as it should be, a significantly different picture emerges.

Moreover, the two major elements of the Barclays guarantee have clearly been shown to be questionable and unreliable sums.

In the case of the salary claimed, (USD\$150,000) the amount is put in

doubt because elsewhere within the records of HCL it is shown that the joint annual salary of both directors of HCL (the applicant and his brother John) is less than USD 200,000 for the year 1989 - the year immediately following the construction period.

Furthermore, the applicant sought to justify the figure of USD150,000 as salary on the basis that he had been engaged as a director of HCL full-time and exclusively on the construction of the house, when, in all probability, that could not have been so. Evidence that other HCL employees were so engaged, has been shown to be manifestly untrue.

Further observations on the figure of USD 147,300 claimed as "overheads costs", demonstrate that the applicant's and HCL's account of it is also very tenuous.

In order to arrive at that figure the applicant, entirely after the fact, took fifteen per cent of the figure as comprised by his own estimates of the "hard" costs (which notionally include the sum of \$334,800 now claimed in the liquidation and the sum of \$150,000 claimed as salary) both of which predicate sums are in question.

Moreover, apart from the applicant's own evidence (see paragraph 20 of his first affidavit) that a fifteen percent mark-up for overheads (not to be confused with profit) is a reasonable element of HCL's costs, there is presented no evidence to justify such a sum as a reasonable element of the overall costs. One quantity surveyor takes no account of "overheads" at all, the other estimates it at but a fraction of the amount said to be taken in the Barclays guarantee in that regard. (Patterson's estimate of \$102,900 in this regard includes several other elements including supervision).

Nonetheless, if HCL and the applicant are correct, HIL has already paid that cost and the sum allocated to the applicant's salary, on account of the Barclays guarantee.

I also note that the other director of HCL, the applicant's brother,

does not appear from the records of HCL, to have been charged similar "notional" charges for salary, overheads (or for that matter plant hire), in respect of a similar director's loan account created for the construction of his house.

In attempting to arrive at what may be fair on the basis of a global assessment of a quantum meruit, I find I am unable to regard those payments (of \$150,000 and \$147,000) as having been fairly exacted and allocated, as alleged.

That finding unavoidably carries on into an assessment of what may be fairly and reasonably now owed in terms of the debt of USD 334,800 being claimed.

On the evidence presented, the only specific record of the debt comes from the entries in the HCL directors loan account itself, and the manner, in which those entries appear, itself raises certain questions.

Even within the HCL accounts the alleged director's loan in the total sum of \$334,800 was not established by HCL's accountant until some 6 years after the house had been constructed. And then only with the input and insistence of the applicant.

In fact the earliest record of any debt in the HCL director's loan account in the applicant's name was in June 1988, when a figure of only CI\$19,836 is shown.

That figure is shown in the same record as increasing to CI\$134,469 by June 1989 (fully six months after the construction period).

It remains at that sum through 1990 and then in September 1991 is shown as increasing to \$193,834, but without any explanation for the increase.

It remains at the September 1991 figure throughout until June 1994

when it is increased (as shown in the summary of directors' current accounts) to \$279,334 (USD 334,800) - the sum now being claimed. (See page 206 of the Green bundle).

That last increase of CI\$86,000 is said to be attributable to three specific items of hard costs which the appellant asserts had been overlooked and omitted from the director's loan account over the years but which, he recalled, had been incurred in respect of the construction and which he instructed Mr. Dunne to include.

Although admitted as amenable to strict proof, no separate documentary records of these costs were produced to the court.

The summary of the director's loan account generated within HCL is, therefore an entirely unreliable basis by itself for a finding that the debt is owed.

I should also make reference to another HCL account record - the trial balance - which also shows a record of the director's loan account in the appellant's name for the period 6th January 1994 to 30th June 1994. It reads like this:

"Account Description	Beginning Balance	Debits	Credits	Ending Balance
Directors C/A				
Roberts house	.00	523,234.00	250,000.00	273,234.00"

Thus, that particular account shows an outstanding balance for the beginning of 1994 at zero.

The debit of \$523,234.00 is entirely unexplained.

The credit of \$250,000.00 is attributed to the redemption of the Barclays guarantee by HIL on HCL's behalf. It is inconsistent to have this entry here having regard to HCL's and the applicant's assertions

that the sums secured by the Barclays guarantee bear no relationship to the liabilities in the applicant's director's loan account.

The "ending balance" of \$273,234 is the difference between the "debit" and "credit" entries and so remains as much a mystery as the debit entry itself.

In summary, the accounts presented to the court are replete with inconsistencies and unsubstantiated entries, entries which should be amenable to strict proof once having found their way into company records of that nature.

The stated unavailability of Mr. Dunne to testify to explain them does not render them any more acceptable as proof or provide an excuse for lack of proper proof.

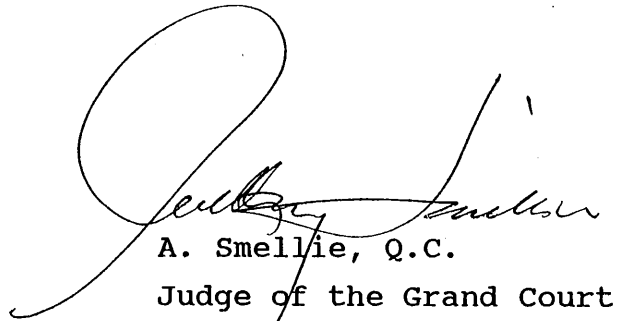
As regards the global evidential value of the quantity surveyors' reports, I will finally observe that they are but estimates, albeit of qualified professionals, of what the costs would have been. Unavoidably to arrive at those estimates, a good deal of extrapolation and assumption would have been employed.

If one were to take a different global perspective, a different picture emerges. By the applicant's own admission the sums paid in one way or another for the construction of the house by HIL totalled USD 959,800 (\$458,000, 200,000 and 301,800). The addition of the further sum of \$334,800 would increase those costs to USD 1,294,600,-: a good deal more than estimated either by himself or the quantity surveyors and a good deal more still if the sum included by the surveyors as "profit" were to be deducted from their estimates.

For all the foregoing reasons I conclude that there is no reasonable basis on which to find a debt owed to the applicant by HIL, either by express or implied contract or on a bare quantum meruit, in respect of the construction of the house.

The appeal succeeds only to the extent of the admission of the applicant's proof of debt in the amount equivalent to the value of the Lexus motor car realised in the liquidation. Otherwise the appeal is dismissed.

I will hear submissions as to costs.



A. Smellie, Q.C.
Judge of the Grand Court
14th October, 1994