Date: 19970611
Docket: 30672
Registry: Prince George

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

DANIEL JAMES COOMBS

PLAINTIFF

AND:

RANDY LLOYD AND JOYCE LLOYD

DEFENDANTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE MEIKLEM

Counsel for the Plaintiff: D. Byl and S. Nicoll

Counsel for the Defendants: W. Cascadden and N. Kearney

Place and Date of Trial: Prince George, B.C. December 2, 3, & 4, 1996

INTRODUCTION

[1] This action arose in the aftermath of the 1993 purchase and sale of the business called Honor Honda, a recreational vehicle dealership in Vanderhoof B.C. The essence of Mr. Coombs' case is that the defendants misrepresented the accounts payable of the business, and as a result the plaintiff, through his "numbered" company, assumed more debt than he had agreed to assume.

[2] The main issues that arise are whether or not the contractual documents contained pertinent representations (express or implied), whether there was a negligent misstatement by one of the defendants and reliance by the purchaser, whether damages are proven, and, whether, if liability by the defendants is established, the loss can be recovered by Mr. Coombs as opposed to his company, which is not a plaintiff.

BACKGROUND FACTS AND CONTRACTUAL DOCUMENTATION

[3] The defendants Mr. and Mrs. Lloyd had purchased the Honor Honda business in 1985 through their company 280021 B.C. Ltd. Mr. Lloyd managed the business and Mrs. Lloyd did the bookkeeping. She developed her expertise and systems without formal training, although she had some minor previous experience doing accounts for Mr. Lloyd's prior log-skidding business. The wife of Honor Honda's previous owner had stayed on to assist her for three months in 1985.

[4] The plaintiff, Mr. Coombs, began working part-time for the business as a mechanic's helper while he was still in high school, and commenced full time employment for Honor Honda upon graduation in 1988. He was appointed as manager of the business in mid-1992, after Mr. Lloyd had purchased a similar business in Prince George and was devoting his energy to that new enterprise. Mrs. Lloyd continued to be employed as the bookkeeper at Honor Honda. Mr. Coombs was unsupervised by the Lloyds in his management role, but he left the bookkeeping to Mrs. Lloyd, and she continued in that role without supervision from Mr. Coombs as manager.

[5] Following Mr. Coombs' purchase of the business in June 1993, she continued to be employed as the bookkeeper for a further seventeen months, until September 1994 and Mr. Coombs and Mrs. Lloyd shared some staff supervision. The working relationship between Mr. Coombs and Mrs. Lloyd did not change following the sale, until Mr. Coombs arranged for his mother Diane Coombs to attend part-time four days per week starting in June 1994, to have Mrs. Lloyd familiarize her with the books of the business and the methods she used.

[6] Mr. Coombs had first expressed an interest in purchasing the business in the fall and winter of 1992 in discussion with Mr. Lloyd. The discussions became more serious in early 1993 and Mr. Coombs and Mr. Lloyd attended together at the office of the accountant for the Lloyds, Mr. Shahid Ahmed, C.G.A., in

Prince George in mid-February 1993 to discuss the feasibility of a purchase and sale and to seek his advice on valuation. In the course of that meeting, Mr. Ahmed asked what the accounts payable of the business were and Mr. Lloyd telephoned Mrs. Lloyd to inquire. She telephoned back to the meeting and provided a figure of $31,167, which, according to her testimony she "guesstimated" by taking a list of the trade payables sitting in a closet and adjusting it because she "knew that there was the credits for warranties and different things to go through".

[7] Mrs. Lloyd testified that she did not know at the time she provided that figure that it would be incorporated into the transaction, and that she was only providing a ballpark figure for the purposes of the discussion on valuation of the business and how to sell it.

[8] I will make further reference to the chronology of negotiations and documentation, but I will just note at this time that this mid-February guesstimate of Mrs. Lloyd of trade payables of $31,167 became enshrined in two written agreements documenting the purchase and sale which were dated for reference April 1, 1993, but signed in late May 1993. Mrs. Lloyd conceded that the figure was not accurate even when provided in February. The evidence called by the plaintiff at trial suggested that the trade accounts payable to taxing authorities and suppliers as of March 31, 1993 (after deduction

of future credits) actually totalled $74,938.16. The difference of $43,771.16 is one of two major components of the damages sought in this action.

[9] The other major component of the damages claimed by the plaintiff relates to an amount claimed at $59,377.41 which the evidence suggests was owed under a wholesale floor plan to wholesale suppliers in respect of new units sold by the business prior to April 1, 1993, with purchase price received or receivable by the defendants, but for which the manufacturer was not paid until after that date. (The receivables of the business were not part of the assets of the business to be acquired by the plaintiff). Invoices for new units were not handled the same way as trade payables, and the units were tracked in a separate record known as the unit book. The new units in stock were not considered assets of the business, since they remained the property of the manufacturer until sold.

[10] None of the parties recall any further formal discussions between them prior to draft documentation being prepared by Ms. Ongman, as the purchaser's solicitor. Ms. Ongman testified that she understood she was documenting an agreement already arrived at by the parties when she prepared the first draft of what she labelled a General Agreement of Intent. This agreement is succinct and setting it out here in full will serve better than a summary or characterization of it to

identify the prospective buyers and sellers and the structure of the transaction:

THIS AGREEMENT made the 1st day of April, 1993.

BETWEEN:

280021 B.C. Ltd. (Inc. #280021), of Box 1219, Vanderhoof, BC, V0J 3A0

(hereinafter called the "Company")

ON THE FIRST PART

AND:

DAVID CARNELL PHILIPS, Businessman, of Box 2199 and **DANIEL JAMES COOMBS**, Businessman of Box 1293, both of Vanderhoof, BC, V0J 3A0

(hereinafter called "David" and "Dan")

OF THE SECOND PART

AND:

RANDY LLOYD, Businessman and **JOYCE LLOYD**, Businesswoman, both of Box 1219, Vanderhoof BC, V0J 3A0

(hereinafter called "Randy" and "Joyce")

OF THE THIRD PART

WHEREAS:

A. Randy and Joyce are the sole directors, officer and shareholders of 280021 B.C. Ltd., carrying on business as Honor Honda, in Vanderhoof, British Columbia (hereinafter called the "Business").

B. Dan is the Manager of the Business and is interested in purchasing the Business.

C. David is a business associate of Dan and is also interested in purchasing the Business.

D. The Company owns certain assets in connection with the Business.

E. Randy and Joyce and the Company wish to sell the Honor Honda Business aspect of the Company to Dan and David, and Dan & David wish to purchase same.

F. Randy and Joyce and the Company have agreed to proceed with the intention of selling the Business to David and Dan, provided that the method and terms of sale are set up in consultation with the Company's accountant, Shad Ahmed.

WITNESSETH that in consideration of the premises, the parties agree as follows:

1. The Company, David and Dan will cause a company to be incorporated to assume the operating business name of Honor Honda (hereinafter called the "New Company").

2. The Company will hold 52% of the New Company's shares and David and Dan will hold 24% each, of the shares.

3. David and Dan will loan the New Company $61,676.00 in exchange for a shareholder's loan recorded on the books of the Company.

4. The New Company will purchase all of the operating business of the Company, including goodwill, inventory for resale and the parts and supplies from the Company for the sum of TWO HUNDRED EIGHT THOUSAND SIX HUNDRED SEVENTY EIGHT DOLLARS AND EIGHTY NINE CENTS ($208,678.89) payable by cash and the following list of debts:

a)	Cash	$ 61,676.00
b)	All Accounts Payable @ March 31, 1993	31,167.00
c)	Bank Overdraft and Operating Line	51,641.00
d)	Shareholder's Loans owing by 280021 BC. Ltd.	$ 64,194.89
		$208,678.89

The New Company will make the necessary arrangements with the creditors to assume these obligations from 280021 B.C. Ltd., including all Wholesale Floor Plans. The assets will be purchased at the following costs from 280021 B.C. Ltd., namely:

New Inventory	$136,004.91
Used Inventory	$ 27,227.28
Equipment & Furniture	$ 20,446.70
Goodwill	$ 25,000.00
	$208,678.89

5. The parties acknowledge and agree that the figures are based on the status of 280021 B.C. Ltd. determined the Accountant, Shad Ahmed as at March 31, 1993 and these figures are acceptable.

6. The New Company will be permitted the use of the accounts receivable on record prior to and up to March 31, 1993 in order to have operating capital. All such funds utilized are to be repaid in full on or before March 31, 1994, according to the attached repayment schedule.

7. The New Company will hire the staff of Honor Honda as soon as it is incorporated but in any event will be responsible for their wages from April 1, 1993 forward, except for accrued unpaid holiday pay.

8. The Company will settle outstanding holiday pay and benefits with its Manager, Daniel Coombs as soon as possible.

9. David and Dan will purchase the Company's 52% interest in the New Company provided that such purchase shall be financed by the Company over a one year period.

10. The price of the shares shall be $64,194.89 and the price will be secured by an Escrow Agreement, Promissory Note, signed by David, Dan and the New Company, and supported by a General Security Agreement registered in the Personal Property Registry. Randy and Joyce will remain as Directors of the New Company until the debt is paid.

11. The Company will enter into a five year lease of the premises with the New Company in a form acceptable to all parties.

12. This Agreement is entered into by the parties to outline their intentions and their business relationship. The parties agree to enter into all formal documentation necessary to accomplish the transactions referred to herein.

In Witness Whereof...........

[11] The attached repayment schedule referred ti in paragraph 6 for remitting the business' March 31, 1993 accounts receivable to the defendant's company, read as follows:

REPAYMENT SCHEDULE

> 48% of all accounts receivable of record at March 31, 1993 are to be paid immediately. The balance of the said Accounts Receivable in Record will be paid during the course of the 12 mos fiscal period as follows. The sum of 25% of "All accounts receivable" as received shall be paid to the Company until the debt is extinguished. All Accounts receivable means all the accounts receivable of Honor Honda both before and after March 31, 1994, until the debt is paid.

[12] A share purchase agreement was drawn in furtherance of the provisions of paragraphs 9 and 10 of the above agreement and was also dated April 1, 1993. Randy Lloyd and Joyce Lloyd were added as parties and signatories to the share purchase agreement, but the warranties and representations are stated to be those of 280021 B.C. Ltd. who is therein called the Vendor. The "Purchaser" was the plaintiff Coombs and an associate Mr. Philips. This agreement pertains to the "Vendor's Shares", being 52 Common Shares in the capital of 441731 B.C. Ltd., (The Company) and the relevant representations in paragraph 1 included the following:

> (c) The Company was incorporated on May 12, 1993
>
> . . .
>
> (i) The company was incorporated to continue the business Honor Honda in Vanderhoof, British Columbia operated by David and Dan until the company was incorporated;

(j) There are no liabilities of the Company which are not disclosed or reflected in this Agreement except those incurred in the ordinary course of the Company's business as at the date of incorporation;

. . .

(l) The Company has good title to and possession of all the assets referred to in Schedule "A" and all assets are free and clear of all liens, charges or encumbrances, except for the indebtedness of Honda Canada Inc. secured by Wholesale Floor Plan under the Personal Property Security Act;

. . .

(o) The Company is not indebted to the Vendor;

[13] There was no Schedule "A" list of assets prepared as the agreement stated, but it is undisputed that references to "inventory for resale" and "new inventory" in paragraph 4 of the General Agreement of Intent do not include new units covered under the Wholesale Floor Plan. Therefore the implication in paragraph 2(1) that assets to which the sale price of the business was allocated might be encumbered by security under the ***Personal Property Security Act*** is not, strictly speaking accurate.

[14] The indebtedness under the Wholesale Floor Plan is referred to in both agreements, and although neither agreement quantifies it, the evidence is that it was $256,007 at some point in time. The evidence from Ms. Ongman's testimony, and her file, suggests that she initially misconstrued this as

being $25,607, and as pertaining to the asset described as "inventory for resale". The evidence establishes that Mr. Coombs' and Mr. Lloyd's discussion in Mr. Ahmed's office in mid-February included concurrence to the effect that the value of new units in stock and the Wholesale Floor Plan indebtedness should closely offset each other. Ms. Ongman testified that she was advised of the fact of offset by either Mr. Ahmed or Mr. Lloyd, and that there was therefore no need to refer to the $256,007 figure in the agreements.

[15] The share purchase agreement further provided that Coombs and Philips would pay the Vendor (280021 B.C. Ltd.) the sum of $64,194.89 pursuant to the terms of a promissory note in the form attached to the agreement, which provided for the joint and several obligation of Coombs, Philips and 441731 B.C. Ltd. (It will be noted that this is the same sum that Coombs and Philips had agreed in paragraph 4 of the General Agreement to make arrangements to have the new company assume in respect of 280021 B.C. Ltd.'s obligation to its own shareholders, as part of the consideration for the assets transferred from 280021 B.C. Ltd. to the new company. This, presumably, is why the new company was named as an obligant on the promissory note, even though the payee on the note is 280021 B.C. Ltd. rather than its shareholders. There is no evidence of a separate document whereby the new company assumed 280021 B.C. Ltd.'s shareholders loans obligations as contemplated by paragraph 4, nor is there

any evidence that the new company paid 280021 B. C. Ltd.'s shareholder's loans obligations directly to the Lloyds.)

[16] The share purchase agreement provided that the Vendor 280021 B.C. Ltd.'s obligation to close was dependent upon the Purchaser having made the $61,676.00 shareholder loan to the new company by May 25, 1993, and that the Purchaser's obligation to carry out the terms was subject to several conditions, including:

> d) That the payables other than the Wholesale Floor Plan at March 31, 1993 do not exceed the approximate sum of $31,167.00.

[17] The share purchase agreement also provided that the Vendor 280021 B. C. Ltd. would indemnify the Purchaser (Coombs and Philips) for loss arising out of a breach of any of the warranties and representations in Paragraph 1 of the agreement.

ARGUMENTS OF THE PARTIES

[18] The plaintiff's argument is that Mrs. Lloyd was careless or reckless and breached her duty of care in providing an amount for payables that was grossly inaccurate as to trade accounts payable, and in failing to include net liability under the Wholesale Floor Plan, and Mr. Coombs relied on this material pre-contractual representation to his detriment.

[19] It is submitted that the plaintiff and Randy Lloyd, who was the defendant that instructed the accountant and solicitor,

both were negotiating under the common mistake of fact that floor plan assets roughly equalled floor plan liabilities. It is further submitted that, given the evidence of both defendants that the sale of the business was to proceed at the price and structure suggested by Mr. Ahmed, it can be inferred that if the true facts had been known, an adjustment would have been made on the purchase price to offset the additional liability. The plaintiff argues that the defendants "impliedly warranted to the plaintiff that all wholesale floor plan units sold to customers prior to March 31, 1993 were paid for to the financiers on or before that date."

[20] In respect of the allegedly negligent misstatement about payables, the plaintiff argues for concurrent tort liability, relying on ***Central & Eastern Trust Co. v. Rafuse*** (1986) 2 S.C.R. 147, ***Queen v. Cozmos Inc.*** [1993] 1 S.C.R. 87.

[21] The defendants argue that the agreements contain no representation as to the accuracy of the figures, and in paragraph 5 of the general agreement the parties expressly acknowledged and agreed that the figures are based on the status of the vendor company as determined by Shad Ahmed and are acceptable. Thus, it is suggested, the intention of the parties was "to preclude one another from liability for the accuracy of the figures".

[22] The defendants argue that the express representations in the share purchase agreement (see paragraph 11 above) are given only by 280021 B.C. Ltd., and any remedy for breach must be sought against the company, rather than the personal defendants. The defendants further submit that it is the new company, 441731 B.C. Ltd., that assumed any excessive liabilities, and therefore if any losses were suffered, they were not suffered by the plaintiff.

[23] The defendants further argue that no implied terms should be found because it cannot be said that the parties' intention in the event of inaccuracy of the figures can be confidently determined from the agreements they signed.

[24] The defendants rely on ***Hjort v. Wilson*** (1953) 11 W.W.R.(ns) 375 (B.C.C.A.) for the proposition that innocent misrepresentation does not give rise to damages.

[25] In respect of the negligent misstatement claim, the defendants dispute the elements of reliance, and argue alternatively that reliance upon a "ballpark" estimate of payables made by Mrs. Lloyd in mid-February would not be reasonable. They argue that there is no evidence of any representation by the defendants in respect of the wholesale floor plan.

FINDINGS OF FACT ON THE ACCOUNTING EVIDENCE

A. The Accounts Payable, Other Than Wholesale Floor Plan

[26] Exhibit 4 in the trial was an exhibit book containing 65 tabs, each dealing with a single payee, and containing the pertinent documentation which the plaintiff or his advisors, Messrs. William Lewis, CGA and his son Michael Lewis had been able to locate in the records of the Honor Honda business, relevant to the state of each account as of March 31, 1993. There is a three page itemized summary at the beginning of the exhibit book which, under the title headed "Suppliers", sets out the witnesses' conclusions as to the March 31, 1993 balances owing. One item, namely item #39, is a summary of "future credits" from Brooks Equipment which were processed after March 31, 1993 in the sum of $4,960.38. The total of these accounts, after deducting the future credit is $74,938.16, or $43,771.16 more than the $31,167.00 figure used in the agreements.

[27] Cross-examinations of William Lewis and Michael Lewis were brief, but they acknowledged that there may have been unnoted credits on suppliers' March statements, and they had only tracked credits to June 1993 in their examination of the company accounting records. In the course of the trial, the defendants prepared an exhibit book, of 12 tabs entered as Exhibit #11, which documents credit notes for warranty credits, promotional credits and copies of cheques dated late in March, or cheque stubs dated late in March, which suggest credits

totalling $27,786.06 should be deducted from the plaintiff's compilation. Because the exhibit was prepared mid-trial, and not put to the Lewis' in the plaintiff's case, William Lewis was re-called by way of rebuttal and I did receive the benefit of his evidence in respect of these credits.

[28] He acknowledged that Tab 2, an account balance of $34.24 was paid on or before March 31, 1993 and should be deducted from the claim. He pointed out that he accounts described under Tabs 11 and 12 were not alleged by the plaintiff to be outstanding payables.

[29] Mr. William Lewis testified about the general practise as to when a cheque written is treated as an outstanding cheque, and when a payable is deemed paid for accounting purposes. This generally occurs when a cheque has been placed in circulation. There are 6 accounts on which cheques were written, but the evidence does not answer the question of whether the cheques were in circulation or, more to the point, on the structure of this business sale, the question of whether the bank overdraft amount assumed as a debt and recited in the agreement ($51,641.00) included those cheques as outstanding. The evidence did not deal with the genesis of the "Bank Overdraft and Operating Line" figure apparently supplied by Mr. Ahmed. He was not called as a witness, and there is no evidentiary basis for inferring that the figure includes any outstanding unpresented cheques, never mind these specific six,

written between March 25 and March 31. The total of these cheques is by my calculation, $4,115.21, the largest single component being one for $3,206.62 payable to Cycle Works. Of course, if any of those cheques were treated as outstanding cheques and were included in the bank overdraft figure, the equivalent amount should be deducted from the accounts payable claimed, since the buyer also assumed the overdraft as a method of paying another part of the purchase price for the business. If these cheques were not included in the overdraft figure, they should not be credited in reduction of the accounts payable.

[30] The documentation supplied in Exhibit 11 supports inferences that the following credits were probably processed subsequent to closing in reduction of specific accounts:

Tab 1	Mercury Marine	$ 2,321.37
Tab 3	Cycle Works	4,393.48
Tab 7	Prince George Yamaha	441.64
Tab 9	Brooks Equipment (In addition to the Lewis allowance of $4,960.38)	$ 5,384.54
		$12,541.03

[31] Mr. Lewis testified that the work necessary to do a "reconstructive reconciliation" to determine the issue of whether the late March cheques were included in the overdraft figure used or whether the overdraft figure used is accurate at all, would take anywhere from 1 hour to 2 days. It is not clear why this important factual issue was not explored more fully. The focus seems to have been entirely on the payables

component of debt assumed as part payment of the purchase price, without there being any serious attention paid to the equally relevant bank overdraft figure.

B Wholesale Floor Plan Indebtedness Not Offset by Units On Hand

[32] Exhibit 2 is the plaintiff's compilation of documentary evidence in respect of 22 new units wholesale financed by the manufacturers, which it is alleged were sold by the business prior to the adjustment date of March 31, 1993 in respect of which the manufacturers were not paid until on or after April 1, 1993. The payments to the wholesale financiers in respect of these units were made by the business between April 1, 1993 to June 16, 1993. It is acknowledged that one of the units was listed in error, so that the corrected total for 21 units is $59,509.12. This evidence establishes to my satisfaction that the Wholesale Floor Plan indebtedness exceeded the value at cost of new units in stock as of March 31, 1993 by $59,509.12.

[33] In other words, these were additional outstanding accounts payable of the business as of March 31, 1993 which were not recorded as part of the accounts payable on the bookkeeping system maintained by Mrs. Lloyd, because of her separate accounting for new floor-planned units in the "unit books".

C Analysis

[34] There is no evidence that Mrs. Lloyd was consulted at any time about the state of accounts on the new units. The assumption of rough equality between value of units in stock and Wholesale Floor Plan liability which Mr. Coombs and Mr. Lloyd both made in their meeting in mid-February may or may not have been more accurate at that time, but common sense suggests that, in any ongoing floor-plan financed business, there is a time lag following the retail sale in remitting to financiers such that exact equality rarely, if ever occurs. The busier the business is, the greater the balance that remains outstanding during this lag time. I note that, of the 21 units in dispute, 10 were sold in March 1993, their wholesale financiers being paid in April (6), May (3), and June (1). The evidence shows that the cumulative total of the remittances to financiers for these units sold in March 1993, (most of them late in March) was $32,931.39.

[35] The whole of the evidence leads me to conclude that the parties simply did not apply their minds to the issue of what magnitude of difference there would normally be between the Wholesale Floor Plan Liability and the wholesale value of new units in stock as of the adjustment date, due to the ongoing nature of the business and the bookkeeping and remittance practices in use in the business.

[36] I have been speaking of what might be termed normal or reasonably expected delay in remittances. There is a second category of transaction where the delay was lengthier and unexplained. There were remittances after the adjustment date of March 31, 1993 to financiers of new units that were recorded as being sold as early as June 1992. Any assumption by Mr. Coombs or Mr. Lloyd of rough equality of liability and asset, even if not mindful of the factors discussed in the previous paragraph, must have been based on the assumption of regularity of bookkeeping and timeliness of payment for units sold, rather than on specific information or knowledge of the business.

DISCUSSION OF LEGAL ARGUMENTS

a) <u>The Misjoinder Issue</u>

[37] The defendants argued (even though it was not pleaded) that the proper plaintiff should be 441731 B.C. Ltd. because it was that company that paid the cash portion of purchase monies and assumed the liabilities as further part payment for the assets, and suffered the loss, if any, that occurred. While it is true that 441731 B. C. Ltd. notionally advanced the cash and did assume the business liabilities, one might suppose that if 441731 B. D. Ltd. was the plaintiff, the defendants would argue that it was not the proper plaintiff in the contract action because it is not a party to either of the contracts that were entered into. Mr. Coombs is a party to the General Agreement of Intent, and he is described thereon as wishing to purchase the business. He is also a party and one of the named

purchaser's in the share purchase agreement relating to the shares of 441731 B.C. Ltd., which was the "New Company" conceived of in the General Agreement of Intent to facilitate the recommended purchase structure.

[38] Mr. Coombs and his associate at the time agreed to advance $61,676.00 to 441731 B.C. Ltd. as a shareholder's loan for the cash portion of the asset purchase, and then they agreed to pay $64,194.89 to acquire the 52% majority interest in 441731 B. C. Ltd, that the vendor initially retained. It was these individuals who would have paid less cash to complete the purchase, if the correct payable amount was known and used at the time of purchase.

[39] The defendant's argument on this issue invoked references to several cases dealing with the rule in ***Foss v. Harbottle***, which is to the effect that a company and its shareholders are separate entities and only the company can sue for a wrong done to it.

[40] In my view of this case, the ***Foss v. Harbottle*** rule does not stand in the way of the plaintiff's claims, either in contract or in tort. In so far as the claim rests on Mrs. Lloyd's allegedly negligent misrepresentation to Mr. Coombs in mid-February, it is clear that 441731 B.C. Ltd. was not then incorporated. This is clearly not a case of Mr. Coombs claiming consequential damages for a wrong done to the company,

such as in ***Rogers v. Bank of Montreal*** (1985) 64 B.C.L.R. 63 and in ***McGauley v. B. C.*** (1989) 39 B.C.L.R. (2d) 223.

[41] In so far as the claim rests in contract, as I noted above, the company 441731 B.C. Ltd. is not a party to either written contract, whereas Mr. Coombs is a party to both. Mr. and Mrs. Lloyd agreed in these arguments with Mr. Coombs that the "New Company", which would be 52% owned by their existing company, would purchase assets and assume liabilities. The General Agreement of Intent contains provisions purporting to both obligate and benefit the "New Company", which are clearly not enforceable by or against the new company, and are no more than agreements between two parties to cause certain events to happen in the course of the purchase and sale.

[42] It is clear from recitals B, C, D, and F. of the General Agreement of Intent that Mr. Coombs and his associate at the time ("Dan and David") were the true intended purchasers. The agreed structure, including the incorporation of a new company, facilitated the deferral of a portion of the purchase price and the provision of shares in escrow as security for same.

[43] The fact that implementing this agreed structure eventually resulted in the new company paying the debts which the parties agreed to cause it to assume, does not divest Mr. Coombs of his rights of action on the agreement.

[44] An alternative analysis would be that Coombs entered into the General Agreement with Lloyds for the benefit of the new company to be incorporated, and Coombs is entitled to sue on the contract for the benefit of the new company as, in effect, an "in trust" claim. (See ***Lloyd's v. Harper*** (1880) 16 Ch D. 290, quoted in Cheshire and Fifoot's ***The Law of Contract*** 10th ed. 1981 p. 409. The recital c(i) from the share purchase agreement (see paragraph 11 above) supports that view.

[45] The defendants do not assert any present interest in 441731 B.C. Ltd., and there is no suggestion that Mr. Coombs is improperly claiming in his own name for a loss to his wholly owned corporation to shield the recovery, if any, from any company creditors. Clearly an issue of title to recovery of the losses might arise upon an insolvency of 441731 B.C. Ltd., but I do not accept the defendants' argument that the wrong plaintiff is joined and that no losses can be recovered by Mr. Coombs.

b) <u>The negligent misstatement issue.</u>

[46] The plaintiff cannot succeed on this issue.

[47] The only misstatement alleged is Mrs. Lloyd's advice over a telephone speaker phone to Mr. Coombs, Mr. Lloyd and Mr. Ahmed in mid-February 1993 that the payables of the business were $31,167.00. I have no difficulty concluding that Mrs. Lloyd owed a duty of care, that the statement was probably

inaccurate, that she acted negligently in providing that figure and that Mr. Coombs and others relied on her statement, and that the reliance was detrimental to Mr. Coombs and his business. The missing ingredient is the reasonableness of any reliance by the plaintiff on this statement.

[48] This business had annual sales revenues of approximately $1,070,000 and $980,000 in 1991 and 1992 respectively, and operating expenses in those years of approximately $170,000 and $163,000. Mr. Coombs became the manager of the business in mid-1992.

[49] In my view, reliance on the figure provided on short notice as to accounts payables in mid-February as representing accounts payable on March 31, in such an active business, is not reasonable, particularly in light of Mr. Coombs' position as the manager of the business both prior to and subsequent to the representation.

c) **The Implied Term Issue**

[50] It is readily apparent that the contractual documents do not contain any express representations or warranties of much assistance to the plaintiff in recovering his losses due to the liabilities significantly exceeding the amounts specified in the General Agreement. From the Share Purchase Agreement's provisions that the purchaser's obligation to carry out the terms was subject to the payables other than the Wholesale

Floor Plan not exceeding $31,167.00, one gleans that the quantum of accounts payable was a fundamental matter. It is obvious from the structure of the General Agreement, paragraph 4, that both the accounts payable figure and the bank overdraft figure are fundamental matters, because assumption of these liabilities is the means of payment of the purchase price. Their amounts determined what the cash portion of the purchase price was to be, and therefore the amounts are more fundamental than if they were, for example, merely representations about the financial status of a company whose shares were being bought and sold.

[51] It is of course surprising that the parties themselves did not diligently verify the three variables of accounts payable, floor plan liabilities, and bank overdraft, in light of the significance of each of these matters, and in light of what we now know of the size of the business. Perhaps they assumed Mr. Ahmed or Ms. Ongman monitored these matters.

[52] It is significant, in considering what the real intention of the parties was, that Mr. Coombs and Mr. & Mrs. Lloyd had been closely associated in the operation of the business in the past and planned a continuation of Mrs. Lloyd's employment with Mr. Coombs as owner. This undoubtedly goes part way to explaining how they could sail along from the mid-February concurrence, that the Wholesale Floor Plan liability should be roughly equal to the assets in stock, to the end of March and

beyond without apparently giving the matter a second thought. There is of course absolutely no logical basis for assuming any such equality at any given fixed point in time, as I have noted earlier; and certainly no logical basis to assume, without checking, that a mid-February state of affairs would apply to March 31.

[53] The parties also took a very casual approach to the inventory taking, and eventually discontinued a physical count and accepted the computer's record as workably accurate. From that, one can infer there was a good deal of flexibility on both parts in respect of the purchase price of the business. The evidence was that, at the commencement of negotiations, neither Coombs or Lloyds had any idea how to valuate the business and relied on Mr. Ahmed's advice. However, having received that advice, they structured a purchase and sale of some of the assets at a price of $208,678.89, which excluded the business's receivables and the premises. These were excluded to lower the purchase price to being more within Mr. Coombs and Mr. Philips' financial means.

[54] I am satisfied that both parties were of the mistaken belief that the accounts payable and bank overdraft figures in the general agreement were reasonably accurate approximations of the state of accounts on the selected adjustment date. Paragraph 5 of the general agreement is their agreement that the figures used represent the status as of March 31 as

determined by Mr. Ahmed, and are acceptable. At least one of those figures is clearly wrong, as we have seen, but the stated reliance on Mr. Ahmed probably obscured their recollection as to the origin of the $31,167.00 figure that was placed in the agreement.

[55] The parties did not put their minds to what their agreement should provide for in the event that the figures were wrong, nor did they foresee the error of their assumption that on any specific date the Wholesale Floor Plan liability would equal to value of unsold units. (The discrepancy on the latter would not have been at all significant, but for the unusual exclusion of accounts receivable and inclusion of accounts payable in the transaction).

CONCLUSIONS

[56] The law on construing implied terms is non-contentious, and the following words of Scrutton L.J. in ***Shirlaw v. Southern Foundries (1926) Ltd.*** [1939] 2 All E.R. 113 at 124 remain definitive:

> A term can only be implied if it is necessary in the business sense to give efficacy to the contract, i.e. if it is such a term that it can confidently be said that if at the time the contract was being negotiated someone had said to the parties: "What will happen in such a case?" they would both have replied: "Of course so and so will happen; we did not trouble to say that; it is too clear".

[57] In my view, it is implicit in the general agreement and the payment structure that there was no significant net deficit liability under the Wholesale Floor Plan contemplated by the parties at the time they contracted with one another. If there was expected to be one, it would obviously have been credited against the purchase price or a formula set forth for making an adjustment to the purchase price.

[58] I am also confident that, if at the time the contract was negotiated someone had said: What will happen if the liabilities being assumed are significantly greater than you have stated?", the response would have been: "We will adjust the cash portion of the purchase price, or we will pay the excess from receivables". I hold, therefore that such a term is implied in the general agreement; the defendants have breached the agreement by declining to adjust, in the face of clearly significant errors in the liability amounts assumed. The plaintiff is entitled to judgment for the appropriate adjustments.

[59] There was no evidence led as to the amount of March 31, 1993 receivables or as to how the parties finally accounted for remittance by Mr. Coombs or Honor Honda of the receivables as they stood at March 31, 1993, which, by the terms of the attachment of the general agreement, as I interpret it were to be paid over as follows:

a) 48% of the March 31 accounts receivable were to be paid over on receipt

b) the remaining 52% would be reduced by the further remittance over 25% of all accounts receivable receipts, until paid.

[60] This provision clearly involves a quantification of the March 31 receivables and an ongoing detailed accounting of receipt and remittance of those accounts identified as included in that number. It is difficult to infer that this relatively complicated task was executed with diligence and accuracy following March 31, in light of the manner in which Mrs. Lloyd, as bookkeeper, dealt with the matter of accounts payable, and amounts owing to wholesale floor plan finances for units already sold. It is conceivable that some of the receivables outstanding as of March 31 may have related to the 21 new unit sales, and that these were not properly accounted for or paid over to the defendant's company and may have remained with the plaintiff's business. I must presume at this point however, that if such were the case, the defendants could and would have provided some evidence to that effect, such as they were able to do, however belatedly, in respect of credits against payables for warranty and promotion, by producing, in mid-trial, Exhibit 11.

[61] There is some uncertainty, discussed in paragraphs 28 and 29 above, as to whether the adjustment in the plaintiff's

favour in respect of non-wholesale-floor-plan liabilities should have been $43,771.16 minus $12,541.03, or whether there should be a further deduction for some or all of the $4,115.21 identified in paragraph 28 above. This turns on the issue I cannot resolve on the evidence adduced, namely: whether the late March 1993 cheques, or any of them, were included the bank overdraft figure of $51,641.00 used in the general agreement. This question is referred to a Master of the court for assessment and certification.

[62] There is little uncertainty to the evidence establishing that an adjustment of $59,509.12 should have been made in respect of Wholesale Floor Plan liability in excess of the value at cost of unsold units in stock, but considering that a reference is required for one purpose, in the interests of fairness the defendants are at liberty to adduce evidence before the Master on the matter I raise in paragraph 60 above. If the Master does not receive evidence and make an assessment and certification in respect of this component of the claim, the plaintiff shall recover judgment for $59,507.12 in respect thereof.