[2011] JMCA Civ 18

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 102/2007

BEFORE: THE HON. MR JUSTICE SMITH JA
THE HON. MRS JUSTICE HARRIS JA
THE HON. MR JUSTICE DUKHARAN JA

BETWEEN	**BASIL CUNNINGHAM**	**APPELLANT**
AND	**THE PUBLIC ACCOUNTANCY BOARD**	**RESPONDENT**
AND	**DWIGHT CLACKEN**	**INTERESTED PARTY**
AND	**LYNNE CLACKEN**	**INTERESTED PARTY**

Garth McBean instructed by Garth McBean & Company for the appellant

Miss Stephany Orr instructed by Director of State Proceedings for the respondent

Michael Hylton QC and Miss Kalaicia Clarke instructed by Rattray Patterson Rattray for the interested parties

28, 29 April 2009 and 17 June 2011

SMITH JA

[1] I have read the reasons for judgment of my sister Harris JA and I am in agreement with her. There is nothing further I wish to add.

HARRIS JA

[2] The appellant is a registered public accountant who was brought before the Public Accountancy Board (PAB), as a result of the complaint of the interested parties, Dwight and Lynne Clacken, who were minority shareholders in the EML group of companies. This group comprised three companies, Equipment Maintenance Limited, Windshield Centre Limited and Rodeo Holdings Limited. At the time the complaint was brought, Mr Clacken was the managing director and chairman of the group. After a hearing, the appellant was found guilty of gross negligence in respect of the execution of his duties as an auditor. The penalty imposed was suspension from practice for six months and payment of the sum of $1,000,000.00 towards the costs of the enquiry.

[3] The appellant appealed the decision. At the hearing of the appeal the Clackens were granted permission to participate as interested parties. On 29 April 2009, the appeal was dismissed with costs to the respondent and the interested parties for one day. The following are the reasons for our decision.

[4] On 2 May 2002 a consent order was made between the Clackens, Michael and Richard Causwell, the majority shareholders in the EML group pursuant to a winding up petition of the EML group brought by the Clackens. The terms of the order essentially related to the valuation and the purchase by the Causwells of 6,666 ordinary shares in the EML, registered in the names of the Clackens. The purchase of the shares should be at a price to be fixed by Peat Marwick and Partners, accountants, who were enjoined to value the shares within 90 days of the date of the order or within such other time as approved by the court. As will

be observed later, the failure of the appellant to supply the requisite financial statements had far-reaching consequences in relation to this order.

[5] On 12 April 2005 the Clackens wrote to the PAB seeking its assistance in obtaining certain information from the appellant in respect of financial statements for the years 2000-2001 for the EML group, which had been audited by him. Financial statements were supplied. However, the Clackens, being dissatisfied with them, were impelled to transmit to the PAB, two other letters later that year, complaining of many discrepancies appearing in the statements.

[6] By a letter dated 5 January 2006, which I have set out below in part, the Clackens again wrote to the PAB outlining their diffculties with the appellant's audit:

> "Dear Sir,
>
> In April last year we wrote to you twice.
> [April 12th and 22nd].
>
> We requested help in getting accounting explanations from J.B. Causewell & Co after our efforts failed for several years.
>
> Among other irregularities – current liabilities are overstated in excess of sixty milliion dollars and inventory figures understated by over twenty million dollars.
>
> While our efforts failed to get the required schedules there are signs that assets of the EML Group of Companies are still being dissipated.
>
> Lynne Clacken and I are minority shareholders suffering heavy financial losses resulting from these irregularities. That's why we sought your help.

> Our concern now is that time is passing; the Company's assets and our share value are being abused...
> We need clarification of the huge discrepancies in the books of the Group.
>
> We have attached a copy from my files – of an Affidavit from Paul Cole of KPMG which shows that not even a court order has had any impact on Mr Basil Cunningham of JB Causewell & Company. It shows that KPMG exhausted every possible avenue before declining to go any further...
>
> Mr. Cole's affidavit confirms and supports our claim that Mr Basil Cunningham and others have withheld documents and information creating delays to the financial benefit of the majority shareholders and tremendous financial loss and emotional stress to us..."

[7] The appellant was the sole practitioner in the firm of J.B. Causewell & Co. On 11 October 2006 the PAB wrote to the appellant advising him that at its meeting of 28 September 2006 it considered the complaints of the Clackens against him and notified him of its decision to hold the enquiry. That letter was followed by a further letter dated 8 November 2006, under the hand of the Registrar, in which the PAB outlined particulars of alleged acts of gross negligence against him as follows:

> "Further to my undertaking at the start of the Board's enquiry into the allegations when your Attorney, Mr. Garth McBean, had complained that the particulars of the charges had not been communicated, I now outline the particulars of the alleged acts of gross negligence related to the complaint, which will be examined at the enquiry:
>
> (a) The amounts stated in the Fnancial Statements in respect of Net Current Liabilities (see below)are deemed to be incorrect and in addition you have not provided information to indicate otherwise:

	2001	2000
Equipment Maintenance Ltd.	55,080,441	56,666,933
Rodeo Holdings Ltd.,	6,110,055	6,101,480
Windshield Centre Ltd.,	(14,132,522)	(5,205,524)
Net Current Liabilities	**47,057,974**	**57,562,889**

(b) The amounts stated in the Financial Statement for Inventories (see below) are deemed to be incorrect and you have not provided evidence to prove otherwise

	2001	2000
Equipment Maintenance Ltd.,	566,551	909,995
Windshield Centre Ltd.,	6,003,826	3,231,018

These figures differ from Inventory Summaries provided by Mr. Dwight and Mrs. Lynne Clacken which show the following:-

Equipment Maintenance Ltd.,	272,095	274,312
Windshield Centre Ltd.,	27,462,105	22,592,493

It is noted that in respect of the Valuation of Shares done by you on October 31, 2001, the following inventory figures were shown: -

Equipment Maintenance Ltd.,	2,624,000
Windshield Centre Ltd.,	18,211,000

(c) You have incorrectly allowed certain transactions involving other companies in which Mr. Michael Causwell is a major shareholder to be expensed in the books of Equipment Maintenance Ltd.

(d) You have not provided particulars of Director's loans reflected in the following Companies' Books

Equipment Maintenance Ltd.,	83,360	84,409
Windshield Centre Ltd.,	1,700,000	600,000

(e) You have not provided information/supporting documentation requested by KPMG to facilitate their repayment of a Valuation as ordered by the Supreme Court of Judicature of Jamaica (see letter

dated June 11, 2004 addressed by KPMG to the Hon. Mr. Justice Anderson).

(f) You did not provide KPMG with the Audited Statements for 2001 (which were completed in 2002). Please see the PAB letter dated January 23, 2006 addressed to you and your reply dated February 10, 2006. The Statements were provided following the PAB letter to you dated June 27, 2006. It is observed that the Financial Statements for 2002 prepared by the Accounting Firm Lee Clarke Chang on April 11, 2003, reflected amounts which indicated that the latter Firm had the 2001 Financial Statement. It is noted that on January 19, 2005 Dunn Cox (Attorneys for Richard and Michael Causwell) advised Chancellor & Co, (Attorneys for Mr. Dwight and Mrs. Lynne Clacken), that "there are no audited accounts for 2001. The only audited accounts are for 2002." However, it is noted that there are accounts for 2001 which are dated October 2002 and November 2002.

(g) According to the Consultant engaged by Dr. Dwight and Mrs. Lynne Clacken that the Financials for 2001 reflect high shifts of figures for Accounts Payable and Accruals, Affiliated companies and Inventories for WCL, Accounts Payable and Accruals and Accounts Receivables for EML and Affilliated Companies for EML group. Please see Opinion dated 29 August 2006. He indicated that "given the magnitute of the changes, he would have expected to see explanations for them."

(h) You advised the Board that certain documents werenot available as they were teken by the RPD and you were unable to have access to them. This conflicts with information provided by Mr. Dwight Clacken which suggests that you have from time to time been provided by the RPD with documentation requested by you. The Court Order was dated May 2, 2002. The RPD visited your office on July 23, 2003. The RPD have advised the (sic) Mr. Clacken that all documents were returned to Equipment Maintenance Ltd., and J.B. Causwell & Co., by way of copies or originals on Febryary 2, 2005.

(i) The preparation of incorrect financials by you is likely to impact the tax liability of the (sic) Mr. and Mrs. Clacken negatively.

(j) You did not provide the Board with the Work in Progress (Building in Progress) working papers re the building in progress on Montrose Road. See letter dated June 27, 2006.

(k) In response to the PAB request of June 27, 2006, you did not provide the listing of current liabilities of Windshield Centre Ltd. You only provided the information for the other two companies.

(l) You did not secure your Working Papers and other documents by making copies of them before they were removed by the RPD as indicated by you. Mr. Clacken has advised that the RPD has informed them that they did not remove your Working Papers.

(m) You did not secure third party confirmation of the amounts reflected in the accounts as due to the New Zealand suppliers of used cars."

[8] The enquiry was held over a period of five months and on 3 September 2007, the PAB wrote to the appellant informing him of the charges on which they made their findings, as well as the findings, as follows: -

"**Item (b)** The amounts stated in the Financial Statements for Inventories are deemed to be incorrect and you have not provided evidence to prove otherwise.

Finding

The PAB finds that your failure to satisfy yourself as to the accuracy of the quantities of the inventories on your part amounts to gross negligence. This finding is significant because you issued an unqualified auditor's report in respect of inventories.

Item (c) You have incorrectly allowed certain transactions involving other companies in which Mr. Michael Causewell is a major shareholder to be expensed in the books of Equipment Maintenance Ltd.

Item (d) You have not provided particulars of Directors' loans reflected in the following Companies' Books, Equipment Maintenance Ltd. and Windshield Centre Ltd.

Finding

There were no explanatory notes in the financial statements to reflect the particulars of directors' loans and or related party transactions. Contrary to the requirement of the applicable accounting standard, the financial statements did not reflect particulars of directors (sic) loans and or related party transactions. You nevertheless issued an unqualified audit report in respect to those deficient financial statements. You admitted to the foregoing in your evidence before the PAB. These particulars have been proven against you and taken together the PAB finds that the charge of gross negligence against you is established.

Item (m) You did not secure third party confirmation of the amounts reflected in the accounts as due to the New Zealand suppliers of used cars.

Finding

The PAB finds that this particular has been proved against you as GAAS (Generally Accepted Auditing Standards) required that you secure third party confirmation of all balances of this magnitude and nature. You asserted that you did not think it necessary to secure this confirmation.

Item (h) You did not secure your Working Papers and other documents by making copies of them before they were removed by the RPD as indicated by you.

Finding

The PAB finds that your efforts to retrieve or obtain copies of your working papers from the RPD, given your rights under the Law, were inadequate or non existent. Also you neglected or failed to secure legal advice and you left the retrieval of the Working Papers to your client which was highly inappropriate.
The Board finds your conduct in this matter to have been highly irresponsible and finds that in this regard you have been guilty of gross negligence.

Item (g) According to the Consultant engaged by Mr Dwight and Mrs Lynne Clacken, the financials for 2001 reflect high shifts of figures for Accounts Payables and Accruals, Affiliated Companies and Inventories for WCL, Accounts Payables and Accruals and Accounts Receivables for EML and Affiliated Companies for EML group.

Finding

> You admitted that you were aware of the applicable standard and that you neither issued a qualified auditor's opinion nor drew attention in your Audit Report to the deficiencies in the Financial Statements. These Statements failed to adhere to Generally Accepted Accounting Principles."

The PAB also invited the appellant to attend to make address in respect of any mitigating circumstances he wished to advance. On 4 September 2007, the appellant's representative attended, made submissions and the PAB thereafter informed him of its decision and the sanction imposed.

[9] Mr McBean filed five grounds of appeal on behalf of the appellant. However, during the hearing, he indicated that he would not pursue ground (b), the second of these grounds.

Ground (a)

> "The Respondent Board erred in finding that the Appellant failed to satisfy himself as to the accuracy of the inventories. The Board so erred for the following reasons:-
>
> (i) As a matter of law it is not an auditors (sic) duty to take stock and he is entitled to rely on other people for details of stock in the absence of suspicion being aroused.
>
> (ii) The Appellants (sic) evidence was that although he did not conduct aphysical check he examined certain things such as pricing and valuation of the inventory.
>
> (iii) Further or alternatively if the Appellant was under a legal duty to make a physical check of the inventory, his failure to do so was not conduct which was so serious as to constitute gross negligence."

[10] Mr McBean submitted that there was no dispute that the appellant did not conduct a physical check of the inventory. He contended that it is not an auditor's duty to take stock but that the auditor is entitled to rely on other people for details of stock, in the absence of suspicion being aroused. He relied on Jackson and Powell on Professional Negligence 4th edition, para 8-100 and ***Re Kingston Cotton Mill Co Ltd No 2*** [1896] 2 Ch 279 to support his contention. The appellant, he submitted, relied on the statement of Mr Richard Causewell, who was a director who had technical expertise and who had a very good working knowledge of the stock in question, which basically involved windshields and automobile glasses. He submitted further that having regard to the evidence of the appellant, he would not have had to conduct a physical check of the inventory because he could have relied on and trusted the judgment of Mr Causewell. Since that stock was somewhat unique, he argued, the appellant was entitled to rely on someone who had the requisite technical knowledge. Further, he contended, historically the appellant had found previous inventories to be correct and was therefore entitled to rely on them. He argued further that even if it could be said that the appellant was obliged to attend the physical stock-taking exercise, his failure to conduct a stock-taking or to give a qualified report, did not amount to gross negligence.

[11] Miss Orr, for the respondent, contended that although an auditor may not be obliged to take stock, he was obliged to satisfy himself as to the competency of the person conducting the stock-taking exercise. The figures for the inventory, she argued, were given to the appellant by Mr Clacken, the chief executive officer of the companies, who had obtained them from his computer. There was

no evidence, it was argued, that the appellant had satisfied himself as to the competency of Mr Clacken to take the inventory. It was further submitted that the court's decision in ***Re Kingston Cotton Mill No 2*** did not reflect the prevailing accounting standards used in the twenty first century which guide auditors and accountants in their practice today.

[12] Miss Orr further argued that the evidence of the chartered accountant, Miss Yvonne Davis, showed that although the information for the inventory would have originated from the company, the auditor was still required to carry out a verification procedure which requires his physical attendance at the inventory count. Miss Davis' evidence, she urged, also indicated that the valuation of the inventory would ultimately affect the valuation of the company. It was further submitted by Miss Orr that the appellant had a statutory duty to ensure that the books of the account of the companies gave a 'true and fair view' of the state of the companies' affairs, as was required by section 142(1) of the Companies Act. It was also her contention that the appellant was under a duty to attend the count of the inventories and had failed to show by his evidence, how pricing and valuation could substitute for a failure to be physically present.

[13] Mr Hylton, QC for the interested parties, Mr and Mrs Clacken, submitted that an auditor is at least required to observe the stock-taking. A reduction in the stock would mean a reduction in the amount payable pursuant to the court order, he argued**.** The appellant, he argued, issued an unqualified auditor's report notwithstanding that he had failed to attend the stock-taking exercise**.** He submitted that the failure to attend the physical stock-taking was one of the

circumstances in which a qualified report should be issued, as indicated by the Generally Accepted Accounting and Auditing Standards. Counsel adverted the court's attention to this provision in the Members' Handbook of the Institute of Chartered Accountants of Jamaica (Members' Handbook). It was further argued that in the appellant's evidence before the PAB he was quite unclear as to how pricing and valuation could have substituted for his attendance at the stock taking exercise. It was also submitted by Mr Hylton that it was significant that the person on whom the appellant relied was a major shareholder who was involved in a dispute with the Clackens in the courts pursuant to which the audit was ordered.

[14] Since this appeal is largely concerned with the appellant's performance of his duty as an auditor it may be useful to refer briefly to certain guidelines as outlined in the Members' Handbook with respect to an audit and an auditor's performance of his duties. The Members' Handbook provides that the objective of an audit is to enable the auditor to express an opinion whether the financial statements are prepared in accordance with an identified financial reporting framework. The auditor is required to produce a written opinion to this effect. In other words, the auditor must indicate whether based on generally accepted accounting principles, his examination has revealed that the company's accounts are true and fair and therefore reliable. On one hand, the auditor may issue an unqualified opinion which makes no exceptions and inserts no qualifications as to his opinion that the accounts are true and fair. However, clearly the import of this exemption is that the financial statements are free from misstatements. On the other hand, the auditor may issue a qualified opinion. The opinion usually

states that except for the effects of some deficiency in the financial statements or some limitation in the scope of the auditor's examination, the accounts are presented fairly. There may also be adverse opinions and disclaimers of opinion, but these are not relevant to this appeal.

[15] The PAB found that in carrying out his audit, the appellant had failed to satisfy himself as to the accuracy of the inventories but had nonetheless issued an unqualified opinion. The appellant has not sought to dispute that a duty was placed on him to satisfy himself as to the accuracy of the inventories but rather, his contention was that no obligation was imposed on him to take stock in order to do this. The court in ***Re Kingston Cotton Mill No 2*** did indeed decide that an auditor is not required to take stock but is entitled to rely on other people for the details of the stock, in the absence of suspicion. However, it must be borne in mind that in ***Re Kingston Cotton Mill No 2*** the court followed the decision in ***In London and General Bank Ltd*** [1895] 2 Ch 673 which revolved around the duties of an auditor within the context of the Companies Act of 1879. There was no indication that there were attendant or existing guidelines to regulate the conduct of auditors then. The learned authors of Jackson & Powell on Professional Negligence are of the view that these cases should be approached cautiously since a more stringent approach is applied to the test for the competence of an auditor as the current standard is much higher. They say:-

> "Older case law should be treated with caution since although the test has always been that of the reasonably competent accountant, the standard to be expected of a reasonably competent practitioner is

> substantially higher today than it was in the nineteenth century."

[16] The standard used in ***Re Kingston Cotton Mill No 2*** was distinguished by Pennycuick J in ***Re Thomas Gerrard and Son Ltd*** [1967] 2 All ER 536 as follows:-

> " ... but I am not sure that the quality of the auditor's duty has changed in any relevant respect since 1896. Basically that duty has always been to audit the company's accounts with reasonable care and skill. The real ground on which ***Re Kingston Cotton Mill Co. (No.2) (9)*** is, I think, capable of being distinguished is that the standards of reasonable care and skill are, on the expert evidence, more exacting today than those which prevailed in 1896. I see considerable force in this contention. It must, I think, be that it is open, even in this court, to make a finding that in all the particular circumstances the auditors have been in breach of their duty in relation to stock."

[17] Since those two early decisions in ***Re Kingston Cotton Mill*** and in ***RE London and General Bank*** the landscape has changed. International and local guidelines regulating the professional and ethical conduct of accountants and auditors have been formulated in various jurisdictions which definitively demonstrate that the bar as to the standards to be applied to an auditor's execution of his duties has been raised. While a court is bound by precedent, I think this court must, in reaching its decision, pay due regard to the guidelines governing ethics and standards of professional bodies, in that they are framed by professionals in the accounting profession to govern behaviour throughout that profession. In ***Susie McLeod v Royal College of Veterinary Surgeons*** Privy Council Appeal No. 88/2005, delivered 24 July 2006, the disciplinary committee

in arriving at its decision, took into consideration evidence in the context of the relevant legislation governing the conduct of medical professionals as well as the Guide to Professional Conduct. Lord Carswell, who delivered the opinion of the Board, stated that the disciplinary committee was justified in finding the doctor guilty of misconduct.

[18] Obviously, their Lordships recognised that the members of a profession have the expertise to determine the standards of competence to be applied to the profession. Although the Board was dealing with a decision relating to a member of the medical profession, I think the approach as to the disciplinary committee taking into account their relevant guidelines is equally applicable to this case. In that, the guidelines or standards formulated by the PAB may be used by it in the determination of matters before it. This is particularly so in light of the fact that the PAB is given the statutory mandate to formulate guidelines regarding the standards expected of members of the profession. Section 4(2)(c) of the Public Accountancy Act states:

> "4.(2) The Board shall –
>
> (a) ...
>
> (b) ...
>
> (c) make, with the approval of the Minister, rules in relation to the promotion by the Board, in the public interest of acceptable standards of professional conduct among registered public accountants;"

[19] Counsel for the respondent pointed out that the Handbook of Auditing and Ethics Pronouncements (the Handbook), which is based on the International

Standards on Auditing (ISA), stipulates that auditors attend stock-taking exercises where this will be important to the audit. Counsel indicated that the ISA has been adopted in this jurisdiction since 2002. However, there is no firm ground in support of this assertion. Even if the applicability of the Handbook is uncertain, it appears that, in my view, implicitly, the Members' Handbook imposes a requirement for auditors in this jurisdiction to attend physical stock-taking exercises. At para 37 of the Members' Handbook it is stated:

> "A qualified opinion should be expressed when the auditor concludes that an unqualified opinion cannot be expressed but that the effect of any disagreement with management or limitation on scope is not so material and pervasive as to require an adverse opinion or a disclaimer of opinion. A qualified opinion should be expressed as being 'except for' the effects of the matter to which the qualification relates."

Para 42 of that text also states:

> "A scope limitation may be imposed by circumstances (for example, when the timing of the auditor's appointment is such that the auditor is unable to observe the counting of physical inventories)..." (Emphasis mine)

[20] It appears that para 42 of the Members' Handbook contemplates that an auditor should be present at the physical stock-taking exercise to observe the counting of the inventory unless he is limited by circumstances from doing so, for example, the timing of his appointment prevents him from doing so. Where the auditor does not attend the stock taking exercise he must indicate that his opinion is qualified and state the reason. The appellant did not give a reason for the requirement of attendance at the stock-taking exercise, but counsel for the interested parties has submitted, and I entirely agree, that the purpose of the

requirement is for the auditor to satisfy himself as to the accuracy of the inventory. The evidence of Miss Davis supports the view that the auditor is required to physically attend the inventory count as part of his procedure to ensure that the inventory and the figures are correct. She stated that if the inventory is undervalued in the balance sheet, it would affect the valuation of the company. The accuracy of the inventory was pivotal to the accuracy of the statements of account. Reference was made by Miss Orr to the 2001 IFAC Auditing and Ethics Pronouncements which provide that when inventory is material to the financial statements, the auditor should be in attendance at the physical inventory counting unless impracticable. There is nothing to show that it was impracticable for the appellant to have attended the stock-taking.

[21] The attendance of the auditor as a means of verification of the stock is not, I think, entirely at odds with the decision in ***Re Kingston Cotton Mills No 2***. No obligation is placed on the auditor by the provisions of the Members' Handbook to take stock; what is required is that he be present to observe the counting of the inventory so as to satisfy himself as to its accuracy. The only recourse available to an auditor who does not attend the stock-taking exercise is to indicate that his report is qualified by the fact that he was not, for whatever reason, present at the stock-taking exercise.

[22] It follows therefore that the appellant's reliance on Mr Richard Causewell's count of the inventory, would be insufficient as this would be contrary to the requisite standards. The appellant indicated that, historically, he had found the figures supplied by the directors to be correct. He, however,

failed to provide any clear or satisfactory answers to questions as to how he was able to verify the figures in the financial statements. When asked whether he had ever been invited or asked to be at a physical stock-taking of the companies, he said he could not recall. However, he stated that in the absence of a physical check, the pricing and valuation of the items could be used. Curiously, he was unable to show how pricing and valuation could achieve this. In fact, when further asked what he would have done to satisfy himself that the quantities presented to him by Mr Clacken were in the warehouse, his response was that the extent of his procedures would have been to examine the details of the listing provided by the directors in discussion with the Board members. This would clearly be an unsatisfactory means of verifying the accuracy of the inventory in an independent manner. Even if it were accepted that the standard in ***Re Kingston Cotton Mills No 2*** was the standard to be applied**,** other than saying that historically he had verified the figures, the appellant failed to demonstrate any adequate basis on which Mr Causewell could have been accepted as an expert on whose figures he could have relied. An auditor is required to verify the accuracy of financial statements and it is expected that he will get the figures from management but in order to verify that the figures in the statement are correct, I would think that he ought to attend the counting of the inventory as a means of verification of the stock.

[23] The appellant has asserted that even if there were an obligation to make a physical check of the inventory, his failure to do so did not amount to gross negligence. It cannot be said that the PAB found that his failure to make a physical check of the inventory amounted to gross negligence. It is clear from its

finding that it was the appellant's failure to issue a qualified report in circumstances where he had failed to satisfy himself as to the accuracy of the inventory which the PAB found to have amounted to gross negligence. In ***Susie McLeo***, at para 23 of the judgment, Lord Carswell cited with approval the dicta of Collins J in ***Moody v General Osteopathic Council*** [2004] EWHC (Admin) 967. Lord Carswell said that:

> "... [at] para 14 Collins J referred, in terms with which their Lordships would agree, to the necessity to attach great weight to the decision of a committee whose members have the expertise and know what are the appropriate standards that are expected of members of the profession. He added:
>
> > 'As must be obvious, when it comes to questions of professional competence the committee's views are to be accorded the very greatest of weight. When it comes to decisions which do not so much depend upon professional expertise, this court may be in a better position to be able to form a judgment for itself. But this court must never act unless it is plain that in the circumstances the decision was one which, as I would put it, (sic) clearly wrong.'
>
> The standard to which Collins J referred, that the decision must be plainly wrong, is similar, if not identical, to that which is applied to decisions of judges exercising judgment in balancing factors in decisions relating to family matters ... It has been said many times that in such cases, there is a generous ambit within which judicial disagreement is perfectly possible and within those bounds decisions should not be upset on appeal. Their Lordships consider that that is an appropriate criterion for them to adopt when considering appeals against decisions of professional disciplinary bodies."

[24] As can be readily observed from the foregoing, an appellate court does not lightly intervene in the decision of a disciplinary tribunal. An intervention by this court would only be permissible where it is evident that the decision was unreasonable or plainly wrong. It is clear that the verification of the accuracy of the inventory is a crucial matter in the auditing of the accounts. The appellant had a duty to do this, which it is obvious he failed to do. Failing to indicate that his report was qualified was misleading and would have important consequences for those who wished to rely on it. In view of this, it cannot be said that the finding that this amounted to gross negligence was plainly wrong. This ground fails.

[25] **Ground (c)**

> "The Respondent Board erred in finding that the Appellant failed to secure third party confirmation of the amounts reflected in the accounts as due to New Zealand Suppliers. The Board so erred for the following reasons:-
>
> (i) The complainants in their evidence were unable to show that the alleged amounts due to the New Zealand Supplies (sic) were reflected in the accounts and as a matter of fact there was no evidence that such amounts were reflected in the accounts.
>
> (ii) In view of the fact that there was no evidence of such amounts in the accounts the Appellant was under no duty to obtain third party confirmation of same."

[26] Mr McBean submitted that the appellant could not obtain third party confirmation of something that was not reflected in the accounts. He argued that there was unchallenged evidence from the senior Mr Causewell that no amounts

were due to New Zealand suppliers. Therefore, he submitted, the PAB would have erred by finding that the appellant erred in failing to get third party confirmation of amounts reflected in the accounts.

[27] Miss Orr submitted that Mr Clacken's evidence indicated that he knew that money was owed but that it was not reflected in the account. She further adverted to the evidence of the appellant where he admitted that sums were outstanding for the suppliers but he did not seek confirmation. Mr Hylton also adverted to this evidence as an admission by the appellant to the charge.

[28] This ground shall be dealt with in short shrift. It cannot be disputed that the finding of the PAB was that there were amounts in the accounts of the EML group of companies, which the appellant had failed to verify, which were, in fact, owed by the companies. It also is indisputable that the charge of failing to verify amounts stated in financial statements is clearly different from a charge that the amounts ought to have been recorded in the statements. What is significant is that from the very outset of his evidence relating to this aspect of his complaint, Mr Clacken was maintaining that sums had been paid by the EML group of companies to New Zealand suppliers and that that sum should have been reflected as being owed to EML but the statements were silent as to this transaction. It is obvious from the evidence that Mr Clacken's complaint was that sums were owed to the New Zealand suppliers for cars that had been imported and that EML had been paying for these imports even though Michael Causewell received the proceeds of sale. At page 81 of the notes of the proceedings the following exchange is recorded between the chairman and Mr Clacken:

> "CHAIRMAN: You would like to see the books or your understanding is that the books should reflect a position where EML did not get into this transaction at all, any benefits or liabilities relating to this, should be for Michael Causewell
>
> MR. CLACKEN: Yes, should be.
>
> CHAIRMAN: That's your position?
>
> MR CLACKEN: Rights (sic).
>
> CHAIRMAN: And you are saying that to the extent that it didn't reflect that position, the accounts were deficient?
>
> MR. CLACKEN: Right."

[29] Mr McBean sought to clarify whether Mr Clacken was saying that there was no mention of the figures in the account or that there was no verification of these figures. When the Chairman enquired as to whether Mr Clacken would be relying on item (m) of the charge (as I have set out at para [6]), he stated that he would be standing by the statement in the particulars and said:

> "Yes. I am saying that the financial statements, based on the advice I get from people who read it, is that there is no input there, no debt showed as owed or any notes in the financials to show that anything is owed to the New Zealand Suppliers."

[30] However, during the appellant's examination-in-chief, the following exchange between Mr McBean and the appellant took place:

> "BY MR McBEAN:
>
> Q: Two questions: are you aware of any amounts reflected in the

accounts as due to New Zealand Suppliers, are you aware of any, sir?

A: Oh yes, there would have been amounts.

Q: It says you did not seek third party confirmation of the amounts, is that so?

A: Yes, because as I said in our response to the Board, it is our opinion that it was not necessary to get third party confirmation because we had all the information related to the transaction and we were convinced the information was correct so to speak."

[31] It is, in my view, quite obvious that the appellant's evidence made it plain beyond reasonable doubt that the charge had been made out. Even if Mr Clacken had not recognised any figures as representing sums owed to the New Zealand suppliers, the appellant was well aware that these figures were included and admitted that he did not seek confirmation. There has been no contest by the appellant to the PAB's assertion that by acceptable accounting standards, he was required to seek confirmation of the figures. This ground also fails.

[32] **Ground (d)**

> "The Respondent Board erred in finding that the Appellants (sic) efforts to retrieve or obtain copies of his working papers from the RPD were inadequate or non-existent. The Board so erred for the following reasons:-
>
> (a) The evidence of the Appellant was to the effect that efforts were in fact made to

retrieve the working papers and as a result of this documents were returned by the RPD which did not include the working papers.

(ii) Further or alternatively the failure of the Appellant to make efforts to retrieve the working papers was not the subject of the complaint by the complainants Mr & Mrs Clacken and ought not to have been considered by the Board."

[33] Mr McBean submitted that the charge relating to the finding in relation to the appellant's effort to obtain the working papers had not been the subject of any complaint made by the Clackens. The charge, he contended, had been issued midway through the proceedings. He argued that the PAB could have initiated a complaint, however, since it had failed to do so, it should not have made a finding relating to this issue as this would violate the principle of the appellant being put in a position to fully answer to a charge. In the alternative, he submitted, the finding of the PAB in this respect was flawed having regard to the overwhelming evidence from the appellant and Mr Michael Causewell (who, it was submitted, was the appellant's agent for the purpose of attempting to retrieve the working papers). He argued that Michael Causewell's liaising with an agent from the Revenue Protection Division (RPD) and him "getting the run-around" constituted serious efforts to get the working papers. It appeared from the evidence, it was submitted, that Michael Causewell had been trying to retrieve the papers for two years.

[34] Miss Orr submitted that the PAB had found that the appellant was negligent with respect to what he had done at the time of the seizure of the

working papers (that is, he had not copied them) and what he had done subsequently. The appellant had provided evidence of the importance of the working papers, she submitted. She adverted to his evidence where he stated that "all the evidence for the audit would have been kept in the working paper file". She made reference to the Revenue Administration Act and the rules and regulations of the PAB concerning the right to make copies of any documents that have been seized. Counsel submitted further that the appellant had admitted that he did not make any copies of the papers, he did not write to the Financial Investigation Division (FID) to inform them that the working papers had not been returned and on the evidence, it was Michael Causewell who had "spearheaded" the move to retrieve the working papers with his concurrence. She submitted that he also admitted that he had not carried out a physical check to determine whether the FID had returned the papers and that he had said that he had not known that he could have made copies, yet he had been in practice for 30 years. It was submitted also that in light of the important role the working papers play in the scheme of an audit, the appellant had delegated his duty to Michael Causewell and had not done all that was necessary to secure these papers.

[35] In dealing with the question that the PAB ought not to have considered the charge because it was not the subject of complaint by the Clackens, Miss Orr referred to section 4 of the Public Accountancy Act which fixes the PAB with the responsibility "generally to promote, in the public interest, acceptable standards of professional conduct among registered public accountants in Jamaica" and to take disciplinary action against any accountant who breaches the provisions of

the Act. The allegation had been made during the hearing, she submitted, and, in light of its mandate the PAB had a duty to enquire into the issue. She further submitted that the PAB had informed the appellant that it had not reached any conclusion in relation to these allegations and they would have to be proven by evidence. The appellant had been given an opportunity to take the necessary time to respond but he had chosen not to do so. He could not, it was argued, now allege that the charge should not have been added and subsequently considered by the PAB.

[36] Mr Hylton submitted that the appellant had admitted twice that he had not done enough to secure his working papers. There were other aspects of the case that made the appellant's breach even clearer, he argued. The appellant appeared to have delegated the task of communicating with the (RPD) in respect of the return of his working papers to his client, Michael Causewell, and had accepted Michael Causewell's word that the working papers were not among documents returned by FID without verifying that this was in fact so.

[37] In respect of ground d (ii) counsel submitted that the contention of the appellant is without merit. He referred to and relied on section 23 of the Public Accountancy Regulations which allows the PAB to amend a "notice of enquiry or charge". He submitted that the intention and purpose of the legislation was correctly summarised by the chairman when he gave his ruling in response to Mr McBean's objection. Counsel contended that there had been no injustice to the appellant because the PAB had amended the charge before the appellant had

commenced his case and had indicated that it was willing to allow the appellant time to prepare but counsel representing him had elected to proceed.

[38] Although ground d (ii) is couched in the alternative, I think it apt to address it first as it challenges the PAB's jurisdiction to add the charge. If it is found that the PAB had exceeded it jurisdiction, then, it would have clearly erred in making a finding on the charge and this would dispose of this issue. The critical question is whether the charge could have been properly introduced at the hearing**.** This requires an examination of the powers of the PAB. Section 23 of the Public Accountancy Regulations gives the PAB a right to amend a charge. The section reads:

> "Where before the hearing it appears to the President or at any stage of the hearing it appears to the Board that a notice of enquiry or charge requires amendment, the President or the Board, as the case may be, shall give to the Registrar such directions for the amendment of the notice or the charge as they may think necessary unless, having regard to all the circumstances, such amendments cannot be made without injustice."

[39] As can be readily seen, the word "amendment" and not addition is used. The real issue here is whether the charge is an amendment of an existing charge or a new charge. The power given to amend is in respect of a charge or a notice of enquiry. The PAB is permitted to amend only where this will not result in injustice. It is perfectly true that the appellant is entitled to have notice of all charges preferred against him. No prior notice of the charge was given to him. This being so would the PAB be excluded from presenting the charge during the conduct of the enquiry?

[40] As counsel for the respondent pointed out, section 4 of the Public Accountancy Act imposes an obligation on the PAB to take disciplinary action against a public accountant. In the light of this provision, it is my view that the power to amend in relation to the notice of enquiry must relate to this mandate of the Board. It follows then that amending the notice of enquiry, as opposed to the charge, must relate to the addition of a charge in order to fulfil the PAB's function to take disciplinary action against the member. It is my view also that ascribing such an interpretation to this section avoids a multiplicity of actions, as expressed by the chairman in giving his ruling to Mr McBean's objection on this point. If this were not the case, the consequence would be that even where a charge arises prima facie on the evidence, the chairman would have to wait until the conclusion of the proceedings to institute fresh proceedings in respect of the charge that had arisen. This could not have been what was intended by the subsection. I therefore agree with counsel for the respondent that the PAB in carrying out its mandate under section 4 would have been obliged to add the charge and enquire into it. The PAB having sought to address any attendant injustice by offering the appellant and his counsel more time, and counsel for the appellant having declined to take the offer, in my view, the PAB acted correctly in proceeding to hear the evidence in relation to the charge.

[41] I now turn to ground d (i) challenging a finding of fact made by the PAB. Before I address this aspect of the ground, however, I think it prudent to set out briefly, the relevant factual circumstances surrounding the working papers. There is evidence from one Mr Harriman, principal director of the Financial Crimes Unit, that pursuant to a court order, he carried out a search at the

appellant's offices in respect of documents relating to the EML group. It appears that documents including the appellant's working papers were taken.

[42] The documents were taken from the appellant's office under a warrant issued under section 17(j) of the Revenue Administration Act, which allows a judge of the Revenue Court in certain circumstances to grant a search warrant for the entry into premises to make copies of the books, documents/records relevant to tax liability or to detain and remove such books. Section 17(k) (2) of the said Act provides that in these circumstances, the taxpayer concerned shall be permitted to make requests and obtain copies or extracts of documents requested. The appellant asserted that he needed the documents to assist with the preparation of the financial statements and as the auditor of the companies he would have had a right to request copies from the Financial Crimes Unit. Furthermore, an obligation is imposed by the relevant guidelines of the accounting profession that the auditor makes copies of the working papers. The working papers are central to the execution of an auditor's duty. The appellant ought to have secured and retained, in his possession, copies for his files. The Members' Handbook indicates that the auditor is required to provide working papers, the contents of which should include the "nature, timing and extent of the audit procedures performed, the results thereof, and the conclusions drawn from the audit evidence obtained". It is also specified by the Members' Handbook that the working papers are of great significance. This is underscored by the requirements of accounting standards which I have already outlined above, which demand that great care be taken to preserve these papers. The appellant himself gave evidence of the significance of the working papers. He stated that they carry

"the history of the companies in terms of a lot of information, transactions and all that kind of thing, financial information". He said that anything used to produce the audit report would have been in that file.

[43] Although the appellant admitted that he had not taken copies of the working papers at first, he indicated that he was unable to remember if he had sought legal advice in the matter, but later agreed that he had not taken any legal action to recover them. He said that he had never made any requests for the working papers to be returned. He admitted that he had delegated the responsibility of retrieving the papers to his client EML and asserted that he had "tried his best by telephone conversation" but to no avail. But, perhaps the most significant aspect of the appellant's evidence, which, in my view, is decisive of this point, is recorded at Vol. 2 page 166 of the notes of the proceedings in the appellant's response to the chairman's question, as stated hereunder:

> "CHAIRMAN: Mr Cunningham, do you think you have done enough to secure your working papers? I would have been very upset if the RPD seized my working papers. I would have used all mean at my disposal to get them back, because they are your property, including provisions under the law that gives an auditor certain entitlement. You think you have pursued the prosecution of your rights, the exercise of your rights sufficiently, vigorously, with sufficient vigour?
>
> A: I don't think so."

[44] Questions were posed to the appellant, in relation to the propriety or accuracy of the financial statements, upon which he indicated that he could not

respond because he did not have the working papers. The working papers being highly instrumental to an audit, the appellant was obliged to have retained copies and having not done so, ought to have secured copies from the FID after they were seized. This he failed to do. As Miss Orr rightly pointed out, the PAB found the appellant's actions at the time of the seizure of the working papers and subsequent thereto to be inadequate. In the face of the very clear evidence of his negligence, it cannot be seriously argued that the PAB was plainly wrong in finding that the appellant's efforts were inadequate or non-existent.

[45] **Ground (e)**

> "The sanction of suspension from practising as a Public Accountant for a period of six months and for the Respondent to pay One Million dollars ($1million) as costs and expenses incidental to the enquiry are excessive for the following reasons:-
>
> (i) Having regard to the fact that the Board found that there was no professional misconduct or conduct which discredited the profession, which are more serious charges for which such sanctions may have been appropriate, the Board ought to have been more lenient.
>
> (ii) The main reason for finding that the Appellant was guilty of gross negligence was that he failed to adhere to and observe certain accounting standards and the findings of such conduct did not warrant such sanctions."

[46] Mr McBean submitted that the sanctions imposed were excessive, having regard to the errors which the PAB found the appellant had made. He argued that even if all the findings were accepted, there is no finding of deceit or misconduct or any other finding that would have brought the profession into

disrepute. The appellant, he submitted, had enjoyed a long history in the profession without committing any breaches.

[47] Miss Orr submitted that in considering whether the sanction imposed was unwarranted, the court should apply an objective test. She further submitted that the appellant had to bring evidence before this court to show that the PAB was more lenient in sanctioning any other member of the profession who was found to be guilty of the same charges and in similar factual circumtances. She referred us to the case of ***McCoan v General Medical Council*** [1964] 1 WLR 1107 in which their Lordships' Board expressed the view that it would require a very strong case to interfere with a sentence handed down by a disciplinary committee given its discretion to impose sentence. It was her further submission that this principle would also be applicable to the PAB. She also argued that the sanction imposed was appropriate given the finding that the appellant was aware of many of the general standards of the profession and had failed to adhere to them and that the purpose of a sanction was not mainly to punish but to protect the public. In light of the risk to which the appellant exposed the complainants, the suspension from practice for six months was not unjust, she argued. In respect of the sum which the appellant was required to pay, it was submitted that this sum was not a fine but was imposed pursuant to section 13(2) of the Public Accountancy Act as costs and expenses incidental to the enquiry. The appellant, she argued, had not led any evidence to show that the costs were unjustifiable or unwarranted.

[48] Mr Hylton submitted that the PAB has knowledge of all of the disciplinary cases that come before it and the penalties imposed. Therefore, it is more competent to fix the appropriate penalty. The court, he submitted, does not have this knowledge.

[49] Section 13 of the Public Accountancy Act permits the PAB to impose penalties where an accountant is found to be in breach of the Act. It also provides the possible sanctions which may be imposed. The relevant portion reads:

> "13(1) If any person registered under this Act as a public accountant –
>
> (a) ...
>
> (b) ...
>
> (c) Is found, upon enquiry by the Board made in accordance with the regulations –
>
> (i) ...
>
> (ii) ...
>
> (iii) to have been guilty, in the performance of his professional negligence or gross incapacity, or to have been guilty of any act, default or conduct discreditable to the profession, the Board may, it it thinks fit, exercise in respect of that person all or any of the disciplinary power conferred on the Board by subsection (2).
>
> (2) The disciplinary powers which the Board may exercise as aforesaid in

respect of any such person are as follows: –

(a) the Board may cause the name of such person to be removed from the register;

(b) the Board may suspend the registration of such person for any period not exceeding one year;

(c) the Board may censure such person;

(d) the Board may order such person To pay to the Board such sum as the Board thinks fit in respect of and incidental to the enquiry."

[50] There is nothing contained in this section that stipulates that a particular sanction is reserved for a particular type of conduct. The PAB therefore is clothed with the discretion to decide which conduct is deserving of a particular sentence, but logic dictates that the most serious penalties, such as the removal of the accountant's name from the register would be imposed for the more serious types of conduct. As a rule, an appellate court is reluctant to interfere with disciplinary bodies' exercise of their sentencing powers. The approach in relation to the exercise of a discretion by a disciplinary body of a profession has been the subject of many decisions of the Judicial Committee of the Privy Council. In ***Ghosh v The General Medical Council*** Privy Council Appeal No. 69/2000, delivered 18 June 2001, the appellant was found guilty of serious professional misconduct and the General Medical Council ordered that her name should be erased from the register. She appealed against this sentence contending that it was an excessive and inappropriate penalty and that a lesser sentence should be

substituted for it. Lord Millett, who delivered the judgment of the Board, after reviewing some of the earlier decisions in relation to the approach of the Board in these matters, stated (para 34):

> "It is true that the Board's powers of intervention may be circumscribed by the circumstances in which they are invoked, particularly in the case of appeals against sentence. But their Lordships wish to emphasise that their powers are not as limited as may be suggested by some of the observations which have been made in the past. In **Evans v General Medical Council** (unreported) Appeal No 40 of 1984 at p.3 the Board said:
>
> > 'The principles upon which this Board acts in reviewing sentence passed by the Professional Conduct Committee are well settled. It has been said time and again that a disciplinary committee are the best possible people for weighing the seriousness of professional misconduct, and that the Board will be very slow to interfere with the exercise of the discretion such a committee... The Committee are familiar with the whole gradation of seriousness of the cases of various types which come before them, and are peculiarly well qualified to say at what point on that gradation erasure becomes the appropriate sentence. This Board does not have that advantage nor can it have the same capacity for judging what measures are from time to time required for the purpose of maintaining professional standards .'
>
> For these reasons the Board will accord an appropriate measure of respect to the judgment of the Committee whether the practitioner's failings amount to serious professional misconduct and on the measures neseaasry to maintain professional standards and provide adequate protection to the public. But the Board will not deter to the Committee's judgment more than is warranted by the circumstances."

[51] It may therefore be said that while an appeal tribunal is empowered to disturb the sentence imposed by the disciplinary body of a profession, it will exercise this power cautiously. In ***Brian Alexander v Land Surveyors' Board of Jamaica*** SCCA No. 13/2008, delivered 2 July 2009, this court had to consider whether the sentence imposed by the Land Surveyors' Board should be disturbed. Smith JA, who delivered the judgment of the court, stated that this court should "only interfere with the decision of the Surveyors' Board if the sentence imposed on the appellant was unlawful or unreasonable".

[52] Clearly, the suspension of the appellant and the imposition of fines are lawful sentences permitted by section 13(2) of the Public Accountancy Act. The only question that then remains is whether the penalties were unreasonable. It is quite clear that the most serious penalty is removal from the register. That, is no doubt, to be imposed in the most serious cases. In my view, it is not necessary to decide which are the most serious types of conduct for there is no gainsaying that all of them are of a serious nature. It is true that the PAB's finding that the appellant was guilty of gross negligence was primarily in respect of his failure to observe the generally accepted accounting standards. However, the PAB would have had to consider that the negligence was in respect of several breaches. In some cases, the appellant admitted that he had never observed some of the requisite standards. There is no doubt that the audit report is a very important document which is relied on by various individuals when making decisions in relation to a company. The appellant's breaches led to him producing a report that would have been misleading to those who sought to rely on it.

[53] The PAB, as Mr Hylton submitted, would have been aware of the various offences committed by various members of the profession and would therefore have been able to determine where the appellant's breaches fell among that gradation. It would have considered the serious implications of the breaches in comparison to other breaches and would also have borne in mind the protection of the public. In my view, in the light of all these circusmtances, it was reasonable to impose a period of suspension on the appellant's ability to practise. It is significant that the PAB advised the appellant to align himself to an experienced practitioner so as to familiarise himself with the standards that he had failed to observe. A period of suspension would have allowed the appellant to do this. The enquiry having been conducted over a period of at least five months, with the result that costs were incurred, it also cannot be said that requiring the appellant to pay costs incidental to the enquiry was unreasonable. The appellant has therefore failed to show that the PAB was unreasonable.

[54] For all these reasons, it was decided that the appeal should be dismissed with costs.

DUKHARAN JA

[55] I too agree with the reasons for judgment of Harris JA.