JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 28 OF 2008

BEFORE: **THE HON. MR. JUSTICE SMITH, J.A.**
THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MISS JUSTICE SMITH, J.A. (Ag.)

BETWEEN:	**MICHAEL CAUSWELL**	**1ST APPELLANT**
AND	**RICHARD CAUSWELL**	**2ND APPELLANT**
AND	**DWIGHT CLACKEN**	**1ST RESPONDENT**
AND	**LYNNE CLACKEN**	**2ND RESPONDENT**

Mr. John Vassell, Q.C., Mrs. Julianne Mais-Cox and Miss Cindy Lightbourne instructed by DunnCox for the Appellants.

Mr. Michael Hylton, Q.C. and Miss Anna Gracie, instructed by Rattray, Patterson, Rattray for the Respondents.

10th, 11th, 12th June and 24th October, 2008

SMITH, J.A.

I have read in draft the judgment of Cooke, J.A. I agree with his reasoning and conclusion and there is nothing further I wish to add.

COOKE, J.A.

1. The background in this matter has been helpfully outlined in the skeleton argument which was submitted to the court. This I now reproduce.

"**Background**

2. On the 5th October 2001 the Petitioners, Dwight and Lynne Clacken, instituted proceedings in Suit No. E505 of 2001 by filing a Petition to Wind Up the Company, Equipment Maintenance Limited ("EML"), under the provisions of sections 196 and/or 203 of the Companies Act, 1967.

3. The Petition of the Respondents/Petitioners included a prayer that the shares of EML be valued by a competent valuer being a chartered accountant **appointed by the Court** and the Petitioners' shares be purchased by the Respondents (the Appellants herein).

4. On the 29th May, 2002, the Supreme Court (Mr. Justice Anderson) by and with the consent of the parties made an Order upon the Winding Up Petition determining the dispute between the parties (hereinafter called "the Consent Order"). The Consent Order embodies the terms of an agreement between the parties for the resolution of their dispute. The Consent Order provides *(inter alia)* that: (a) the Appellants (Michael and Richard Causwell) purchase the Petitioners' shares in EML at a price to be fixed by the accounting firm of Peat Marwick and Partners (hereinafter called "the Valuer"); (b) the Valuer value the Petitioners' shares as at 31st December 2001; (c) the Valuer is authorised to make enquiries and examine books, records and documentation including but not limited to the Affidavits and documentation filed in the proceedings in order to ascertain the value of any assets or amount of any funds or any amount which EML is entitled to demand repayment which not only have been diverted, but which have been utilized or paid by or to any shareholder (which includes the directors) and/or certain companies; (d) the Valuer is permitted to use

the in house figures for the financial year ending the 31st December 2001 in the absence of Audited financial statements for that year; (e) the decision of the Valuer in the event of any dispute relative to the valuation is final.

5. Upon the application of the Petitioners, by Order made on November 20, 2002, where the valuation is incomplete by January 31, 2003 the Valuer is authorized to use the audited accounts of EML for the financial year ending 31st December 2000. By the same Court Order, the Valuer is permitted to arrive at an **approximate** valuation 'for the purposes of the purchase of the shares of the Petitioners by the Respondents".

6. The Court of Appeal, in its Judgment in *Michael Causwell et al v. Dwight Clacken* et *ux* SCCA No 129/2002 on February 18, 2004, remitted this matter to the Supreme Court to fix the dates for the completion of the valuation of the Respondents'/ Petitioners' shares and for the payment of the 22% deposit thereof, as well as for the computation of the period within which the balance of the purchase price is to be paid. The application to set timelines was to be heard in the Supreme Court when on 25th January 2007 the Honourable Mr. Justice Marsh in the court below ordered *inter alia* that the Application to Reschedule Time Lines be adjourned for a date to be set by the Registrar of the Supreme Court, and further stated that on the said Court of Appeal judgment, the setting of dates (timelines) is a matter contemplated was properly to go before the Honourable Mr. Justice Anderson and be determined by him, and that therefore the clarification of the Court of Appeal on this point was required.

7. On 5th March 2008 the Court of Appeal, upon an application for such clarification, directed that its said Order of February 18, 2004 be

> effected forthwith by the Supreme Court, and that any Judge of the Supreme Court may preside over a hearing to bring into effect the said February 18, 2004 Order.
>
> 8. There is pending in the Supreme Court a Motion filed by the Respondents/Petitioners in October 2007 to set aside the Consent Order on the basis that the performance of its terms have been frustrated. It is in relation to that Motion that the Affidavits (paragraph I hereof) were filed."

It should be noted that apparently there has been no action, as yet as regards the direction of this court given on the 5th March 2008 ((7) supra).

2. In support of its motion to have the Consent Order of 29th May 2002, set aside by reason of frustration the respondents placed reliance on an affidavit of Paul Saulter and two affidavits of Dwight Clacken one of the respondents. The appellants sought to strike out the Saulter affidavit in its entirety and certain paragraphs of the Clacken affidavits. On 13th March 2008, Pusey J. refused the appellants' application for the following orders:

> "The affidavit of Paul Saulter filed on February 11, 2008 be struck out on the ground that it is irrelevant and inadmissible.
>
> Paragraphs 10 through 18 (inclusive) of the 24th January 2007 Affidavit of Dwight Clacken and paragraphs 15 through 21 (inclusive) of the Affidavit of Dwight Clacken sworn on November 6, 2007 and filed herein be struck out on the basis that the evidence as to the proceedings before the Public Accountancy Board and the determination made by and before that body as to Basil Cunningham are

> irrelevant, inadmissible and only serve to hinder and thwart proceedings herein."

This appeal lies from this order.

3. The focus of the appeal centered on what the appellants regard as the offending paragraphs of the Clacken affidavits. These speak to the involvement of the Public Accountancy Board (PAB). In the Clacken affidavit dated 24th January 2007, Clacken states how from his perspective the PAB became involved.

> "6. That since the Consent Order was made in May 2002, the majority shareholders of the Company have failed and/or refused to deliver relevant documentation, particularly financial records to enable KPMG Peat Marwick and Partner Limited (hereinafter referred to as 'KPMG") to complete the valuation of the shares in the Company pursuant to the said Consent Order. Consequently, there has been no purchase of the shares of the minority shareholders by the majority shareholders (hereinafter referred to as "the Respondents") as contemplated by the said Consent Order.
>
> 7. That at all material times when we left the Company all documents concerning the monies received and expended by the Company, all sales and purchases by the Company and the assets and liabilities of the Company were in place and were up to date.
>
> 8. That notwithstanding the requirement that the majority shareholders of the Company deliver the audited financial statements of the Company for year 2001 to KPMG to enable KPMG to value the shares in the Company. KPMG was forced to rely on the audited financial statement for the Company for 2000

in the face of the majority shareholders' failure to deliver the audited financial statement for the Company for 2001.

9. That the Respondents have simply stated that the audited financial statements for 2001 is not available but to date have given no explanation or no satisfactory explanation for the absence of the said audited financial statements save and except to say that they have detailed the reasons for the absence of the audited financial statements for 2001 in several affidavits filed by Michael and Richard Causwell which are before the Court.

10. That after we exhausted all avenues that should cause the Respondents to provide KPMG with the requisite documents to complete the valuation pursuant to the Consent Order, we complained to the Public Accountancy Board in the Ministry of Finance by letters dated 12th of April 2005, 22nd of April 2005, 12th of July 2005 and 5th January 2006. Copies of these are attached together hereto respectively and marked "**DC-1**" for identification.

11. That the Public Accountancy Board wrote to Mr. Cunningham of J B Causwell & Co by letters dated 29th April 2005, 9th May 2005, 23rd January 2006, and 27th June 2006. Copies of these letters are attached together hereto respectively and marked "**DC-2**" for identification."

4. Following the Clacken complaint to the PAB a hearing was conducted into the professional conduct of Basil Cunningham. He was the accountant of J B Causwell & Co. whose responsibility it was to provide KPMG who was the agreed valuer with audited financial statements. J B Causwell & Co. was the auditors of

Equipment Maintenance Limited (EML) the company which is the subject of this dispute. It is the adverse findings against Cunningham by the PAB which the appellants seek to exclude from consideration in the hearing as to whether or not there has been frustration in respect of the Consent Order. Before I address the issue of the admissibility of the findings of the PAB I will set out in outline the contention of the respondents. These are:

> "(a) Audited Financial Statements are a pre-requisite to the valuation of any corporate entity;
>
> (b) Both parties agreed that KPMG should conduct the valuation and both parties agreed to the conditions set out by KPMG in their letter of engagement;
>
> (c) KPMG's letter of engagement stipulated that it required the audited Financial Statements for the year ending 31st December 2001 and that in the absence of same, the audited Financial Statements for the year ending 31st December 2000 together with the in-house figures for 2001 would be used as a last resort;
>
> (d) The Financial Statements for both the years 2000 and 2001 were prepared by Mr. Basil Cunningham of Messers J.B. Causwell & Co. and the Public Accountancy Board found Mr. Cunningham guilty of Gross Negligence in the preparation of same;
>
> (e) The veracity of the Financial Statements prepared by Mr. Cunningham directly impacts the ability to conduct the valuation of the Company as ordered by the Honourable Mr. Justice Anderson on the 29th day of May 2002;"

5. I now reproduce the findings of the PAB:

"September 3, 2007

Mr. Basil H. Cunningham,
J.B. Causwell & Co.,
1A Conolley Avenue,
Kingston 4.

Dear Sir,

Re Audit of Equipment Maintenance Ltd.,
Windshield Centre Ltd.,
Rodeo Holdings Ltd.

You will recall the enquiry into certain complaints made against you by Mr. & Mrs. Dwight Clacken. On March 22, 2007, the last day of the enquiry, the Board reserved its decision in this matter

1 Findings of Guilty of Gross Negligence

The Board, having examined all the charges made and the evidence before it, has found your actions amount to gross negligence based on the evidence adduced in support of the charge in respect of the following particulars:

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.

Findings

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 Causwell 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 statement 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 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 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 supplies of used cars.

Findings

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.

Findings

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 or figure for Accounts Payables and Accruals, Affiliated Companies and Inventories for WCL, Accounts Payable and Accruals and Accounts Receivable 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.

II Findings of No Gross Negligence
Based on the evidence adduced in response to the following particulars the Board finds that your actions do not amount to gross negligence.

Items (a)
The amounts stated in the Financial Statements in respect of Net Current Liabilities are deemed to be incorrect and in addition you have not provided information to indicate otherwise.

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

Item (f)
You did not provide KPMG with the Audited Financial Statements for 2001.

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

Item (k)
In response to the PAB request of June 27, 2006, you did not provide the listing of current liabilities of Windshield Centre Ltd.

III Findings of No Professional Misconduct and No Conduct Discreditable to the Profession.

The Board finds that the evidence adduced to you does not support a finding that your actions amount to professional misconduct or conduct discreditable to the profession.

IV Invitation to address the PAB on any mitigating circumstances
In relation to the finding of gross negligence and pursuant to Regulation 33 of the Public Accountancy Regulations you and your representative are hereby invited to a meeting at 31 Phoenix Avenue, Kingston 10 at 5:00 pm., on Tuesday September 4, 2007 to address the Board on any mitigating circumstance in regard to the findings abovementioned.

After hearing your submission on any mitigating circumstances, the Board will deliver its decision. The Board intends to deliver its decision on the same day, viz., September 4, 2007.

Yours sincerely,

C.N. Rodney
REGISTRAR"

6. The grounds of appeal pertinent to the admissibility of the findings of the PAB are:

"(a) The learned Judge erred in law in determining that the findings of the Public Accountancy Board of gross negligence as to Basil Cunningham are relevant to the questions which the Court below is to decide in the pending application by the Respondents/ Petitioners that the May 29, 2002 Consent Order be set aside, and thereby he fell into error.

(b) The learned Judge erred in law in finding that the substance and content of the findings of the Public Accountancy Board as to Basil Cunningham are admissible and relevant to the pending application below as to whether the Consent Order of May 29, 2002 is frustrated.

(c) As to the parts of the Affidavits of Dwight Clacken filed below referring to and relying upon antecedent correspondence dealing with proceedings of the Public Accountancy Board and as to the findings of the Public Accountancy Board in relation to Basil Cunningham, the learned Judge erred in failing to determine or in not properly determining whether the facts and matters therein can be proved in such manner and form as a matter of law for the purposes of the said pending application below.

(d) The learned Judge failed to determine or to properly determine whether the said antecedent correspondence and Public Accountancy Board findings and conclusions as to Basil Cunningham can be tendered in evidence in the proceedings in the court below between the parties hereto as proof of the facts therein."

The burden of the challenge to the correctness of the order of Pusey, J. was that of admissibility and relevance. Although the submissions on these two factors overlapped, for purposes of analysis it may be stated that the contentions

of the appellants were firstly that the findings of the PAB without more were inadmissible and secondly that:

> "The court ought not to be prejudiced or restrained by findings of another body, and ought not to rely on those findings in its own determination of the questions before it. It is submitted that it would be improper for a court or tribunal to substitute a decision of another tribunal for its own, and in fact ought not to even consider such decision in its determination of the questions which the Court must decide."

7. The appellants relied principally on two authorities which were **Three Rivers District Council and Others v Bank of England** (No. 3) [2001] 2 All E.R. 513 and **Hollington v Hewthorn & Co. Ltd.** [1943] 2 All E.R. 35. In **The Three Rivers case** BCCI in 1990 was granted a licence by the **Bank of England** to carry on business as deposit-taking institution. BCCI collapsed in 1991. Subsequently to this a Court of Appeal Judge (Bingham, L.J.) was invited to conduct a non-statutory private enquiry into the supervision of BCCI under the Banking Acts and to consider whether the action taken by the United Kingdom authorities was timely and to make recommendations. The enquiry was duly conducted and Bingham, L.J. produced his report. In ensuing litigation the issue was as to whether his report was of any evidential value. The House of Lords ruled that it was not. I will content myself by extracting two passages from the speeches of Lord Steyn and Lord Hope of Craighead The former said at p. 517 a – b:

> "The report is self-evidently an outstanding one produced by an eminent judge. But in law the judge and the majority erred in relying on positive conclusions and findings, and absence of conclusions and findings, of Bingham LJ. Not only was such use of the report ruled out by settled principles of law but on broader grounds it was also unfair to the claimants. After all, the report was the outcome of a private inquiry, the claimants were not represented before Bingham LJ and the case against the Bank was not put by counsel. And the appendices to the report, which recount the history in greater detail, were not published and have never been seen by those representing the claimants. " (Emphasis mine)

They later said at p 524 c– d.

> "The investigation which Bingham LJ conducted was a private and not a statutory inquiry. The rigorous attention which must be paid to the distinction between what would and what would not be admissible has not always been observed in the written cases, and I had the impression that it was not always being observed during the oral argument." (Emphasis mine)

The proceedings before the PAB were sanctioned by statute. The PAB faithfully adhered to the task given to it by the Public Accountancy Act and The Public Accountancy Regulations 1970 made pursuant thereto. The appellant attempts to meet this hurdle by submitting that:

> "although the enquiry was conducted pursuant to a statute, it is evident that the enquiry as to Basil Cunningham was not entertained for a public purpose but for the private purpose of the complainants."

From the affidavit of Dwight Clacken it is clear that the purpose of the complaint to the PAB was in respect of obtaining proper accounts (in their view)

from EML auditors. At this juncture, perhaps I should point out that Regulation 33 (3) states that:

> "The Board shall hold all disciplinary enquiries in private but shall pronounce it findings and decisions in public."

8. In **Hollington v Hewthorn** it was held that a certificate of conviction could not be tendered in evidence in civil proceedings. On a subsequent civil trial the court should come to a decision on the facts before it without regard to the proceedings before another tribunal. Accordingly it was argued that the report of the PAB is inadmissible. To a layman the decision in **Hollington v Hewthorn** may provide some difficulty in comprehension. Uneasiness in this regard is not limited to laymen. In **Hunter v The Chief Constable of West Midlands** [1981] 3 All E.R. 727 Lord Diplock in his speech at pps 34 — 5 had this to say about **Hollington v Hewthorn**:

> "'Despite the eminence of those who constituted the members of the Court of Appeal that decided it (Lord Greene MR, Goddard and du Parcq LJJ), **Hollington v Hewthorn** is generally considered to have been wrongly decided, even in the context of running-down cases brought before the Law Reform (Contributory Negligence) Act 1945 was passed and contributory negligence ceased to be a complete defence; for that is what **Hollington v Hewthorn** was about. The judgment of the court delivered by Goddard LJ concentrates on the great variety of additional issues that would arise in a civil action for damages for negligent driving but which it would not have been necessary to decide in a prosecution for a traffic offence based on the same incident, and on the consequence that it would still be necessary to call in the civil action all the witnesses whose evidence had previously been given in a successful prosecution of

> the defendant, or a driver for whose tortious acts he was vicariously liable, for careless or dangerous driving, even if evidence of that conviction were admitted. So no question arose in **Hollington v Hewthorn** of raising in a civil action the identical question that had already been decided in a criminal court of competent jurisdiction, and the case does not purport to be an authority on that matter."

Specifically **Hollington v Hewthorn** did not consider findings emanating from tribunals empowered by statute to enquire and come to conclusions. **Hill v Clifford** [1907] 2 Ch. D 236, (an authority which will subsequently receive my attention) was not cited in **Hollington v Hewthorn**.

9. The respondents relied principally on two authorities which were **Re St. Piran Ltd.** [1981] 3 All E.R. 270 and **Hill v Clifford** (supra). They also sought to advance their cause by proffering their construction of the Public Accountancy Act. In **St. Piran** the activities of a company and its directors were investigated by inspectors appointed by the Secretary of State under ss 165 and 172 of the Companies Act 1948. In their report the inspectors recommended that the Secretary of State should petition the court to wind up the company. The latter declined so to act. However, the petitioner, a contributory to the company presented a petition for the compulsory winding-up on the ground that it was just and equitable to do so. The petitioner relied largely on the report of the inspectors and adopted as its own allegations the findings of the inspectors in their report. One of the issues that fell for determination was whether the

petitioner could rely on the report. The head note at p 271 accurately summarises the decision on this point.

> "**Held-**(1) Although a report of inspectors appointed by the Secretary of State under ss 165 and 172 of the 1948 Act was hearsay evidence, it was not ordinary hearsay evidence because the inspectors acted in a statutory fact-finding capacity and were only appointed where there were facts about some aspect of the company's activities which were not readily available and there appeared to the Secretary of State to be a need for an inquiry. Since one reason for appointing inspectors was to protect the interests of minority shareholders in a company, and although in such a case it might not be expedient for the Secretary of State to petition for winding up, it would defeat the object of the inspector's inquiry if a minority shareholder who wished to petition could not rely on the inspector's report. It followed that a contributory was entitled to rely on a report of inspectors appointed by the Secretary of State to investigate the affairs of a company to support a petition for the winding up of that company (see p 276 a to g and j, post); ***Re Travel & Holiday Clubs Ltd*** [1967] 2 All ER 606, ***Re SBA Properties Ltd*** [1967]2 All ER 615 and ***Re Armvent Ltd*** [1975] 3 All ER 441 applied."

10. As to the probative value of the Inspectors report Dillon, J. the presiding judge in the Chancey Division said at p 276 g – h:

> "Accordingly I see no valid reason why the inspectors' report cannot be used to support a contributory's petition to the same extent that it can be used to support a petition by the Secretary of State. In his judgment in *Re Travel & Holiday Clubs Ltd* [1967] 2 All ER 606 at 609 [1967] 1 WLR 711 at 715 Pennycuick J stated that a different position would arise if the findings in the inspectors' report were to be challenged by evidence adduced on behalf of the company. That aspect was discussed by Templeman J

> in ***Re*** *Armvent* [1975] 3 All ER 441, [1975] 1 WLR 1679, where he ruled that the opponents of a petition could not exclude a report of inspectors simply by asserting by counsel that the inspectors' findings were challenged. Any challenge had to be by evidence disputing the particular findings which were challenged. If such evidence were adduced then it would be for the judge hearing the petition to weigh all the material before him at the end of the hearing including the report and decide then whether a winding-up order should be made (see [1975] 3 All ER 441 esp at 446, [1975] 1 WLR 1679 esp at 1685). *Re Arment* is in my judgment as applicable to the petition presented by a contributory in the present case as it is to any petition presented by the Secretary of State."

It is the respondents' stance that they seek no more than that the PAB report be admissible as an item of evidence for the consideration of the court hearing the motion in respect of frustration.

11. In **Hill v Clifford** there was a partnership as between dentists. Any partner was entitled to give to any other partner a notice in writing determining the partnership with the partner who was guilty of professional misconduct. On the 24th of May 1906 the General Medical Council acting under the powers of the Dentists Act 1878 made an order directing the registrar to strike out the names of two of the partners off the Register of Dentists on the ground that they had been guilty of misconduct "which was infamous or disgraceful in a professional respect" within the words of the Act. Notices were given to the partners against whom the Medical Council had made adverse findings. There was litigation as to the validity of the notices determining the partnership pursuant to the articles of agreement. In the ensuing litigation one of the issues was whether the order of

the Medical Council was admissible in evidence. The English Court of Appeal decided it was.

12. In that case Cozens-Hardy M.R. in his judgment said at p 245:

> "In my opinion the order of the General Council should be treated on the same footing as an inquisition. Unless and until evidence to the contrary is given, the order suffices to prove that the Cliffords were guilty of statutory misconduct. No evidence was given by the Cliffords to rebut this prima facie evidence. I may add that I doubt whether it is competent to any Court to review a declaration by the General Council that an act of a particular kind is "disgraceful conduct in a professional respect," even though it may be competent to review the decision that a certain individual has committed an act of that particular kind. I prefer to base my judgment on this general principle, although in the present case it might be sufficient to say that the respondents, by the mouth of their counsel speaking in their presence in the most formal manner, admitted "that they have been guilty, as has been found by the committee, of offences of professional misconduct," and promised not to repeat these offences."

13. Sir Gorrell Barnes, President opined that it was unnecessary to deal with the issue of admissibility of the order of the Medical Council because the case could have been disposed of upon the facts admitted or proved at the trial without using the report (of the Medical Council). However, he thought it "desirable to make some observation upon it (report) which show that I am not satisfied that the arguments of the appellant completely disposed of the difficulties of the matter" p 249. The learned President recognized and so stated

that the council acted in accordance with a statutory duty imposed on it and that the legislature had thought it fit to entrust the power as exercised by the council to this special tribunal since it was more likely to be familiar with the matters which might be considered as amounting to professional misconduct and more able to properly consider and deal with such matters than the ordinary tribunals of the country consisting of a judge or of a judge and jury (p 250). He said at p 252:

> "If the order should be admissible, the question then would seem to be for what purpose and to what extent would it be admissible in this case. Now I think upon this it must be borne in mind that the case is one relating to professional men who are subject to the special and peculiar jurisdiction of the Medical Council, and have entered into partnership with each other to carry on a profession in which they are subject to this jurisdiction, and liable to have their power to continue to carry on that profession determined by the action of the council if they act in a manner which renders them liable to have their names erased from the register. That the order was admissible in evidence for some purposes for which it may be required in this case is, in my opinion, clear. It was admissible as evidence, and conclusive evidence, of the fact that the defendants' names had been erased by the order of the council. I think, further, it might be admissible against the defendants to shew the grounds upon which it was made, as without one or other of the grounds specified in the Act the council had no jurisdiction to make the order, and I should doubt whether it would be a good order by such a tribunal unless it shewed the grounds of making it."

14. Buckley L.J. at p 257 had this to say:

> "The order of the General Medical Council is unquestionably admissible, and is, indeed, conclusive upon the question that Ruby Clifford's name has been erased from the register. It is in my opinion also admissible to shew the grounds upon which his name was erased. This is not the same as saying that it is evidence that those grounds were truly alleged. The Act provides s.15, that the report of the council shall be conclusive as to the facts for the purpose of the exercise of the power by the General Medical Council. The order may, I think, be tendered in evidence for at least two purposes – first, to shew its own existence and; and, secondly, to shew the grounds on which it was made. The next stage is no doubt more difficult, namely, whether it is admissible as evidence of the truth of those facts. It is no doubt not conclusive as to their truth."

15. In **Cross and Tapper on Evidence** Ninth Edition at p 104 the learned authors commented that:

> "Hill v Clifford was not cited in Hollington v Hewthorn & Co. Ltd. but the cases can perhaps be distinguished because, being charged with the duty of inquiry the General Medical Council fulfills a different function from that of a judge."

16. Section 3 (i) of the Public Accountancy Act (the Act) established a body to be called the Public Accountancy Board (PAB). Section 4 (i) sets out in general terms the functions of this board which are in these terms:

> "4.—(1)The functions of the Board shall be, generally, to promote, in the public interest, acceptable standards of professional conduct among registered public accountants in Jamaica, and, in particular (but without prejudice to the generality of the foregoing)

> to perform the functions assigned to the Board by the other provisions of this Act."

The composition of the PAB is dealt with in the first schedule to the Act. There can be no doubt, nor was it ever so suggested that the PAB was not comprised of suitable persons with the requisite expertise and integrity to perform the duty imposed on it by the statute. Section 13(2) concerns the disciplinary powers of the PAB:

> "(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 the costs and expenses of and incidental to the enquiry."

Basil Cunningham's registration as a Public Accountant was suspended for a period of six months commencing Monday 10th of September 2007. He was also required to pay one million dollars in costs. Regulations 14-36 set out the procedure to be followed where "a complaint in writing or information in writing is received" by the PAB. These regulations which mandate the procedural

measures to be employed satisfy the essential requirement that Cunningham would have – and did have a fair hearing.

17. I reject the contention that the enquiry conducted by the PAB was "for the private purposes of the complainants". In carrying out its investigation the PAB was honouring and discharging the statutory duty imposed on it to promote in the public interest acceptable standards of professional conduct among registered accountants in Jamaica. Its findings and decisions are to be pronounced in public (Regulation 33 (2)). This was no private enquiry. It is not as if the PAB launched an investigation based on a private retainer. That there should be a public pronouncement of PAB's conclusion is readily understandable. Cunningham and J B Causewell & Co. held out to the public that they were possessed of a specialized skill in the field of accounting. Cunningham was a registered public accountant. The public is entitled to know if there are any deficiencies in the execution of his calling so that those who seek accounting expertise can exercise caution. In my view the **Three Rivers** case does not assist the appellants.

18. I am impressed with the approach of Dillon, J. in **Re St. Piran Ltd.** to which I have previously adverted. The appellants contend that it is impermissible for the learned trial judge trying the motion to discharge for frustration, to "rely" on the findings of the PAB. This submission is misconceived. Firstly the trial court hearing the motion will not be concerned with whether or not Cunningham was "grossly negligent". That conclusion can be tested elsewhere. Secondly the

trial court will not "rely" on the findings of the PAB as conclusive of the truth of those findings. It is evidence which, subject to our adversarial system, the trial judge is entitled to consider.

19. My earlier treatment of **Hollington v. Hewthorn** should have indicated that, that case does not assist the appellants. The focus, in the resolution of this appeal, should be on the nature of the enquiry. What is the genesis of the enquiry? Was it a private enquiry as in Three Rivers? Was it a statutory enquiry as in **Re St. Piran Ltd. and Hill v. Clifford**? If it was statutory how is the statute to be construed? In the instant appeal where a statutory duty was imposed on the PAB to act in the public interest and faultlessly so did, there is no reason why within the limit already stated, its findings should be excluded from the consideration of the court.

20. The respondents in their conclusion at paras 30 and 31 of their written submissions advocated as follows:

> "30. The basis of the consent order was to ensure that the minority shareholders received the fair market value in respect of their shares. It has been the Respondents' contention that the Financial Statements overstated the liabilities of the Company and were not prepared in accordance with proper accounting standards.
>
> 31. In our submission, expert accounting evidence and the findings of the Public Accountancy Board are plainly relevant. The trial judge should be allowed to consider those findings and Mr. Saulter's expert reports in considering

> whether reliable audited financial statements exist or whether those put forward by the Appellants were prepared in a grossly negligent manner as such may not be relied upon. The trial judge will also consider whether given the time which has passed and the difficulties which the court appointed valuator had in getting the cooperation of the Appellants, the terms of the consent order can still be performed as originally envisaged."

21. I have perused the findings of the PAB. It is my view that there is merit in the submissions contained in para 20 (supra) and the findings of the PAB are relevant to the issue(s) which the trial judge will have to decide. Therefore the appeal in respect of excluding the PAB report fails.

22. I now turn to the appeal against the order of Pusey J. refusing to strike out the affidavit of Paul Saulter filed on 11th February 2008. No oral submissions were addressed to the court. In the grounds of appeal filed it was complained that:

> "(e) The learned Judge erred in law in finding that the matters set out in the Affidavit of Paul Saulter filed in the court below on February 11, 2008 are relevant to the questions for determination in the pending application by the Respondents/Petitioners that the May 29, 2002 Consent Order be set aside, and thereby he fell into error.
>
> (f) In finding that the Affidavit of Paul Saulter filed on February 11, 2008 is relevant and admissible, the learned Judge failed to appreciate and to take into account or to take into proper account the appointment by the Court of a Valuer which is not Paul Saulter

> and the terms of that appointment with the parties' consent.
>
> (g) The learned Judge failed to take into account or into proper account that the appointment of the court- appointed Valuer subsists."

The written response to these grounds was that:

> "The foundation for the performance of the valuation, which is a term of the consent order, is the existence of reliable audited financial statements. Mr. Saulter's reports address that very issue. It is submitted that Mr. Justice Pusey was correct in holding that the appropriate course in this case would be for the expert reports to be left to the trial judge to determine what weight to give to them."

In my view there can be no argument that in the circumstances of this case the Saulter reports should be considered by the judge hearing the motion. Thus the appeal in this regard fails.

23. The findings of the PAB in respect of Cunningham are now the subject of appellate proceedings. I do not consider this a factor in determining whether as a matter of law findings of the PAB are admissible (and relevant) in the instant case. Subsequent impeachment of those findings could impact adversely on those findings. So too could close scrutiny in the trial court.

24. Finally I would dismiss the appeal. The respondents should have their costs.

SMITH, J.A. (Ag.)

I too agree with the reasoning and conclusion of Cooke, J.A. I have nothing further to add.

SMITH, J.A.

ORDER:

The appeal is dismissed. Costs to the respondents to be agreed or taxed.