

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 44/2006

**BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE COOKE JA
THE HON MISS JUSTICE SMITH JA (Ag)**

**BETWEEN PRICE WATERHOUSE (A FIRM) APPELLANT
AND CARIBBEAN STEEL COMPANY LIMITED RESPONDENT**

Mrs Sandra Minott-Phillips and Mrs Alexis Robinson instructed by Peter Goldson of Myers Fletcher & Gordon for the appellant

Miss Hilary Phillips, QC & Mrs Minett Lawrence instructed by Grant Stewart Phillips & Company for the respondent

14, 15, 16, 17 April 2008 and 29 July 2011

PANTON P

[1] On 24 May 2006, Jones J delivered judgment in this matter which involved a claim and a counterclaim. Both parties were unhappy with the judgment so they filed notice of appeal and counter-notice of appeal, respectively. The formal order reads:

- "1. Judgment for Caribbean Steel Company Limited in the sum of \$13,849,000.00 with interest at the rate of 24.55% from January 1995 to the date of judgment.

2. Costs to Caribbean Steel Company Limited to be agreed or taxed with certificate for 3 counsel.”

There was no mention of the fate of the counter-claim.

[2] In its amended notice of appeal, the appellant sought an order for the appeal to be allowed, the judgment of the court below set aside and judgment entered for the appellant on the claim and the counter-claim. The appellant also sought a dismissal of the cross-appeal, and for the costs to be awarded in its favour in respect of the hearing in this court as well as in the court below.

[3] In its amended counter-notice of appeal, the respondent sought judgment in its favour “in the sum of \$32,173,400.00 with interest at the rate of 35.71% from January 1995 to the date of this judgment. Costs to Carib Steel to be agreed or taxed with certificate for three Counsel”. The respondent also sought a dismissal of the appeal.

The claim

[4] The appellant (Price) is a partnership carrying on business as chartered accountants and at the material time acted as auditor of the respondent (Steel) as well as of Caribbean Cable Company Limited (Cable). Price provides chartered accounting and management consultancy services including assessments of the values of corporate entities and/or shareholdings to clients for a fee.

[5] Steel is a company incorporated under the laws of Jamaica and at all material times carried on business as manufacturers and traders in steel.

[6] In its claim, Steel alleged that in or about November 1994 it entered into a contract with Price for Price to provide its professional opinion as to the value of the ordinary shares in Cable. According to Steel, Price knew or ought to have known that the opinion was required for assessment by Steel whether or not to purchase a controlling interest in Cable.

[7] Steel has maintained that there were express and/or implied terms of the contract that in auditing the financial statements of Steel and Cable for the period 1 April 1994 to 31 March 1995 Price would, among other things:

- (a) verify the substantial accuracy of the financial statements;
- (b) ensure that the statements contained a true and fair representation of the state of the companies' financial affairs; and
- (c) inform the companies by way of notes or addenda or otherwise on any extraordinary borrowing by Cable or on any borrowing by that company which would materially affect Steel's assessment of the value of its shares, and in particular any borrowing from Cable's pension fund and its ability to repay such borrowing.

[8] According to Steel, Price knew that Steel and the majority shareholders of Cable had, in anticipation of entering into a binding agreement subject to the content of Price's valuation, prepared and executed a draft Heads of Agreement on terms that included the following:

- (a) the issuing of additional shares by Cable would be subscribed by Steel such that Steel would acquire a 50.1% interest in Cable – the aggregate issue price would be \$32 million;
- (b) two-thirds of the issue proceeds would be used to retire a portion of Cable's high cost debt, the remainder to provide "needed working capital" to Cable;
- (c) Steel initially would have the right to elect five of Cable's nine directors;
- (d) there would be a shareholders' agreement among the parties that inter company transactions be "arms-length" and a 75% majority requirement for certain prescribed Board decisions; and
- (e) Steel would not be an active participant in the day to day management of Cable despite its holding of 50.1% interest in that company.

[9] Price delivered to Steel its professional estimate in or about November 1994 of the value of the said ordinary shares in Cable, and represented that a pension surplus of \$13,849,000.00 as at September 1994 was an asset to be relied on in determining the value of the shares, and that the pension surplus may be brought back into the company. This income would be taxable but the tax would be offset through utilization

of the company's tax losses. The taxable pension fund surplus enhanced the value of the shares to be purchased by Steel.

[10] Steel relied on the estimate of value and the representation and acquired 50.1% of the shares in Cable at a cost of \$32,173,400.00. The representation was that Price had examined the financial statements of Cable and Steel, and had obtained all the information and explanations necessary, and that in Price's opinion, proper accounting records had been maintained and there had been general compliance with the Companies Act.

[11] Price, according to the claim by Steel, breached the contract between them; alternatively, it breached its statutory duty pursuant to section 156 of the Companies Act. Steel claimed that Price's report on the consolidated accounts for the year ending 31 March 1995, was made negligently and/or in breach of its contractual duty and/or with a reckless disregard for the requirement for the accounts to contain a true and fair reflection of the state of the companies' financial affairs and, as such, in breach of Price's said statutory duty. Steel said that there was a failure on Price's part to advise or inform Steel properly or at all. Alternatively, the representations made and pleaded were negligently made and false. Further, the representation in Price's audit that the financial statements gave a fair view of the affairs of Cable was false.

[12] Steel claimed that it suffered loss by acquiring the shares, and this loss when particularized amounted to \$38,389,308.00. In addition, Steel claimed damages for

negligence and/or breach of fiduciary duty, and for negligent misstatement or misrepresentation.

The defence

[13] Price denied any negligence or willful misconduct on its part. It said that the terms of its engagement were contained in a letter dated 5 October 1994 which set out its duties and responsibilities in giving the valuation. The agreement entitled "Heads of Agreement" had been entered into by Steel prior to the valuation. Further, Price was not responsible for the accuracy of Cable's unaudited financial accounts. In arriving at the valuation, Price took into account and relied on representations made by Cable and supported by an actuarial valuation prepared by R. Watson & Sons dated September 1994 which stated that there was a surplus in Cable's staff pension scheme amounting to \$13,849,000.00 at December 1993 which surplus could be brought back into the assets of Cable.

[14] Price denied that Steel relied upon Price's estimate in order to acquire the 50.1% shareholding in Cable as in the Heads of Agreement made by Steel, the latter had agreed to subscribe for an issue of new shares that was equivalent to 50.1% of the issued capital of Cable after the issue of the new shares, which agreement was not conditional upon the estimate of value to be prepared by Price. There was also no representation that the surplus would be available to Steel when it became a shareholder of Cable. Price maintained that Steel was incorrect in assuming that the pension surplus could not be treated as an asset brought back to Cable if same had been loaned to Cable.

[15] Price insisted in its defence, that it had complied with all that was required of it, in accordance with the Companies Act. Paragraphs 15-17 of the defence read:

“15. Further, the Defendant states that in accordance with the Companies Act, the Defendant’s obligation as auditor of the Plaintiff for the financial year ended 31st March, 1995 was to examine the accounts presented by the Plaintiff in order to ascertain and report to the Plaintiff’s members:

i) whether the Plaintiff’s balance sheet and profit and loss account for the relevant financial year were in agreement with the Plaintiff’s books of account and returns,

ii) having regard to the information and explanations given to the Defendant by the Plaintiff’s directors, whether the said accounts gave the information required by the Companies Act in the manner required and gave a true and fair view:

(a) in the case of the balance sheet, of the state of the company’s affairs as at the end of its financial year; and

(b) in the case of the profit and loss account, of the profit or loss for its financial year,

iii) in the case of the Plaintiff’s group accounts, whether, in the Defendant’s opinion, the group accounts had been properly prepared in accordance with the provisions of the Companies Act, so as to give a true and fair view of the state of affairs and profit and loss of the company and its subsidiaries dealt with thereby,

so far as concerned the members of the company.

16. The Defendant states that the Defendant duly discharged its aforesaid obligations as auditor and that in the Defendant's opinion, the Plaintiff's accounts including its group accounts had been properly prepared in accordance with the provisions of the Companies Act so as to give a true and fair view of the Plaintiff's state of affairs and the profit and loss of the Plaintiff and its subsidiary Carib Cable for the financial year ended 31st March 1995.
17. The Defendant states that the Defendant owed no obligation as auditor to expressly advise the Plaintiff or its shareholders that the Plaintiff's subsidiary, Carib Cable had borrowed money from the pension scheme, and such loans having been duly included in the balance of liabilities in Carib Cable's audited balance sheet for the year ended 31st March, 1995 and the interest charges thereon deducted in the profit and loss account for the 15 months then ended."

[16] Price denied that a loan from the pension scheme to Cable had depleted the pension scheme or caused loss or damage to Steel, a shareholder of Cable. Further, the existence of a loan to Cable did not affect Price's estimate of the value of the then existing issued ordinary shares of Cable, which estimate took into account the total indebtedness of Cable as reflected in Cable's unaudited accounts which included the loan from the pension scheme to Cable at 31 August 1994, which amounted to US\$14,549.12, the equivalent of J\$400,000.00.

[17] Price stated that Steel was not entitled to maintain an action for the recovery of the cost of sums paid for shares in Cable while still remaining a shareholder entitled to

the benefit of such shares and having brought no action against Cable or its directors, or pursuant to the shareholders' agreement for the alleged loans taken by Cable from the pension scheme. Price contended that Steel was liable to pay for the valuation irrespective of whether Steel proceeded with the agreement to acquire shares in Cable, and the audit fee had not been paid. As a result of the non-payment of the audit fee, Price counterclaimed for the sum of \$937,783.40.

The evidence on behalf of the respondent Steel

[18] Steel presented evidence from its chairman Mr Richard Lake (who at the time he gave evidence had the distinction of being chairman of more than 20 companies) and Mr Collin Greenland who is not only a certified fraud examiner but also a certified financial services auditor and a forensic accountant. In his witness statement, Mr Lake spoke of the engagement of the services of Price to carry out a valuation of shares in Cable, further to Steel's "interest in acquiring a controlling interest" in Cable. According to Mr Lake, Steel relied on the valuation report in acquiring 50.1% of the shares in Cable. The report, he said, did not disclose the fact that the two owners/managers had borrowed heavily from the pension fund; instead, the report described the management as "experienced" with many years in the industry. The loans, he said, were described as "trade payables" and were not separately identified for the scrutiny of Steel's board. In failing to disclose that the company had been borrowing from its pension fund, Price denied Steel the benefit of its professional advice and guidance as to the recoverability of the loans, and the significance of such conduct as regards the integrity and competence of the owners/managers whose shares were being acquired. Cable, Mr

Lake said, did not repay the loans and ultimately, Steel suffered a loss of its entire investment.

[19] Under cross-examination, Mr Lake said that Price was not Cable's auditor. He said that having read the complete report, Steel decided to purchase the shares at a premium. He had expected to find the pension fund surplus in cash, but he discovered that part of it was borrowed by Cable. According to him, "We found that out subsequently after we bought it." He said further that there had been no reliance on the consolidated accounts in the decision to purchase the shares in Cable. It was not Steel that had contracted Price to do the accounting work, it was Cable.

[20] In his witness statement, Mr Collin Greenland said that he had examined the report done by Price in November 1994 giving the estimate of the value of Cable. He said that he was not in agreement with Price's inclusion of the pension fund surplus in arriving at the liquidation value, based on the accounting constraints stipulated in International Accounting Standards (IAS). At the very least, he said, the inclusion of the surplus should have been accompanied with substantial disclosures, in order not to be regarded as wholly speculative. He took issue with the categorization of payables. In his view, they should have been regarded as current liabilities, in keeping with "Generally Accepted Accounting Standards" and "International Accounting Standards" which formed the basis of his analysis and research in relation to the issues identified. The loans granted to Cable from the pension fund would have been more properly presented under "Short term loans" as this would have, he said, facilitated immediate and obvious recognition on the balance sheet and still allow Price to reflect the

transactions as current liabilities. In Mr Greenland's view, the failure "to accord the importance of the loans granted from the pension surplus", and to ensure that the loan transactions were correctly presented in the March 1995 statements had the effect "to conceal and/or obscure not only the loans themselves, but their current and potential effect on the valuation and the financial statement of March 1995". He concluded that Price was negligent in its duty to apply Generally Accepted Accounting Standards and IAS in the presentation of the March 1995 balance sheet for Cable and as such failed in its duty to provide the true and fair view of Cable's position at that time.

The evidence on behalf of the appellant Price

[21] The witnesses called on behalf of Price were Messrs Richard Downer and Colin Maxwell, both partners at Price, and Mr Stephen Holland, vice-president of the Insurance Company of the West Indies and Company Secretary of the ICWI group of companies. Mr Holland, at the time he gave evidence, was also chairman of the disciplinary committee of the Institute of Chartered Accountants of Jamaica (ICAJ). In his witness statement, Mr Downer said that the estimate of the value of Cable was done by him, and that the information in the unaudited financial statements of Cable was taken at face value, and by agreement between Price and Steel, the latter expressly accepted responsibility for Price's use of such information. The purpose of the valuation, he said, was to assist in the negotiation of the purchase by Steel of a majority of the shares of Cable. The figure of \$13,800,000.00 reported in the estimate of value as a surplus in Cable's pension fund was based on an actuarial valuation of the pension fund as at 31 December 1993 done by the actuaries, R. Watson & Sons. This actuarial

valuation, he said, was apparently submitted to Cable in September 1994. At the time of the valuation, the borrowings from the pension fund amounted to \$400,000.00. However, by March 1995, the borrowings stood at \$3,500,000.00. The amount of \$400,000.00 represented borrowings by the company from the pension fund surplus. He said that the borrowing by Cable did not deplete the assets of the pension scheme as the money was due to be repaid and so was a receivable which was therefore an asset of the pension scheme.

[22] Mr Downer said in his statement that he has been doing valuations for decades, and this is the only valuation that he has done that has been challenged by a client. Under cross-examination, he said that the actuarial report was not sent to Steel, and that Price would not have been aware that the trustees were the borrowers of the funds from the pension fund surplus. His understanding was that Cable was the borrower, but that was not a significant fact. In his view, the sum owed to the pension fund was a potential asset available to Cable. He put it this way: "It is an incoming asset to the company."

[23] In his witness statement, Mr Colin Maxwell said that he was the partner in charge of the audit of Cable for the various accounting periods from 1992 to 1996, and that Price was engaged directly by Cable for this purpose. There was no contractual arrangement between Price and Steel in relation to the auditing of the financial statements of Cable. During the period of the audit, the loans from the pension fund were payable on demand. Consequently, these loans were included as part of "Accounts Payable". He said that Generally Accepted Accounting Principles promulgated by the

ICAJ did not at that time require the disclosure of the interest rate and repayment terms of demand loans.

[24] Mr Maxwell said that after the financial period ended on 31 March 1995, Steel requested of Price specific disclosure of Cable's liability to Cable's pension fund. Cable, he said, was a subsidiary of Steel for that period and the consolidated financial statements of Steel included those of Cable. In paragraph 18 of his witness statement, he continued:

"As a result of that request and given that the preparation of the consolidated accounts were the responsibility of Carib Steel's management and we had no objection to including a disclosure that went beyond that required by law or generally accepted accounting principles in Jamaica, the liability of Carib Cable to Carib Cable's pension fund was separately shown in Carib Steel's audited consolidated financial statements for the year ended 31 March 1996. That separate disclosure in the Carib Steel's audited consolidated financial statements without objection from us was done solely because of the specific desire of Carib Steel to do so and was not an implied admission by PW that not setting out Carib Cable's liability to its pension fund as a separate line item in the financial statements for the period ended 31 March 1995 was wrong, negligent or in any way an error."

[25] The final witness for Price was Mr Stephen Holland, a chartered accountant since 1974. He is a Fellow of the Institute of Chartered Accountants in England and Wales, and also Jamaica. He reviewed the relevant documents in the case, as well as the expert witness report of Mr Collin Greenland filed in the action. Having done that, he formed the opinion that Price's estimate of the value of Cable was reasonable, and had

been properly carried out. He said that in the 1990s it was commonplace in Jamaica for pension plan surpluses to be used to reduce a company's contribution rate to the pension plan and so give the company a "holiday" from future contributions. In that event, he said, the surplus could be considered an asset of the company. Loans extended to the company from the pension fund would not have diminished the amount of the surplus as the loans were receivables repayable by the company to the pension plan on demand. He said that assets take various forms; cash is one, a receivable is another. A reduction in available cash does not mean a depletion of the asset, he said, if the asset remains in another form.

[26] Mr Holland said that from an examination of the table of audited accounts annexed to Price's valuation report of November 1994, he could tell that Cable did not consistently make a profit. Consequently, he thought it prudent for Price to value the shares on two hypotheses, namely, (a) that of liquidation, and (b) that of a going concern. He said he did not disagree with Price's inclusion of the pension fund surplus as an asset. If Cable had "gone under", he said, the pension fund would not have gone under as it was in surplus.

[27] Steel, it will be recalled, paid \$32,173,400.00 for half of the shares of Cable. The total valuation of Cable as a going concern was \$43,500,000.00 and the value of half of the shares as at the November 1994 valuation by Price was \$21,750,000.00. It will also be recalled that the proposed price of \$32,000,000.00 had been set before the valuation by Price. This is evident from the Heads of Agreement which pre-dated the valuation. Mr Holland gave his opinion that the \$32,000,000.00 was a preconceived

figure (because it appears in the draft Heads of Agreement) which was not varied from even after the valuation was rendered and showed a figure lower than \$32,000,000.00 for half of the shares of the company. Mr Holland also pointed out that in March 1995, the total loans to Cable from the pension fund stood at \$3,560,000.00. However, of that sum, \$2,230,000.00 was loaned in the said month of March, that is, "after the acquisition of Caribbean Cable's shares by Caribbean Steel and at a time when the Claimant, therefore, controlled Caribbean Cable Company Limited".

[28] Mr Holland's witness statement gave a picture of the standards in accounting at the time. He said that in 1994 the ICAJ had issued several Statements of Standard Accounting Practice (SSAP) which the profession was required to adhere to at the time. If financial statements did not reflect those standards, auditors were obliged to qualify their audit opinion on whether inter alia the financial statements presented a true and fair view of the state of affairs of the company. In 2003, the ICAJ adopted IAS as its own standards in place of SSAP. Many of the references in Mr Greenland's report, according to Mr Holland, are to IAS adopted by the ICAJ in 2003, that is, almost a decade after Price had done the valuation. The only standards that were relevant at the time the financial statements of Cable were prepared by Price were SSAP issued by the ICAJ. The term "true and fair", he said, is applicable to financial statements and is inapplicable to the valuation of shares. In his professional experience, Mr Holland was of the view that a liability is to be treated as current in the absence of an agreement stating that the liability is repayable over a period in excess of one year. He therefore could not fault the categorization of the loans from the pension fund to Cable as a

current liability. The inclusion of the demand loans extended by the pension plan to Cable as “payables” is an issue of categorization and the effect was immaterial given the small size of the loans in the context of the overall balance sheet.

The judge’s reasons for judgment

[29] In his judgment, the learned judge stated the issues as he saw them thus:

- “a) Was there an expressed or implied duty of care owed by Price Waterhouse to Carib Steel to use reasonable care and skill in the performance of their (sic) duties:
 - (i) Under the terms of the contract for the valuation of shares as set out in the Engagement Letter.
 - (ii) In the conduct of the audit on the accounts of Carib Cable subsequent to the purchase of the shares
- b) Whether or not Price Waterhouse breached their (sic) duty of care to use reasonable care and skill:
 - (i) in the preparation of the share valuation report for Carib Steel having regard to the standard of care applicable to accountants and auditors;
 - (ii) in the preparation of the consolidated audited accounts after the acquisition of the majority shares of Carib Cable by Carib Steel having regard to the standard of care applicable to auditors.
- c) What is an appropriate award of damages in this case and whether or not an award for

exemplary and/or aggravated damages is appropriate in this case.”

[30] Jones J, after reviewing the evidence, concluded that Price owed a duty to Steel to exercise the necessary skill and care under the terms of the contract for the share valuation and it also had a concurrent duty in tort. He compared the evidence of the experts Greenland and Holland and after stating a preference for Mr Greenland’s evidence on the question of the treatment of the loans from the pension fund, concluded “as a matter of law” that Price had breached its duty of care to Steel in respect of the audit of Cable. The learned judge found that Price had breached its duty of care to Steel in both contract and tort in its conduct of the share valuation exercise.

[31] As far as damages were concerned, the learned judge reasoned that the arguments of the parties depended “on assumptions that do not hold up under scrutiny”. Price had contended that the price of \$32,173,400.00 paid for half the shares of Cable was pre-determined and did not relate to the valuation, seeing that the price remained unchanged even though the valuation price for half the shares was much less. On the other hand, Steel claimed that it lost its entire investment in Cable due to its reliance on Price’s share valuation report. The learned judge found that the purchase price for the shares in Cable as set out in the Heads of Agreement was always subject to the share valuation exercise, and that Price knew it. He found also that Steel would not have concluded the shareholder’s agreement and finalized the sale for the 50.1% of the issued share capital of Cable at a price of \$32,173,400.00 without reliance on the representations contained in the valuation report prepared by Price. So far as the claim

by Steel for the sum of \$38,389,308.00 is concerned, the learned judge described it as “a poor attempt to link the loss of the entire investment with the breach of duty”. He found that the loss of the entire investment in the purchase of the majority shares in Cable could not be “causally linked to the breach of duty by Price”. As he saw it, the position was that but for the advice that the pension surplus of \$13, 849,000.00 “may be brought back into the company”, Steel would not have settled for a purchase price of \$32,173,400.00. Hence, he limited the damage suffered by Steel to the reasonable expectation that the latter sum would be an immediate part of Cable’s assets.

The amended grounds of appeal

[32] The following grounds of appeal were argued by Mrs Sandra Minott-Phillips for Price:

- “i. The findings of fact of the learned trial judge are unreasonable in light of the evidence adduced at the trial.
 - a. The evidence showed that there were no audited financial statements for Cable for the year 1995 at the time of Steel’s acquisition of the shares of Cable in February, 1995. These financial statements could not, therefore, have had any impact on the share acquisition.
 - b. There was evidence from a qualified expert that presentation of the funds Cable borrowed from its Pension Fund as a ‘payable’ was an issue of categorization only as it was not, in fact, an issue of substance.
 - c. There was evidence from a qualified expert that the applicable accounting standards at the time did not require PW to list Cable’s

borrowings from its Pension Fund as a 'related party' transaction.

- d. The evidence showed that only approximately \$3,000,000 of Cable's Pension Fund surplus of \$13,849,000 was borrowed by Cable at the time of the share acquisition.
- e. There was no evidence that Ernst & Young regarded Cable's borrowings from the Pension Fund surplus as 'doubtful'. In fact, the evidence was that they did not as the audited financial statements of Cable's Pension Fund have no notification to that effect and/or make no provision for a loss in that regard.
- f. The evidence showed that a pension fund surplus could be used to reduce the employer's contributions to the fund and, on winding up of the Pension Fund, would revert to the employer [Cable]. Any discounting would be counteracted by interest earned on the balance of the surplus which was unapplied in any given year. It was therefore not incorrect for PW to say that the pension fund surplus 'may be brought back into the company'.
- g. Further, it is wholly consistent with the Trust Deed and Rules admitted into evidence.
- h. There was no evidence to support the learned judge's conclusion that PW's statement that the Pension Fund surplus 'may be brought back into the company' would only be possible on the liquidation of the company. The financial statements of Cable for the year ending December 31, 1996 (on page 4

paragraph 1a) show that the applicable Trust Deed was a 'defined benefit' scheme. In any event the Deed in evidence did not confine realization of the asset to liquidation of the company, but also allowed Cable to apply the surplus to its required contributions to the Pension Fund. Mistakes by the trial judge in construing the document in evidence and in failing to take account of another such document which were vital to the course of the proceedings critically affected the reasoning which led to his conclusion in the case.

- i. Furthermore, the onus was on Steel to establish not only the incorrectness of PW's statement that the pension fund surplus 'may be brought back into the company', but also, more importantly, that the loans made out of Cable's pension fund surplus were not in fact repaid to Cable as at the date of the trial. It failed to do either.
 - j. The evidence showed that Mr. Collin Greenland was not a registered public accountant and the learned judge erred in regarding him as an expert in the field of auditing of financial statements and as being able to give expert evidence in relation to the share valuation.
 - k. There was no evidence that the loans from the Pension Fund to Cable had not been repaid by Cable as at the date of trial.
- (ii) The learned trial judge erred in finding that Collin Greenland was competent to give expert evidence relating to a share valuation and audited financial statements and that his evidence on what is, or is

not, an acceptable standard of service rendered by registered public accountants was admissible.

- (iii) The learned trial judge failed to appreciate that in circumstances where the acquisition of Cable's shares by Steel preceded Cable's presentation of its audited financial statements, there could have been no reliance by Steel on the audited financial statements in the making of its decision to acquire the shares and, therefore, no special relationship could have arisen as would have resulted in a duty of care being owed by PW to Steel in relation to PW's audit of the financial statements of Cable.
- (iv) The learned judge fell into error in holding that the case of **Caparo Industries plc v Dickman** is a decision restricted to its own facts and can be distinguished from the facts of this case. The learned judge ought to have found instead that the principle expressed in **Caparo** that an auditor owed no duty of care to an individual shareholder or potential investors in a company, was one of general application and applied squarely to the facts of this case.
- (v) The learned trial judge erred in having no, or insufficient, regard to the testimony of expert witness Steve Holland, a chartered accountant with experience in valuations of shares, and in preferring the evidence of Collin Greenland on matters where expert evidence ought to have been helpful, particularly as he gave no reason for his preference of the evidence of the patently less qualified expert witness.
- (vi) The learned trial judge erred in treating the instant case as:

(a) an exception to the general rule that in the absence of relevant expert evidence the claim will not be proved;

(b) an obvious case which does not require any expertise in share valuation itself.

(vii) Alternatively, to the above, on the question of damages, as Steel's interest in Cable was limited to 50.1% of the company, an award of damages which represented the entire (as opposed to 50.1% of the loans from the) pension fund surplus of Cable at the time of the share purchase was excessive."

The submissions

[33] Mrs Sandra Minott-Phillips' submissions, on behalf of Price, may be classified as follows:

(a) Questionable findings of fact

The learned judge, according to Mrs Minott-Phillips, made findings that were not in keeping with the evidence. She submitted that the findings were unreasonable and warrant intervention at the appellate level, notwithstanding the well-known reluctance on the part of appellate courts to interfere with a trial judge's findings of fact. She emphasized the following findings as being among those that should be set aside:

- (1) The finding that Price made representations in the audit which would guide Steel in the purchase of the shares. This she said was a chronological impossibility seeing that the shareholders' agreement whereby Steel agreed to subscribe

for shares in Cable is dated February 1995 whereas Price's financial statements covered the fifteen month period ending 31 March 1995, and were certified on 22 September 1995.

- (2) The finding that it was incorrect for Price to say that the pension fund surplus "may be brought back into the company". In this regard, Mrs Minott-Phillips pointed to the fact that the trust deed and rules of the pension scheme show that the surplus in the plan can revert to the employer in a winding-up. Clause 24 of the trust deed deals with payments to be made from the fund on a winding-up, and provides that any balance remaining in the hands of the trustees after winding-up shall be paid to the employer. Rule 18 (b) provides that in the event an actuarial valuation discloses a surplus, that surplus may be used at the direction of the employer for reducing contributions payable by the employer, augmenting benefits, or may be carried forward unappropriated. The only issue in the appeal, said Mrs Minott-Phillips, was the inclusion of the pension fund surplus in the valuation of the asset. Whereas Price thinks that it should be so included, Steel thinks it should not be. In the circumstances, given the provisions in the deed and in the

rules, she contended, the finding of the learned judge in this regard led to an erroneous conclusion.

(b) The evidence of the experts

Mrs Minott-Phillips submitted that the learned trial judge had the evidence of Mr Greenland and Mr Holland to consider in respect of how the audit was done. He rejected that of Mr Holland who was eminently qualified, but accepted the evidence of Mr Greenland who was neither an auditor nor a chartered accountant, and who had never prepared a valuation of a company. There was no reason given, said Mrs Minott-Phillips, for the preference. She submitted that in the absence of an explanation by the judge, the decision should not be allowed to stand.

The burden of proof, contended Mrs Minott-Phillips, rests upon Steel and it had not adduced the requisite expert evidence upon which the learned trial judge could properly have made a finding of professional negligence against Price for the simple reason that the expert called by Steel is not qualified in the field in which Price is engaged. It is, said Mrs Minott-Phillips, as if Steel had not called an expert witness.

(c) Causation

Mrs Minott-Phillips submitted that the learned judge had failed to appreciate that Steel had failed to establish the basic element of causation. The shareholders' agreement predated the delivery of Cable's audited accounts for the fifteen month period ending March 1995. In addition, the shareholders' agreement into which Steel had entered with the vendors of Cable's shares was dated 14 February 1995, whereas on Steel's

pleadings, Price was instructed to present audited financial statements for Steel and Cable up to 31 March 1995.

[34] In response to these submissions, Miss Hilary Phillips, QC for the respondent Steel, said that there was no basis in law or on the evidence for the findings of fact to be disturbed. She reminded the court that the learned trial judge had had the benefit of observing the witnesses as they gave their testimony. She said that Steel had not made any allegation that the conduct of the audit had guided its decision to purchase shares in Cable, and there was no finding by the learned trial judge that representations in the audit guided Steel in the acquisition of the shares. Miss Phillips submitted that the contract between the parties contained an express or implied term that Price in conducting the valuation, owed Steel a duty of care to exercise the requisite skill and care of a professional valuator including the application of the necessary prudence, and that it would be careful in carrying out its tasks and consider at all times the purpose for which Steel was seeking the valuation. The result of Price's actions was a flawed valuation in breach of the contract as well as of Price's duty of care to Steel. She emphasized, in her oral submissions, that the chief complaint against Price was that the pension fund surplus had been included as an income asset. Price, she said, should have made it clear that the pension surplus was not readily available to the company as an asset.

[35] Miss Phillips supported unconditionally the findings of the learned judge in respect of the evidence of Mr Greenland. In particular, she said that the judge had

indicated the instances in Mr Greenland's evidence which he could rely on and which were consistent with common sense. She submitted that Mr Greenland's evidence can bear scrutiny and was credible, notwithstanding that he had never performed a share valuation of a company and so may not have had the appropriate expertise in that area. Miss Phillips relied on the authorities applied by the learned judge in arriving at his decision.

[36] So far as the counter-notice is concerned, Miss Phillips submitted that Steel would not have concluded the shareholders' agreement and finalized the sale for the 50.1% of the issued share capital of Cable at a price of \$32,173,400.00 without the reliance on the representations contained in the valuation report prepared by Price. Seeing that the value of the pension fund formed an integral part of that exercise, and that the valuation was substantially flawed, Steel was entitled to the value of the loss of its entire bargain, that is, the loss of the entire investment in Cable, she submitted.

Resolution of the issues

(i) The terms of engagement

[37] There is no doubt that what was expected of Price was the provision of a valuation of Cable. The letter from the chief executive officer of Steel dated 29 September 1994, addressed to Mr Max Rochester of Price reads:

"Caribbean Cable Company

I refer to our recent telephone conversation.

Caribbean Steel Co. Ltd is considering the purchase of controlling interest in the captioned company. We

would appreciate your carrying out a valuation of this company at your earliest convenience.

Enclosed, as requested, are the audited annual reports for 1992, 1993 and the year-to-date unaudited report for the period ending August 27, 1994.

Yours faithfully

CARIBBEAN STEEL CO. LTD"

In response to this letter, Price advised Steel by letter dated 5 October 1994, that it would "provide an estimate of the fair market value of Carib Cable". For purposes of the estimate, Price defined "fair market value" as the best price available in an open and unrestricted market between informed, prudent parties acting at arm's length and under no compulsion to act, expressed in terms of money or money's worth. Price indicated that it was accepting no responsibility or liability for any losses suffered by Steel or Cable, Steel's shareholders, and/or any other party as a result of the following:

- "(a) Our reliance on the opinion of any independent real property appraiser, expressing his opinion on the market value at the valuation date of equipment owned by Carib Cable
- (b) Our use, in preparing the valuation, of unaudited interim financial statements or future projected financial information, as prepared by the management of Carib Cable
- (c) General circulation, publication, reproduction or use by the shareholders, the companies and by any other party, of our report for any purpose other than outlined above without our prior written consent in each specific instance, which consent will not be unreasonably withheld."

[38] Price stated in its letter that it understood that Steel was undertaking to indemnify it against loss, damage or claim of any kind which it may have by acting as an independent valuator pursuant to the appointment, save and except as may arise out of Price's gross negligence or willful misconduct in performing its services. Price also reserved the right to review all calculations and, if necessary, to revise the valuation in the light of any information existing at the valuation date which subsequently becomes known to Price, but it would be under no obligation to do so. In view of the disclaimer it would seem that for Price to be held liable to Steel for any loss resulting from Price's action as a valuator herein, gross negligence and willful misconduct would have to be shown.

(ii) Was the judge correct in his assessment of the evidence and in his finding of negligence on the part of Price?

[39] There is no doubt that the valuation was done. Steel was unhappy with it, whereas Price felt there was no basis for any complaint as it has done what it was contracted to do. As indicated earlier, the learned judge found that Price had breached its duty to Steel in both contract and tort in relation to the valuation exercise. In arriving at his decision, he relied heavily on the evidence of Mr Collin Greenland and added that the case was one of common sense.

[40] It is clear that the learned judge, in arriving at his decision, made findings of fact in respect of the expert evidence in particular. An appellate court is always reluctant to interfere with a trial court's findings of fact bearing in mind that the trial court has had the advantage of seeing the witnesses in the process of giving their evidence and so

has had the opportunity to assess their demeanour and to determine their credibility and reliability. Notwithstanding this reluctance, an appellate court will disturb findings of fact where the trial court has not made good use of the opportunity given it in seeing and hearing the witnesses in person. In his well-known speech in ***Watt (or Thomas) v Thomas*** [1947] AC 484 at 487 and 488, Lord Thankerton stated the position thus:

- “(I) Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge’s conclusion.
- (II) The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.
- (III) The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.”

This statement of the law has been accepted in our jurisdiction: see ***Industrial Chemical Co (Jamaica) Ltd v Ellis*** (1986) 35 WIR 303. However, there are situations in which there is no dispute as to the facts, and it is a question of the

assessment of the opinions of several experts. In such cases, the qualification, experience and expertise of the expert in the particular field are of great importance.

[41] In dealing with the evidence of the expert witnesses, the learned judge took note of the fact that Mr Greenland was: not a chartered accountant, not a registered public accountant, not an external auditor, and **had never** prepared a valuation of a company. He also noted that Mr Stephen Holland was a chartered accountant, and had done external audits as well as valuations of companies (page 253 of the record). He said that while Mr Greenland was not a chartered accountant, he accepted that he was qualified to express an opinion in the field of auditing and accounting. He continued:

“On the other hand, while I accept Colin Greenland as an expert in the field of accounting and auditing, the issue of his expertise in the area of share valuations is a different matter. Share valuations are considered to be an area of expertise within the area of accounting although generally performed by chartered accountants. It goes without saying that being a chartered accountant does not without additional experience or qualifications make one eligible to be an expert in share valuations.

There is no evidence that Colin Greenland has ever performed a share valuation on a company and he may not have the appropriate experience or expertise in this area. However, this does not rule out his views on aspects of accounting practice that may relate to share valuations, or where the breaches of duty are so obvious or fundamental ...”(page 254 record)

[42] The learned judge had a determination to make as to whether the valuation exercise had been properly done. He had the evidence of three persons – two of them with expertise in the particular area, and one definitely without. That he preferred the

evidence of the one without is surprising. One of those whose evidence he rejected, without giving reasons, was Mr Stephen Holland. His evidence was referred to in paragraphs [25] to [28] above. It should be emphasized that Mr Holland said he could not fault the categorization of the loans from the pension fund to Cable as a current liability. He said that –

1. Price's estimate of the value of Cable was reasonable and had been properly carried out;
2. The surplus could be considered an asset of the company;
3. Loans extended to the company from the pension fund would not have diminished the amount of the surplus as the loans were receivables repayable by the company to the pension plan on demand;
4. Assets take various forms – cash is one, a receivable another;
5. At the time of the valuation, the profession in Jamaica was required to adhere to the SSAP issued by the ICAJ; and
6. Many of the references in Mr Greenland's report are to IAS which were not accepted in Jamaica until 2003, that is, nearly a decade after the valuation by Price.

[43] Given Mr Holland's qualifications and vast experience as well as his chairmanship of the disciplinary committee of the ICAJ, it is difficult to understand how the learned

judge could have rejected his evidence virtually out of hand. The difficulty in comprehension is exacerbated by the fact that the learned judge went on to find that Price was negligent.

[44] Mr Holland's evidence, it should be pointed out, did not stand alone as Mr Richard Lake, the chairman of Steel, gave evidence similar to Mr Holland's. Mr Lake said that he was familiar with pension fund schemes and was of the view that a surplus can revert to the company and that in Cable's case, the surplus so reverts (page 229 of the record). He agreed that cash is one form of asset and a receivable is another form of an asset (page 230 of the record). Recoverability of loans, he added, is the concern of the company.

[45] As said earlier (para. [30]), the learned judge found that Price had breached its duty of care to Steel in both contract and tort in its conduct of the share valuation exercise. In making his finding, he said that the instant case was "an obvious case requiring the application of commonsense and, which does not require any expertise, in share valuation itself" (page 260 of the record). Whereas there can be no doubt that the determination of cases generally requires the "application of commonsense", it is somewhat mystifying that the learned judge should have expressed the view that there was no need for "expertise in share valuation itself". It is clear, however, that by placing so little value on the need for expertise, the learned judge's assessment resulted in the elevation and acceptance of Mr Greenland's evidence above, and in place of, that of the professionals in the specific field. In doing so, the learned judge fell into error. Had he given due value and weight to the evidence of the witnesses called

on behalf of Price, he would have concluded that Price had indeed fulfilled the terms of its contract with Steel.

[46] The learned judge found that the purchase price for the shares in Cable set out in the Heads of Agreement “was always subject to the share valuation exercise”. This finding is weakened by the fact that there was no change in the price after the valuation was done by Price. As Mr Holland pointed out, the pre-determined price of \$32,000,000.00 was not varied from even after the valuation had been rendered and it showed a figure lower than \$32,000,000.00 for half of the shares of Cable. Certainly, Price cannot be blamed for Steel’s decision. Steel must therefore bear the consequences of its decision to proceed along the lines set out in the Heads of Agreement.

[47] So far as the finding of negligence is concerned, this court has to be guided by the established principle that courts are usually unwilling to find a professional person negligent in the absence of evidence from a professional in the same field. In ***Sansom v Metcalfe Hambleton & Co.*** [1998] PNLR 542, Butler-Sloss LJ, in giving the judgment of the English Court of Appeal, said:

“In my judgment, it is clear ... that a court should be slow to find a professionally qualified man guilty of a breach of his duty of skill and care towards a client (or third party), without evidence from those within the same profession as to the standard expected on the facts of the case and the failure of the professionally qualified man to measure up to that standard. It is not an absolute rule ... but, less it is an obvious case, in the

absence of the relevant expert evidence the claim will not be proved.”

It has been shown that the relevant professional evidence was lacking in this case.

[48] In the circumstances, the appeal succeeds in several respects and the counter-notice of appeal fails. The appeal succeeds (so far as it is necessary to state) on ground (i)(a), (b), (c), (d), (f), and (j); and on grounds (ii), (v) and (vi). The judgment of the court below is set aside and judgment is hereby entered in favour of the appellant on the claim and counter-claim. The counter-appeal is dismissed and the appellant is awarded costs of the appeal as well as in the court below, such costs to be agreed or taxed.

COOKE JA

[49] I have read in draft the judgment of my brother Panton P. I agree with his reasoning and conclusion and have nothing to add.

SMITH JA (Ag)

[50] I too agree.

PANTON P

ORDER

Appeal allowed.

Judgment of Jones J set aside.

Judgment entered for the appellant on the claim and on the counter-claim for \$937,783.40 with interest at 15% per annum. Counter appeal dismissed.

Costs of the appeal as well as costs in the court below, to the appellant to be agreed or taxed.