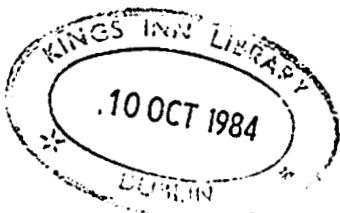


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THE HIGH COURT

BETWEEN:

JOHN SISK AND SON LIMITED

Plaintiff

and

DONAL PATRICK FLINN AND OTHERS

Defendants

Judgment delivered on the 18<sup>th</sup> day of July 1984 by  
Finlay P.

This is an action brought by the Plaintiff claiming damages for negligence and breach of duty against the Defendants. The Plaintiff is a construction company forming one of a number of inter-related companies engaged in the construction of buildings and public works. The Defendants practise as partners under the name of Coopers and Lybrand and are a well known firm of Auditors and Accountants.

As a result of negotiations which commenced in or about February 1977 and concluded with a written agreement dated the 4th May 1978 made between Albert Underwood and Mary Agnes Underwood of the one part and the Plaintiff of the other part, the Plaintiff purchased for the sum of £87,500 fifteen thousand ordinary shares in a company known as Irish Industrial Fabricators Ltd. that shareholding constituting 75% of the issued shareholding.

The Defendants were at all times material to that transaction the auditors and accountants of Irish Industrial Fabricators Ltd. (whom I shall hereinafter refer to as the Company) and on behalf of the Company through the third-named Defendant who was then one of the members of the partnership took part in the negotiations leading to the agreement of the 4th of May 1978. Expressed in extremely

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short terms, the Plaintiff's claim is that in the course of those negotiations the Defendants through their servants or agents made representations to the Plaintiff and submitted accounts and financial statements with regard to the affairs of the company which were untrue and that in so doing they were negligent. There is no claim for fraud or intentional mis-representation.

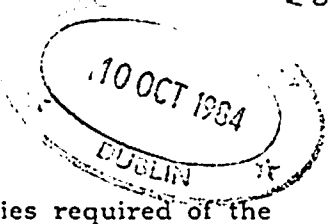
The Defendants in short deny that they owed any duty to the Plaintiff, deny that they were negligent, or in breach of any duty and deny that the Plaintiff in entering into the agreement of the 4th May 1978 relied upon any representations made by them, the Defendants, or that it ought reasonably to have done so.

The uncontested facts

The uncontested facts on the evidence before me may thus be summarised.

The Company was formed in 1963 by Mr. Albert Underwood and was owned by himself and his wife who were the Directors. The business of the Company was industrial pipework and steel work and it was largely employed as sub-contractor for major engineering contracts. Work was originally carried out on site but by about 1970 premises were acquired at Churchfield Estate in Cork. The original auditors to the firm were a firm named O'Shea Daly but by the end of 1976 the Company was short of capital. After discussions with the Bank to whom they were indebted, a suggestion was made that they should seek advice from the Defendants. The Defendants then became auditors to the Company and remained so at all times material to this action and in addition afforded financial advice. Fundamentally, the request made of the Defendants at the end of 1976 was that Mr. Underwood required a partner in the business who would inject capital into it and to some

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extent assist in its financial control. The activities required of the Defendants by the Company were at all material times carried out by or under the immediate supervision of the third-named Defendant, Mr. Noel Barry.

In February 1977, Mr. Barry communicated with Mr. John R. Sisk who was Managing Director of the Plaintiff company to inquire whether they would be interested in taking a share in the Company.

As a result of that communication, a meeting was arranged in March 1977 which was attended by John R. Sisk, James Headon who was a Director of Sicon Ltd. the Group Controlling Company of the various companies owned by the Sisk group and was a Chartered Accountant and in effect, Financial Adviser and Controller as a Director of Sicon Ltd., by Mr. Albert Underwood and by Mr. Barry.

At that meeting, there was produced by Mr. Barry draft unaudited accounts to November 1976 together with historical financial statements of the Company for the five or six previous years. Various matters were discussed and it was agreed that a further meeting would take place after the Defendants had produced fully detailed accounts for the Company to the 1st of May.

In the meantime, the Plaintiff Company engaged a firm of Consulting Engineers to investigate the quality of the work produced by the Company but no other step was taken by them.

On the 28th March 1977, the Defendants produced, audited accounts of the Company to the 30th November 1976 and their report thereon included the following relevant statements -

"We have obtained all the information and explanations which to the best of our knowledge and belief were necessary for

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the purpose of our audit except that (a) stocks and work in progress at the beginning of the year are as certified by the management and were not physically observed by us, stocks at the end of the year were physically observed by us, (b) closing work in progress includes an amount of £58,178 which is based on the judgment of the Directors, we are unable to express an opinion on its value."

A further meeting was held between the same parties in May 1977 and as a result of the serious qualification in the report of the Auditors to the accounts for the 30.11.1976 it was agreed that the Plaintiff would engage a Quantity Surveyor in their employment to investigate the work-in-progress figures shown by these accounts and that he would receive the cooperation of the management and officers of the Company.

On the 18th July 1977, the Defendants delivered audited accounts for the six months ended 31st May 1977 which had been agreed as being necessary subject to the following qualifications -

- "(a) Work-in-progress at the beginning of the period amounting to £83,178 and at the end of the period amounting to £115,656 is as certified by the management and was not physically observed by us.
- (b) The valuation of opening work in progress amounting to £58,178 and closing work in progress amounting to £115,656 is based on the judgment of the Directors and we are unable to express an opinion on its value."

In the meantime, Mr. Frank O'Flynn, a Building Surveyor in the employment of the Plaintiff commenced early in May 1977 to check on the work-in-progress which was to be included in the accounts being prepared by the Defendants as at 31st May 1977. He visited the main sites of the work in progress which was at the Poolbeg Power Station

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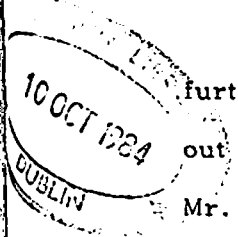
contract and interviewed various officers and servants of the Company. An issue arises on the evidence as to whether he obtained useful and full cooperation from the Company.

It is agreed that at the end of June or beginning of July Mr. Headon complained to Mr. Barry about the absence of cooperation in the investigations being carried out by Mr. O'Flynn.

In September 1977, as the result of a conversation between Mr. John R. Sisk and Mr. Barry, the negotiations then ceased though there is a dispute as to the precise terms in which the break-off in negotiations occurred.

In February 1978 Mr. Barry again contacted Mr. Sisk and a further series of meetings took place. These were almost all carried out between Mr. Barry and Mr. Albert Underwood on the one part and Mr. Sisk and Mr. Headon on the other. At these meetings discussions took place as to the value of the Company and further discussions took place as to the proportion of the issued shares in the Company which should be purchased by the Plaintiffs. It was clearly agreed that the interest in the Company should be purchased by the Plaintiff on the basis of the audited accounts to the 30th November 1977 and that the sale and purchase should be completed at or about the 1st May 1978.

On the 4th May 1978, the completion of the transaction took place in the office of Messrs. Guest Lane & Williams who were acting for Mr. Albert Underwood and his wife, Mary Underwood, who were the vendors. At the completion there attended the two vendors, Mr. Robert Williams, acting for the vendors, Mr. Cormac Daly, Solicitor, acting for the Plaintiff and Mr. John R. Sisk. An agreement in writing was then executed by the vendors and by Mr. John R. Sisk on behalf



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of the Plaintiff which contains two schedules, the first being a typed schedule of the work-in-progress at the 30th November 1977 showing a net figure of claims due in the sum of £79,260. The second schedule consisted of the audited accounts of the Company for the year ended 30th November 1977 issued by the Defendants on 12th April 1978 which contains the following material qualification in the Auditor's report -

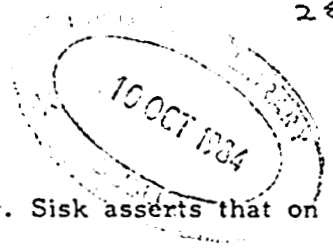
"We have obtained all the information and explanations which to the best of our knowledge and belief were necessary for the purpose of our audit except that stock and work in progress at the beginning and end of the financial period are as certified by the management and have not been physically observed by us."

Immediately after the execution of this agreement, the Plaintiff went into effective control and management of the Company though retaining in accordance with the terms of the agreement the services of Mr. Albert Underwood in the Company. The Company through the summer and autumn of 1978 continued to make heavy losses and after an audit account prepared internally by officers of the Plaintiff and their associated companies an audit and report specifically on the audited accounts as to the 30th November 1977 (which had been prepared by the Defendants) was carried out and prepared by Messrs. Craig Gardner & Company, Auditors and Accountants. The conclusion reached by them was that the work-in-progress figure set out in the accounts for the year ended 30th November 1977 had been over-stated by approximately £180,000. It is not seriously contested that as a result of that over-statement, the Plaintiff suffered loss and damage.

Issues of Fact

The major issues of fact on the evidence before me arose from the following conflicting contentions.

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The Plaintiff through Mr. Headon and Mr. Sisk asserts that on the resumption of negotiations in February 1978 between the Plaintiff and the Company for the purchase of the shares therein that the Defendants through Mr. Barry indicated that they would stand over the work-in-progress figures which were then available in draft unaudited accounts for the year ended 30th November 1977 and would issue an unqualified audited account for that period upon which the Plaintiff could rely and on which the Plaintiff indicated it would rely. It is further asserted that the Defendants never supplied or delivered to the Plaintiff or to any person on its behalf a set of completed audited accounts for the year ended 30th November 1977 containing the Auditor's report and in particular the qualification which I have already quoted until such accounts were delivered during the course of the meeting on the 4th May 1978 in the office of Guest Lane Williams when they were scheduled to the Agreement and were not examined or perused by Mr. John R. Sisk or by anyone on his behalf.

The Defendants through Mr. Barry on the other hand deny that the Plaintiff was given any assurance that they the Defendants would in any way stand over the work-in-progress figures contained in the accounts for the year ended 30th November 1977; that the Plaintiff was to carry out its own investigation of those figures and was to satisfy itself concerning them and further assert that a full and complete set of the audited accounts containing the report and qualification were sent by the Defendants to Mr. Cormac Daly, Solicitor for the Plaintiff, by letter of 12th April 1978 and were thus in the hands of the Plaintiff for some three weeks prior to the execution by it of the agreement of the 4th May 1978.

I am satisfied on the evidence that the major determining force in the decision of the Plaintiff to enter into this agreement with regard

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to the question of the accounts on which it was based was at all material times the opinion and recommendation of Mr. Headon, the Financial Director of Sicon Ltd. It is quite clear to me from the evidence that Mr. John R. Sisk who is an Engineer and not an Accountant by profession and who was involved in the management of the Plaintiff was satisfied to accept the advice and interpretation which Mr. Headon put on the accounts which were placed before him though he, of course, was deeply concerned with the technical and commercial consequences of a take-over.

Mr. Headon in evidence before me stated that if he had been aware of any qualification in the audited accounts of the 30th November 1977 affecting the work-in-progress figure that he would not have recommended the conclusion of any agreement by the Plaintiff and to quote his own words - "that he would have walked away from the deal." He did not seek, as I understood his evidence, to rely upon any distinction between the qualification contained in the Auditor's report of the accounts to the 30th November 1977 and the qualifications which had occurred in the two earlier audited accounts to the 30th November 1976 and 31st May 1977 respectively. Furthermore, Mr. Patrick Blanc, a Senior Partner in Craig Gardner & Co. called as a witness on behalf of the Plaintiff said that from the point of view of an auditor and accountant the meaning and interpretation of the qualification contained in the accounts for the year ended 30th November 1977 with regard to the work-in-progress figures was that they constituted by the auditors and accountants concerned a disclaimer indicating that they were taking no responsibility for those figures.

I therefore conclude that the vital issue of fact which has to be determined in this case is as to whether, as the Plaintiff contends,



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an assurance was given earlier in 1978 that the Defendants would stand over the work-in-progress figure and as they further contend that the qualification contained in the Auditor's report was not brought to their attention prior to the 4th May 1978. The onus of proving these two essential matters being, of course, upon the Plaintiff.

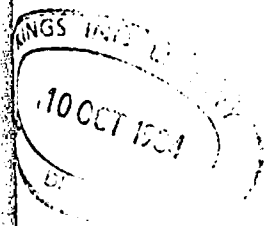
The determination of other issues arising in the case as a result of conflict of the evidence adduced before me becomes important only to the extent of the light such issues may throw on this vital question.

I will deal first with these other issues.

Whether the Company cooperated with the Plaintiff's Surveyor, Frank O'Flynn

I am satisfied on the evidence that the Company did not cooperate with the Plaintiff's surveyor, Frank O'Flynn. It was, I am satisfied, essential for him in order to make any sort of realistic check on the work-in-progress figures that he should have had access to the original figures upon which tender and estimate of profit had been based. These figures were refused to him and in my view he made proper and reasonable applications for them. It is conceded by Mr. Barry on behalf of the Defendants that a complaint about non-cooperation was made to him in the end of June or beginning of July 1977 and I am satisfied on the evidence that no improvement in the situation occurred after that date.

As almost follows from this conclusion, I am also satisfied that in September of 1977 Mr. John R. Sisk on behalf of the Plaintiff broke off the negotiations on the express ground that the Plaintiff was not satisfied with the work-in-progress figures and had not received the cooperation which they might have expected in checking on them.



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Further checking by the Plaintiff after  
September 1977 of the work-in-progress figure

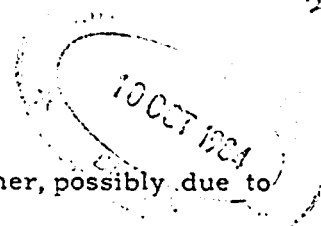
The Defendants asserted that the activities of Mr. O'Flynn and possibly other persons working with him in checking the work-in-progress figure by investigation of the Company's affairs continued after September 1977 and up to closely before 4th May 1978. Having heard the evidence of Mr. O'Flynn and other witnesses, I am quite satisfied that this was not so and that no further checking by him or by any other Quantity Surveyor or Building Surveyor on behalf of the Plaintiff took place after September 1977.

Whether the Plaintiff accountancy staff investigated the accountancy situation and books of the Company between February 1978 and May 1978

Evidence was given on behalf of the Defendants to the effect that various members of the Accountancy staff of the Plaintiff and of Associated Companies spent lengthy periods investigating and examining the books of the Company prior to the 4th May 1978 and in that year. In particular, evidence to that effect was given by Miss Underwood, a daughter of Albert Underwood, who had during that period worked in the office of the Company. Evidence to the like effect though not quite so specific was given by Mr. Albert Underwood whose evidence in this action was taken on commission.

Notwithstanding these very definite assertions of continued presence of identified members of the Accountancy staff of the Plaintiff in the office prior to the 4th May, having heard the officers concerned in the Plaintiff and having carefully listened to their evidence, I am satisfied that the balance of probability must be that no such examination of the accounts of the Company took place prior to the 4th May 1978. It seems to me likely that the two witnesses who gave specific evidence

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of this are transposing for some reason or another, possibly due to a lack of recollection, events which occurred after the making of the purchase agreement and after the entry of persons to manage and control the company to a period prior to the making of the agreement.

Whether the Defendant Noel Barry gave in conversation at meetings in March 1978 a verbal assurance that his firm would stand over the work-in-progress figures and complete an unqualified audited account containing them

The evidence of Mr. Headon on this matter is that at a meeting held in the middle of March 1978 in Cork draft unaudited accounts to the end of November 1977 were available and discussed which contained the work-in-progress figures eventually inserted in the audited accounts forming part of the agreement. During that discussion, he stated that Mr. Barry informed him and Mr. Sisk who was present that acceptance of the liability of clients for these work-in-progress figures was not available in writing but that possibly it was available verbally and that he, Mr. Barry, would accept this from Albert Underwood. Mr. Headon supported his recollection of that by a note made by him some short time afterwards. His evidence, however, went further and stated that Mr. Barry then made it clear and unequivocal that the accounts when eventually audited to the period ended the 30th November 1977 would be wholly without qualification. Mr. Sisk's recollection of this meeting is similar in effect to that of Mr. Headon but less specific as to the words used or as to what was said. I am satisfied, as I have already indicated, that whilst Mr. Sisk is trying to remember to the best of his ability the details of the various transactions that took place to a large extent in regard to accountancy matters, he left those to be the responsibility and special concern of Mr. Headon and this may well explain his failure to recollect the specific words or expressions which he says Mr. Barry used.

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Mr. Barry on the other hand, not only denies the giving of any such assurance but on the contrary specifically states that he pointed out that the checking out of the work-in-progress figures was a matter for the Plaintiff and that they would have to investigate them themselves.

I have found it particularly difficult to resolve this conflict. My conclusions with regard to the failure of Mr. O'Flynn to make a satisfactory check on the work-in-progress figures up to September 1977 and my conclusion that no Accountants on behalf of the Plaintiff investigated the books of the Company prior to the 4th May 1978 make it, in a sense, probable that the Plaintiff would have been anxious for some vouching or authentication of the work-in-progress figures contained in the accounts to the 30th November 1977. To some extent this issue is closely interwoven with the issue as to the form of accounts supplied to the Plaintiff in April 1978 and I will deal with my conclusion on it in dealing with that issue.

Whether the accounts sent by the Defendants to Mr. Cormac Daly, Solicitor, under cover of the letter dated 12th April 1978 were the complete audited accounts to the 30th November 1977 including the Auditor's report with the qualification which I have quoted.

Subsequent to a meeting between the representatives of the Plaintiff, Mr. Barry and Mr. Underwood, at which in substance the terms of the purchase agreement were finalised, the Plaintiff instructed Mr. Cormac Daly as their solicitor and Mr. and Mrs. Underwood instructed Messrs. Guest Lane Williams as their solicitors and the matter was to some extent left in the hands of the two solicitors. At the meeting at which those arrangements were made which was shortly prior to the 12th April 1978, it was agreed that the audited accounts which were practically complete should be sent to Mr. Cormac Daly.

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From his file it is clear that a letter was written to Mr. Cormac Daly and received by him probably on the 13th April 1978 enclosing what were described as the audited accounts for the period ended 30th November 1977. I am satisfied on the evidence that these accounts were brought by Mr. Daly to Mr. Headon and were considered and examined by him. No relevant query was raised either by Mr. Daly or Mr. Headon to the Defendants on those accounts.

Certain correspondence and discussions took place between Mr. Daly and his clients with regard to the format of the agreement and presumably certain correspondence and discussions took place between the two solicitors with regard to the text of it.

The meeting to close the sale took place, as I have indicated, on the 4th May 1978 in the vendor's solicitors office. Unfortunately, one of the persons present at that namely, Mr. Robert Williams, the solicitor for the vendors has since become indisposed and was not available as a witness. The recollection of Mr. Cormac Daly is that on arrival at that meeting, he did not have with him a complete set of the audited accounts for the year ended 30th November 1977 and that it was necessary for Mr. Williams to phone the Defendant's office in Cork and that after some delay a person from that office arrived with both a separate sheet consisting of a list of the work-in-progress which now constitutes the first schedule to that agreement and also with a full and complete set of audited reports bound in a blue cover which forms the second schedule to the agreement as executed. Mr. Daly's recollection was that he discussed with Mr. Sisk the figures contained on the separate sheet forming the first schedule but that he neither investigated nor discussed with Mr. Sisk any figures contained nor in particular the report contained in the bound book of audited accounts. The evidence of Mr. John R. Sisk was that he remembered the meeting, that there was a

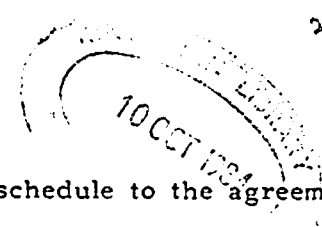
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delay of 20 minutes to half an hour while accounts and other figures were got from the Defendants, that Mr. Robert Williams telephoned the Defendants and that the meeting was in progress and that it was vital that these figures would be available, that Mr. Cormac Daly showed him the schedule of work in progress, that he recognised this as according with figures previously submitted and that after that the agreement was executed. He stated "that these figures were attached and we signed the agreement". His recollection was that he did not look at any other figures, that the rest of the accounts were taken for granted. His impression was at this stage that there were two copies of the agreement and he would expect he had signed two. Mrs. Mary Underwood did not give any evidence in the action and Mr. Albert Underwood could not remember the incidents and details of the meeting of the 4th May 1978 in connection with the arrival of figures in the middle of the meeting or what figures or accounts were brought in.

Mr. Barry Greene, a Chartered Accountant, who in 1978 was employed in the office of the Defendants in Cork, gave evidence that on the 4th May 1978 his instructions were to attend at the Office of the Solicitors where the agreement between the Plaintiff and the Company was being concluded, if Mr. Noel Barry was unable to attend. Mr. Noel Barry was unable to attend and Mr. Greene gave evidence that he did attend and brought with him a single sheet consisting of the schedule of the work-in-progress with regard to the Company, that he brought with him no other document. He stated that he arrived at about 4.30, that he stayed for a very short time and then something was said to him and that he left. That upon his return to his office, he prepared a memorandum as to what he had done in accordance with the instructions received by him and made it available to his superiors. That memorandum, I am satisfied, clearly indicates the bringing by him of a single document consisting of the schedule of the work in progress,

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namely the document which now forms the first schedule to the agreement of the 4th May 1978.

The evidence of Mr. Headon was that it was in July or August of 1978 when the completed audited accounts of the Company up to the 30th November 1977 were for the first time brought to his attention and that he then for the first time observed the qualification contained in the auditor's report on those accounts. He was at that time, I am satisfied, one of the principal persons associated with the Plaintiff who was concerned and, I think, gravely concerned with the performance of the Company in which the Plaintiff had purchased a 75% stake. He was subsequently involved with others in arranging for the investigation of the affairs of that company and in particular, with the request to Messrs. Craig Gardner & Co. to investigate the validity of the figures contained in the audited accounts with regard to work-in-progress for the period ended 30th November 1977.

Upon the receipt of a report from Messrs. Craig Gardner indicating the over-statement in the region of £180,000 of the work-in-progress figures, Mr. Headon with the assistance of Mr. Sisk, compiled a report for the purpose of submitting facts to a solicitor to obtain legal advice. That report was completed on 12th January 1978 and apparently Mr. Headon and Mr. Sisk then brought it to the office of their solicitors. It does not contain any reference to any verbal assurance by Mr. Barry on behalf of the Defendants that the audited accounts to the 30th November 1977 would be unqualified nor does it contain any reference of any description to the failure of the Defendants to supply a complete set of the audited accounts to the 30th November 1977 to the Plaintiff or to any representatives of the Plaintiff prior to the signing of the agreement on the 4th May 1978. Apparently, after discussion with the solicitors, Mr. Headon and Mr. Sisk were requested to amplify

or extend the information containing in this report. This they apparently did and prepared a further similar but more expanded report which does contain a reference to the note made by Mr. Headon of the statement by Mr. Barry that he would accept from Mr. Underwood the verbal acceptance by clients of liability for some of the work-in-progress figures but again contains no reference to the failure of the Defendants to supply a full and complete audited set of reports prior to the execution of the agreement on the 4th May 1978.

In the first report dated 12th January 1978, there is a reference to and analysis of the qualification contained in the Auditor's report on the accounts of the company to the 30th November 1977 which appears wholly inconsistent with the concept that this qualification was not known to Mr. Headon and Mr. Sisk prior to the execution of the agreement. In the more expanded but undated report subsequently prepared, there is a reference to a discussion between Mr. Headon and Mr. Sisk as to the meaning of the qualification on work in progress in the audited accounts for the 30th November 1977 stated in the past tense which seems impliedly to mean that such discussion took place before the final decision to conclude the agreement. The evidence of Mr. Headon and Mr. Sisk was to the affect that it was after the second meeting with their solicitors when the expanded report was discussed that upon completion of the meeting and having left their office, they then for the first time remembered that the Auditor's report on the accounts to the 30th November 1977 had not been supplied to them prior to the execution of the agreement. They apparently discussed this matter with Mr. Daly and he as he carefully stated in his evidence to me having referred to his file and found on it only an extract from these audited accounts starting at Page 3 and containing neither an Auditor's report, a Director's report nor any folding binder and having tried to recollect the events of the



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4th May 1978 in the office of Guest Lane Williams, he came to the conclusion that this was correct.

On all this evidence, I have come to the conclusion, that the probability is that the entire audited accounts including the report of the Auditors and the qualification contained in it were delivered to Mr. Daly on or about the 13th April 1978 and were considered in detail by Mr. Headon after that date and in good time before the conclusion of the purchase on the 4th May 1978. I have come to this conclusion for the following reasons. Having accepted the unsatisfactory nature of the investigations carried out by Mr. O'Flynn in 1977, and accepting the Plaintiff's denial of any investigation of the accounts by their accountancy staff in 1978, I conclude that if the only audited accounts for November 1977 which Mr. Headon had received and considered prior to the execution of this agreement which he was aware was to take place on or about the 1st May 1978 had not contained the Auditor's report that he would immediately have been alerted to that deficiency and would have made enquiries as to the nature of that report and in particular would have sought assurances as to the absence of any qualification from it.

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Furthermore, I find it almost impossible to believe that if in July or August 1978 when the affairs of the Company were clearly in a much less advantageous situation than the Plaintiff and Mr. Headon had expected, he had for the first time, been supplied with a copy of the Auditor's report on the accounts to the 30th November 1977 that he would not have reacted and reacted strongly to the qualification which on his evidence he expected not to be placed in that report. Even if his reaction had not been to the extent of challenging Mr. Barry or some other officer of the Defendant firm with that change, as he asserts it would have been of a fundamental matter, I find it impossible that he could by

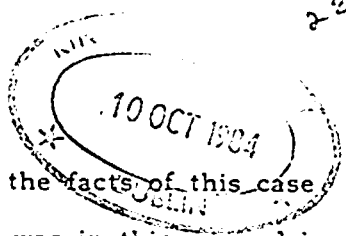
January of 1978 with the increasing problems and developing investigations into the affairs of the Company have failed to remember that striking occurrence in preparing two lengthy reports for the purpose of submitting the matter for legal advice. I am therefore driven to the conclusion that the audited reports complete and in the precise form in which they are now scheduled to the agreement of the 4th May 1978 were delivered to and considered by the officers and advisers of the Plaintiff in good time prior to the 4th May 1978. Having come to that conclusion, I am satisfied that whilst it is probable that Mr. Barry expressed some willingness at a meeting in March 1978 to accept the word of Mr. Underwood concerning the acceptance by clients verbally of sums claimed for work in progress that he did not at any time give to Mr. Headon or to Mr. Sisk an assurance that his firm would be prepared to issue an unqualified Auditor's certificate concerning the work-in-progress figures.

Legal Principles Applicable

I am prepared to accept as correct the Statement of Principal contained in the decision of Reid L.J. in Hedley Byrne & Co. Ltd. -v- Heller and Partners Ltd. 1964 A.C. 465 where at Page 486 speaking of the decision of Haldane L.J. in Derry -v- Peek, he stated as follows -

"He speaks of other special relationships and I can see no logical stopping place short of all those relationships where it is plain that the parties seeking information or advice was trusting the other to exercise such a degree of care as the circumstances required, where it was reasonable for him to do that, and where the other gave the information or advice when he knew or ought to have known that the enquirer was relying on him."

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Applying this Statement of Principal to the facts of this case as I have found them, I have no doubt that it was in this case plain that the Plaintiff who was the party seeking information from the Defendants was trusting the Defendants to exercise such a degree of care as the circumstances required. Furthermore, though the matter was contended, I have no doubt that in those circumstances it was reasonable for the Plaintiff being the prospective purchasers of shares in the Company to trust the Auditors and Accountants appointed to the Company who had also a function in granting financial advice to the Company and were taking an active part in the negotiation for the purchase of shares in it to exercise such care. I cannot see how it would be possible in this case to avoid the further consequential conclusion that the Defendants ought to have known that the Plaintiff as the enquirer was relying on them to exercise that care. This last conclusion, in my view, necessarily flows from the finding which I have made on the facts that the Plaintiff did not, prior to the execution of the agreement on the 4th May 1978, have any opportunity of examining the books or accounts of the Company except in so far as the abortive investigations in 1977 by Mr. O'Flynn, their Building Surveyor, involved some access to those books.

The next issue of law which must necessarily arise is as to the standard of care which was required in the circumstances of the facts as I have found them from the Defendants in this case.

Hedley Byrne -v- Heller was of course a case of a simple enquiry as to the financial stability of a company from the bankers to the company and the facts are significantly different from the facts in this case.

Notwithstanding this difference, however, I would adopt with approval the general principle stated by Reid L.J. in his judgment at Page 486 as follows -

"a reasonable man knowing that he was being trusted or that his skill and judgment were being relied on, would, I think, have three courses open to him. He could keep silent or decline to give the information or advice sought; or he could give an answer with a clear qualification that he accepted no responsibility for it or that it was given without that reflection or enquiry which a careful answer would require; or he could simply answer without such qualification. If he chooses to adopt the last course, he must I think be held to have accepted some responsibility for his answer being given carefully or to have accepted a relationship with the enquirer which requires him to exercise such care as the circumstances require."

I am satisfied on the evidence in this case that no case has been made against the Defendants of negligence, material to the losses which the Plaintiff has suffered other than in respect of the work-in-progress figures. Certain evidence was given critical of the method of the audit and critical of some of the information contained in the working papers leading to the audit which were discovered. None of this, in my view, amounted however to even prima facie evidence of negligence except in respect of the work-in-progress figure.

The evidence of Mr. Blanc to which I have already referred as to the true interpretation of the qualification contained in the Auditor's report on the accounts to the 30th November 1977 to the effect that it means that the Auditors have no responsibility for

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that item which I accept and which is the evidence on this topic adduced on behalf of the Plaintiff seems to me clearly to put the Defendants in the position of having adopted the second course which in the passage which I have quoted Reid L.J. states

"is open to a person knowing that he is being trusted or his skill and judgment is being relied on with regard to an enquiry."

Mr. Blanc did further say in his evidence that in his opinion as an Accountant the qualification was inadequate and it should have been a qualification in the form of a disclaimer, apparently similar to the qualifications which had been contained in the reports attached to the audited accounts to the 30th November 1976 and the 31st May 1977.

I have very carefully considered whether this alteration in the form of qualification could found an action by the Plaintiff.

As already indicated, I have no doubt on the evidence that the question of the accounts and the financial viability of the Company was one which was the prime responsibility of Mr. Headon and that the only other person negotiating on behalf of the Plaintiff and making such recommendations both to the parent company Sicon Ltd. and to the Plaintiff itself as lead to the decision to execute the agreement namely Mr. John R. Sisk, left this question and in particular left the interpretation of the accounts to Mr. Headon. This is strongly confirmed by the fact that on my findings of fact when the audited accounts to the 30th November 1977 complete were received by Mr. Daly, it was to Mr. Headon in Dublin rather than to Mr. Sisk who was immediately available in Cork that he brought them for consideration and discussion. Mr. Headon's evidence, as I have already indicated, was that if he had been aware of any qualification to the accounts of

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the 30th November 1977, he would as it is stated "have walked away from the deal". On this evidence, it seems to me impossible to conclude that the entry by the Plaintiff into this agreement and the losses which they may have suffered as a result of that step could have flowed from the difference between the qualification contained in the accounts to the 30th November 1977 and the qualification contained in the accounts for the previous periods.

In these circumstances, I am satisfied that the Plaintiff's action fails and that the claim must be dismissed.

*approved*  
*J. a. Finlay*  
*31/7/1984.*

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