IN THE SUPREME COURT OF BERMUDA

COMMERCIAL COURT

2005: No. 52

BETWEEN:

ANN H. WOMER BENJAMIN
Superintendent of the Ohio Department of Insurance and her successors in office in her capacity as Liquidator of Credit General Insurance and Credit General Indemnity Company (in Liquidation)

Plaintiff

-and-

KPMG BERMUDA
(a firm)

First Defendant

-and-

KPMG BARBADOS
(a firm)

Second Defendant

RULING

Date of hearing: March 5-6, 2007
Date of Ruling: March 12, 2007

Mr. Paul Harshaw, Lynda Milligan-Whyte & Associates,
for the Plaintiff
Mr. Narinder K. Hargun, Conyers Dill & Pearman, for the Respondent

Introductory

1. By Summons dated October 24, 2006, the Defendants applied to strike-out the Amended Statement of Claim ("ASC") herein on the following principal grounds: (a) there is no sustainable plea of duty of care, (b) breach of duty is not adequately pleaded, and (c) there is no sustainable plea on causation of loss.

2. The Plaintiff is the Liquidator of two insolvent Ohio insurers ("the reinsureds"), who were reinsured by three captive insurers incorporated in Barbados, all of

whom were audited by the Second Defendant with substantial assistance from the First Defendant.

3. The Plaintiff claims that because the Defendants knew or ought to have known that their clients would pass on their audit reports to the reinsureds who would rely upon them for regulatory and other purposes, the Defendants owed not only their clients but also the reinsureds a duty of care which was breached when they provided an unqualified report for the 1998 year when the captives were in fact insolvent.

4. The Defendants contend most importantly that the pleaded case discloses no reasonable cause of action because, assuming the pleaded allegations to be true, no duty of care in respect of negligent misstatements can be found to exist as a matter of law.

5. The Plaintiff invited the Court to decline to strike-out at this stage on the grounds that this area of the law was evolving and it was impossible to fairly assess the viability of the claim in isolation from the evidence. The Plaintiff's fall-back position was to ask the Court to grant leave to re-amend.

Strike-out principles

6. The Defendants relied on the case of *Guang Xin Enterprises Ltd. –v- Kwan Wong Tan & Fong*[2002] 2 HKLRD 319 in support of the approach to be taken in relation to their present application. I found particularly relevant paragraph 10 of the judgment of Deputy Judge Tong, who cited with approval the judgment of Browne-Wilkinson V-C (as he then was) in *Lonrho Plc-v-Tebbit* 1991] 4 All ER 973 at p. 979F. The fact that the Court should be cautious about striking-out a claim based on the pleadings and resolving complicated questions of law, in an area of the law which is developing, before the facts are known was, in reality, common ground. This same principle was also articulated, perhaps in slightly more strident terms, in the Plaintiff's authority of *Electra Private Equity Partners et al v. KPMG Peat Marwick* [2001] BCLC 589, per Auld LJ at 613-614.

7. Obviously, the dominant principle is that the Plaintiff's claim should only be struck-out altogether in plain and obvious cases, and all reasonable opportunities to cure what is merely a defectively drafted pleading ought to be afforded to the Plaintiff. I took the broad-brush approach that the application fundamentally turned on the merits of the duty of care issue, and that it was only if this fundamental element of the claim was shown to be legally untenable, and obviously so, that the strike-out application should be acceded to at this stage. The no actionable loss point was a related legal viability point, which on the facts of the present case stood or fell with the duty of care issue.

8. The breach of duty point was a pleadings point, which could potentially be cured by way of amendment. However, after hearing Mr. Harshaw and having regard to his proposed amendments, it seemed clear to me that, to some extent at least, the breach of duty defects complained of were curable. Mr. Hargun conceded that his limitation complaint was peripheral to the main grounds upon which the strike-out application was based.

The Amended Statement of Claim and the Existence of a Duty of Care Issue

9. The case against the First Defendant is pleaded in the ASC as follows. The Second Defendant was contracted by the captives as auditor under Barbados law governed agreements ("the Agreements") and the First Defendant performed most of the audit work, being engaged so to do by the captives under Bermuda law

(paragraph 12). It is then alleged that the Defendants reported on the captives' financial statements and/or gave consulting advice (paragraphs 14, 31).

10. The duty of care to the Plaintiffs is pleaded almost nonchalantly in paragraph 12 as follows:

> "*Nevertheless, the Second Defendant owed all of the duties and obligations to the Captives and others, including CGIC and/or CGIND* [i.e. the Plaintiffs], *that an auditor owes to such people by virtue of the Agreements, as a matter of Barbados law. The First Defendant owed a duty of care in carrying out the audit work to the Captives and others, including CGIC and/or CGIND* [i.e. the Plaintiffs] *that a person doing such work and holding themselves out as competent to do so owes to such people, as a matter of Bermuda law.*

11. So the dominant double-barrelled assertion is that the Second Defendant owes a duty of care not just to the captives by virtue of being engaged by them as their auditor, but also to the Plaintiffs as well. The same plea is made as regards the First Defendant in respect of the work done in Bermuda in substantial fulfilment of the Second Defendant's contractual audit obligations. The scope of the duty of care is also said to be the same as regards both the captives and the Plaintiffs (paragraphs 19, 33). But what is controversial is whether a sustainable case on the existence of a duty is pleaded. So what other matters are relied upon as giving rise to this duty of care to the Plaintiffs? The following central allegations are made as regards the First Defendant in paragraphs 24-26, and substantially repeated as regards the Second Defendant in paragraphs 41-43 of the ASC:

> "*24. The First Defendant was aware or ought to have been aware, and it was foreseeable by it, that the Audited Financial Statements it prepared were to be provided to other companies such as CGIC and CGIND (as counterparties) within the PIGI group of companies. Moreover, the First Defendant was or ought to have been aware, and it was foreseeable by it, that the audits were in fact performed for the benefit (among others) of CGIC and/ or CGIND as the primary counterparties to the Reinsurance Agreements issued by the Captives.*
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> *25. The First Defendant was aware or ought to have been aware, and it was foreseeable by it, that the Captives intended to supply the Audited Financial Statements opined on and certified as fair and prepared in accordance with GAAP by the Second Defendant to CGIC and CGIND for their use, including the filing of required audited financial information with the Ohio Department of Insurance. The First Defendant knew or ought to have known that CGIC and/ or CGIND would rely on the Audited Financial Statements to continue the Reinsurance Agreements and relationships with the Captives.*

26. *The First Defendant also foresaw or ought to have foreseen that the Ohio Department of Insurance would directly or indirectly rely upon the Audited Financial Statements in the course of its regulation of CGIC and CGIND.*"

12. The duty of care on the part of the captives' auditors to the reinsureds is said to arise because (a) they were or ought to have been aware that the audited financial statements would be supplied to the Plaintiffs for their use, including for filing with the Ohio Department of Insurance, and (b) the Defendants knew or ought to have known that the Plaintiffs (and the Department) would rely on the audited financial statements in deciding on whether to continue the Reinsurance Agreements. In addition it is averred that (c) the Defendants were aware or ought to have been aware "*that the audits were in fact performed for the benefit (among others) of CGIC and/ or CGIND as the primary counterparties to the Reinsurance Agreements issued by the Captives.*"

13. This third averment is perhaps the only allegation which appears to make a case that the Defendants in carrying out the audit work for their paying and contracted clients was also providing a gratuitous service of "*benefit*" to the Plaintiff companies. But it is neither expressly nor impliedly alleged that either (i) the Plaintiff companies did not have recourse to independent financial advice of their own in assessing the veracity of the captives' financial position, or (ii) that the Defendants knew or ought to have known that their audit work product prepared on behalf of their clients was going to be relied on by the Plaintiff companies without independent verification. It is not even alleged that in performing the audits additional work not required by their auditing obligations was performed solely for the Plaintiff companies' benefit.

14. Accordingly, it is essentially alleged that the Defendant's performance of various audits for their clients gave rise to a duty of care to the reinsured companies because the auditors knew that the financial reports they prepared for the captives would be passed on by their clients to the reinsureds and would be utilized by the reinsurers for their own financial purposes. The Plaintiff's case, therefore, leads to the logical conclusion that, at common law at least, every auditor of a captive insurance company or reinsurer owes a duty of care to their clients' insureds/reinsureds and/or its creditors by virtue of accepting an appointment as the insurer's auditor.

Legal Findings: Principles governing when auditors may owe a duty of care in torts to persons other than their clients

15. When a duty of care may arise for a professional person working under a contract towards third parties is, to some extent, primarily a question of judgment to be determined on the facts of each case. It may also be true that this area of the law is, to some extent as well, in a continuing state of development. However, the guiding principles are essentially settled and clear. Were this not to be the case, auditors would be unable to obtain professional indemnity insurance because their level of potential liability would be wholly incapable of quantification.

16. Mr. Hargun in his comprehensive Written Submissions cogently articulated the policy rationale underlying the distinction between the circumstances under which a duty of care comes into existence in relation to torts causing physical damage (foreseeability of harm is the main requirement) and negligent statements or advice (foreseeability of harm is not sufficient). In the former case the class of potential plaintiffs and the scale of potential liability will almost invariably be circumscribed by the nature of the negligent act. The driver of a car can readily comprehend the risks in liability and quantum terms of colliding with other

vehicles. An auditor who negligently certifies a company to be insolvent cannot readily comprehend the level of liability to which he is potentially exposed if he is liable for all loss suffered by any third party who might be expected to have access to his client's accounts. The Defendant's Counsel submitted that the modern law on tortious liability for negligent statements was derived from the famous judgment of Chief Judge Cardoza in the New York Court of Appeals decision in *Ultramares Corporation-v-George A,. Touche* (1931) 255 N.Y. 170.

17. Mr. Harshaw legitimately relied upon what appears to be the most recent House of Lords case dealing with this area of the law, *Customs and Excise Commissioners –v Barclays Bank plc* [2006] 4 All ER 256, and the following passage from the speech of Lord Bingham, which merits reproduction in full:

> "**The test of tortious liability in negligence for pure financial loss**
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> *4. The parties were agreed that the authorities disclose three tests which have been used in deciding whether a defendant sued as causing pure economic loss to a claimant owed him a duty of care in tort. The first is whether the defendant assumed responsibility for what he said and did vis-à-vis the claimant, or is to be treated by the law as having done so. The second is commonly known as the threefold test: whether loss to the claimant was a reasonably foreseeable consequence of what the defendant did or failed to do; whether the relationship between the parties was one of sufficient proximity; and whether in all the circumstances it is fair, just and reasonable to impose a duty of care on the defendant towards the claimant (what Kirby J in Perre v Apand Pty Ltd [1999] HCA 36, (1999) 198 CLR 180, para 259, succinctly labelled "policy"). Third is the incremental test, based on the observation of Brennan J in Sutherland Shire Council v Heyman (1985) 157 CLR 424, 481, approved by Lord Bridge of Harwich in Caparo Industries Plc v Dickman [1990] 2 AC 605, 618, that*
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> > *'It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinable 'considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed'.*
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> *Mr Brindle QC for the Bank contended that the assumption of responsibility test was most appropriately applied to this case, and that if applied it showed that the Bank owed no duty of care to the Commissioners on the present facts. But if it was appropriate to apply either of the other tests the same result was achieved. Mr Sales for the Commissioners submitted that the threefold test was appropriate here, and that if applied it showed that a duty of care was owed. But if it was appropriate to apply either of the other tests they showed the same thing. In support of their competing submissions counsel made detailed reference to the leading authorities including Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] AC 465; Ministry of Housing and Local Government v Sharp [1970] 2 QB 223; Smith v Eric S Bush [1990] 1 AC 831; Caparo Industries Plc v Dickman [1990] 2 AC 605; Henderson v Merrett Syndicates Ltd [1995] 2 AC 145; White v Jones [1995] 2 AC 207; Spring v Guardian Assurance Plc [1995] 2 AC 296; Williams v Natural Life Health Foods Ltd [1998] 1 WLR 830; and Phelps v Hillingdon London Borough Council [2001] 2 AC 619. These authorities yield many valuable insights, but they contain statements which cannot readily be reconciled. I intend no*

discourtesy to counsel in declining to embark on yet another exegesis of these well-known texts. I content myself at this stage with five general observations. First, there are cases in which one party can accurately be said to have assumed responsibility for what is said or done to another, the paradigm situation being a relationship having all the indicia of contract save consideration. Hedley Byrne would, but for the express disclaimer, have been such a case. White v Jones and Henderson v Merrett, although the relationship was more remote, can be seen as analogous. Thus, like Colman J (whose methodology was commended by Paul Mitchell and Charles Mitchell, "Negligence Liability for Pure Economic Loss (2005) 121 LQR 194, 199), I think it is correct to regard an assumption of responsibility as a sufficient but not a necessary condition of liability, a first test which, if answered positively, may obviate the need for further enquiry. If answered negatively, further consideration is called for.

5. Secondly, however, it is clear that the assumption of responsibility test is to be applied objectively (Henderson v Merrett, p 181) and is not answered by consideration of what the defendant thought or intended. Thus Lord Griffiths said in Smith v Bush, p 862, that

> *'The phrase 'assumption of responsibility' can only have any real meaning if it is understood as referring to the circumstances in which the law will deem the maker of the statement to have assumed responsibility to the person who acts upon the advice.'*

Lord Oliver of Aylmerton, in Caparo v Dickman, p 637, thought 'voluntary assumption of responsibility'

> *'a convenient phrase but it is clear that it was not intended to be a test for the existence of the duty for, on analysis, it means no more than that the act of the defendant in making the statement or tendering the advice was voluntary and that the law attributes to it an assumption of responsibility if the statement or advice is inaccurate and is acted upon. It tells us nothing about the circumstances from which such attribution arises.'*

In similar vein, Lord Slynn of Hadley in Phelps v Hillingdon, p 654, observed:

> *'It is sometimes said that there has to be an assumption of responsibility by the person concerned. That phrase can be misleading in that it can suggest that the professional person must knowingly and deliberately accept responsibility. It is, however, clear that the test is an objective one: Henderson v Merrett Syndicates Ltd [1995] 2 AC 145, 181. The phrase means simply that the law recognises that there is a duty of care. It is not so much that responsibility is assumed as that it is recognised or imposed by law.'*

The problem here is, as I see it, that the further this test is removed from the actions and intentions of the actual defendant, and the more notional the assumption of responsibility becomes, the less difference there is between this test and the threefold test.

6. Thirdly, the threefold test itself provides no straightforward answer to the vexed question whether or not, in a novel situation, a

party owes a duty of care. In Caparo v Dickman, p 618, Lord Bridge, having set out the ingredients of the threefold test, acknowledged as much:

> *'But it is implicit in the passages referred to that the concepts of proximity and fairness embodied in these additional ingredients are not susceptible of any such precise definition as would be necessary to give them utility as practical tests, but amount in effect to little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognises pragmatically as giving rise to a duty of care of a given scope. Whilst recognising, of course, the importance of the underlying general principles common to the whole field of negligence, I think the law has now moved in the direction of attaching greater significance to the more traditional categorisation of distinct and recognisable situations as guides to the existence, the scope and the limits of the varied duties of care which the law imposes.'*

Lord Roskill made the same point in the same case at p 628:

> > *'I agree with your Lordships that it has now to be accepted that there is no simple formula or touchstone to which recourse can be had in order to provide in every case a ready answer to the questions whether, given certain facts, the law will or will not impose liability for negligence or in cases where such liability can be shown to exist, determine the extent of that liability. Phrases such as 'foreseeability', 'proximity', 'neighbourhood', 'just and reasonable', 'fairness', 'voluntary acceptance of risk', or 'voluntary assumption of responsibility' will be found used from time to time in the different cases. But, as your Lordships have said, such phrases are not precise definitions. At best they are but labels or phrases descriptive of the very different factual situations which can exist in particular cases and which must be carefully examined in each case before it can be pragmatically determined whether a duty of care exists and, if so, what is the scope and extent of that duty. If this conclusion involves a return to the traditional categorisation of cases as pointing to the existence and scope of any duty of care, as my noble and learned friend Lord Bridge of Harwich suggests, I think this is infinitely preferable to recourse to somewhat wide generalisations which leave their practical application matters of difficulty and uncertainty.*

7. Fourthly, I incline to agree with the view expressed by the Messrs Mitchell in their article cited above, p 199, that the incremental test is of little value as a test in itself, and is only helpful when used in combination with a test or principle which identifies the legally significant features of a situation. The closer the facts of the case in issue to those of a case in which a duty of care has been held to exist, the readier a court will be, on the approach of Brennan J adopted in Caparo v Dickman, to find that there has been an assumption of responsibility or that the

proximity and policy conditions of the threefold test are satisfied. The converse is also true.

8. Fifthly, it seems to me that the outcomes (or majority outcomes) of the leading cases cited above are in every or almost every instance sensible and just, irrespective of the test applied to achieve that outcome. This is not to disparage the value of and need for a test of liability in tortious negligence, which any law of tort must propound if it is not to become a morass of single instances. But it does in my opinion concentrate attention on the detailed circumstances of the particular case and the particular relationship between the parties in the context of their legal and factual situation as a whole."

18. So one recognised test requires the Court to ask the broad question of whether, objectively viewed, the Defendants may arguably be said to have accepted responsibility to the Plaintiffs assuming all the allegations in the ASC are proved. Another recognised test requires the Court to address three issues: (a) is the loss complained of reasonably foreseeable, (b) is the relationship between the parties sufficiently proximate, and (c) is it just and reasonable to hold that a duty should be owed? It seems to me that the threefold test represents a more detailed exposition of the elements of which the first broad test is comprised. Which factors carry greater or less weight will depend on the facts of a particular case. However, as Lord Bingham and other luminaries have pointed out, the closer the facts of a case are to a scenario in which a duty of care has been found to exist, the easier it should be to persuade a court on an incremental basis to find for a plaintiff. And the corollary is that the more far removed a factual scenario is from established categories where a duty of care has been held to exist, the more difficult it will be to establish the existence of a duty of care.

19. In the present case it is in my view at least arguable that it was foreseeable by the Defendants that the loss complained of would be suffered by the Plaintiff companies, assuming they were likely to rely (without independent verification) on the audited reports in the context of the reinsurance relationship in which they were involved. It is at least arguable, that the requirement that the document be relied upon by the third party for the purposes of a single transaction would be legally met by proof that the reinsurance contracts might not have been renewed for the 1999 year if the captives had been certified as being insolvent for the 1999 year.

20. The crucial question to my mind is whether the Defendants on the pleaded case may be said to have assumed responsibility to the Plaintiffs, or (to put it another way), whether (a) the damage complained of is reasonably foreseeable, (b) whether a sufficient relationship of proximity exists between the parties and (c) whether it is just and reasonable in policy terms to hold that a duty of care exists in the pleaded circumstances. Issues (a) and (b) are closely intertwined in the particular circumstances of the present case, and are the determinative factors in the present case.

21. One fundamental principle, extracted from the case of *Caparo plc-v- Dickson* [1990] 2 A.C. 605 on which Mr. Hargun relied, I consider to be of pivotal importance in this regard. The central inquiry entails determining whether responsibility has been assumed by a professional who makes a report to a client which he knows or ought to know will likely be relied upon by a third party. This involves clarifying what quality of reliance is alleged to have been actually placed on the relevant information and/or was contemplated by the Defendants, a factor which is inextricably intertwined with the issue of whether the loss complained of was itself foreseeable. If the requisite type of reliance was not itself foreseeable, the loss flowing from such reliance would not be foreseeable, and this element of the claim would not be made out. If the requisite form of reliance was not in fact placed on the information supplied to the third party and/or not contemplated by

the advisor in any event, insufficient proximity between the parties would exist to justify holding that a duty of care was voluntarily assumed.

22. The term "*reliance*" is often bandied about without any explicit articulation of the precise meaning of the word in the present legal context. The law has never simply required bare reliance, but rather actual reliance without an opportunity to receive independent advice. Lord Oliver's speech (at pages 638-641 in the *Capararo* case) elucidates what is meant by knowledge of a third party's reliance on the negligent statements in this context. He states:

> "*The most recent authority on negligent misstatement in this House…does not , I think, justify any broader proposition than that already set out, save that they make it clear that* **the absence of a positive intention that the advice shall be acted upon by anyone other than the immediate recipient**-*indeed an expressed intention that it shall not be acted upon by anyone else*-**cannot prevail against actual or presumed knowledge that it is in fact likely to be relied upon in a particular transaction without independent verification.**" [1] [emphasis added]

23. So the absence of proof of a subjective intention on the Defendants' part that their audits be relied upon by the Plaintiff companies is not fatal to their claim. But if they do not allege that the Defendants consciously intended that the reinsureds should rely on their audits rendered to the captives, they must allege actual or constructive knowledge on the Defendants' part that the audit work was "*in fact likely to be relied upon in a particular transaction without independent verification.***"** Lord Oliver in *Caparo* also cited with approval the following dictum of Lord Jauncey in *Smith-v-Eric S. Bush* [1990] 1 A.C. 831at 871-872 in explaining what the defining parameters of the terrain which will give rise to a duty of care are:

> "*Finally, in relation to the* Smith *appeal, Lord Jauncey of Tullichettle observed, at p. 871-872:*
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> > *'The four critical facts are that the appellants knew from the outset: (1) that the report would be shown to Mrs. Smith; (2) that Mrs. Smith would probably rely on the valuation contained therein in deciding whether to buy the house without obtaining an independent valuation; (3) that if, in these circumstances, the valuation was, having regard to the actual condition of the house, excessive, Mrs. Smith would be likely to suffer loss; and (4) that she had paid the building society a sum to defray the appellants' fee. In the light of this knowledge the appellants could have declined to act for the building society, but they chose to proceed. In these circumstances they must be taken not only to have assumed contractual obligations towards the building society but delictual obligations towards Mrs. Smith, whereby they became under a duty towards her to carry out their work with reasonable care and skill.* **It is critical to this conclusion that the appellants knew that Mrs. Smith would be likely to rely on the valuation without obtaining independent advice**. *In both Candler v. Crane, Christmas & Co . [1951] 2 K.B. 164 and Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd . [1964] A.C. 465, the provider of the information was the obvious and most easily available, if not the only available, source of that information. It would not be difficult therefore to conclude that the person who sought such information was likely to rely upon it. In the case of an intending mortgagor the position is very different since, financial considerations apart, there is likely to be available to him a wide choice of sources of information, to wit, independent valuers to*

[1] At 638H-639A.

> *whom he can resort, in addition to the valuer acting for the mortgagee.* **I would not therefore conclude that the mere fact that a mortgagee's valuer knows that his valuation will be shown to an intending mortgagor of itself imposes upon him a duty of care to the mortgagor. Knowledge, actual or implied, of the mortgagor's likely reliance upon the valuation must be brought home to him. Such knowledge may be fairly readily implied in relation to a potential mortgagor seeking to enter the lower end of the housing market but non constat that such ready implication would arise in the case of a purchase of an expensive property whether residential or commercial**.' **"** [emphasis added]

24. This analysis is fortified by reference to three authorities which were not referred to in argument. Firstly, reliance in this limited and special sense may not be needed in cases where negligence results in both economic and physical damage. As Lord Denning pointed out in *Dutton-v- Bognor Regis UDC* [1972] QB 374 at 395 :

> "*Mr. Tapp made a strong point here about reliance. He said that even if the inspector was under a duty of care, he owed that duty only to those who he knew would rely on this advice - and who did rely on it - and not to those who did not. He said that Mrs. Dutton did not rely on the inspector and, therefore, he owed her no duty.*
>
> *It is at this point that I must draw a distinction between the several categories of professional men. I can well see that in the case of a professional man who gives advice on financial or property matters - such as a banker, a lawyer or an accountant - his duty is only to those who rely on him and suffer financial loss in consequence. But in the case of a professional man who gives advice on the safety of buildings, or machines, or material, his duty is to all those who may suffer injury in case his advice is bad.*"

25. Secondly, in the negligent advice context, the Judicial Committee of the Privy Council, in the early days of the development of the law relating to tortious liability for negligent misstatement, took a narrower view which is still consistent with the more modern authorities referred to by Counsel in the present case. In *Mutual Life and Citizens Assurance Co. Ltd. -v-Evatt* [1971] A.C. 793 at 804 , the sort of circumstances which would give rise to a duty of care in tort where no contractual relationship existed was described by Lord Diplock (on behalf of the majority) as follows:

> "*In our judgment when an enquirer consults a business man in the course of his business and makes it plain to him that he is seeking considered advice and intends to act on it in a particular way, any reasonable business man would realise that, if he chooses to give advice without any warning or qualification, he is putting himself under a moral obligation to take some care. It appears to us to be well within the principles established by the Hedley Byrne case to regard his action in giving such advice as creating a special relationship between him and the enquirer and to translate his moral obligation into a legal obligation to take such care as is reasonable in the whole circumstances."*

25. The importance of reliance as an essential ingredient for the creation of a duty of care being owed by an adviser to someone other than his contracted client is even more clearly and concisely articulated in Lord Denning's Judgment in the *Dutton-v-Bognor Regis U.D.C.* case as follows:

> "*Nowadays since Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. [1964] A.C. 465 it is clear that a professional man who gives guidance to others owes a duty of care, not only to the client who employs him, but also to another who he knows is relying on his skill to save him from harm. It is certain that a banker or accountant is under such a duty. And I see no reason why a solicitor is not likewise. The essence of this proposition, however, is the* reliance. *In* Hedley Byrne v. Heller *it was stressed by Lord Reid at p. 486, by Lord Morris of Borth-y-Gest at pp. 502-503, and by Lord Hodson at p. 514. The professional man must know that the other is* relying *on his skill and the other must in fact rely on it*."[2]

26. And thirdly, it appears that Parliament has further narrowed the common law reliance doctrine in relation to audit work carried out in Bermuda. While this statutory limitation of liability would not strictly come into play when a Bermudian accounting firm is doing audit work for an overseas company or non-audit work, it does reflect a clear public policy shift towards restricting the scope of liability for negligent advice in relation to claims advanced by non-clients. At the very least, it gives further credence to regarding the issue of reliance as a pivotal consideration when considering a common law claim based on a duty of care said to be owed to a non-client in the auditing context. If the First Defendant had been appointed as the auditor of a Bermudian company, the following provisions of section 90(3A) of the Companies Act 1981 would come into play:

> "*No action shall lie against an auditor in the performance of any function as an auditor contemplated by this Act except in the instance of-*
>
> *(a) the company who engaged the auditor to perform such function; or*
> *(b) any other person expressly authorized by the auditor to rely on his work."*

27. The claim against the Second Defendant is grounded in Barbados law. Section 154(1) of the Companies Act CAP 308 (2001 revision) provides that "*an individual is not qualified to be an auditor of a company unless he is independent of the company, its affiliated companies, and the directors and officers of the company.*"[3] This strongly suggests that an auditor of the Barbadian captives is by law required to act solely for the company he is auditing. Section 147(1)(b) of the same Act requires the directors to place the auditor's report together with the company's financial statements before the annual general meeting. The auditor's duties in complying with these reporting obligations imposed on the company are spelt out in section 164 as follows:

> *"164. (1) An auditor of a company must make the examination that is in his opinion necessary to enable him to report in the prescribed manner on the financial statements required by this Act to be placed before the shareholders, except such financial statements or parts thereof that relate to the immediately preceding financial year referred to in subparagraph (ii) of paragraph (a) of subsection (1) of section 147.*
>
> *(2) Notwithstanding section 165, an auditor of a company may reasonably rely upon the report of an auditor of a body corporate or an unincorporated business the accounts of which are included in whole or in part in the financial statements of the company.*

[2] [1972] QB 374 at 394-395.
[3] Section 89(8) of the Companies Act 1981 is the counterpart Bermudian provision. Section 90 (3) of the same Act expressly provides that "*the auditor shall make a report to the members.*"

(3) For the purpose of subsection (2) reasonableness is a question of fact.

(4) Subsection (2) applies whether or not the financial statements of the holding company reported upon by the auditor are in consolidated form."

28. So the audit work that the Second Defendant was contracted to perform under Barbados law with the First Defendant's assistance, was in fulfilment of a statutory duty to report to the captives' shareholders in general meeting. This supports the view that it is inherently illogical to contend that the compliance with such express statutory duties, without more, gave rise to a duty of care to third parties who would likely receive the accounts and rely upon them for wholly different purposes. Section 164 of the Barbados Companies Act is also instructive in explicitly stating that a Barbados auditor may rely on the audited accounts of an affiliated company where it is reasonable to do so. The effect of this provision appears to be that if the auditor of company A is negligent in relying on an affiliate company B's account, and causes company A loss which is itself reasonably foreseeable, the auditor of company A will be liable to his own client in negligence. This provision is not designed to create a duty of care owed by the auditors of company B to company A in the event that its own auditors deem it reasonable to rely on the audit performed in respect of company B.

29. All of this is simply additional general support for the central analysis of the applicable law which was fully canvassed in argument, although it would constitute policy grounds for holding, assuming my primary finding is wrong and a duty of care did prima facie exist, that it plainly would not be fair and reasonable to hold that a duty of care exists in the pleaded circumstances. But, in my judgment, the fact that an auditor knows that his counterparts in an affiliated company may choose to rely on reports he prepares for his own clients in compliance with statutory requirements cannot form the basis of a sustainable plea of reliance in the sense that the law requires for the creation of a duty of care in this specific context. As Lord Oliver observed in *Caparo*, having analysed the statutory function of the auditor under English law:

"As I have already mentioned, it is almost always foreseeable that someone, somewhere and in some circumstances, may choose to alter his position upon the faith of the accuracy of a statement or report which comes to his attention and it is always foreseeable that a report - even a confidential report - may come to be communicated to persons other than the original or intended recipient. To apply as a test of liability only the foreseeability of possible damage without some further control would be to create a liability wholly indefinite in area, duration and amount and would open up a limitless vista of uninsurable risk for the professional man.

On the basis of the pleaded case, as amended, it has to be assumed that the appellants, as experienced accountants, were aware or should have been aware that Fidelity's results made it vulnerable to take-over bids and that they knew or ought to have known that a potential bidder might well rely upon the published accounts in determining whether to acquire shares in the market and to make a bid. It is not, however, suggested that the appellants, in certifying the accounts, or Parliament, in providing for such certification, did so for the purpose of assisting those who might be minded to profit from dealings in the company's shares. The respondents, whilst accepting that it is no part of the purpose of the preparation, certification and publication of the accounts of a public company to provide information for the guidance of predators in the market, nevertheless argue that the appellants' knowledge that predators

might well rely upon the accounts for this purpose sufficiently establishes between them and potential bidders that relationship of "proximity" which founds liability. On the face of it, this submission appears to equate "proximity" with mere foreseeability and to rely upon the very misinterpretation of the effect of the decision of this House in the Anns case [1978] A.C. 728 which was decisively rejected in the Governors of Peabody Donation Fund v. Sir Lindsay Parkinson & Co. Ltd . [1985] A.C. 210 and in Yuen Kun Yeu v. Attorney-General of Hong Kong [1988] A.C. 175."

30. At the end of the hearing, I afforded Mr. Harshaw the opportunity to locate an authority illustrating a situation in which an auditor was held to owe a duty of care to a third party in circumstances where it was not alleged that the third party had no access to independent legal advice. To his immense credit, and no doubt after extensive researches, he produced the Court the case of *Haig-v- Bamford* (1976) 72 D.L.R. (3d) 68, a decision of the Supreme Court of Canada. This decision, from a most eminent tribunal, is seemingly inconsistent with the English authority referred to above in that a duty of care was found to exist in circumstances where the third party investor, an "*experienced businessman*", might well have been expected to have access to independent advice.

31. There is no difficulty in distinguishing this case from those upon which I rely on two important grounds. Firstly, and most importantly, the audit in *Bamford* was not a statutory audit prepared for the company's shareholders, but an audit prepared at the request of the client for the specific purpose of attracting investment. The "*statements were required primarily for these third parties and only incidentally for use by the company*"[4]. In a more recent case, the Supreme Court of Canada has held that no duty of care exists towards individual shareholders, as distinct from the company and shareholders as a collective body, when audited financial statements are prepared for statutory purposes: *Hercules Managements Ltd.-v-Ernst & Young* [1997] 2 S.C.R. 165. The Canadian approach seemingly departs from the English approach in only considering whether it would reasonable for the recipient of the audited reports to rely upon them as a secondary policy consideration, holding that a duty of care *prima facie* exists if it is reasonably foreseeable that the recipient may in fact rely on the reports. But the following conclusion, which applies with greater force to the claims of the reinsureds in the present case, was reached by La Forest J (who gave the unanimous Judgment of the Court) in any event:

> "*56 As I have already explained, the purpose for which the audit reports were prepared in this case was the standard statutory one of allowing shareholders, as a group, to supervise management and to take decisions with respect to matters concerning the proper overall administration of the corporations. In other words, it was, as Lord Oliver and Farley J. found in the cases cited above, to permit the shareholders to exercise their role, as a class, of overseeing the corporations' affairs at their annual general meetings. The purpose of providing the auditors' reports to the appellants, then, may ultimately be said to have been a "collective" one; that is, it was aimed not at protecting the interests of individual shareholders but rather at enabling the shareholders, acting as a group, to safeguard the interests of the corporations themselves. On the appellants' argument, however, the purpose to which the 1980-82 reports were ostensibly put was not that of allowing the shareholders as a class to take decisions in respect of the overall running of the corporation, but rather to allow them, as individuals, to monitor management so as to oversee and protect their own personal investments. Indeed, the nature of the appellants' claims (i.e. personal tort claims) requires that they assert reliance on the auditors' reports qua individual shareholders if they are to recover any personal damages. In so far as it must concern the interests of each individual shareholder, then, the*

[4] At pages 78-79

> *appellants' claim in this regard can really be no different from the other "investment purposes" discussed above, in respect of which the respondents owe no duty of care.*"

32. Secondly, and only slightly less importantly, the reliance issue did not form the subject of argument in *Bamford*, so there was no conscious decision by the Canadian Supreme Court to depart from the English approach on this topic, which latter approach I consider to be more persuasive. From the later Supreme Court of Canada decision of *Hercules Managements Ltd.*, however, it does seem that in Canada a different theoretical path has been followed, albeit one which ultimately reaches the same conclusion. It now appears to be settled law in Canada that the mere issuance of statutory audited financial statements does not give rise to a duty of care to anybody other than the company and the general body of shareholders for him the audit report is prepared. This is the position regardless of the fact that the auditors can reasonably foresee that other persons may place reliance on their reports for their own private purposes.

Findings: Extent to which Court may take judicial notice of captive insurance practice

33. Mr. Hargun also submitted that the Commercial Court could take judicial notice of the fact that it was commonplace in captive insurance and offshore reinsurance relationships for there to be (a) common management shared by onshore insureds and offshore reinsurers, but separate auditors for each counterparty, (b) a free flow of information relating to the insurance business concerned between counterparties, and (c) use, as opposed to unverified reliance, by an insured or reinsured of financial data (including audited financial statements) relating to an insurer or reinsurer in consolidated accounts or otherwise. Mr. Harshaw was bound to concede that insurers in the United States, as in Bermuda, were likely required by statute to appoint independent auditors, as the Plaintiffs had done in the present case. He accepted that it was not the Plaintiff's case, nor could it be, that the auditors of the Ohio insureds had agreed not to independently verify any financial information received from the Defendants which was prepared in their capacity as auditors for the captives. The Plaintiff's Counsel took no position as to the extent to which judicial notice could be taken of Bermuda captive and reinsurance practice.

34. The English Court of Appeal has summarised the law on judicial notice of notorious facts as follows:

> "*It is well established that courts may take judicial notice of various matters when they are so notorious, or clearly established, or susceptible of demonstration by reference to a readily obtainable and authoritative source that evidence of their existence is unnecessary (see Phipson on Evidence (14th edn, 1990) ch 2/06).*"

35. In the present case the captives were incorporated in Barbados but, according to the ASC, managed substantially from Bermuda in terms of both (a) insurance management, and (b) audit work. It is well established, by reference to insurance insolvency and other cases before this Court, that onshore insurers affiliated with offshore captives commonly file consolidated accounts including the audited accounts of the offshore captive, and that members of the corporate group share common directors, officers and managers. It is equally well established by reference such cases, that the financial position of an alien offshore captive or other insurer is frequently monitored by both US insurance regulators and the US insureds, in the context of either (a) determining what security should be posted by the offshore entity in the US and/or what accounting credit may be taken for the offshore reinsurance recoverable, and (b) generally monitoring the value of

the insurance/reinsurance recoverable by the insured/reinsured as part of the US or other regulator's duty to monitor the solvency of the insured.

36. I take judicial notice of the foregoing facts as representing common captive insurance practice (a) for the purposes of determining whether it may fairly be implied from the Plaintiff's case as pleaded that the Plaintiff companies were likely to rely on the audits without independent verification[5], and (b) for the purposes of determining whether it is alleged the Defendants did anything inconsistent with merely acting for their own clients, with a view to considering the policy implications of holding that a duty of care exists on the Plaintiff's pleaded case. The case alleges, in effect, that by virtue of providing audit services to a captive insurer in similar circumstances, a Bermuda auditor assumes a duty of care to the captive's insured, notwithstanding the fact that the insured has its own independent auditor. The Barbados common law position is, for present purposes, agreed to be the same as under Bermudian and/or English law.

37. In any event, these background facts are not dispositive as the usual legal position in circumstances such as those alleged in the ASC may be elucidated by reference to the judicial authority referred to above on the implications of an auditor's statutory duties in this context, and, additionally, by reference to academic authority. I accept the following passage from the leading practitioner's text on English and Bermudian Reinsurance law, O'Neill & Woloniecki, '*The Law of Reinsurance in England and Bermuda*'[6], upon which Mr. Hargun also relied, as reflecting the usual legal position :

> "*The primary duties of auditors are contractual and are owed to the company which they audit. The courts have restricted the scope of an auditor's duty of care in tort. Auditors do not generally owe a duty of care to shareholders of a company in relation to decisions as to future investment in the company, or to prospective investors of a company who subsequently become shareholders. In the absence of circumstances giving rise to a voluntary assumption of responsibility on the Hedley Byrne principle, auditors do not therefore owe any duty of care to reinsureds who may rely upon the audited accounts of a reinsurer in deciding whether to place contracts of reinsurance.*"

Legal Findings: Does the pleaded case on the existence of a duty of care disclose in the ASC a reasonable cause of action?

38. Having regard to the legal principles summarized above, I am bound to conclude that no sustainable case is pleaded as to the existence of a duty of care owed by the Defendants to the Plaintiff on the basis set out in the ASC, assuming all material averments to be true. In my judgment it is plain and obvious that the pleaded case is unsustainable. This is because it is an incontestably bad plea to allege, in effect, that merely by accepting the appointment as an auditor of a captive insurance company, whose accounts would be routinely relied upon for various purposes by their clients' insureds, the auditors became subject to a duty of care to such insureds.

39. This conclusion is based on principles of law which in my view have been settled for many years. This conclusion is reached in relation to a pleaded case which falls well beyond the boundaries of past cases where a duty of care has been held to exist. The ASC alleges generalised reliance but also alleges that the Plaintiff companies had their own auditors. A relationship of sufficient proximity to arguably give rise to a duty of care would require actual or presumed knowledge on the auditor's part that the Plaintiff would rely upon the captives' auditors without seeking any independent advice from its own auditors or other financial

[5] *Smith-v-Eric S. Bush* [1990] 1 A.C. 831at 871-872.
[6] 2nd edition (Sweet & Maxwell: London, 2004), paragraph 16-28.

advisers. No such plea is made, and having regard to the commercial context of the pleaded case, it cannot fairly be implied that the reliance pleaded is of the requisite type. The position might be otherwise if the Plaintiff companies were alleged to be individual policyholders who would not be presumed to have access to independent financial advice. It follows that the pleaded loss was not foreseeable, and that this element of the Plaintiff's claim is also clearly untenable.

40. Since the normal legal position is that no duty of care is owed by an auditor of a reinsurer to individual shareholders, let alone to third party reinsureds, more than the usual reinsurance relationship must be alleged to effectively plead a sustainable case on duty of care. In these circumstances, no policy considerations strictly need to be taken into account. The position would be otherwise if the first two elements of the threefold test had been arguably made out. In case I am wrong in these primary conclusions, I set out my views on the relevant policy considerations applicable to holding that the Plaintiff's case pleads a sustainable case on the existence of a duty of care.

41. It seems to me to be obvious that as a matter of Bermuda law, there exist compelling policy reasons for concluding that it would not be just and reasonable to hold that a duty of care may be held to exist based on the allegations relied upon in the ASC. Firstly, Parliament has mandated that Bermuda auditors may not be sued by any entity other than their client Bermuda company unless that person was "*expressly authorized by the auditor to rely on his work*": Companies Act 1981, section 90 (3A). In my judgment, it would be wrong to interpret the common law more widely than the statutory position merely because an overseas company not covered by the relevant provisions of the Companies Act is involved.

42. Secondly, the conclusion as a matter of Barbados law that it was legally viable for a third party to sue another company's auditor merely because they knew the third party was likely to receive and rely upon its audit reports for its own purposes would potentially unleash an avalanche of unmeritorious litigation against Barbadian and other offshore auditing firms which do not have the protection of a statutory limitation of liability similar to section 90(3A) of the Bermuda Companies Act. As a matter of comity, having regard to the fact that the Barbadian proceedings have been stayed to allow the present action to proceed including a cause of action against a Barbadian firm governed by Barbados law, (not to mention the close ties that exist between Bermuda and Barbados, CARICOM and otherwise), this Court should have regard to potential mischief that may be sustained by that and other friendly jurisdictions if the present law is extended without good cause.

Findings: Discretion to Strike-Out ASC

43. In my judgment the question of law relied upon by the Defendants, properly analysed, is not complicated and may appropriately be dealt with at the strike-out stage. No criticism of the decision by the Plaintiff to issue the proceedings flows from this conclusion, because this issue does not appear to have been directly addressed before by the Bermuda Courts. It is also understandable that a liquidator seeking to make recoveries for an insolvent estate may be required to demonstrate to her stakeholders, perhaps more vividly than the management of a solvent trading company, that all efforts to make a potential recovery have been exhausted.

44. If I had viewed the legal question as complicated, however, I would nevertheless decide the question of law at this stage. I would do so because of the policy reasons referred to above, and in order to avoid the mischief that would potentially flow from holding that a claim based on a revolutionary theory of tortious liability is tenable.

45. For the above reasons, I would exercise my discretion in favour of striking-out the ASC on the grounds that it discloses no reasonable cause action as regards the existence of a duty of care or reasonably foreseeable loss.

Findings: Can the Plaintiff's case be cured by re-amendment?

46. On the second day of the strike-out hearing, Mr. Harshaw tendered a draft re-Amended Statement of Claim ("DRASC"). The proposed new pleading attempted to fortify the Plaintiff's claim as regards the duty of care issue. Mr. Hargun tendered a binder containing materials relating to the way the case had been pleaded in previous proceedings and previously herein, with a view to contending that any new plea that the Defendants directly delivered their reports to the Plaintiff would be an abuse of the process of the Court.

47. But the DRASC does not assert that the Defendants delivered their audited financial statements directly to the Plaintiff in any legal sense. It alleges communication with the Plaintiff companies without alleging the provision to them of any advice. In paragraph 12.2, it is asserted that the First Defendant "*provided (or undertook to provide) copies*" of their audit opinions to the Plaintiff companies. In my view alleging that the Defendants supplied copies of reports explicitly addressed to their clients to a third party in the pleaded commercial context would not cure the flaws in the ASC in any event.

48. And the Plaintiff's Counsel was bound to concede that it was not possible for the Plaintiff to allege that any such communication of the reports was made in circumstances where (a) the First Defendant knew or ought to have known that the Plaintiff companies would not independently verify the information supplied and (b) not place substantial reliance on their own auditors' judgment as to whether the Defendants' audit reports could be relied upon.

49. The new allegations it is sought to add elaborate upon communications between the Defendants and the Plaintiff companies which are wholly consistent with their acting as auditors for the captives in a commercial context within which information was freely exchanged. The Achilles heel of the ASC, the failure to allege either (a) any legally cognisable reliance on the Plaintiff's part on the information supplied, or (b) knowledge of such qualifying reliance, is in no sense cured.

50. There is no or no plausible suggestion that the case could be improved after discovery. The recent proposed changes have in part been explained due to the Plaintiff's own difficulties in completing a review of documents in her possession. If an agreement had been purportedly reached with the Plaintiff companies' own auditors and/or financial advisers to the effect that they would not verify the Defendants' opinions in auditing the Plaintiff companies' own accounts, such an unusual (and probably unlawful) arrangement could readily have been elicited from the Plaintiff's auditors, Grant Thornton.

51. It has been the Defendants' position, prior to the commencement of the present action and the now stayed Barbados proceedings, since February 2003, that:

> "*…the regulatory scheme governing CGIC and CGIND negates any argument that justifiable reliance actually occurred…This regulatory scheme required CGIC and CGIND to submit their own annual audit reports…and…were subject to a regulation specifically requiring them to obtain and file letters from their own auditors in which such auditors expressly acknowledged (1) an awareness of the applicable insurance code and regulations, (2) an expectation that ODI would rely on their work, and (3) consent for ODIO to review their audit papers…*" [7]

[7] Motion of KPMG Bermuda to Dismiss, February 25, 2003, filed in the US proceedings.

52. In Court of Common Pleas, Franklin County Ohio, Case No. 02CVH-12-13841 ("the US Proceedings"), the Ohio Court found that it lacked jurisdiction over the Defendants in substantial part because it accepted the Defendants' arguments that no "*justifiable reliance actually occurred*." The jurisdictional application, like the present strike-out application, was dealt with on a basis which "*requires the Court to accept all allegations in the complaint are true and construe all allegations in a light most favorable to the plaintiff*"[8]. The Plaintiff's claim, as here, was based on the premise that the audit work done by the Defendants was relied upon by both the Plaintiff companies and the Ohio Department of Insurance, and that in sending correspondence and documents to and visiting Ohio, they were effectively giving advice to the Ohio-based Plaintiffs. This argument was unequivocally rejected by Judge Nodine Miller in her November 24, 2003 Judgment, where she observed at page 14:

> "*The Court finds that KPMG Bermuda's contacts with Ohio do not constitute a purposeful, continuous, and systematic contact with this state such that KPMG Bermuda would have reasonably anticipated being brought into court in Ohio. As previously noted,* **KPMG Bermuda is a non-resident defendant whose limited contacts with Ohio were to assist in another non-resident's transaction.** *Therefore the court may not exercise jurisdiction over KPMG Bermuda.*" [emphasis added]

53. So the Plaintiff has been, or ought to have been, on notice for over four years that her case against the Defendants had to allege more than that the Defendants had contacts with the Plaintiff companies in their capacity as agents of the captives. Yet the February 23, 2005 Statement of Claim filed in Barbados alleged no more than that the Defendants knew or ought to have known that their reports would be passed on to the Plaintiff companies by their clients, and that the Plaintiff companies and the Ohio Department would rely upon them. No further allegation that the Defendants were acting on the Plaintiff companies behalf was made. Essentially the same allegations were repeated, with no material fortification, in the April 18, 2005 Bermuda Statement of Claim and the July 18, 2006 ASC.

54. It was against this background that Mr. Harshaw was compelled to concede the following. The DRASC represented the best case the Plaintiff could ever advance on reliance. This was because it could never be alleged, far less proved, that the Plaintiff companies (a) did actually rely in the applicable legal sense on the audit work performed by the Defendants on behalf of their own clients, and/or (b) that the Defendants knew or ought to have known of such reliance.

55. In these circumstances, the DRASC is liable to be struck-out on the same grounds as is the ASC presently before the Court. Leave to amend is accordingly refused.

Summary

56. The Plaintiff's Amended Statement of Claim herein is liable to be struck-out on the grounds that, plainly and obviously, it discloses no reasonable cause of action against either Defendant. Assuming all allegations contained in the pleading to be true, the Plaintiff could not as a matter of law establish that any duty of care was owed by the Defendants to the Plaintiff companies. Assuming my view of the law to be correct, this defect is incapable of being cured by amendment, and so the oral application for leave to re-amend is also refused.

57. This decision turns on a very narrow but fundamental element of the law relating to liability in tort for allegedly negligent misstatements in circumstances where the Plaintiff is not in contractual terms the client of the maker of the statements

[8] Judgment dated November 24, page 4.

concerned. Assuming negligence and foreseeability of economic damage can be proved, the law does not presently contemplate that professional men should be held to be subject to a duty of care to all persons who may receive their advice save on the following terms.

58. The maker of the statement sued upon must be proven to have known, actually or constructively, that his advice was likely to be relied upon by the plaintiff in circumstances where the plaintiff would not have recourse to advice of his or her own. Further, for essentially policy reasons, where an auditor prepares a report for laying before the company's shareholders in fulfilment of statutory duties, a duty of care only arises towards the client company and/or the shareholders as a whole. The Bermuda law position is that auditors are not liable to third parties unless they expressly agree that such parties may rely on their audit reports: Companies Act 1981, section 90(3A). This supports the view that at common law, as regards work done by a Bermudian firm in relation to a Barbados company, the duty of care to third parties should be construed in a narrow manner.

59. At the end of the two-day hearing, it being clear that Mr. Hargun's submissions were likely to prevail, I reserved judgment but, out of an abundance of caution afforded the Plaintiff's Counsel an opportunity to contradict what I considered to be a fundamental submission. This was Mr. Harshaw's opponent's assertion that a duty of care had never previously been found to exist from an advisor to a non-client in circumstances where the non-client had access to independent advice. Mr. Harshaw was equal to this challenge, but the Canadian case he found[9] dealt with an audited statement prepared for the specific purpose of enabling the client to give it to a prospective investor, not for the standard statutory purposes.

60. To the extent that the Court retains any discretion to allow even hopeless claims to proceed to trial where, for instance, some public interest may be served, there are compelling policy reasons against adopting such a course in this case. To hold, in effect, that it is arguable that any auditor of a Barbados captive insurer assumes a duty of care to its insureds and reinsureds and their creditors would potentially unleash an avalanche of unfounded claims brought by overseas insurers against the auditors of insolvent Barbados insurers, where the statutory protection available in Bermuda seems not to exist. For reasons of comity, bearing in mind the Barbados Court has stayed an action there to permit this Court to adjudicate a Barbados law claim against Barbadian auditors, this consideration may properly be taken into account.

61. This result implies no criticism of the Plaintiff and her Bermuda Counsel for bringing a claim which has been struck-out on the basis of a point upon which there appears to have been no previous local or other judicial authority directly on point which was strictly binding on this Court. Nevertheless, subject to hearing Counsel, I can think of no reason why the Defendants should not have their costs, to be taxed if not agreed, on the standard basis.

Dated this 12th day March, 2007

KAWALEY J.

[9] *Haig-v-Bamford* (1976) 72 D.L.R. 68.