NMLS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

SUIT NO. 1998/C-166

BETWEEN	**CARIBBEAN STEEL COMPANY LIMITED**	**CLAIMANT**
AND	**PRICE WATERHOUSE (A FIRM)**	**DEFENDANT**

Gordon Robinson, Christopher Honeywell and Minett Palmer instructed by Palmer & Walters for claimant.

Sandra Minott-Phillips and Christopher Kelman instructed by Myers, Fletcher & Gordon for defendant

Heard: December 5th 6th 2005 and May 24th 2006

JONES, J:

[1] "The office of auditor is of high antiquity." It is not easy to determine the exact date of its origin, but it can be said that from as early as 423 B.C, Aristophanes, the famous Greek comedy writer refers to the incorrect accounts of Pericles in his play "The Clouds". It can also be said that the ancient Egyptians and Babylonians set up auditing systems in which everything that went into and came out of storehouses were double-checked. These "audit reports" were given out loud, hence the later term "auditor", derived from the Latin "audire", to hear.

[2] Price Waterhouse is an international firm of auditors and accountants who were engaged as auditors of Caribbean Steel Company Limited (Carib Steel) and Caribbean Cable Company Limited (Carib Cable) and who were subsequently requested to conduct a valuation of the shares of Carib Cable a company, which the auditors were aware, Carib Steel intended to acquire. Carib Steel is a

company registered under the Companies Act and engaged in the business of steel manufacturing in Jamaica.

[3] Carib Steel complained that their auditors, Price Waterhouse, were guilty of:

a) Breach of contract, breach of fiduciary duty, and negligence while engaged in providing a valuation which they relied on for the purchase of the 50.1 % of the issued share capital of Carib Cable.

b) Breach of contract, breach of statutory duty and negligence in failing to identify or report on financial irregularities in the operations of Carib Cable after Carib Steel had acquired the majority shares in Carib Cable.

[4] Price Waterhouse, on the other hand, denied that they were guilty of breach of contract, breach of statutory duty or were negligent in the performance of their duties in either the conduct of the valuation of the shares of Carib Cable or in the subsequent audit, having regard to the standard of care applicable to auditors at the time of their engagement. Implicit in their denial is an assertion that they are victims of a disgruntled client (Carib Steel) who, simply, made a bad investment in purchasing the majority shares in Carib Cable at a premium.

[5] The issues in this case may be stated as follows:

a) Was there an expressed or implied duty of care owed by Price Waterhouse to Carib Steel to use reasonable care and skill in the performance of their duties:

(i) Under the terms of the contract for the valuation of shares as set out in the Engagement Letter.

(ii) In the conduct of the audit on the accounts of Carib Cable subsequent to the purchase of the shares

b) Whether or not Price Waterhouse breached their duty of care to use reasonable care and skill:

(i) in the preparation of the share valuation report for Carib Steel having regard to the standard of care applicable to accountants and auditors;

(ii) In the preparation of the consolidated audited accounts after the acquisition of the majority shares of Carib Cable by Carib Steel having regard to the standard of care applicable to auditors.

c) What is an appropriate award of damages in this case and whether or not an award for exemplary and/or aggravated damages is appropriate in this case.

The first issue: was there an expressed or implied duty of care owed by Price Waterhouse to Carib Steel to use reasonable care and skill in the performance of their duties; (a) under the terms of the contract for the valuation of shares as set out in the Engagement Letter, and; (b) in the conduct of the audit on the accounts of Carib Cable subsequent to the purchase of the shares

Duties of an Auditor

[6] In the mid-thirteenth century Sir Walter of Henley in his **Treatise on Husbandry** set out, in broad terms, the duties of the auditor in the following passage which appears in the chapter on the "Office of the Seneschal":

> "It is not necessary to speak to the auditors about making audit, because of their office, for they ought to be so prudent, and so faithful, and so knowing in their business that they have no need of other teaching about things connected with the account"

[7] Of course, in modern times the duties of the auditor would in most cases depend mainly on the contract between the auditor and the client. This contract between the auditor and the client will usually set out the nature and extent of the duties and an indication of the standard of performance which is expected. In general, though, it can be said that the duty of the company's auditors is to provide an independent opinion on an organization's financial statements, annually. Their approach is generally historical in nature, as they assess whether the financial statements conform

to generally accepted accounting principles. They also assess whether; the statements fairly present the financial position of the organization; the results of operations for a given period of time are accurately represented; and whether the financial statements have been materially affected by particular items.

[8] These duties may also extend to other task for which the auditor is engaged. In **Fox v Morrish, Grant and Co**[1] a firm of accountants were engaged to check the books of accounts from which balance sheets were prepared. It was held that the accountants committed a breach of duty as they checked the books of accounts without verifying the correctness of the cash and bank balances that were stated in the books and without informing the client that they had not done so.

The Duty of Care for the Conduct of the Share Valuation

[9] Carib Steel entered into an agreement with Michael Poole and Michael Locker in October 1984 to subscribe for 50.1% of the issued share capital of Carib Cable at a price of $32,173,400.00. The agreement to purchase the shares was subject to Price Waterhouse's valuation of Carib Cable Company Limited. The terms of the agreement for the valuation is set out in letters dated September 29, 1994, from the Carib Steel to Price Waterhouse and the Engagement Letter dated October 5, 1994. The relevant provisions in the contract for the valuation as set out in the Engagement Letter dated October 5, 1994, were as follows:

a) Carib Steel required an estimate of value for Carib Cable as the basis for negotiating for the purchase of Carib Cable's shares.

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[1] [1918] 35 TLR 126

b) The valuation by Price Waterhouse would provide an estimate of the fair market value of Carib Cable.

c) Price Waterhouse would use either the earning approach or the asset based approach to conduct the valuation.

d) Price Waterhouse rejected any responsibility or liability for any losses by Carib Steel arising from the use of un-audited interim financial statements prepared by the management of Carib Cable in the valuation. The agreement included a provision that Carib Steel would indemnify Price Waterhouse against any loss or damage other than those arising from Price Waterhouse's gross negligence or wilful misconduct.

[10] Carib Steel now claims damages for breach of contract based on the Engagement Letter dated October 5, 1994, and a parallel claim for breach of the duty of care owed to them in tort. Price Waterhouse says that it is doubtful whether Carib Steel can bring an action in contract as well as tort. They rely on some dicta by Lord Scarman in **Tai Hing Cotton Mill Ltd v Lin Chong Hing Bank**[2] where he said:

> "Their Lordships do not believe that there is anything to the advantage of the law's development in searching for a liability in tort where the parties are in a contractual relationship"

[11] However, in **Henderson v Merrett Syndicates Ltd**[3] the House of Lords made it clear that where liabilities arise concurrently in tort and contract it was open to the claimant to emphasize the cause of action that was to his advantage. There cannot be any doubt that it was an implied term of the contract that Price Waterhouse in conducting this valuation would owe to Carib Steel a duty of

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[2] [1990] 1 AC 80
[3] [1994] 2 All ER 506

care to exercise the necessary skill and care of a professional valuator. It is also implicit in the terms of the contract that they should consider Carib Steel's purpose in seeking the valuation (which was known to Price Waterhouse) and should exercise prudence and be careful in conducting the valuation. The disclaimer is not relevant, as it does not protect Price Waterhouse from an act of gross negligence or wilful misconduct, which is what is being claimed here. Accordingly, I find that Price Waterhouse owed a duty of care to Carib Steel to exercise the necessary skill and care under the terms of the contract for the share valuation and they also have a concurrent duty in tort.

The Duty of Care for the Conduct of the Audit

[12] As far as the subsequent audit of Carib Cable's accounts is concerned, Price Waterhouse contends that they did not owe a duty of care or a contractual duty to Carib Steel for the conduct of the audit. They say that they did not have a contract with Carib Steel for the audit of Carib Cable and the auditor's only duty is to the company with whom he has a contractual relationship.

[13] The duty of care to a third party by an auditor in the absence of a contract was considered at length **Caparo Industries plc v Dickman**[4]. The House of Lords held in that case that an auditor could not be sued in negligence by any person, whether existing shareholder, prospective shareholder, or institutional lender who suffered financial loss as a result of relying upon an annual report and accounts negligently prepared. In relation to the duty of care owed to the shareholders, Lord Bridge said[5]:

> The shareholders of a company have a collective interest in the company's proper management and in so far as a negligent failure of the auditor to report accurately

[4] [1990] 1 All ER 568
[5] At page 579

> on the state of the company's finances deprives the shareholders of the opportunity to exercise their powers in general meeting to call the directors to book and to ensure that errors in management are corrected, the shareholders ought to be entitled to a remedy. But in practice no problem arises in this regard since the interest of the shareholders in the proper management of the company's affairs is indistinguishable from the interest of the company itself and any loss suffered by the shareholders . . . will be recouped by a claim against the auditor in the name of the company, not by individual shareholders.

[14] The facts were that the respondents owned shares in a public company, whose accounts for the year ended 31 March 1984 showed profits far short of the predicted figure. This resulted in a dramatic drop in the quoted share price. After receipt of the audited accounts for the year ended 31 March 1984 the respondents purchased more shares in the company and later that year made a successful take-over bid for the company. After the take-over, the respondents brought an action against the auditors Touché Ross, alleging that the accounts of the company were inaccurate and misleading in that they showed a pre-tax profit of some £1·2m for the year ended 31 March 1984 when in fact there had been a loss of over £400,000. They also claimed that the auditors had been negligent in auditing the accounts. The respondents had purchased further shares and made their take-over bid in reliance on the audited accounts, and claimed that the auditors owed them a duty of care either as potential bidders for the shares of the company or because they ought to have foreseen that the 1984 results made the company vulnerable to a take-over bid or as an existing shareholder they were interested in buying more shares.

[15] On the trial of a preliminary issue whether the auditors owed a duty of care to the respondents, the judge held that the auditors did not. The respondents appealed to the Court of Appeal, which allowed their appeal in part on the ground that the auditors owed the respondents a duty of care as shareholders but not as potential investors. The auditors appealed to the House of Lords and it

was held that in the absence of exceptional circumstances auditors owed no duty of care to third parties who rely on the company's accounts. The court accepted that although a broad test for liability was inappropriate, in certain circumstances liability could arise, but this could only be identified after considering the specific facts and merit of each case. On the strength of **Caparo** Price Waterhouse argues that they are not liable in negligence to Carib Steel for the preparation of the audit.

[16] **Caparo** is a decision that is restricted to its own facts and can be distinguished from the facts of this case. First, in **Caparo** the defendants did not have the claimant in mind when they prepared the audit reports. This was not so in this case as Price Waterhouse was the advisor and auditor of Carib Steel and auditor for Carib Cable. They would have been aware of the terms and conditions of the share purchase agreement and the importance to and reliance placed on the information in the audit report by Carib Steel. So then, although in **Caparo** the court held that the purpose of preparing annual reports was to furnish existing shareholders with the necessary information for the purpose of voting at the annual general meeting and not to provide investment information, this can be contrasted with the facts of this case where Price Waterhouse made the representations with knowledge that Carib Steel would be guided by the information that was provided. The auditors' report is made to the members and not to the company – the implication here is that the duty of care is owed to each individual member.

The second issue: whether or not Price Waterhouse breached their duty of care to use reasonable care and skill; (a) in the preparation of the share valuation report for Carib Steel having regard to the standard of care applicable to accountants and auditors, and; (b) in the preparation of the consolidated audited accounts after the acquisition of the majority shares of Carib Cable by Carib Steel having regard to the standard of care applicable to auditors.

The Expert Witnesses

[17] Both Price Waterhouse and Carib Steel were allowed to utilise an expert witness in this case. Mr. Colin Greenland, a certified internal auditor and Mr. Stephen Holland a chartered accountant gave evidence. Both relied on their specialist knowledge and experience having regard to the issue of whether Price Waterhouse valued the shares of and audited Carib Cable at the standard of a reasonably competent accountant. It cannot be gainsaid that the value of the testimony of an expert witness depends on the extent of his expertise and experience. This particularly so where the issue on one of professional negligence.

[18] Counsel for Price Waterhouse referred the court to **Jackson and Powell on Professional Negligence, 5th Edition, London Sweet & Maxwell 2002** at page 1114, where the learned authors set out the following proposition:

> "A court is usually unwilling to find a professional person negligent in the absence of evidence from a professional in the same field".

[19] The authority supporting the proposition is the case of **Sansom v Metcalfe Hambleton**[6] In that case, the plaintiffs prior to purchasing property, engaged the services of Chartered Surveyors, to do a survey and report on the structural condition of the property. Subsequent to the report, the property was purchased. However, the plaintiffs had to do work to a retaining wall on the property which had a crack and sued the Defendant for failing to disclose the need for this in their report.

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[6] [1997] EWCA 3019.

The trial judge accepted the evidence of a structural engineer called by the plaintiffs over the evidence of a Chartered Surveyor called by the defendant and gave judgment to the plaintiffs. The Defendant appealed. Lady Justice Butler-Sloss in giving the judgment of the court said:

> "In my judgment, it is clear, from both lines of authority to which I have referred, that a Court should be slow to find a professionally qualified man guilty of a breach of his duty of skill and care towards a client, (or third party) without evidence from those within the same profession as to the standard expected on the facts of the case and the failure of the professionally qualified man to measure up to that standard ....I am satisfied that the judge did not have the evidence upon which he would have been able to make a finding of professional negligence against Mr. Brown. It is not an absolute rule as Sachs LJ indicated by his example but, unless it is an obvious case in the absence of the relevant expert evidence the claim will not be proved....Consequently, the judge did not have relevant and admissible evidence from the owners to show failure by Mr. Brown to comply with the standard of skill and care to be exercised by a competent surveyor instructed by the owners. The judge failed to apply the correct test. If he had done so, he would have been driven to the conclusion that the owners had failed to prove their case".

[20] While I accept the above position in general terms, it is clear from the passage cited above that the proposition that a court requires evidence from a professional in the same field in order to make a finding of professional negligence, is not an absolute rule and is subject to exceptions. In **Sansom's case** reference was made to the case of **Worboys v Acme Investments Ltd** where an allegation of professional negligence was made against an architect and the argument mounted that the case was one that the court could find a breach of professional duty without having evidence of what constitutes lack of care on the part of a professional man. Sachs L.J made it clear that[7]:

> "There may well be cases in which it would not be necessary to adduce such evidence – as, for instance if an architect omitted to provide a front door to the premises."

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[7] [1969] 4 BLR 133 at 139

[21] On the other hand, in the case of **Whiteoak v Walker**[8], the Court accepted as an expert witness a chartered accountant who had ten years experience in share valuation and carried out six or seven share valuations per year.

[22] In this case the expert witness called by Carib Steel, Colin Greenland is a member of the Institute of Internal Auditors and a Certified Fraud Examiner. I accept that internal auditors are accountants but are generally part of an organization and their objectives are determined by professional standards, the board, and management of the particular company. Colin Greenland said that he:

a) is not a Chartered Accountant.

b) is not a member of the Institute of Chartered Accountants of Jamaica.

c) has never prepared a valuation of a company.

d) is not a registered public accountant.

e) is not an external auditor.

[23] The other expert Stephen Holland is a chartered accountant and had done external audits and valuations of companies. Price Waterhouse contends that Carib Steel has not adduced the necessary expert evidence upon which the Court can make a finding of professional negligence against them as Colin Greenland is not a qualified (much less expert) in the field of external auditing.

[24] The issue of whether a person is qualified to give expert evidence in a court goes to admissibility not to weight. The issue to be resolved is whether or not Colin Greenland is qualified to assist this court as an expert in the field of auditing and accounting. While he is not a chartered

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[8] [1988] 4 BCC 122.

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

[25] There is no evidence that Colin Greenland has ever performed a share valuation on a company and he may not have the appropriate experience or expertise in this area. However, this does not rule out his views on aspects of accounting practice that may relate to share valuations, or where the breaches of duty are so obvious or fundamental. I accordingly find that the expert evidence of both Colin Greenland and Stephen Holland to be admissible within the limits which I have stated.

The Standard of Care in Respect to the Conduct of the Audit

[26] The standard of care applicable to the auditor has been set out in a number of cases. First in **Re Kingston Cotton Mill (No. 2)** Lopez L.J said[9]:

> "What is reasonable skill, care and caution must depend upon the particular circumstances of each case. An auditor is not bound to be a detective or approach his work with suspicion or with a foregone conclusion that something is wrong. He is a watchdog but not a bloodhound".

[9] [1896] 2Ch. 279 at page 288

[27] In that case, it was held that auditors were justified in relying on certificates stating the stock-in-trade given to them by the directors of a company. The Court ruled that it was not a part of their duty to verify the entries in the certificates.

[28] Second, in **Re London and General Bank (No. 2)** Lindley said[10]:

> "His (the auditor's) business is to ascertain and state the true financial position of the company at the time of the audit, and his duty is confined to that ....How is he to ascertain that position? The answer is, by examining the books of the company. But he does not discharge his duty by doing this without inquiring and without taking any trouble to see that the books themselves show the company's true position ....An auditor, however, is not bound to do more than exercise reasonable care and skill in making inquiries and investigations. He is not an insurer, he does not guarantee that the books do correctly show the true position of the company's affairs, he does not even guarantee that his balance-sheet is accurate according to the books of the company".

[29] In that case, it was held that auditors had been guilty of malfeasance when they called the attention of a company's directors to the insufficiency of securities in which the company had invested, but in a report to shareholders merely stated that the value of the assets depended on realization. The auditors were held liable for the consequent dividend declared out of capital and not out of income.

[30] Thirdly, in **Re City Equitable Fire Insurance Co. Ltd.**, Romer, J. commented[11]:

> "It was not part of his (auditors') duty to criticise or call attention to transactions that were well within the powers of the board, and were, on the face of them perfectly regular".

[31] In that case, the auditors' description of certain loans in the balance sheet as "Loans at call or short notice" was sanctioned by the Court and held not misleading. The complaint that the auditors

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[10] [1895] 2 Ch. 673 at 682-683
[11] [1925] 1 Ch. 407 at page 489

failed to call specific attention to the loans by failing to mention the debtors by name was held to be not improper.

[32] A recent pronouncement of the duties of an auditor can be found in the House of Lords' decision in **Caparo Industries plc v. Dickman**[12] per Lord Oliver of Aylmerton,

> "It is the Auditor's function to ensure, so far as possible, that the financial information as to the company's affairs prepared by the directors accurately reflects the company's position in order, first, to protect the company itself from the consequences of undetected errors or, possibly, wrongdoing (by, for instance, declaring dividends out of capital) and second, to provide shareholders with reliable intelligence for the purpose of enabling them to scrutinise the conduct of the company's affairs and to exercise their collective powers to reward or control or remove those to whom that conduct has been confided".

[33] All the cases without exception endorse the proposition that the standard of care required by auditors in performing audits is to show the skill, care and caution of a reasonably competent, careful and cautious auditor.

[34] Price Waterhouse contends that insofar as the loans to the company from the pension fund appeared regular and within the powers of the company they were under no duty to call specific attention of the shareholders of Carib Cable to the loans. In addition, Colin Maxwell, the partner in charge of the audit said that at the time of the audit in 1995 the local accounting standard on related parties did not make any reference to the pension funds of companies. This he agrees has changed since the International Accounting Standard (IAS) in 2002 have now made it necessary that they report on related party relationships between companies and their pension funds.

[35] They argue that Carib Steel has made no complaint of a negligent misstatement in respect of the 1995 audit. They say the complaint is only with the categorisation of the loan. They point out

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[12] Already cited at page 583

that Stephen Holland's evidence establishes that the categorisation was neither wrong nor improper. On this basis they argue that the behaviour of Price Waterhouse cannot amount to gross negligence, which is the only basis that they would be liable on the audit contract.

[36] The claim by Price Waterhouse that their treatment of the loans from the Pension Fund to Carib Cable as "payables" in just a matter of categorisation, raises uncomfortable questions about their understanding of their responsibilities as auditors. It is quite plain what has gone wrong; to treat the pension debt as "payables" mixed together - as it was - with trade payables incurred in the ordinary course of business, and then call it an issue of categorisation only, is to miss the point. I reject Stephen Holland's evidence on this aspect, and prefer the evidence of Colin Greenland.

[37] Colin Greenland was adamant that Price Waterhouse should have treated the pension debt as a separate item as it was a loan from a "related party" to Carib Cable. I agree; there cannot be any doubt that the loan from the Pension Fund was a related party transaction and as such cannot and should not be considered to be a transaction in the ordinary course of business. These transactions raised important issues of trusteeship and breaches of fiduciary duty (on the part of Poole and Locker who were both trustees of the pension fund and owners of Carib Cable) of which a note should have been made or comments qualified, particularly so, as interest had accrued.

[38] One point, on which everyone should be clear on, is that where transactions are not at arms length, the issue of whether local accounting standards on related parties - at that time - dealt with reporting the relationship between pension funds and their companies cannot arise. Colin Greenland's opinion is vindicated by the subsequent audit of Carib Cable by Ernst & Young in 1996, (some six years prior to the change of local practice) in which they treated the pension fund loans to Carib Cable as doubtful as interest had accrued and as coming from a "related party". The

court concludes as a matter of law that Price Waterhouse breached its duty of care to Carib Steel in respect of the audit of Carib Cable.

Standard of Care for the Valuation

[39] The standard of care to be shown by accountants performing a valuation of companies' shares was considered in **Whiteoak v Walker**[13] In that case, it was held that the required standard was that of:

> "A reasonable competent chartered accountant in general practice acting as an auditor who has agreed to request to undertake the valuation task".

[40] In that case a negligence action was brought against the Defendant auditors who had undertaken a valuation of a company's shares. The court took the view that had to apply the relevant standards applying to valuations at the time when the valuation was done. As a result the court examined the defendant's method of valuing the shares and found that it was a method that could have been used by a reasonably competent chartered accountant at the time the valuation was done.

[41] Price Waterhouse contends that the relationship between themselves and Carib Steel in respect of the valuation of the shares for Carib Cable was a contractual one. They argue that they were justified in relying on the audited and un-audited financial statements and the pension fund report provided by the management of Carib Cable and accepting them at face value. As a result, their implied duty of care and skill inherent in the valuation exercise was sufficiently discharged bearing in mind the standard of a reasonably competent chartered accountant performing the valuation at the time it was done.

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[13] Already cited

[42] In the notes to the estimates of value, Price Waterhouse represented that "the $13,897,000.00 pension fund surplus may be brought back into the company. This income would be taxable but the tax would be offset through utilization of the company's tax losses." The Pension Fund Rules provide that while the company is a going concern any surplus disclosed in the actuarial valuation may be used to reduce the contributions payable by Carib Cable or used to improve benefits. It also provides that on the closure of the Pension Fund any surplus would revert to Carib Cable as an asset.

[43] Price Waterhouse contends that the pension fund surplus under the rules can be applied by Carib Cable to provide relief from future contributions to the pension fund as long as the surplus exists. This they say is a form of bringing the asset back into the company. Stephen Holland agreed with Price Waterhouse's inclusion of the pension fund surplus as an asset. They point out that assets can take varying forms, cash or receivables, so whether or not the money was loaned to Carib Cable at the time when Carib Steel acquired majority shareholding in February 1995, the asset remained.

[44] Richard Downer conceded that his note (2) to the Estimates of Value was unqualified. The pension fund surplus was available to Carib Cable as an asset – full stop. Richard Downer was unable to recall in cross-examination whether he had looked at the trust deed for Carib Cable and was therefore not aware of the restrictions applying to the pension fund surplus. The argument by Price Waterhouse that the pension fund surplus is an asset as Carib Cable would be able to access it by taking a "contribution holiday" is unsound, as in any event, that asset would be subject to discount as an income stream over time. This fact was never made clear in the notes to the Estimate of Value given to Carib Steel. In fact, Richard Downer in cross-examination remained

unmindful to the fact that a "contribution holiday" paid to Carib Cable over time would be subject to a discount. While referring to the pension fund surplus as an asset he said "Cash would give more flexibility to the purchaser, but the reduction in contributions is the same thing."

[45] The notion that Price Waterhouse sufficiently discharged its duty of care to Carib Steel in the conduct of the valuation exercise is an appealing one, but it does not bear much examination. The court accepts Colin Greenland's view that having regard to the nature of the valuation requested of Price Waterhouse by Carib Steel; the multiple professional relationships that existed between them; and the fact that the Defendant ought to have realized the importance of the status and value of the Pension Fund surplus to the whole valuation exercise, then any activity affecting the Pension Fund (e.g. the borrowing by Carib Cable) ought to have been reported to the Carib Steel a prospective 50.1% shareholder of Carib Cable. I accept that this is an obvious case, requiring the application of commonsense and, which does not require any expertise in share valuation itself (the omission to provide a front door in **Worboy's**[14]). These views are also clearly within Colin Greenland's competence as an auditor and with what he considers to be in accordance with good accounting practice.

[46] I also accept that as Price Waterhouse was aware that the valuation report was necessary to finalise the purchase of majority shares in Carib Cable; and they were also aware of the fact that Carib Steel intended to allow Poole and Locker to continue the management; they should have informed Carib Steel that the trustees of the pension fund (Poole and Locker) had made loans to the company and of the possible conflict of interest. Again, one does not have to be an expert in share valuations to understand this. The court concludes as a matter of law that Price Waterhouse

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[14] Already cited

breached its duty of care to Carib Steel in both contract and in tort in their conduct of the share valuation exercise

The third issue: (a) did Carib Steel Steel suffer damage as a result of Price Waterhouse's breach of duty and; (b) what is an appropriate award of damages, and is an award for exemplary and/or aggravated damages proper on the facts of this case?

[47] Price Waterhouse contended that the price of $32,173,400.00 paid for half the shares of Carib Cable was predetermined and did not relate to the valuation. They argue that this is so as after the valuation was done the figure remained the same even though the valuation price for half the shares was much less. On this basis they say that the damage claimed is not attributable to the valuation.

[48] On the other hand, Carib Steel claimed that their entire investment in Carib Cable was lost as a result of its reliance on Price Waterhouse's share valuation report. Richard Lake says that that the sum of $38,389,308.00, pleaded was lost as a direct result of Carib Steel's reliance on the advice and representations of Price Waterhouse contained in the valuation report.

[49] The trouble with both of these arguments is that they depend on assumptions that do not hold up under scrutiny. An auditor is only liable for the loss that is effectively caused by his breach of duty: See **Galoo and Others v Bright**[15]. In this case, the attempt by Price Waterhouse to construct a coherent defence by suggesting that there was a predetermined price of $32,173,400.00 in the Heads of Agreement signed by Carib Steel is specious, and they know it. I find as a fact that the purchase price for the shares in Carib Cable set out in the Heads of Agreement was always subject to the share valuation exercise, and that Price Waterhouse knew it.

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[15] [1995] 1 All ER 17

The court also finds as a fact that Carib Steel would not have concluded the Shareholder's Agreement and finalised the sale for the 50.1% of the issued share capital of Carib Cable at a price of $32,173,400.00, without reliance on the representations contained in the valuation report prepared by Price Waterhouse.

[50] On the other hand, the claim by Carib Steel for $38,389,308.00 is a poor attempt to link the loss of the entire investment with the breach of duty. The breach of duty must be the effective or dominant cause of the loss. I find that the loss of the entire investment in the purchase of the majority shares in Carib Cable cannot be causally linked to the breach of duty by Price Waterhouse. The commonsense position seems to me to be that but for the advice that the pension surplus of $13,849,000.00 "may be brought back into the company" Carib Steel would not have settled for a purchase price of $32,173,400.00.

[51] The fundamental principle governing the measure of damages is that the claimant must be put in the same position he would have been in if the auditor had properly discharged his duty: See **Livingstone v Rawyards**[16]. In this case the correct measure of damage can be ascertained by calculating what would have been paid for the shares had the advice or information been correct, with what was actually paid. An unqualified representation was made that the $13,849,000.00 pension fund surplus "may be brought back into the company." As we now know, the trust deed showed that this would only be possible on the liquidation of the company, which was never contemplated at that time. The damage suffered, therefore, would only relate to the reasonable expectation that the $13,849,000.00 pension fund surplus would be an immediate part of Carib Cable's assets.

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[16] [1880] 5 App. Cas. 25 per Lord Blackburn at page 29

[52] In addition, Carib Steel seeks interest on its special damages at 1% above the prime lending rate for commercial banks for the period November 1994 to today's date. The evidence from the publication of the Bank of Jamaica on interest rates for the period shows that the cumulative average rate for commercial loans during that period was 24.55%. On that basis Carib Steel asks for interest at the rate of 24.55% per annum on the sum awarded from 1995 up to the date of payment. In addition, Carib Steel contends that the behaviour of Price Waterhouse is such as to merit an award of aggravated damages, in the region of 20 – 25% in addition to the amount claimed. Price Waterhouse submits in response that this case does not justify such an award. They rely on the well-known authority of **Rookes v Barnard**[17] for support.

[53] In **Rookes v Barnard**[18] Lord Devlin set out three categories of cases in which exemplary damages could be awarded. The first was in cases involving oppressive, arbitrary or unconstitutional behaviour by servants of government. Cases in the second category were those in which the defendant's conduct had been calculated to make a profit for himself which could exceed any damages which he would be likely to have to pay to compensate the plaintiff. Finally, there were those cases where the award of exemplary damages was authorized by statute. This case does not fall into any of the well-known categories laid down by Lord Devlin and accordingly, the issue of exemplary and/or aggravated damages does not arise.

[54] In summary then, there shall be a judgment for Carib Steel in the sum of $13,849,000.00 with interest at the rate of 24.55% from January 1995 to the date of this judgment. Carib Steel asks for cost certified for three counsel (on the basis of the amount of legal research, documentary and

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[17] [1964] 1 All ER 367
[18] Already cited

expert evidence required, and the complexity of the legal and factual issues). It is a reasonable request. Cost to Carib Steel to be agreed or taxed with certificate for three counsel.