



JUDGMENT

**Caribbean Steel Company Limited (Appellant) v
Price Waterhouse (a Firm) (Respondent)**

From the Court of Appeal of Jamaica

before

**Lord Hope
Lord Wilson
Lord Sumption
Lord Carnwath
Lord Toulson**

**JUDGMENT DELIVERED BY
LORD TOULSON
ON**

9 July 2013

Heard on 16 April 2013

Appellant

Denise E. Kitson QC
Trudy-Ann Dixon-Frith
Mark Reynolds
(Instructed by MA Law
(Solicitors) LLP)

Respondent

Sandra Minott-Phillips QC
Alexis Robinson

(Instructed by Myers,
Fletcher & Gordon)

LORD TOULSON:

Introduction

1. On 14 May 1998 the plaintiff appellant (“Carib Steel”) issued a writ and statement of claim against the well-known firm of accountants Price Waterhouse (“PW”) claiming damages arising from Carib Steel’s acquisition, on 14 February 1995, of 50.1% of the shares of a company called Caribbean Cable Company Limited (“Carib Cable”) at a cost of J \$32,173,400. Prior to the acquisition Carib Steel had obtained a valuation report on Carib Cable from PW. PW was at that time the auditor of Carib Steel and Carib Cable. Carib Steel alleged negligence and/or breach of contract by PW in the preparation of the valuation report. The allegations centred on PW’s treatment in the report of a surplus in Carib Cable’s pension fund which amounted to \$13,849,000 according to a valuation provided to Carib Cable by a firm of consulting actuaries, Watson & Sons.

2. After the acquisition PW continued to act as Carib Steel’s auditors, and the consolidated financial statements of Carib Steel included the financial statements of Carib Cable. On 22 September 1995 PW issued a report on the consolidated financial statements for the 15 months ended 31 March 1995. Carib Steel alleged negligence and/or breach of contract and breach of statutory duty on the part of PW in relation to its treatment of Carib Cable’s pension fund in the post-acquisition audit.

3. Carib Steel claimed special damage of \$38,389,308. This included the cost of acquisition of the shares and the fees paid to PW for the pre-acquisition valuation report and the post-acquisition audit. There were also claims for aggravated and exemplary damages.

4. In its defence and counter-claim, dated 17 June 1998, PW denied liability and counter-claimed \$937,783 in respect of unpaid fees for auditing Carib Steel’s accounts for the year ended 31 March 1996.

5. The case was tried by Jones J. The witnesses for Carib Steel were its chairman, Mr Richard Lake, and an expert witness, Mr Collin Greenland. The witnesses for PW were the partners responsible for the valuation report and the post-acquisition audit, respectively, Mr Richard Downer and Mr Colin Maxwell, and an expert, Mr Stephen Holland.

6. The judge preferred the views of Mr Greenland to Mr Holland and found that PW was negligent both in the pre-acquisition valuation and in the post-acquisition audit. He held that the correct measure of damages was to be ascertained by calculating what would have been paid for the shares if the advice or information given to Carib Steel had been correct, compared with what was actually paid. He found that Carib Steel's loss was the amount attributed by PW in its valuation to Carib Cable's pension fund surplus, ie \$13,849,000, and he awarded damages in that sum together with interest and costs. In effect, he appears to have proceeded as if the claim were for breach of a warranty as to the value of the pension fund surplus and to have regarded its value as nil. In his reasons for judgment, given on 24 May 2006, the judge made no reference to the counter-claim, which was treated by the parties as dismissed although no formal reference was made to it in the order.

7. On 29 July 2011 the Court of Appeal (Panton P, Cooke JA and Smith JA [Ag]) set aside the judgment of Jones J and entered judgment for PW on the claim and counter-claim with interest and costs. The court considered that the trial judge had not given satisfactory reasons for rejecting the evidence of PW's expert and had been wrong to prefer the evidence of Carib Steel's expert, who in the court's view was lacking in relevant expertise. The court considered also that Carib Steel's claim failed on causation of loss.

8. Carib Steel submits that the Court of Appeal erred in substituting its views about the expert witnesses for those of the trial judge. He had the benefit of seeing and hearing them give their evidence, and the findings which he made were properly open to him. Carib Steel also submits that the judge was properly entitled to find that PW's negligence caused it to suffer loss, but it submits that the judge was wrong to limit that loss to the value ascribed by PW to Carib Cable's pension funds surplus. It is submitted that the judge should have found that Carib Steel was entitled to recover its full loss resulting from the acquisition.

9. PW submits that the Court of Appeal was right to set aside the judgment for the reasons which it gave. PW's expert was not only better qualified than Carib Steel's so-called expert, but no proper grounds had been shown for rejecting the views expressed by PW's expert. Carib Steel had also failed to establish any proper basis for the judge's finding of loss.

10. The arguments on the hearing of the appeal rightly concentrated on the valuation report rather than the post-acquisition audit. Carib Steel submitted in its written case that the Court of Appeal was wrong to set aside the judgment in its favour in respect of both parts of its claim. However, on the oral hearing it was rightly not submitted by Ms Kitson QC that, if the Court of Appeal was right to set aside Jones J's judgment in relation to the valuation, it would have a free standing claim for damages arising from the post-acquisition audit.

11. Before embarking on a closer examination of the issues raised by the appeal, it is important to remember that the valuation of the shares in a company is an exercise requiring professional skill and judgment. There may be more than one way of approaching it. The question facing the courts in this case is whether PW fell below the standards properly to be expected of an accountant carrying out such an exercise. In such a case, if a properly qualified and reputable independent expert expresses a reasoned opinion that the valuation met the required professional standard, it is for the claimant to establish why that view should be rejected.

PW's engagement

12. Carib Steel manufactured, imported and traded in steel products for use in the construction industry. Carib Cable manufactured and distributed cables and wire products. Its shares were largely owned by two of its directors.

13. In October 1994 Carib Steel entered into non-binding heads of agreement with Carib Cable's controlling shareholders by which Carib Steel agreed to subscribe for a new issue of shares equivalent to 50.1% of Carib Cable's issued share capital at a price of \$32,000,000. Before going ahead with the acquisition, Carib Steel instructed PW to carry out a valuation of Carib Cable. Carib Steel provided PW with Carib Cable's audited accounts to the end of 1993 and unaudited accounts for the first 8 months of 1994. In a letter dated 5 October 1994 PW gave details to Carib Steel of the scope of the work which it proposed to carry out. It disclaimed any responsibility for loss which might result from its use of unaudited financial statements and information provided by Carib Cable's management.

PW's valuation

14. The valuation report was delivered in November 1994. In its overview of Carib Cable's historic performance PW commented:

“Despite the company's fairly consistent operational performance and results, its financial condition has steadily deteriorated ...

Beginning in 1992, the company increased its indebtedness to finance capital expenditures which included the purchase of approximately US \$500,000 of new machinery. This machinery was fully in place by the end of the first 1st quarter of 1993. However, the planned expansion into US-type cables had to be postponed as a result of the strike in April 1993 and a drop in existing sales from the general uncertainty surrounding the elections in early 1993 and the delay of the budget until

the summer of 1993. These circumstances combined to deplete Carib Cable's working capital. Since then, liquidity has progressively worsened as a result of depressed cash flow generation from operations attributable to general economic conditions, increased interest rates and devaluation losses. As a result, the company's revolving debt has increased and has been used mainly to pay interest charges, with none being available to provide the working capital required for the company's planned export expansion."

15. The balance sheet figures showed that the indebtedness by way of loans from banks had risen from nil at the beginning of 1992 to almost \$77,000,000 by the end of August 1994. This obviously explained the reason for Carib Cable seeking an injection of equity capital.

16. In assessing the actual and potential value of the company, PW took three approaches. First, it estimated the earnings value of the company in its present circumstances but under the assumption that it was completely equity financed. That method involved estimating an annual maintainable net earnings figure to which an appropriate multiplier was applied. The resulting sum was then adjusted by certain additions and deductions. The additions were for the value of the company's equipment and pension fund surplus. There were deductions for the value of outstanding loans and leases.

17. PW assessed the annual maintainable earnings at J \$15,589,000. In considering the appropriate multiplier, it noted among the company's strengths that it had an experienced management team and among its weaknesses that it was very highly leveraged. It assessed the appropriate multiplier as 6.5. The largest deduction was for its bank indebtedness. The additions included the pension fund surplus of \$13,849,000. The result of this approach was to produce an estimated value of the existing shares in the sum of J \$43,539,000. Half of that figure would have been \$21,769,500, ie considerably less than the \$32,000,000 which Carib Steel had negotiated to pay for 50.1% of the equity.

18. The estimate was followed by a number of explanatory notes. Note (2) ("the pension note") stated:

"The \$13,897,000 pension fund surplus may be brought back into the company. This income would be taxable but the tax would be offset through utilisation of the company's tax losses."

19. PW's second approach was to estimate the value of Carib Cable's assets on a liquidation basis. The report made clear that an accurate assessment of its liquidation

value was not possible, as the company had not commissioned an expert appraisal of the company's machinery and equipment, and the estimation of the current liquidation value was therefore an approximation.

20. Including the pension fund surplus, the total estimated value on liquidation was put at \$14,401,000, which would plainly not have warranted investing \$32,000,000 for a half share.

21. Thirdly, PW noted that the company management believed that with new working capital it would have the potential to expand into additional export markets. PW therefore attempted to estimate what might be the value of Carib Steel's proposed half share of the equity based on the prospect of new export sales after the injection of fresh working capital. PW adopted a lower price earnings multiple, because on this scenario it would be applied to an unproven market, and arrived at a potential value of Carib Steel's shareholding at \$48,317,000. That figure again included the value of the pension scheme surplus.

22. The relevant pension scheme was a defined benefit scheme which had commenced in 1974. In 1995 (after the date of the valuation report) the 1974 scheme was succeeded by a 1995 pension scheme, which was a contribution scheme.

23. PW derived the value of the surplus in the 1974 scheme from the actuaries' report. The actuaries valued the fund at 31 December 1993. Paragraph 4.4 of the actuaries' report stated under the heading "Treatment of surplus":

"As this is a balance of cost plan, the past service surplus disclosed is available to provide benefit improvements or to reduce the employer's contribution rate, or a combination of both."

At the date of PW's share valuation Carib Cable had borrowed approximately J \$1,400,000 from the pension fund. The actuaries' report did not show any loan to the company in the funds' assets, and so it would seem that this borrowing occurred in the same period that its revolving bank debt was increasing. PW made no reference to the borrowing from the pension fund in its share valuation report, but it is accepted that the company's repayment liability would have been reflected in its current liabilities in the company's financial statements used by PW in assessing its maintainable earnings.

24. By 31 March 1995 loans due from Carib Cable to the pension fund had risen to J \$3,561,937. This sum was included in the post-acquisition accounts in the category of payables. The debt to the pension fund was similarly treated in the accounts audited

by PW for the year ended 31 March 1997. When those accounts were presented at the company's annual general meeting, Mr Lake, who carried the proxy for Carib Steel, objected that they should have been included under loans rather than payables. Correspondence ensued which led to the present claim.

Carib Steel's claim

25. Carib Steel's statement of claim referred to the words of the pension note in the share valuation report and alleged that it was negligent and false for PW to represent "that the pension fund was in surplus in the amount of \$13,849,000 and that the said surplus was an asset of Carib Cable and available to it". The allegation of negligence was particularised in 9 sub-paragraphs, the central thrust of which was that PW ought to have advised Carib Steel of the facts regarding Carib Cable's borrowing from the fund.

26. One of the sub-paragraphs complained of PW:

"Failing to advise itself or the Plaintiff properly or at all as to the benefits that can accrue to companies, including Carib Cable, from their Pension Fund surpluses and/or whether or not Carib Cable could properly claim the said pension fund surplus as an asset of the company."

However, the pleading made no reference to the rules of the 1974 scheme, nor did it state in what respect the note in the valuation report was deficient or what should have been said regarding the benefits of the value of the pension surplus, beyond complaining that PW ought to have drawn attention to the borrowing by the company from the fund.

27. As to the effect of the alleged negligence, the statement of claim alleged that:

"... if the false representations and/or acts of negligence and breach of contractual and/or statutory duties had not been made, then it would not have acquired the shares in Carib Cable or, alternatively, would have taken steps promptly and timeously to rescind or otherwise challenge the agreement to acquire the said shares on the basis of misrepresentation and/or fraud as soon as the said depletion of the pension fund became known to the plaintiff."

In summary, therefore, the essence of the claim was that the value of the pension fund had been materially depleted by the company borrowing from it and that Carib Steel would have acted very differently if it had known of the borrowing prior to its acquisition of a majority shareholding.

28. Carib Steel's pre-trial memorandum summarised its claim in this way:

“3. The Claimant alleges that the Defendant was negligent in providing the Claimant with a valuation report which stated that the Company's pension scheme showed a surplus of \$13,849,000 as at September 1994, which surplus would be brought back into the company, and was therefore a relevant consideration in placing a value on the company.

4. The Claimant relied on the Defendant's valuation report to invest \$32M in acquiring 50.1% interest in the cable company. The Claimant contends that in so doing it was put to loss and expenses as a result of the Defendant's negligence and/or breach of contract, and/or breach of fiduciary duties.

5. The Defendant's valuation report did not disclose the fact that the two owners/managers had been borrowing from the Pension Fund. Instead it described the management as “experienced” with many years in the industry. The Claimant contends that the Defendant was in a special position of knowledge as auditors for both the Claimant and Caribbean Cable, and that they were under a continuing duty to disclose such information to the Claimant both in reference to the contract for valuation of the company and the audit of the consolidated accounts thereafter.

6. The Defendant failed to disclose that the loans from the pension fund depleted the surplus. The loans were themselves classified as trade payables in the audited accounts prepared by the Defendant and were not separately identified for the scrutiny of the Claimant's Board. The Claimant alleges that the Defendant was negligent in its accounting treatment of the said loans.

7. The loans from the pension fund were never repaid, and the Claimant lost its investment. The Claimant contends that the loss of its investment was caused by the Defendant's conduct as aforesaid.”

29. Consistently with Carib Steel's statement of claim and pre-trial memorandum, Mr Lake concentrated in his written and oral evidence on the borrowings from the pension fund.

30. According to the judge's notes of the evidence, Mr Lake said that he was no stranger to a pension fund scheme. He said that a pension fund trust deed can provide that it can be used to the benefit of the company. He added, correctly, that the trust deed which had been produced prior to the trial was the wrong trust deed, because it referred to the 1995 scheme. The trial judge never saw the correct trust deed. However, the nub of Mr Lake's complaint was not about the language of the deed but the borrowing from the fund. According to the judge's note, he said:

“Having read the complete report Carib Steel made a decision to purchase at a premium. I expected to find the pension fund surplus in cash. I found that part of it was borrowed by the company, Carib Cable. We found that out subsequently after we bought it.”

Expert Evidence

31. Carib Steel's expert, Mr Greenland, was a certified fraud examiner, certified financial services auditor and forensic accountant, but he was not qualified to practise as a chartered accountant. He had never prepared a valuation of a company or audited financial statements under the Companies Act. His expertise was in the investigation of fraud. In his report Mr Greenland made numerous references to International Accounting Standards (“IAS”), but PW's expert, Mr Holland, pointed out that the Institute of Chartered Accountants of Jamaica (“ICAJ”) did not adopt IAS until 2003. At the time of the share valuation in 1994 the relevant professional standards were those set out in various Statements of Standards Accounting Practice (“SSAPs”). Mr Greenland gave no general opinion about how the share valuation ought to have been carried out. He acknowledged in his report that at the time of the share valuation the applicable Jamaican accounting standard was not comprehensive and required only the following disclosures:

- i) The type of pension plan;
- ii) The date of the most recent actuarial study;
- iii) The extent of any under-funding;

iv) The recommendations for funding and whether the company was complying with them;

v) The employer's contributions for the year with comparative figures for the previous year.

32. However, in the context that a company might be required in any financial year to make good an inability on the part of the pension fund to meet its obligations, he considered that any information about the utilisation of the pension fund surplus should be accompanied with substantial disclosures of any matter relating to the pension fund, such as the loans to the company. He considered that Mr Downer's failure to draw attention to the loans made from the pension surplus was negligent. He said that it obscured the current and potential effect of the loan transactions on the valuation, but he did not expressly state whether in his opinion the valuation figures on PW's various approaches were excessive and, if so, by how much.

33. PW's expert, Mr Holland, was a fellow of the ICAJ and chairman of its Disciplinary Committee. The Court of Appeal noted that Mr Holland made, among others, the following points:

i) PW's estimate of the value of the company was in his opinion reasonable and had been properly carried out.

ii) The pension fund surplus could be considered an asset of the company.

iii) Loans extended to the company from the pension fund would not have diminished the amount of the surplus, as the loans were receivables repayable by the company to the pension plan on demand.

iv) Assets could take various forms, including receivables.

34. As to point 2, Mr Holland said in his report:

"In the 1990's it was commonplace in Jamaica for pension plan surpluses to be used to reduce the company's (employer's) contribution rate to the pension plan and so give the company a "holiday" from future contributions (see clause 4.4 on page 11 of the [Actuaries'] valuation). In that event, the surplus could be considered an asset of the company."

35. Mr Holland was cross-examined about this and about the loans which had been made by the pension fund to the company. According to the judge's note Mr Holland said:

“They [the loans] were not an impairment as they were immaterial given the value of the fund. That is, they would be repayable in accordance with the terms of the borrowing. The company could take a holiday and would reduce the expense. This would be until the surplus was exhausted. There were more aggressive employers that would take the money back, and others would take it back in contributions. Either by taking it back as a lump sum, which would increase the assets [sic]. The contribution holiday would allow a reporting of higher profits. Contributions would normally be monthly. If one takes a contribution holiday one would not take the money right away if the business is a going concern. I think the value was reasonable and the methodology was reasonable. ... I found the methodology good. I have personally done a valuation on a company. ... Where there are loans it is a matter of materiality. An audit opinion of the company affairs taken as a whole. The materiality of the balance is what one looks at. It would depend on the circumstances.”

36. Mr. Greenland did not grapple directly with the points made by Mr. Holland.

Negligence

37. Jones J found that PW through Mr Downer was negligent in the valuation of the company in two respects. First, Mr Downer was negligent in representing in unqualified terms that “the \$13,897,000 Pension Fund surplus may be brought back into the company” and in treating that sum as an asset of the company. As to that, the judge said:

“42... 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 contribution 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.

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 the majority shareholding in February 1995, the asset remained.

44... 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.”

38. Secondly, the judge found that Mr Downer was negligent in failing to report the fact that the company had borrowed from the pension fund. The judge said:

“45... The court accepts Collin 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 realised 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 Carib Steel a prospective 50.1% shareholder of Carib Cable. I accept that this is an obvious case, requiring the application of common sense and which does not require any expertise in share valuation itself.”

39. In the Court of Appeal the President expressed difficulty in understanding how the trial judge could have rejected Mr Holland’s evidence about these matters “virtually out of hand”. The President also described it as “somewhat mystifying” that the judge regarded the finding of negligence as an application of common sense which did not require any expertise in share valuation. He cited *Sanson v Metcalfe Hambleton and Co* [1998] PNLR 542 for the proposition that a court should be slow to find a professionally qualified person guilty of negligence without evidence from those within the same profession as to the standard properly to be expected in the relevant circumstances. He concluded that if the trial judge had given due value and weight to the evidence of Mr Holland he would not have found that PW was negligent. The other members of the court agreed with the President’s reasoning.

40. The Board agrees with the conclusion of the Court of Appeal.

41. As to the judge’s first ground for finding that PW was negligent, the pension fund rules to which he referred were not the rules of the relevant scheme. The rules of the 1974 scheme were not put in evidence and it was never alleged, still less proved,

that the statement in the valuation report that the “pension fund surplus may be brought back into the company” was contrary to the rules. If that allegation had been made, it would have been necessary to examine the rules but Carib Steel’s complaint was different. Its complaint was about PW’s failure to refer to the borrowing from the fund.

42. On the question whether it was reasonable as part of the valuation exercise to take the value of the pension fund surplus into account, having regard to standards and practices at the relevant time, Mr Holland considered that it was and he gave his reasons for his view. No reasoned rebuttal was advanced by Mr Greenland or put to Mr Holland.

43. One part of the reasoning advanced by Mr Holland was that Carib Cable would have access to the surplus by taking a “contribution holiday”. In his judgment Jones J described this as unsound, because on that scenario the asset would be subject to a discount as an income stream over time. However, this point does not appear to have been put to Mr Holland, and therefore the judge did not have the benefit of his response. One can see the potential force of the judge’s point if one were concerned simply with an income stream. But in this case there was an established capital fund. To the extent that the fund was not drawn on to increase the company’s annual profitability, the size of the remainder would be expected to continue to grow as an asset ultimately available for the company’s use by one means or another. In those circumstances it is not self-evident that a prudent valuer would consider it necessary or appropriate to discount the value of the fund. This was properly a matter for a professional opinion, based on accounting standards and practices at the relevant time.

44. Moreover the suggestion that there should have been a discount would lead logically to the question “how much?” The issue was whether the overall valuation figure put forward by PW was a negligent over-estimate. No alternative lesser figure was canvassed. This is not surprising since it would not appear to have been within Mr Greenland’s area of expertise. The case was not about whether some, and if so what, discount ought to have been made on account of the prospective deferral of use of the fund.

45. The second finding of negligence related to the borrowing from the fund. The borrowing formed part of the company’s current liabilities reflected in the valuation report. The relevant question was whether PW’s method of approaching the valuation of the pension fund surplus was negligent in view of the borrowing. Mr Holland did not consider it to be negligent for a number of reasons. The loans did not diminish the amount of the surplus, as they were receivables repayable on demand, and the Board notes that it was not alleged that PW ought to have had doubts as to the company’s ability to pay on demand. Mr Holland also did not consider the amount of the borrowing to be material. He explained that materiality involves considering the

amount in relation to the company as a whole, and he did not consider that the borrowing would affect the balance sheet for the reasons which he gave.

46. The Board agrees with the Court of Appeal that the judge was wrong to regard it as a matter of obvious common sense that PW was negligent, not requiring any expertise in share valuation. The fact that the defendant called an independent expert to testify that in his opinion there was no negligence did not, of course, preclude the court from rejecting the expert's view and finding that there was negligence. But it was essential that the reasons given by the expert for reaching his opinion were carefully scrutinised; for unless there was sound reason for rejecting it, the judge could not properly find that professional negligence had been established. In this case Mr Holland advanced reasoned grounds in support of his conclusion, and the Board agrees with the Court of Appeal that if the trial judge had given due weight to that evidence he would not have concluded that PW was negligent.

Causation

47. The Board's conclusion on the issue of negligence makes it unnecessary to consider the question of causation in detail. However, in view of the judgments below and the arguments advanced by the parties, it is right to comment shortly on the subject.

48. Carib Steel's evidence of reliance on PW's valuation was expressed in general terms. There is no reason to doubt that Carib Steel believed that the valuation was a reasonable one, but the purchase price did not represent any of PW's bases of valuation. The purchase price was agreed prior to PW's valuation and Carib Steel did not subsequently seek to adjust it. It was significantly higher than PW's estimate of the value of the shareholding in the company's existing circumstances, but significantly less than its potential value after the injection of new working capital in order to develop new export markets. That prospect must have provided the motivation for the purchase.

49. The judge made no finding about what would have been a proper valuation on that approach, or on either of the other approaches used by PW, because no other figures had been put forward for his consideration. Carib Steel's evidence did not focus on what ought allegedly to have been a proper valuation figure having regard to the borrowing by the company from the pension fund of approximately \$1,400,000, nor did Mr Lake deal with the specific question of what difference it would have made if he had known of that borrowing. The gap in the evidence about those matters was significant. It was for Carib Steel to plead and prove what difference that borrowing should have made to the valuation and would have made to its conduct. Set against the known bank indebtedness of almost \$77,000,000 in less than three years, for the

reasons explained in PW's valuation report, it is hard to see what difference an additional borrowing of \$1,400,000 over recent months would have made to Carib Steel's decision whether to inject \$32,000,000 in return for 50.1% of the equity. The Board therefore agrees with the Court of Appeal's conclusion that Carib Steel's decision to invest that sum was not one for which it had shown that it could properly blame PW. As to the amount of damages awarded by the judge, both parties are agreed that the judge's assessment of quantum could not be sustained, albeit for different reasons. The Board agrees that the judge approached quantum on an incorrect basis (as if he had found that there had been a warranty of the value of the pension fund surplus and that the value was nil) but it is unnecessary to say more about that.

Conclusion

50. The Board will humbly advise Her Majesty that the appeal should be dismissed. The parties will have 28 days in which to lodge written submissions about the order to be made for the costs of the proceedings before the Board, which will otherwise be that Carib Steel must pay PW's costs.