[2020] JMSC Civ 126

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2014 HCV 01394

BETWEEN	**CECELINE MAUREEN SHAE**	**CLAIMANT**
AND	**AUTO CHANNEL LIMITED**	**DEFENDANT/ ANCILLARY CLAIMANT**
AND	**THE TRADE ADMINISTRATOR**	**1S ANCILLARY DEFENDANT**
AND	**THE COMMISSIONER OF CUSTOMS**	**2ND ANCILLARY DEFENDANT**
AND	**ISLAND TRAFFIC AUTHORITY**	**3RD ANCILLARY DEFENDANT**
AND	**ATTORNEY GENERAL OF JAMAICA**	**4TH ANCILLARY DEFENDANT**
AND	**AUTO ASSESSORS ASSOCIATES LTD**	**5TH ANCILLARY DEFENDANT**

Stuart L. Stimpson and Ms Tashauna A.K. Grannum instructed by Hart Muirhead Fatta for the ancillary claimant.

Ms Christine M. McNeil and Louis Jean Hacker instructed by the Director of State Proceedings for the 1st, 2nd and 4th ancillary defendants.

Ms Tenneshia T. Watkins for the 5th ancillary defendant.

Heard: 22, 23, 24 October, 5 December 2019; 28 January, 13 March and 19 June 2020.

Negligence– Negligent misstatement – Age of motor vehicle – Duty of Trade Administrator to verify year before issuing licence – Duty of Commissioner of Customs to verify age during assessing of import duty – Whether Island Traffic Authority to decode chassis number before issuing certificate of fitness – Motor vehicle assessor's duty of care – Whether assessor breached its duty of care – Standard of care – Ancillary claim – Ancillary claim tried after release and discharge without admission of liability. CPR 18.

EVAN BROWN J

INTRODUCTION AND BACKGROUND

[1] The defendant/ancillary claimant is a company engaged in the business of importing and selling used motor vehicles in the Jamaican marketplace. The claimant was a private citizen who wished to buy a used motor car. On or about 17 March 2011, the claimant and the defendant/ancillary claimant contracted for the sale of a 2007 model Nissan Sunny motor car with chassis number JNICFAN16Z0077879 at a cost of $1,400,000.00. On 4 April 2011 the motor car was delivered to the claimant. Approximately one year later, on 3 April 2012, MSC McKay (Ja.) Limited carried out a valuation of the motor car. That valuation revealed that although the vehicle was registered locally as a 2007 model, its year of manufacture was 2004 and was therefore valued $1,030,000.00.

[2] The upshot of those discoveries was the filing of a claim form on 20 March 2014 which, among other things, alleged a breach of contract, claimed specific performance, damages and, in the alternative special damages of $1,692,400.00. On 5 June 2014, the defendant/ancillary claimant filed a very detailed defence. In sum, the defendant/ancillary claimant denied that it breached its contract with the claimant. The defence alleged that the defendant/ancillary claimant was induced to sell the misdescribed motor car to the claimant by its reliance on negligent misstatements made to it by the Trade Administrator (1st ancillary defendant), Commissioner of Customs (2nd

ancillary defendant), Island Traffic Authority (3rd ancillary defendant) and Auto Assessors Associates Limited (AAA Ltd) (5th ancillary defendant). The Attorney-General (4th ancillary defendant) was added as a party by virtue of the ***Crown Proceedings Act.***

[3] The allegations of negligent misstatements became the subject of this ancillary claim. The ancillary claim form was filed on the same date as the defence to the claim. The ancillary claimant's claim against the ancillary defendants is for an indemnity or contribution against the claimant's claim, interest and costs. On 22 December 2015, however, the ancillary claim against the Island Traffic Authority (ITA) was discontinued for want of a juristic personality.

[4] The ancillary claim was eventually set down for trial over the course of four days, commencing on 22 October 2019. On the first day of the trail, it appeared that, as between Ms Shae and the defendant, the claim was no longer extant. A "Release and Discharge" was executed by Ms Shae in favour of Auto Channel Limited (ACL) on 29 July 2019. The payment made to Ms Shae was "accepted on a confidential basis, in settlement of the Claim, **without the determination of any liability against the Company**". Emphasis added.

Preliminary Point

[5] The emphasized words became the launch pad for a preliminary point at the commencement of the trial by counsel for the 1st, 2nd and 4th ancillary defendants. Learned counsel commenced her submission by referring the court to paragraphs 8, 9 and 19 of the defence filed in the main claim. I set out immediately below the relevant part of paragraph 8, omitting its particulars:

> *"Further, and/or in the alternative, if the Claimant shall prove, that the Car (sic) is a 2004 model Nissan Sunny, such loss and damage as the Claimant shall also prove, was a result of the breach of contract and/or statutory duty and/or negligent misstatement by: (i) the Trade Administrator; (ii) the Commissioner of Customs; (iii) the ITA; and (iv) Auto Assessors Associates Limited; and/or its detrimental reliance on their joint and/or several representations".*

Paragraph 9 is in the following terms:

> *"Further, if the Claimant shall prove the Car (sic) is a 2004 model Nissan Sunny, both the Claimant and the Defendant were mutually mistaken as to the model (sic) the Car (sic) for the reasons set out at paragraph [?] and its particulars above".*

Paragraph 19 reads:

> *"Further, if it is proved as alleged, that the Car (sic) is a 2004 model Nissan Sunny, the GOJ's servants/agents named herein and Auto Assessors Associates Limited acted unconscionably in the circumstances".*

[6] Reference was also made to amended ancillary claim form, paragraphs 2, 4(a) and (b) and the relief. Paragraph 2 reads (particulars omitted):

> *"The ancillary claimant claims against the GOJ's servants, for an indemnity and/or contribution from them for any loss that the claimant shall prove against the ancillary claimant, in relation to its alleged misrepresentation of her Nissan Sunny with Chassis No. JN1CFAN16Z0077879 ("the Car") as a 2007 model; on the grounds of equitable estoppel and/or alternatively negligent misstatement as set out in the defence filed herewith".*

Paragraphs 4(a) and (b) are as follows:

> *"The ancillary claimant will also ask the court to determine the following matters not only between the claimant and the ancillary claimant but also between the ancillary claimant and you –*
>
> *(a) what liability, if any, does the ancillary claimant bear for the alleged loss suffered by the claimant, or such loss as she shall prove;*
>
> *(b) what is the extent to which the ancillary defendants, jointly and/or severally shall be liable to indemnify the ancillary claimant?"*

The relief simply encapsulates the foregoing quoted paragraphs in stating that the ancillary claimant claims indemnity against the claimant's claim.

[7] She highlighted that the ancillary claimant seeks indemnity or contribution if liability is found between the claimant and the defendant/ancillary claimant. That indemnity is therefore premised on the admission of liability in the main claim. That claim was settled "without any admission of liability for the Claim" (paragraph 3 of the Release and Discharge). This, she argued, indicates that to date liability had not been

found. Based on the foregoing, the ancillary claimant had no legal basis to pursue the ancillary claim, counsel concluded.

[8] Mr Stimpson's opposition to the preliminary point rested on four bases. First, the submission made on behalf of the 1st, 2nd and 4th ancillary defendants is falsely predicated on the notion that proof of Ms Shae's claim is based upon the court's adjudication. By so doing, it disregards four substantive matters. Firstly, the claim against ACL is based on strict liability under section 37 (1) (a) of the ***Fair Competition Act***. Secondly, ACL's breach is established by the ITA's letter of 30 October 2013. That is, regardless of ACL's intention, the 2004 Nissan Sunny it sold to Ceceline Shae was falsely represented as a 2007 model (***Fair Trading Commission v SBH Holdings Ltd and Forest Hills Joint Venture Limited*** (unreported), Jamaica, Supreme Court Civil Appeal No.92/2002 judgment delivered 30 March 2004, applied in ***Fair Trading Commission v Crichton Automotive Limited*** [2015] JMCC Comm 7 was relied on). Thirdly, the ancillary claim is predicated on, what was described as an undisputed fact, ACL's reliance on the ancillary defendants' representations, all to its detriment.

[9] Second, the submissions on the preliminary point wrongly equates a compromise of the claim, which preserves ACL's rights and does not admit liability, with the claim being dismissed or struck out. The position was quite the opposite. That is, the fact of payment puts in sharp relief its claim for contribution. Furthermore, resting as the ancillary claim does, on negligent misstatement, that is an issue that can be dealt with separately in accordance with the court's case management powers. Both Stuart Sime and Gilbert and Vanessa Kodilinye are of the view that even if an action has been settled, third party proceedings can proceed in the same way as if they had been started by separate actions (see Stuart Sime ***A Practical Approach to Civil Procedure*** 14th edition at page 269 and Gilbert Kodilinye and Vanessa Kodilinye ***Commonwealth Caribbean Civil Procedure*** 3rd edition at pages 47 and 48). ***Stott v West Yorkshire Road Car Co Ltd and another and (Home Bakeries Ltd and another, third parties)*** [1971] 3 All ER 534 was also cited, as well as Rule 26.1(2)(g), (i) and (v) of the ***Civil Procedure Rules, 2002*** (***CPR***).

[10] Third, if the preliminary point were to be upheld it would amount to punishing ACL for electing to negotiate a without prejudice settlement which mitigates its costs exposure and that of the ancillary defendants, in the event the ancillary claim succeeds. Fourth, the application is inconsistent with the overriding objectives of the ***CPR*** as it would result in a waste of resources. The fourth point rests on two planks. One, the point could have been taken when the matter came up for pre-trial review. Two, in the event the ancillary claim is dismissed, the ancillary claimant could bring fresh proceedings in reliance on the settlement with Ms Shae.

[11] After considering the submissions, I expressed myself in agreement with the submissions made on behalf of the ancillary claimant and ruled that the trial would continue.

[12] At the commencement of the afternoon session, counsel from the Attorney-General's Chambers indicated a desire to make further submissions on the preliminary point. I indulged her. This was really an attempt to bolster the submissions previously made with two authorities: ***Mervis Taylor v Owen Lowe and (Cons Paul O'Gilvie and The Attorney General of Jamaica Third Parties)*** (unreported), Jamaica, Supreme Court Civil Cl. 1995/T188 judgment delivered 9 May 2006 (***Mervis Taylor***) and ***Keo Thompson v Valbert Johnson and others*** [2019] JMSC Civ 58 (***Keo Thompson***). My decision was reserved to the following morning. Overnight reflection left my earlier ruling unchanged. My reasons follow.

Ruling on Preliminary Point

[13] Rule 18 of the ***CPR*** deals with ancillary claims. An ancillary claim includes a claim by a defendant against another person for a contribution or indemnity or some other remedy (r.18.1 (2)). Its legislative roots were firmly established by the ***Judicature (Civil Procedure Code) Law*** (***CPC***) the predecessor of the ***CPR***. Under the **CPC**, the nomenclature or legal terminology was third party proceedings. The change in name however, did not usher in any sea change in the requirements for an ancillary claim.

The law concerning third party proceedings was therefore not confined to the dustbin of history with the ***CPC***.

[14] The objects of third party proceedings were said to be two-fold. First, to prevent a multiplicity of actions and to enable the court to determine disputes between all parties to them in one action. Second, to prevent the same question from being tried twice with the possibility of different results. (See ***The Supreme Court Practice*** 1991 volume 1 O.16/1/1; hereafter the ***White Book***). I venture to say those objectives are a compendious expression of the overriding objectives of the ***CPR***.

[15] That said, both ***Mervis Taylor***, *supra*, and ***Keo Thompson***, *supra*, are cases in which the issue was whether the third party claims were time-barred. That is not the issue before me. However, I will accept and apply the learning in both cases, insofar as the narrow point before me is concerned. That is, and I put it as it was expressed by learned counsel from the Attorney-General's Chambers: the ancillary claimant has no legal basis for pursuing the ancillary claim. That submission rests on the premise that the liability of the ancillary claimant has not been established.

[16] As I understand the submission, the liability of the ancillary claimant can only be established if a court finds for the claimant in the main proceedings or the ancillary claimant expressly admits liability out of court, if there is an out of court settlement. Respectfully, the submission is misconceived.

[17] Both ***Mervis Taylor*** and ***Keo Thompson*** were decided under the ***Law Reform (Tort-feasors) Act***. Subsection 3 (1) (c) appears to provide the basis for third party claims. It is an independent cause of action. This cause of action entitles a defendant to bring a third party before the court on the basis that the third party is liable to make a contribution or pay an indemnity. The cause of action arises when the liability of the defendant has been established.

[18] In ***Mervis Taylor***, Sykes J (as he then was) cited the following passage from the judgment of Cassels J in ***Hordern-Richmond Ltd v Duncan*** [1947] KB 545, at page 551-552 as:

> *"The proceedings by the defendant against the third party are independent of and separate from the proceedings by the plaintiff against the defendant, except that, when the defendant is made liable to the plaintiff, he then has his right open against the third party to establish, if he can, that he possesses a right to indemnity and contribution from that third party".*

Sykes J concluded, at para 11, that "the two actions are separate and distinct albeit that until the liability of the defendant is determined there is no basis on which either an indemnity or contribution can be sought from the third party".

[19] The separateness and distinction of which Sykes J spoke is demonstrated by ***CPR*** 18.2 (1) which mandates the treatment of an ancillary claim as if it were a claim, except in circumstances disallowed by Part 18. This harmonizes with the law as it stood under the ***CPC***. The following passage from the ***White Book***, *supra*, is instructive. I quote:

> *"it should perhaps be observed that third party proceedings, including contributions between co-defendants, have or may have, as it were, a life of their own, quite independent of the main action, so that, for example, if the main action is settled, third party proceedings already begun can still proceed and so can the issue of contribution between co-defendants".*

Stott v West Yorkshire Road Car Co Ltd [1971] 2 QB 651; [1971] 3 All ER 534 was cited as authority for that proposition. The converse, which is not relevant for present purposes, is also true. That is to say, the dismissal of third party claim would present no bar to the continuation of the main claim.

[20] The independence of the main claim from the ancillary claim for indemnity or contribution is brought into sharper focus by the following statement of the law in the ***White Book***. I quote:

> *"Indeed, generally speaking, a defendant and a third party stand in relation to one another as if the defendant had brought a separate action against the third party, and therefore the costs of the successful third party should normally be ordered to be paid by the defendant and not the plaintiff especially if the latter is legally aided".*

It is therefore quite clear that the ancillary claim is capable of standing on its own feet or sit on its own buttocks, although the main claim should fail to come to trial.

[21] The point of the dispute turns on the meaning to be ascribed to the word 'liability'. ***Black's Law Dictionary*** 8th edition offers the following meaning:

> *"the quality or state of being legally obligated or accountable; legal responsibility to another or society, enforceable by civil remedy or criminal punishment".*

The defence makes plain that, although denying being in breach of contract or the ***Sale of Goods Act,*** the defendant/ancillary claimant made the representation to the claimant. That is, the ancillary claimant alleged innocent misrepresentation. That innocent misrepresentation is neither here nor there by virtue of the judicial interpretation making the representation one of strict liability.

[22] Accepting that it made the representation, the ancillary claimant has demonstrated that it is legally obligated or accountable to the claimant. That acceptance of responsibility exposes the ancillary claimant to enforcement by civil remedy. That is the effect of the settlement. On these premises, I accept the correctness of the learning in Gilbert Kodilinye and Vanessa Kodilinye, ***Commonwealth Caribbean Civil Procedure*** 3rd edition at page 48. I quote:

> *"If the defendant is seeking a contribution or indemnity, the ancillary claim is dependent on the main claim in the sense that the defendant is seeking to pass on to a third party the liability to the claimant, and if the claimant's claim fails, there is no liability to pass on. Accordingly, in cases of contribution and indemnity, a distinction must be drawn between:*
>
> *(a) cases where the claimant's claim is settled, the effect of which is that the ancillary proceedings will continue despite the settlement, because there will still be a live issue as to whether the third party should contribute to the settlement; and*
>
> *(b) cases where the claimant's claim is dismissed or struck-out, the effect of which is that there is nothing left to litigate between the defendant and the third party, other than costs".*

Although the learned authors did not cite any authority for the above extract, it is amply supported by ***Stott v West Yorkshire Road Car Co Ltd***, *supra*.

[23] Whether third party proceedings (a claim for contribution) could survive settlement in the main claim was the issue in the appeal in ***Stott v West Yorkshire***

Road Car Co Ltd. In that case directions had been given for the third party proceedings to be tried separately. Before the trial of the latter action, the defendant/ancillary claimant settled with the plaintiff/claimant. It then sought a contribution from the third party/ancillary defendant. The trial judge held that once the action had been settled, it was dead and he had no power to give third party directions. The judge also held that the defendant/ancillary claimant had no right to contribution whatsoever. He said they had foreclosed the issue of contribution by entering a settlement without admission of liability. The claim to contribution could only be sustained if the defendant/ancillary claimant had either been held liable or admitted liability.

[24] That case called upon the English Court of Appeal to construe the word 'liable' in section 6 (1) of the ***Law Reform (Married Women and Tortfeasors) Act***, which is in *pari materia* to the ***Law Reform (Tort-Feasors) Act***, section 3 (1) (c). The unanimous decision of the court was that 'liable' means 'responsible in law'. Consequently:

> *"It follows that a tortfeasor is entitled to recover contribution from another tortfeasor (i) when he has been held liable in judgment; (ii) when he has admitted liability; and (iii) when he has settled the action by agreeing to make payment to the injured person, although in the settlement, he does not admit liability".*

[25] If the submission of the Attorney-General's representative were to be accepted, it would mean once a defendant initiates a third party claim he could never settle with the claimant, if he wished to preserve his right to indemnity, without an admission of liability. The decision in ***Stott v West Yorkshire Road Car Co Ltd*** makes it plain that this is an untenable position. The predicate of third party proceedings appears to be the establishment of liability of the defendant in the meaning given to 'liability' in ***Black's Law Dictionary*** and 'liable' in ***Stott v West Yorkshire Road Car Co Ltd***. That predicate need not be established by the judgment of a court. It could also be by a settlement, whether or not there is an admission of liability.

The ancillary claim

Case for the ancillary claimant

[26] Mr Lynvalle Hamilton, principal director of ACL, was its sole witness. The Nissan car was purchased by ACL on or about 26 November 2010, from Expleo Motors, a supplier in Singapore. Expleo Motors provided a De-Registration Certificate which indicated that the year of manufacture of the motor car was 2007 and "corroborated" its VIN (vehicle identification number) or chassis number, as described in Expleo Motor's invoice. Following the purchase, ACL obtained an import licence from the Trade Administrator and imported the motor vehicle.

[27] Since ACL's core business was the importation of motor vehicles, ACL knew that importation was restricted and regulated under the ***Trade Act*** and current government policies which set out the procedure for importation. At the time of importing this motor car, the relevant policies and procedures were set out in Ministry Paper No 73 – Revised Motor Vehicle Import Policy effective July 1, 2004 (RMVIP). It was ACL's understanding that under the ***Trade Act***, the Minister had the power to determine the age of motor vehicles before they were imported. It was ACL's further understanding that the established procedure for doing so was the approved methods in the RMVIP.

[28] Through the RMVIP, the Minister purported to establish, among other things, the following. First, that motor vehicles required import permits before shipment to Jamaica. Second, import licences were granted by the Trade Administrator, operating under his authority and administered through the Trade Board Limited, a private company, owned and incorporated by the Government of Jamaica. Third, prohibited the importation of motor cars older than three years. Fourth, the age of the motor vehicle was to be determined by its model year. Fifth, all the approved methods for determining the model year included a reference to the motor vehicle's VIN, which it defined as the unique identifying code to each automobile identifying the manufacturer, make, model and year of the vehicle. Sixth, in addition to the Minister, the Island Traffic Authority (ITA) was the

competent authority to determine and adjudicate on matters relating to the model year of imported vehicles.

[29] When ACL applied to import the motor car, ACL was made to comply with the RMVIP and the course of dealings established from or around March 2009. By the latter, a licence would only be granted if the model year could be verified from the conventions set out in section 8 of the RMVIP. ACL also relied on a notice to importers dated 13 March 2009, appearing on the website of the Trade Board. Licences granted to ACL before and contemporaneous with the importation of the subject vehicle stated that their grant was subject to verifications with the Japanese Age Verification Manual (JAVM) and/or based on the RMVIP, confirmed the course of conduct earlier mentioned. A summary of such sample licences was provided as proof of this course of conduct.

[30] Based on all that, ACL contended it had no reason to believe that the Nissan Sunny was anything other than a 2007 model. The assertion was that the import licence verified the model year as 2007 and would not have been granted had the model year not been so verified. Furthermore, the import duties assessed by the Customs Department were in keeping with the model year 2007. ACL therefore expected that the assessed duties “verified that the VIN and other particulars of the Nissan on its landing to match the import licence”.

[31] ACL also obtained a certificate of fitness for the vehicle, after payment of the requisite fees, from the ITA. The ITA was the competent authority for determining the model year of imported motor vehicles, by virtue of section 8.4 of the RMVIP. The ITA not only issued the certificate of fitness for the vehicle, it effected its registration in the Motor Vehicles Register as a 2007 model.

[32] Thereafter, ACL sought an independent valuation from AAA Ltd. The valuation received from AAA Ltd stated that the Nissan Sunny was a 2007 model which, in the view of ACL, confirmed what was determined and verified by the government authorities. ACL itself did not have the legal authority to determine or verify the age of a

motor vehicle. Therefore, it relied on the competence and expertise of the government authorities and AAA Ltd to determine and verify the age of the Nissan Sunny. Accordingly, when ACL contracted with the claimant, it held the genuine belief that the Nissan Sunny was a 2007 model. Therefore, any misrepresentation to her regarding the model year was innocent.

[33] ACL made the following charges. The Trade Administrator and his officers at the Trade Board did not determine the age of the Nissan Sunny when the import permit was issued. The Commissioner of Customs and his officers ratified the error of the Trade Administrator and the Trade Board when import duties were assessed at the rate chargeable on a 2007 model vehicle. The ITA compounded matters when it failed to do any independent verification of the age of the motor vehicle, as was expected. ACL did not provide AAA Ltd with any documentation to inform their determination of the age of the Nissan Sunny.

[34] As an importer of second hand goods, it was ACL's understanding that it could not give any warranty concerning the age of the Nissan Sunny and so was obliged to rely on the registration documents issued by the Government of Jamaica. But for the failures of the governmental authorities to determine and verify the age of the Nissan Sunny, the vehicle would not have been imported into the country and the misrepresentation made to the claimant. When the vehicle was sold to the claimant as a 2007 model, reliance was placed on the valuation from AAA Ltd and the government authorities, not Expleo Motors. The De-registration Certificate provided by Expleo Motors made it clear that the age of the Nissan was based on the year of manufacture, not the model year. That document also made it clear that the information it contained could not be used for any purpose. Hence, ACL could not have relied on the year stated in it. In light of all that, ACL is entitled to be indemnified by the defendants in the event ACL is held to be liable to the claimant.

Case for the 1st, 2nd and 4th ancillary defendants

[35] Mr Clifford Hall, Head of Dealer Certification at the Trade Board Limited (TBL) was called on behalf of the Trade Administrator. His main function, as it related to import licensing, was the monitoring of applications and final approval of import licensing. One of the main functions of the Trade Board is the issuing of import and export licences for a selected range of commodities on behalf of the Ministry of Industry, Commerce, Agriculture and Fisheries (MICAF).

[36] He laid out the process for the importation of motor vehicles into Jamaica as follows. Importers, whether individual companies, dealers or non-dealers, can submit their applications online or manually. Each application, online or manual, is given a tracking number. For applications submitted online, the accompanying documents are submitted either manually or scanned and emailed. The importer first chooses the motor vehicle. Having gotten the documents, the application for the import permit would be submitted.

[37] The importer was required to supply the following information, irrespective of the mode of application. The consignor's/supplier's name and address; consignee's/importer's name and address. The specific characteristics of the vehicle would also be included. For example, the model year, make, model, VIN, colour, seating capacity and signature of the applicant or his representative.

[38] Mr. Hall also spoke to the then RMVIP (exhibit 16). There were three methods of verifying the model year of a motor vehicle. Firstly, there was the Japanese International Standard (JIS). The JIS was used to verify the model year of motor vehicles manufactured in Japan for export. Secondly, there was the Japanese Age Verification Manual (JAVM). JAVM was used to verify the model year of motor vehicles manufactured in Japan for the domestic market. This manual consisted of all the serial numbers for motor vehicles manufactured during a specific period. Thirdly, there was the International Standard (ISO). The ISO was used to verify the model year of the vehicle manufactured in specific countries which subscribed to the ISO.

[39] In both the JIS and ISO, the VIN consists of either 17 or 14 characters. In the 14-character VIN, the 8th character will tell the model year. In the 17-character VIN the 10th character gives the model year. By agreement, the letters “I”, “Z” or “O” are not used. If any of these letters appear at either the 8th or 10th position, that would be an indication that those countries do not subscribe to the international standard, resulting in difficulty in verifying the model year. Among the countries not subscribing to the ISO is Singapore.

[40] The motor car in question was shipped on 7 December 2010. The application for the import licence was submitted on 29 December 2010 (exhibit 3). The motor vehicle was therefore bought and shipped before the application was made for the licence. At the time of applying for the import licence, the importer submits the model year of the vehicle. There is a box on one of the required forms in which the importer must insert the model year. The model year inserted must be consistent with the information on the invoice, title, registration certificate, or cancellation certificate, depending on the jurisdiction from which the motor vehicle was imported.

[41] Based on the VIN, the motor vehicle did not conform to any of the standards. Furthermore, in 2011 there was not a methodology for use to verify the age of motor vehicles coming from Singapore. To his knowledge, there was no such methodology. None of the methodologies listed above could have been used to verify the age of the motor vehicle in question.

[42] Mr Hall disagreed with Lynvalle Hamilton’s evidence that when ACL applied to import the Nissan Sunny, ACL was made to comply with the RMVIP and course of conduct established since 2009; namely, that a licence would only be granted to permit a vehicle’s importation into Jamaica if the model year could be verified from the conventions set out at section 8 of the RMVIP. Mr Hall was not aware of any such undertaking or decision by the Trade Board.

[43] As proof of this course of conduct, Mr Hamilton had said confirmation could be found in the processing of other vehicles prior to and around the time of the subject

vehicle. The licences for these other vehicles stated that they were granted subject to verification with the JAVM and or the RMVIP. In addressing this issue, Mr Hall was also directed to an online Trade Board application (exhibit 12). In that application, this comment was recorded at heading 'processing', "2005 NOT 2006 PG 184". Mr Hall's explanation was that the officer who processed the application found a discrepancy with the model year which was applied for as 2006. On verification it was found to be 2005. This, he said, was a normal occurrence but one of the approved methods in the RMVIP was applicable in verifying the year of this vehicle as it was manufactured in Japan for its domestic market. Hence, a search of the manual would have given the chassis number and the associated year of the vehicle. For clarity, "PG 184" is the specific page in the manual from which the information for the vehicle was found. Mr. Hall's evidence was to a similar effect in respect of exhibits 10, 11, 12 and 13 which showed similar verification details.

[44] Mr Hall said there were two significant differences between the applications in those exhibits and that made for the motor vehicle in question. One, the Nissan Sunny in question was manufactured in Japan for the export market. Hence, it contains 17 characters in the VIN. Two, it was manufactured for export to a country that does not subscribe to the ISO. Therefore, the 10th character does not assist in verifying the model year. On the other hand, the vehicles in the exhibits were all manufactured in Japan for the Japanese domestic market. So, the model year could be verified by using the JAVM.

[45] Clive McDonald, Chief Motor Vehicle Inspector at the ITA at the material time, also gave evidence on behalf of the 1st, 2nd and 4th ancillary defendants. The ITA's remit was to, among other things, inspect and test all motor vehicles in fulfilment of its duties under the ***Road Traffic Act***. On 14 March 2011, the ITA issued a Certificate of Fitness in respect of the Nissan Sunny motor car (exhibit 7). The year 2007 (which referred to the model year) was written in the relevant box.

[46] The ITA was called into action upon receipt of a letter from the Fair Trading Commission requesting verification of the correct year of the Nissan Sunny motor car

bearing the chassis number JN1CFAN16Z0077879. He matched the chassis number in the letter with that on the vehicle. It became apparent to him that the chassis number did not comply with the ISO, JIS or Age Verification Manual (presumably the same as the JAVM). Consequently, he resorted to the Electronic Parts Catalogue (EPC). The resort to the EPC was facilitated through the authorized dealers for Nissan, Fidelity Motors Ltd. He provided Fidelity Motors Ltd with the chassis number. Fidelity Motors Ltd duly verified the Nissan Sunny to be a 2004 model.

[47] Under cross-examination, Mr McDonald was asked what steps should have been taken in March 2011 to determine that the year of the motor vehicle was 2007, in the same way the chassis number was decoded in 2013 to determine that the model year was in fact 2004. The essence of his response was that to issue the initial certificate of fitness, the motor vehicle examiner would have been concerned with confirming what was on the customs entry document with the vehicle and check for road worthiness, since it was a used vehicle. No independent verification of the model year would be done by the ITA unless someone raised an alarm or a complaint was made.

[48] Mr McDonald agreed that the ITA was the competent body to determine both the age of a motor vehicle and its year of manufacture. He, however, did not agree that inspection of the motor vehicle should include inspecting its model year. He elaborated as follows. The model year is provided on the customs entry document along with the chassis number. Both bits of information are normally accepted by the ITA, after verification of the chassis number. The ITA would then add all the other information on inspection. All the other characteristics of the motor vehicle are independently verified by the ITA on inspection although, he had to admit that all those particulars, excepting the engine number, were also contained on the customs entry document.

[49] Mr McDonald was pointedly asked whether it would have been prudent to independently verify the model year of the vehicle, in the same way the other particulars were independently verified. His reply was in the negative because, the steps that are taken to verify the model year cannot be done simultaneously with the issue of the certificate of fitness. Having agreed that the model year is very important, he was asked

if that should not be a material consideration at the inspection of the vehicle, and prior to the issue of the certificate of fitness. He repeated his evidence concerning when the ITA's investigation of the model year would be triggered and added that that exercise is resolved at the ITA's corporate office.

[50] In that regard, the incorrect model year on the certificate of fitness does not represent a failure on the part of the ITA. The motor vehicle examiners at the examination depots are not required to independently verify the model year of motor vehicles. The discharge of the duties of the motor vehicle examiners under the ***Road Traffic Act*** does not speak to the handling of complaints. In his experience, the Trade Administrator/Trade Board had never sought the assistance of the ITA to determine the model year of a motor vehicle. Those interventions were usually sought by private individuals, the Consumers Affairs Commission and Fair Trading Commission.

Submissions on behalf of the 1st, 2nd and 4th ancillary defendants

[51] Separate submissions were made on the two grounds of the ancillary claim. The ground of equitable estoppel was treated with first. Learned counsel referenced ***Halsbury's Laws of England/Estoppel v. 47 (2014)*** at page 2 for the following definition of estoppel:

> *'" Estoppel' has been described as a principle of justice and equity which prevents a person who has led another to believe in a particular state of affairs from going back on the words or conduct which led to that belief when it would be unjust or inequitable (unconscionable) for him to do so. The person making the statement, promise or assurance is said to be estopped from denying or going back on it; 'estopped' means 'stopped'".*

Citing the same work, counsel set out the three kinds of estoppel at common law along with their equitable offshoots.

[52] From there, it was argued that for the ancillary claimant to succeed under this head it must prove that the 1st, 2nd and 4th ancillary defendants made a clear and unequivocal representation and knew that the representation was false or with the intention that it would be acted upon. The representation here concerns the age of the motor vehicle. Using the chronology of the date of the de-registration certificate (which

provides the year of manufacture), through to when the vehicle was invoiced and shipped to Jamaica, counsel sought to demonstrate that no such representation was made to the ancillary claimant. The conclusion advanced was that the representation upon which ACL would have relied was made at the time it purchased and shipped the vehicle to Jamaica. Therefore, the ancillary claimant's assertion of reliance on the 1st, 2nd and 4th ancillary defendants to determine the motor vehicle's age is faulty and without merit.

[53] Counsel's last salvo on this head of the claim was directed at its substratum. Equitable estoppel cannot be used as a cause of action, or claim, in the modern terminology. ***Halsbury's***, *supra*, at page 2, was cited for the following statement of the law:

> *"With the exception of proprietary estoppel, estoppel cannot be used as a cause of action, but it may ensure the success of a cause of action by preventing a party from alleging or proving in legal proceedings that a fact is otherwise than it has been made to appear".*

Consequently, the ancillary claim should fail.

[54] Turning to the second head on the claim, negligent misstatements, the following submissions were made. After citing passages from ***Hedley Byrne & Co Ltd v Heller & Partners Ltd*** [1963] 2 All ER 575; [1964] AC 465 (***Hedley Byrne***), ***Charlesworth & Percy on Negligence*** 13th ed at para 2-184 and ***Caparo Industries Plc v Dickman*** [1990] 2 AC 605 (***Caparo***), it was submitted that the ancillary claimant's success hinged on the proof of three elements. First, it has to show that there was a statement upon which it relied. Second, it must establish that there was an undertaking or assumption of responsibility by the Government of Jamaica's (GOJ) servants. Third, it must be proved that the nature of the relationship or proximity between the GOJ's servants giving the advice was such that a duty of care to ACL would arise.

[55] Counsel elaborated on the ingredients in the order they appear above. It was accepted that both the 1st and 2nd ancillary defendants, as well as the ITA made a statement describing the vehicle as a 2007 model. It was argued, however, that the

statement was not initially made for ACL to rely on it. Rather, the statement concerning the year (age of the motor vehicle) was made by the Land Transport Authority of Singapore and Expleo Motors, the supplier of the motor car. Therefore, any reliance ACL placed on the statement about the age of the vehicle would have been when it bought the motor vehicle, and not when it sought and obtained the services of the GOJ servants. Paragraphs 34 and 38 of the judgment of Sykes J (as he then was) in ***The Fair Trading Commission v Crichton Automotive Limited*** [2015] JMCC Comm 7, were quoted in support. In the opinion of counsel, it is illogical for ACL to expect that TBL could reasonably foresee that ACL would wait until after the age verification process and the issuance of the import licence to rely on the licence as proof of the actual age, model year or year of manufacture of the vehicle.

[56] In relation to the second ingredient (undertaking or assumption of responsibility) the submissions were as follows. These were prefaced by a quotation of Lord Morris' timeless encapsulation of the law of negligent misstatement in ***Hedley Byrne***. There is no evidence to show that the GOJ's servants undertook or assumed any responsibility in relation to age verification of motor vehicles, so as to ensure that ACL could rely on the import licence as proof of that particular when selling the vehicle.

[57] The purpose of the age determination or verification was to satisfy the TBL that the motor vehicle being imported was compliant with the RMVIP's age restriction. Likewise, neither the Commissioner of Customs nor the ITA relied on the import licence. In the case of the former, the import licence only confirmed the importer's right of importation. The calculation of the duties was based on the cc rating and the price of the motor vehicle. In respect of the latter (the ITA), it had resort to the C-87 (customs declaration form) when issuing the certificate of fitness, in pursuance of which, the ITA was concerned only with the roadworthiness of the motor vehicle. This submission was underlined by a quotation of para 36 of the judgment of Sykes J in ***The Fair Trading Commission v Crichton Automotive Limited***, *supra*. Against this background, there can be no argument that the GOJ's servants undertook any responsibility to verify the age/model year/year of manufacture of the motor vehicle at the point of interface with ACL.

[58] Counsel's final submissions were on the third ingredient (proximity of relationship). The burden of these submission is the refutation of any legal relationship between the GOJ's servants and ACL, capable of giving rise to a duty of care. Lord Devlin's dictum in which he identified two scenarios from which the duty of care may arise was quoted***: Hedley Byrne,*** *supra,* at page 611. In one scenario, the duty arises naturally where there is a relationship equivalent to a contract. In the other scenario the relationship is ad hoc. In the latter there must be proximity between the parties. The dictates of the ad hoc relationship were underlined by the citation of ***Charlesworth & Percy on Negligence,*** supra, at para 2-195. In that paragraph the learned authors point to the inadequacy of foresight and reasonable reliance; the need for indicators of closeness between the parties; that the relationship should be very close and proximate and, while not contractual, should be kindred. From there it was advanced that no such relationship existed between the parties in the instant case. The performance of their statutory duties by the GOJ's servant cannot be said to create such a relationship, it was concluded.

Case for the 5th ancillary defendant

[59] Mr Paul Banks, the Chief Executive Officer of the 5th ancillary defendant was its only witness. He accepted that AAA Ltd prepared an appraisal for the Nissan Sunny motor car, on or about 15 March 2011 and issued a valuation report, "acknowledging" that the car was a 2007 model.

[60] When the ancillary claimant engaged AAA Ltd to do the appraisal, it also presented an import permit which indicated that the vehicle was imported as a 2007 model. Mr Banks asserted that in doing the appraisal, AAA Ltd was duty bound to assess what was presented to it. He maintained that all statements made to ACL were of the highest or reasonable standards of the profession of motor vehicle assessors at the time.

[61] It was their understanding that the ITA was the competent statutory authority to determine the model year of vehicles imported into Jamaica. All stakeholders accepted

the model year and other features after an imported vehicle had been issued with a valid import permit by the Trade Board. Should a discrepancy be discovered during the appraisal exercise, their obligation was to highlight it in their report and assign a value accordingly. Additionally, the customer would be directed to the ITA to have the issue addressed.

[62] At the time of the appraisal, the local motor vehicle industry had no resources to decode VIN Plates (chassis numbers) for Nissan vehicles, particularly the Sunny model, being imported from Singapore. Even the local dealers for Nissan, Fidelity Motors Ltd, were unable to decode the chassis number for the motor car in question. The capability to decode the chassis number did not become available until late 2011. Therefore, AAA Ltd accepted the import permit as confirmation of the vehicles particulars. Their inspection of the seat belt tag also suggested a model year of 2007.

[63] In spite of the above, the cross-examiner wished to know why reliance was placed on the import entry. The response was that standard operating protocol dictated reliance on the import permit because it was a newly imported unit. That standard operating protocol had nothing to do with an inability to decode the VIN Plate. He admitted, however, that once the resources to decode a VIN Plate were available, that would be done as part of the overall protocol.

[64] So, since he was unable to independently verify the model year, admittedly a usual key determinant of the vehicle's value, would it have been prudent to make that notification on the valuation? In Mr Banks' understanding it would not have been. Why? Where the chassis number could not be decoded, industry practice at the time was to rely on the official import documentation which, in this case, corresponded with the car's seat belt production date. He insisted, therefore, that the valuation met with prevailing industry standards, in spite of the absent qualification.

[65] Best practices among motor vehicle assessors is to independently verify the model year of motor vehicle through decoding its chassis number, rather than to rely on the import permit. The reliance on the import permit became the industry standard when

they were unable to decode the chassis number independently. So then, Mr Banks concluded his evidence, there was one industry standard to verify the model year of a motor vehicle with an exception.

Submissions on behalf of the 5th ancillary defendant

[66] Miss Watkins submitted that it is not enough to establish that the situation gives rise to a duty of care. It is necessary to go further and find that the duty of care has been broken. This proposition appears to have been culled from her discussion of ***Hedley Byrne***, *supra*; ***Mutual Life and Citizens' Assurance Co Ltd v Evatt*** [1971] AC 793 (***MLCA v Evatt***) and ***Appleton Hall Ltd v T. Geddes Grant Distributors Ltd*** [2011] JMCA Civ 30 (***Appleton v Geddes Grant***). This, in her view, involves the "representor" advancing an opinion which itself is one that could not honestly have entertained or which involves directly the existence of facts which are false.

[67] The major premise of this submission is that the initial information about the subject vehicle came from the ancillary claimant namely, the import permit. The 5th ancillary defendant relied upon the import permit and the seatbelt tag of the subject vehicle as confirmation that its model year was 2007. The 5th ancillary defendant resorted to these methods of confirmation because of the state of the motor vehicle industry at the material time. The 5th ancillary defendant's contention is that it relied upon the ancillary claimant to provide correct information about the subject vehicle. Since it was the ancillary claimant who introduced the vehicle into Jamaica as a 2007 vehicle, and represented it as such to the 5th ancillary claimant, this established that the ancillary claimant had provided false information to the 5th ancillary defendant.

[68] The ancillary claimant took the position that it was simply a conduit for the information concerning the motor vehicle. That is, the very information on which the ancillary claimant alleged it relied, was contained in the accompanying documentation from Singapore. So that, it was left to the ancillary defendants to verify the information. In respect of the 5th ancillary defendant, since it was unable to decode the chassis to verify the model year, it should have said as much on the valuation report it issued.

[69] The 5th ancillary defendant took the position, however, that it complied with prevailing industry standards. Those standards did not require it to attach any such qualifying statement on its valuation report. Perhaps as a secondary argument, counsel adverted to the following inscription on the valuation report:

> *"while we have visually inspected the vehicle to the best of our ability, the possibility exists that there may be hidden defects. This is not a recommendation to purchase the vehicle".*

While acknowledging that this disclaimer may arguably be said to be directed to a regular customer, it was submitted that it was enough notice to ACL's customers, and ACL, that the 5th ancillary defendant was not guaranteeing the accuracy of the information in the valuation report.

[70] It was further argued that it was well-known that prior to 2011 there was no facility to decode the chassis number for the Nissan, particularly the Sunny model, imported from Singapore. Even Fidelity Motors, the local dealers for Nissan was similarly handicapped. The court was urged to accept that the 5th ancillary defendant exercised the degree of care as the circumstances allowed, concordant with industry practice and standard. Accordingly, the court ought to find that in doing the appraisal, the 5th ancillary defendant made statements which were of the highest or reasonable standards of the profession of Motor Vehicle Assessors. It made no negligent statement but merely accepted the information presented to it by the ancillary claimant. It is therefore neither reasonable for the ancillary claimant to say it relied on the valuation to sell the Nissan Sunny nor that the claimant was thereby induced to accept the sale price. The upshot is, the ancillary claimant is the author of its own misfortune and therefore should not be indemnified by the 5th ancillary defendant.

Issues for determination

[71] This ancillary claim was expressed to be on either one or the other or both of the following grounds. That is, "on the grounds of equitable estoppel and/or alternatively negligent misstatement". The ancillary claim was, however, contested on the limb of negligent misstatement. In any event, both grounds depend on a finding that the

ancillary defendants made negligent representations to the ancillary claimant on which it relied to its detriment. The issue for resolution is, therefore, whether the ancillary defendants made representations to the ancillary claimant, and if they did, were those representations negligently made?

Discussion and analysis

[72] The law is settled that a negligent misstatement which results in economic loss may be actionable if the circumstances give rise to a duty of care on the maker of the statement (see, for example, ***Hedley Byrne***, *supra*). Cases of negligent misstatement typically arise in circumstances where one party (usually the aggrieved person) sought information, opinion or advice from the defendant. To succeed on a claim for negligent misstatement, the claimant must establish that the maker of the statement owed him a duty, that he failed to discharge the duty and, as a consequence of that failure, he, the claimant, suffered damage.

[73] Merely to make the statement is insufficient to fix the maker with liability. In the language of the authorities, there must be an assumption of responsibility by the maker of the statement. This is the "something more" about which Lord Reid spoke. At page 483 of ***Hedley Byrne*** he said:

> *"So it seems to me that there is good sense behind our present law that in general an innocent but negligent misrepresentation gives no cause of action. There must be something more than mere misstatement. I therefore turn to the authorities to see what more is required. The most natural requirement would be that expressly or by implication from the circumstances the speaker or writer has undertaken some responsibility".*

[74] This underlines the fact that the circumstances in which the statement was allegedly made must themselves be such as to impose the duty to exercise reasonable skill and care in making statements of fact or of opinion: ***MLCA v Evatt***, *supra*. Insofar as the law of negligence is concerned, there can be no duty of care *in vacuo*. According to Lord Pearce in ***Hedley Byrne***, at page 534:

> *"The law of negligence has been deliberately limited in its range by the court's insistence that there can be no actionable negligence in vacuo*

> *without the existence of some duty to the plaintiff. For it would be impracticable to grant relief to everybody who suffers damage through the carelessness of another".*

There is usually no difficulty in establishing that there is a duty of care in the context of a relationship of contract, or its equivalent. Lord Devlin was content "with the proposition that wherever there is a relationship equivalent to contract, there is a duty of care" (***Hedley Byrne***, at page 530).

[75] It was accepted by Lord Morris of Bort-y-Gest that a duty not only to be honest but also to be careful can arise in relationships independent of contract. For him, it should now be accepted as settled that if an especially skilled man undertakes to apply that skill, whether or not within the bounds of a contract, in the aid of another who relies upon that skill, a duty of care arises: ***Hedley Byrne***, at page 502. Lord Hodson explicitly agreed with Lord Morris. For Lord Hodson it is the adviser's place in the sphere of speciality which makes it reasonable to rely on the skill, judgment or ability to make careful enquiry and his assumption of the task to give information or advice to someone who he knows will rely on it that gives rise to the duty of care (see ***Hedley Byrne*** at page 514).

[76] Lord Diplock accepted this proposition. Normally, the adviser communicates to the recipient that he possesses the requisite degree of special skill and competence and his willingness to exercise the level of diligence for which the practitioners in the field in which the advice is sought are reputed, by his own involvement in that field (see ***MLCA v Evatt***, at page 805 D-E). This is what grounds the second of the two characteristics common to all relationships in which the duty of care was declared to exists. The first characteristic is that the maker of the statement had made it in the ordinary course of his business or profession. Two, the subject-matter of the statement could not have been made without the exercise of some qualification, skill or competence which was beyond that of the ordinary reasonable man and the maker of the statement had broadcasted to the recipient his own speciality by virtue of his involvement in the relevant field (see ***MLCA v Evatt***, at page 802 A-B).

[77] In ***MLCA v Evatt***, at page 805 F-H, Lord Diplock referred to ***Candler v Crane, Christmas & Co*** [1951] 2 KB 164, at pages 179-180 (***Candler v Crane***). The reference was to the dissenting judgment of Denning LJ which had been called forth from the catacombs of dissenting judgments by the House of Lords in ***Hedley Byrne*** and had new life breathed into its proverbial nostrils. In that passage Denning LJ made a distinction between the classes of persons whose profession or calling made them susceptible to the duty of care and others who did not. According to Denning LJ, persons subject to the duty of care in giving advice are:

> *"those persons such as accountants, surveyors, valuers and analysts whose profession and occupation it is to examine books, accounts and other things, and to make reports on which other people – other than their clients – rely in the ordinary course of business," added "Herein lies the difference between these professional men and other persons who have been held to be under no duty to use care in their statements, such as promoters who issue a prospectus:* ***Derry v Peek****, 14 App. Cas. 337 (now altered by statute) and trustees who answer inquiries about the trust funds:* ***Low v Bouverie*** *[1891] 3 Ch. 82. Those persons do not bring, and are not expected to bring, any professional knowledge or skill into the preparation of their statements: they can only be made responsible by the law affecting persons generally, such as contract, estoppel, innocent misrepresentation or fraud".*

Any decision to impose a duty of a given scope on one party for the benefit of another ought to be guided by three factors. These are, foreseeability of damage, a relationship of proximity or neighbourhood and circumstances making it fair, just and reasonable to impose the duty (see ***Caparo***, at page 618 A).

[78] Having answered the question whether a duty of care should be imposed, the next question must be, what is the nature or scope of that duty? The boundaries are dictated by an appreciation of the societal demands to be insured against the carelessness of others. Here I quote Lord Pearce in ***Hedley Byrne***, at pages 536 – 537:

> *"How wide the sphere of the duty of care in negligence is to be laid depends ultimately upon the courts' assessment of the demands of society for protection from the carelessness of others. Economic protection has lagged behind protection in physical matters where there is injury to person or property. It may be that the size and the width of the range of possible claims has acted as a deterrent to extension of economic protection".*

In this assessment of the demands of society, foreseeability, proximity and the composite of whether it is fair, just and reasonable are taken into consideration: ***Caparo,*** at page 633 A – C. A remedy may yet be denied to an injured claimant on the grounds of public policy, notwithstanding the foreseeability of the injury: ***Caparo***, at page 633 E.

[79] In respect of negligent misstatements, the duty is transaction specific. That is to say, the duty is limited to the transaction for which the adviser knew it was to be used. Lord Jauncey of Tullichettle in ***Caparo*** clearly accepted this as a correct statement of the law. At page 656 G he quoted with approval Denning LJ's judgment in ***Candler v Crane*** where Denning LJ said the duty of care extends "only to the transactions for which the accountants knew their accounts were required". Denning LJ confined the duty to only those "cases where the accountant prepares his accounts and makes his report for the guidance of the very person in the transaction in question": ***Caparo***, at page 656 H.

[80] I will now turn my attention to the standard of care. The standard by which the discharge of the duty of care is to be judged is that of the reasonable man. "The law ought as far as possible to reflect the standards of the reasonable man", per Lord Reid in **Hedley Byrne**, at page 482. The reasonable man who knew that his skill and judgment were being relied on had one of three choices to make: be silent, refuse to answer or give the information, advice or opinion, with or without qualification. This was how Lord Reid elaborated on his declaration of the reasonable man standard:

> *"A reasonable man, knowing that he was being trusted or that his skill and judgment were being relied on, would, I think, have three courses open to him. He could keep silent or decline to give the information or advice sought: or he could give an answer with a clear qualification. If he chooses to adopt the last course he must, I think, be held to have accepted some responsibility for his answer being given carefully, or to have accepted a relationship with the inquirer which requires him to exercise such care as the circumstances require".*

Before undertaking to answer an inquiry, the reasonable man would expend time and/or trouble "in searching records, studying documents, weighing and comparing favourable

and unfavourable features and producing a well-balanced and well-worded report" (see ***Hedley Byrne*** at page 503).

[81] The standard of the reasonable man here is not the man on the Clapham or Jamaica Urban Transit Company (JUTC) bus. It is the standard of skill and competence for which persons in the particular field of endeavour are renowned: ***MLCA v Evatt***, at page 803 C. Without this standard, there would be no yardstick by which to judge an alleged breach of the duty of care. This was how Lord Diplock articulated it ***MLCA v Evatt***, at page 803 G – H:

> *"As in the case of a person who gratuitously does an act which calls for some special skill and competence, a duty of care which lies upon an adviser must be a duty to conform to an ascertainable standard of skill and competence in relation to the subject-matter of the advice. Otherwise, there can be no way of determining whether the adviser was in breach of his duty of care. The problem cannot be solved by saying that the adviser must do his honest best according to the skill and competence which he in fact possesses, for in the law of negligence standards of care are always objective".*

[82] Not only must it be shown that a duty of care exists, by virtue of the relationship between the parties and that there was a failure to discharge that duty at the requisite standard, it must also be established that the aggrieved party relied on the information, advice or opinion. ***Hedley Byrne*** itself was a case in which the appellant company acted in reliance on the references received from the respondents, to their detriment. Lord Morris of Borth-y-Gest, at page 501 in ***Hedley Byrne***, accepted the following principle formulated by Lord Shaw in ***Nocton v Lord Ashburton*** [1914] AC 932, at page 972:

> *"That once the relations of the parties have been ascertained to be those in which a duty is laid upon one person of giving information or advice to another upon which that other is entitled to rely as the basis of a transaction, responsibility for error amounting to misrepresentation in any statement made will attach to the adviser or informer, although the information and advice have been given not fraudulently but in good faith".*

There is therefore no liability for the misstatement without evidence that the statement was relied on as the basis of the transaction.

[83] There are two characteristics of the ingredient of reliance which, it seems to me, are intertwined. First, it must be reasonable for the recipient to rely on the information, advice or opinion in deciding on his course of action. Second, the information or advice relied on must lie outside the recipient's corpus of knowledge vis-à-vis the transaction. These propositions were culled from the following extract from Lord Diplock's judgment in ***MLCA v Evatt***, at pages 802 H – 803 A:

> *"Such advice to be reliable (i.e. to be of a quality upon which it would be reasonable to for the advisee to rely in determining his course of action in a matter which affected his economic interests) calls for the exercise on the part of the adviser of special skill and competence to form a judgment in the subject-matter of the advice, which the advisee does not possess himself".*

[84] So then, it is from the circumstances in which the advice was both sought and tendered, together with the state of mind of the parties and their knowledge of those circumstances that the reliance is to be gathered (see ***Appleton v Geddes Grant***, *supra*, at paragraph [40]). The touchstone of reliance is whether the adviser could anticipate that the recipient would rely on the information, advice or opinion, based on the circumstances in which the statement was tendered and what was said: ***Appleton v Geddes Grant***, at paragraph [41].

[85] In ***Caparo***, at page 620 H – 621 A, after Lord Bridge reviewed the cases he identified what he characterized as their salient features which all touch and concern the question of reliance. The all-important predicate of reliance is the knowledge of the adviser in three areas. Firstly, the defendant's knowledge of the transaction which the claimant had in his contemplation. Secondly, the defendant's knowledge that his advice or information would be communicated to the claimant. Thirdly, the defendant's knowledge of the likelihood of reliance being placed on his advice or information in deciding whether to engage in the contemplated transaction.

[86] Two consequences flow from this corpus of knowledge. The first is that the defendant could specifically anticipate the claimant's reliance on the advice or information for the purpose to which it was eventually put. Secondly, the claimant would reasonably suppose that he was entitled to rely on the information or advice

communicated to him for the transaction for which it was acquired. Both results are, of course, subject to the impact of any disclaimer of responsibility which the defendant might have inserted.

[87] One obvious case in which reliance on the information or advice is highly probable is where the person or body providing the information was either the most obvious or only source of the information. In these circumstances "it would not be difficult therefore to conclude that the person who sought such information was likely to rely upon it", per Lord Oliver of Aylmerton, in ***Caparo***, at page 641 C.

[88] A necessary corollary to proving reliance on the statement is establishing a nexus between the damage suffered and the reliance on the statement. The connecting threads between the statement which is alleged to be inaccurate in a material particular and the claimed damage, are foreseeability and proximity (see ***Caparo***, at page 635).

The Revised Motor Vehicle Import Policy

[89] The setting or backcloth against which this claim must be decided is an understanding of the Revised Motor Vehicle Import Policy (RMVIP) contained in Ministry Paper No. 73, which became effective on 1 July 2004. This necessitates an abridged recitation and citation of the relevant provisions of the RMVIP. While the common thread in the claim against all the ancillary defendants is that they misrepresented the year of the Nissan Sunny to the ancillary claimant, the circumstances in which each is said to have done so are different. Consequently, it is more convenient to discuss the claim against each separately. But first, the common background of the claim, the RMVIP.

[90] The RMVIP had two declared objectives. Firstly, it introduced new policy measures to govern the importation of motor vehicles. Secondly, it provided "a single and comprehensive reference document on Jamaica's Motor Vehicle Import Policy" (1.0). This motor vehicle import policy therefore sought to balance an open and inexhaustive list of important factors. The inclusive important factors named were, "road

safety, consumer protection, fair competition, consumer choice, revenue collection, the safeguarding of intellectual property rights and environmental protection" (2.0).

[91] The RMVIP harked back to its historical context and declared itself to be the progeny of the governing aim of liberalization. In short, since 1989 various policy measures were introduced to liberalise the importation of motor vehicles into Jamaica. Between 1989 and 2004, there was close monitoring of the regime and the policy underwent several revisions (2.0). Under this motor vehicle importation regime, new car dealers were permitted to import used cars, zero to three years old, and light commercial vehicles, zero to four years old, of any make or model for the retail trade (13.0). Used car dealers were also allowed to import new motor vehicles of any make or model for the retail trade (14.0). An individual or a returning resident could also avail himself of the facility of importation of his own motor vehicle (15.0).

[92] A notable limitation in this policy of liberalization of motor vehicle importation was in respect of the age of the motor vehicle. The outer limit for cars was three years. The upper limit for light commercial vehicles was four years. These were the age ranges of the vehicles that importers were permitted to import and licence (7.0). There were also stipulations for determining whether a vehicle was to be classified as used.

[93] The RMVIP established three approved methods and an adjudicating entity for determining the model year of a motor vehicle (8.0). The approved methods were, the ISO Standard, the JIS Standard and Age Verification Manual. I will quote the relevant parts.

> *"8.1 The ISO Standard*
>
> *Where a manufacturer conforms to the international standard (ISO 3779-1983) the accepted method for determining the model year of a motor vehicle is based on the character (alphabetic or numerical) in the VIN that designates the year. This character indicating the year maybe located at the 8th character in the 14-character VIN or the 10th character in the 17-character VIN". [A chart was provided which I have omitted for lack of relevance]*
>
> *8.2 The JIS Standard*

> *For vehicles manufactured in Japan for the export market, the model year will be determined by the Japanese International Standard (JIS D-4901-1982).*
>
> *8.3 Age Verification Manual*
>
> *Where a vehicle is manufactured specifically for the Japanese domestic market and not intended for export, the manufacturer does not conform to the international export standard, therefore the model year of the vehicle will be based on the vehicles serial number and determined by the Japanese Automobile Age Verification Manual.*
>
> *8.4 Competent Authority*
>
> *The Island Traffic Authority (ITA) is the competent authority for determining and adjudicating on matters relating to the model year of motor vehicles imported into Jamaica.*
>
> *Where the ISO, JIS and Age Verification Manual are not applicable, the Island Traffic Authority may use any information available to them to determine a motor vehicle's year. This may include the make, model or other features as the ITA may consider relevant.*
>
> *A certificate of First Registration will not be acceptable as proof of the "model year" of a vehicle".*

[94] While liberalization gave the importer carte blanche concerning the make and model of the motor vehicle, he was required to first obtain an import permit before shipping the vehicle. The procedure for obtaining an import permit appeared at 18.0:

> *"Motorcars, pick-ups, small trucks, vans, buses and motor cycles over 700 cc require specific import permits before shipment to Jamaica. … The import permits can be obtained from the Trade Board Limited".*

[95] The required import documentation and collateral matters were addressed under 6.0:

> *"Imports of used vehicles must be accompanied by a copy of the deregistration certificate or original title. At the time of the sale of the motor vehicle, the deregistration certificate of title must be presented by the vendor to the purchaser. These documents must be presented to the Inland Revenue Department when the vehicle is being registered.*
>
> *Consumers may request that dealers importing from Japan obtain an Export Inspection Certificate issued by the Japan Appraisal Institute.*

> *If a vehicle after being sold is found not to be what it is purported to be, the importer shall be liable to a penalty applied by the appropriate authority having jurisdiction over the violation. Consumers are encouraged to contact the Fair Trading Commission for advice on the remedies available for redress. In all instances the dealer is responsible to ensure that there is no misrepresentation to the consumer.*
>
> *Consumers may also exercise the option of obtaining redress from the importer through civil action in the court for knowing or unknowingly selling a motor vehicle that is proved to be other than that represented to the consumer".*

1st Ancillary Defendant's Misrepresentation

[96] To provide clarity to the discussion, I will commence with findings of facts on the procedure for importation. As at 1 July 2004, no motor vehicle older than three years could be lawfully imported into Jamaica. That remained effective up to 2014 when this claim was filed. In order to import the motor vehicle, the importer had to first obtain an import permit. The vehicle could be bought ahead of obtaining the import permit but not before the vehicle was shipped to Jamaica. In this case the Nissan Sunny motor car was bought on or about 26 November 2010. However, the unchallenged evidence is that the Nissan Sunny was shipped to Jamaica on 7 December 2010. On the other hand, the application for the import permit was submitted on 29 December 2010; three weeks post shipment; in flagrant violation of the RMVIP 18.0.

[97] The application for the import permit required the applicant to complete an application form. Whether it was done manually or online, the specific characteristics of the motor vehicle had to be entered. Among these characteristics were the model year, make, VIN, colour and seating capacity. The application form was signed either by the applicant or his representative. It will be recalled that it was mandatory for imports of used motor vehicles to be accompanied by a copy of the deregistration certificate (RMVIP 6.0). This was expanded on in evidence to include, proof of ownership, invoice, bill of sale, title and registration certificate, depending on the originating jurisdiction.

[98] ACL bought the Nissan Sunny from Expleo Motors, a company in Singapore. Expleo Motors presented ACL with a deregistration certificate, issued by the Land Authority of the Republic of Singapore. That deregistration certificate gave 2007 as the

year of manufacture. Therefore, in applying for the import permit, ACL was required to submit to the Trade Board this deregistration certificate which gave the year of manufacture as 2007 (which is not necessarily synonymous with model year). Since the application was being made in 2010, on the face of the deregistration certificate, the Nissan Sunny was three years old, the age limit for the importation of used motor cars. All of that was in keeping with the RMVIP.

[99] The dispute of fact which arises here is ACL's claim that when it made the application to the Trade Board, it was made to comply with the RMVIP and the course of dealing established from about March 2009. That is to say, a licence would only be granted to permit a vehicle's importation into Jamaica if the model year could be verified from the conventions set out at section 8 of the RMVIP.

[100] Learned counsel for ACL submitted that the Trade Administrator, acting through the Trade Board, had the delegated authority to regulate the importation of motor vehicles into Jamaica. In his gatekeeper role to limit the importation of used vehicles to those three years old, the Trade Administrator had the delegated function of determining the age of the motor car. In the discharge of that function, there was a duty to perform its due diligence properly when it granted the licence. As I understand the submissions, due diligence included the independent verification of the model year of the vehicle and a corresponding duty to indicate an inability to do so, if that was the case. Consequently, the issuance of an import permit to ACL without any disclaimer was a representation to ACL that it had done its due diligence and was satisfied of the correctness of the vehicle's age.

[101] There was no dispute that the Trade Administrator enjoyed the delegated gatekeeper functions of the Minister with responsibility for trade (***Trade Act*** s. 8 (1)(b) and s. 11(1)). That is, the power of prohibition of the importation and exportation of goods of any class or description, from or to any country, except under the authority of a licence. The nub of the problem, however, is the ambit of that delegated authority.

[102] No document was exhibited from which the parameters of the Trade Administrator's authority in relation to the importation of used motor vehicles generally, or used motor cars in particular, can be ascertained. The resolution of this issue therefore depends on what facts may be found from the evidence of Mr Lynvalle Hamilton, principal director of ACL, Mr Clifford Hall, Head of Dealer Certification at the Trade Board Limited, and the RMVIP.

[103] Firstly, ACL's contention that under the RMVIP a licence would only be granted if a motor vehicle's model year could be verified from the conventions under section 8 of the RMVIP, is unsupported by the evidence. Insofar as the contention implies that the RMVIP says so, as a statement of policy that too is without evidentiary support. Section 8, quoted at paragraph [93] above, merely sets out the approved methods for determining the model year of a motor vehicle. There is no allusion to the grant or withholding of a licence for want of compliance with the approved verification, either in this section or anywhere else in the RMVIP.

[104] Secondly, ACL's contention that there was an established course of dealings with the Trade Administrator which led it to believe that no licence would be granted unless the model year of the vehicle could be verified, though attractive at first blush, is an unreasonable and faulty generalisation. What, then, is the evidence of this course of dealings which so seduced ACL into its avowed belief?

[105] The evidence relied on here are five licences issued to ACL before and after the grant of the import permit for the Nissan Sunny (exhibits 9, 10, 11, 12 and 13). This evidence shows that the year of the motor vehicles was verified during the processing of the application for the licence. In four of the five applications (exhibits 9, 10, 11 and 13), there was an amendment of the year of the motor vehicle. Although the year of the vehicle remained unchanged in exhibit 12, the comment in the "processing" field speaks to a reference to the Verification Manual to confirm the year.

[106] According to Mr Clifford Hall, the presence of discrepancies in the model year applied for was a normal occurrence. Since it was a normal occurrence, it seems fair

and reasonable to conclude that the Trade Administrator was routinely verifying the model year of motor vehicles in processing the applications for used motor cars. That, I accept, is demonstrably a course of conduct.

[107] The course of conduct demonstrated was, however, limited to motor vehicles manufactured for the Japanese domestic market. These applications were all, therefore, susceptible to age verification by the approved methods under the RMVIP. In particular, the age of the vehicles in the five exhibited applications for import permits could be, and were verified, by the Age Verification Manual (see paragraph [93] above).

[108] The Nissan Sunny which is the subject of this trial was not a vehicle that was manufactured for the Japanese domestic market. Its model year could not therefore be verified using the Age Verification Manual. Mr Clifford Hall testified to what he termed as significant differences between the Nissan Sunny and those in exhibits 9 to 13. The Nissan Sunny was manufactured in Japan for the export market, so that it had a 17-character VIN. That export was, however, to a country which did not subscribe to the ISO. Therefore, the 10th character in its VIN could not have assisted in verifying its model year.

[109] So then, this Nissan Sunny was neither manufactured for the Japanese domestic market nor for export to a country which conformed to the ISO Standard. That eliminated two of the three approved methods for determining its model year. None of the parties asserted that the JIS Standard could have been resorted to. It was accepted on all sides that the model year of this Nissan Sunny was not ascertainable through any of the approved methods under the RMVIP. This Nissan Sunny was therefore an atypical case.

[110] What made it an atypical case? In short, it was a Singaporean export. Learned counsel for ACL, urged the court to have regard to the prevailing circumstances in the local used car sector at the time of the importation of the Nissan Sunny motor car. He submitted, and I accept, that it was then well-known that motor vehicles which were being imported from Singapore posed a difficulty in decoding their VIN to ascertain their

model year. According to Mr Paul Banks, CEO of AAA Limited, the local dealers and valuators had no available resources to decode the VIN of the Nissans, particularly the Sunny model.

[111] The question becomes, how did the Trade Administrator determine the model year for a vehicle like this Nissan Sunny, that originated from a country which did not conformed to the ISO Standard and neither was manufactured in Japan for the export market (JIS Standard) nor manufactured for the Japanese domestic market and not intended for export (Age Verification Manual)?

[112] The evidence on the point is conflicting. As was said before, when the application was made for the licence, ACL had to present the deregistration certificate (exhibit 8), as required by the RMVIP 6.0. This document does not disclose a model year. That notwithstanding, I find as a fact that the Trade Administrator interchanged, or substituted, the year of manufacture as the model year, in reliance on the deregistration certificate.

[113] This conclusion rests on the following bases. First, while Mr Clifford Hall accepted that there was a distinction between the model year and the year of manufacture of a motor vehicle, the terms are not mutually exclusive. Second, accepting as he did, that it is the manufacturer who determines the year of the vehicle, the Trade Administrator relied on the year of manufacture, together with the year of first registration, both disclosed in the deregistration certificate. Thirdly, it was a frank admission by Mr Hall that that was the information used for verification in this case.

[114] From its pleaded case, ACL relies on the issuance of the import permit as the source of the misrepresentation of the 1st ancillary defendant. The authorities indicate that liability for misrepresentation or negligent misstatement must relate to the transaction in which the recipient suffered financial loss (see for example ***Hedley Byrne***). In other words, the claim for negligent misstatement has as one of its premises the exercise of the judgment of the recipient in making a financial decision based on the information, advice or opinion received. As a matter of simple chronology, the decision

to import the Nissan Sunny motor car was made well in advance of making the application for the import permit.

[115] Another premise of a proper claim for negligent misstatement is that the information sought should lie outside of the bosom of the recipient. This is the second of Lord Diplock's two characteristics common to all relationships where a duty of care was found to exist, namely, the subject-matter which called for the exercise of skill and judgment by the giver of the information, lay beyond the ordinary man: ***MLCA v Evatt***, at page 802 A – B, at paragraph [76] above). In this case, the age of the Nissan Sunny was something about which ACL had made its own conclusion. Indeed, as an experienced used car dealer it would not be a credible nor sustainable position that ACL lacked the qualification, skill or competence to exercise its own judgment in the matter of the age of the motor vehicles generally.

[116] In this regard, there are three factors which militate against ACL's claim that the 1st ancillary defendant made a representation to it upon which it relied to its financial detriment. First, ACL was guided by the RMVIP which placed absolute responsibility for misrepresentation to the consumer on the dealer (RMVIP 6.0, extracted at paragraph [95] above). This, in my thinking, is but a reflection of section 37 (1) (a) of the ***Fair Competition Act*** which has been twice interpreted by the Jamaican Court of Appeal to impose strict liability upon the person in the position of the ancillary claimant. I quote section 37 (1) (a):

> *"A person shall not, in the pursuance of trade and for the purpose of promoting, directly or indirectly, the supply or use of goods or services or for the purpose of promoting, directly or indirectly, any business interest by any means-*
>
> *(a) make a representation to the public that is false or misleading or is likely to be misleading in a material respect";*

[117] In ***Crichton Automotive Limited v The Fair Trading Commission*** [2017] JMCA Civ 6 (***Crichton Automotive v FTC***), at paragraph [31] it was held that the section creates an offence of absolute liability and therefore called for no proof of *mens rea*. On its way to so holding, the Court of Appeal confirmed the unanimity of the earlier

case of ***Fair Trading Commission v SBH Holdings Ltd and Another*** (unreported), Court of Appeal, Jamaica, Supreme Court Civil No 92/2002, judgment delivered 30 March 2004, which came to the same decision.

[118] The only way that ACL could discharge its absolute duty to the ultimate consumer was to ensure that it purchased used motor vehicles of the description falling within the limitations of the RMVIP. ACL was well acquainted with the age verification methodologies under the RMVIP and the jurisdictions to which they pertained. Therefore, when ACL bought the Nissan Sunny from Expleo Motors in Singapore, it knew or ought to have known that the RMVIP methodologies could not have assisted in settling the model year of the vehicle.

[119] This takes me to the second militating point against representation. It was acknowledged that exports of used motor vehicles out of Singapore were encumbered by the unique difficulty of age verification, attributable to inability to decode the VIN. Interestingly, one of the grounds of appeal in ***Crichton Automotive v FTC***, *supra*, was the failure of the trial judge "to take judicial notice that the instant claim was not a stand alone (sic) case but part of a used car industry phenomena (sic)". In that case, as in the instant, it was a Nissan Sunny from Singapore that was involved. Although the Court of Appeal did not find it necessary to decide the case on this ground, its import for presents purposes is its confirmation of a problem that was so widespread and well-known that counsel for the appellant thought it deserved to be judicially noticed.

[120] It was against that background that ACL made its purchase of the Nissan Sunny in this case and then applied for the import permit. If, knowing the state of the used vehicle importation sector from Singapore, ACL had signalled its intention to import used vehicles from Singapore to the 1st ancillary defendant, and enquired whether the age of the vehicle could be verified outside of the RMVIP and, having received affirmative assurances, the faith of which it acted upon, it could then have a bona fide claim. The facts are that ACL committed itself to the transaction, that is, bought and shipped the motor vehicle before approaching the 1st ancillary defendant. Never mind that ACL at no time made it clear to the 1st ancillary defendant that it was relying on any

assumed special skill or qualification of the 1st ancillary defendant. In any event, the evidence does not disclose that the 1st ancillary defendant possessed, or led the ancillary claimant to believe that it possessed, any such special skill or qualification in relation to Singaporean used car exports.

[121] This takes me to the question of the purports of the import licence. It is clear to me that when ACL applied for the import permit, post purchase and shipment of the motor car to Jamaica, all it expected was the facilitation of getting the car into the used car market upon the faith of its own representation of the age of the vehicle. Mr Hamilton's assertions to the contrary are unsupported by the chronology of events. This expectation of ACL accords with the evidence of Mr Clifford Hall that the role of the 1st ancillary defendant is one of trade facilitation.

[122] Hypothetically, what would have become of the car had the import licence been refused? It seems to me an intolerable strain on the bounds of credulity to say were the import permit refused, ACL would have returned the car to Singapore, or abandon it to the wishes of the Commissioner of Customs. While this hypothesis was not explored in the evidence, it is more than a little farfetched to say that when ACL purchased the vehicle in Singapore it did so with doubt concerning the motor vehicle's age, which it hoped the 1st ancillary defendant would have cleared up during the application process. Certainly ACL's course of dealing with the 1st ancillary claimant provided no basis for any such expectation.

[123] Against this background, the submission made by counsel for the 1st, 2nd and 4th ancillary defendants that the statement concerning the age of the Nissan Sunny was made by the Land Transport Authority of Singapore and Expleo Motors, is unanswerable. It was upon the conditional assurance of the deregistration certificate that ACL conducted the transaction to purchase the Nissan Sunny motor car. As I tried to show above, there was in fact neither request for, nor the giving of information or advice in the sense of the decided authorities. Hence, no statement was made to the ancillary claimant by the 1st ancillary defendant. On the contrary, it was ACL that provided the information to the 1st ancillary defendant from which the import permit was

issued. This is, of course, the first hurdle that the ancillary claimant needs to assail in order to succeed, and ACL has stumbled.

[124] Even if I am wrong that the 1st ancillary defendant made no statement or representation to the ancillary claimant, upon the strength of which the latter made any financial transaction that resulted in financial loss, the claim would also fail for want of a duty of care. As was said in ***Hedley Byrne***, *supra,* at page 530 (see paragraph [74] above) a contractual relationship, or its equivalent, usually poses no difficulty in finding that there was a duty of care. In the case at bar, there was no contractual relationship between the ancillary claimant and the 1st ancillary defendant. I would venture to say there was no relationship equivalent to contract either. There was no legal relation between these two parties.

[125] However, according to Lord Morris in ***Hedley Byrne***, paragraph [75] above, a duty of care can arise independent of contract. The circumstances in which a duty of care, independent of contract, can arise are (i) the adviser's place in the sphere of speciality, making it reasonable to rely on his skill or judgment; (ii) the adviser's assumption of the task of giving information or advice to someone who he knows will rely on it (***Hedley Byrne*** at pages 502 and 514 encapsulated at paragraph [75] above). I have already found that the 1st claimant made no representation or statement to the ancillary claimant. Consequently, there was no assumption of the task of giving information. Furthermore, any reliance that it could be said that the 1st ancillary defendant knew, or ought to have known ACL would place on the import permit, cannot practically be extended beyond landing the vehicle, which was not in itself a financial transaction for the purpose of a negligent misstatement.

[126] Once again, even if the foregoing reasoning on the absence of a duty of care should be condemned as nonsensical, there are two reasons why no duty of care should be imposed on the 1st ancillary defendant. Firstly, to impose a duty of care on the 1st ancillary defendant would be contrary to the statutory provisions of the ***Fair Trading Act*** which impose an absolute duty on the ancillary defendant for the very thing it now

wishes to make the 1st ancillary defendant liable for. Whereas Parliament may enact legislation to change the common law, the converse is not also true.

[127] Secondly, as a matter of policy it would not be a counsel of prudence to impose a duty of care upon the 1st ancillary defendant. As Lord Pearce appears to have accepted in ***Hedley Byrne***, at page 537, this would certainly be a situation where it would be undesirable to expose the 1st ancillary defendant to potential liability "in an indeterminate amount for an indefinite time to an indeterminate class". The RMVIP allows not just new and used car dealers to import used motor vehicles but also private citizens. Anecdotally, that is an ever-expanding class of importers. Correspondingly, the amount of the liability would require the intervention of actuarial science.

The Commissioner of Customs' representation

[128] Learned counsel for ACL submitted, in essence, that since the Commissioner of Customs has, among his duties and functions, the obligation to restrict imports, the act of releasing the Nissan Sunny was itself a representation that it was a 2007 model. It was argued that ACL was misled into believing Jamaica Customs had conducted its own independent verification of the information it had submitted, when Jamaica Customs stamped the Customs Declaration (C 87) "VERIFIED".

[129] With all due deference to learned counsel, I do not accept that the Commissioner of Customs made any representation to ACL, or induced ACL to believe that Jamaica Customs independently verified the particulars of the Nissan Sunny, inclusive of its model year. Rather, it was ACL who made the representation to the Commissioner of Customs concerning the age of the Nissan Sunny.

[130] Firstly, when the Customs Declaration was stamped "VERIFIED", that had absolutely nothing to do with establishing the correctness of the particulars of the vehicle. The purpose of the verification exercise was to ensure that correct values were declared by the importer, to facilitate the levying of duties and taxes.

[131] Literally, it was the value shown in the original invoice that was being verified. This original invoice, along with a Bill of Sight, Bill of Lading and Certificate of Exportation had been submitted by ACL's agent, a customs broker. The Bill of Sight contained the particulars of the Nissan Sunny in question, including its model year while the original invoice showed a valuation of US$5,800.00. The duty of the Valuation Verification Officer, upon receipt of these documents, was to extract comparable data from its system relevant to previously imported used motor vehicles, for comparison with the unit being imported. The aim, it appears, was to assign a like value to similar used motor vehicles. If the verification exercise revealed that the value on the original invoice was consistent with values assigned to previously imported used vehicles of the similar characteristics, that is the value that would be assigned. So that, when Mr Otmar Richards stamped "VERIFIED" on ACL's customs declaration, it was not meant to convey anything more than that the submitted value had been found to be correct for a used motor vehicle bearing the characteristics of the Nissan Sunny.

[132] Against that background, I do not accept that stamping "VERIFIED" on the C 87 form led, or could have led, ACL to reasonably believe that Jamaica Customs had done independent verification of the details submitted in the declaration and found them to be true, in respect of the model year. These are my reasons. ACL had been in the business of used vehicle importation for 14 years up to the date of trial (this admission came on 23 October 2019). So that, when this Nissan Sunny was bought in November 2010 and shipped in December 2010, ACL had been in the business for approximately 5 years. Neither was this ACL's maiden importation from Singapore. So that, ACL's principal director could, without hesitation, affirm that he was well aware of the importation process involved. Those are primary and irrefutable facts.

[133] From those facts, the following appear to be reasonable and inescapable inferences. First, it would have been pellucid to ACL that the verification exercise conducted by Jamaica Customs was revenue focused. The incisive cross-examination of Mr. Richards was unsuccessful in tilting the evidence away from its centre on revenue. I accept that any reliance that was placed on the import permit by Jamaica Customs was to confirm that the item in the declaration was the one for which a licence

had been granted. That is a conclusion that is amply supported by the revenue gathering function articulated by Mr. Richards. In seeking to bend Mr Richards' evidence away from its revenue focus, cross-examining counsel enquired whether the age of the motor vehicle had anything to do with the duties assessed. Mr Richards' answer that the assessment of duties is based on the cc rating, that is the size of the engine, contradicts his evidence that the verification process involved year of manufacture. I accept that the assessment of duties included the age of the vehicle. However, that leaves undisturbed the position that Jamaica Customs was not verifying the age of the vehicle when it assessed the duties payable.

[134] Second, and a corollary of the first, ACL would have been aware that the exercise required clarifying the information submitted by its broker by simple cross referencing the import permit. This required no independent verification of the vehicle particulars. This much can be fairly inferred from ACL's admission of knowledge of the importation process.

[135] Third, knowing, as ACL must have, that the information concerning the age of the vehicle would have been provided to Jamaica Customs by ACL's customs broker, together with ACL's knowledge of what verification by customs involved, ACL could not have reasonably held the belief it asserts. The imprint of the word "VERIFIED" on the customs declaration must be understood in the context of the exercise carried out on behalf of the Commissioner of Customs. Whereas the uninitiated and unsophisticated may be forgiven for the simplistic and extra-contextual meaning being attached to the word, that indulgence cannot be extended to ACL, through its experienced and sophisticated principal director.

[136] ACL did not deny that it supplied the information which was contained in the customs declaration form/C 87. What ACL seeks to do, by its claim against the Commissioner of Customs, is to avoid all legal responsibility for the falsity of the information concerning the age of the vehicle. Learned counsel for the 1st, 2nd and 4th ancillary defendants, correctly submitted that ACL had a legal obligation to ensure that the information it supplied to Jamaica Customs was true.

[137] That obligation is grounded in section 209 (1) of the ***Customs Act*** which makes it an offence to make a false declaration. In point of fact, Mr Lynvalle Hamilton had signed the declaration, warranting that the particulars were true and correct. So, the correctness of the information concerning the age of the Nissan Sunny was not left to a reasonable belief on the assumption that Jamaica Customs would independently verify the particulars of the motor vehicle. The legislature placed the burden on the importer to ensure the particulars supplied were true and correct. On the other hand, as was submitted by counsel for the Commissioner of Customs, there is no corresponding duty of verification, in the nature of that articulated by ACL, placed on the Commissioner of Customs.

[138] As was said above, the leading authorities in this area show that the information or advice given which induced the aggrieved party to enter into a financial transaction to his detriment, must be information which was not available to the recipient. For ACL to sustain its argument that it believed the Commissioner of Customs verified the age of the Nissan Sunny, it would have to show, at a minimum, the following. One, that the Commissioner of Customs communicated to it, by his engagement in the sphere of motor vehicle age determination, that he possessed the requisite degree of special skill and competence to verify the age of the Nissan Sunny. Two, that he was willing to exercise the level of diligence common to practitioners in that field to verify the age of the Nissan Sunny (***MLCA v Evatt***, supra at page 805 D – E, referred to at paragraph [76] above).

[139] A broad sweep of the ***Customs Act*** revealed that the Commissioner of Customs is the guardian of the country's ports of entry insofar as the movement of goods into and out of the island is concerned. "Goods", include all kinds of goods, wares, merchandise and livestock (section 2 (1)). Central to this role is the imposition or levying of import and export duties as assessed by the Commissioner of Customs. Neither a survey of the ***Customs Act*** nor the evidence show the Commissioner of Customs to be an entity concerned with the age determination of motor vehicles in the sense understood under the RMVIP. Therefore, there is no room to reasonably accommodate any contention that the Commissioner of Customs could have led ACL to believe that he possessed the

requisite skill and competence to decode a motor vehicle's VIN and was willing to exercise the level of diligence to that end, expected of persons ordinarily so engaged.

[140] In short, the purpose of any statement made to the ancillary claimant by the Commissioner of Customs was concerned with the just collection of import duties on the Nissan Sunny. There was therefore no relationship between the Commissioner of Customs and the ancillary claimant from which it could be said that a duty of care arose. Furthermore, it is difficult to see how the imposition of a duty of care on the Commissioner of Customs would not have the effect of rendering nugatory the statutory declaration signed by the importer or his agent on the C87 form.

The Island Traffic Authority's representation

[141] The essence of the claim against the ITA was conveniently encapsulated in the submissions of Mr Stimpson. I will reproduce that solitary paragraph of the submissions verbatim:

> *"When the Nissan was taken to the ITA for the Certificate of Fitness to be issued, the ITA had the duty to properly inspect the vehicle. By issuing the Certificate of Fitness for the Nissan Sunny as a 2007 model, it made the representation to ACL that after it inspected the vehicle it verified the description of the vehicle to be accurate and fit for the road".*

[142] The basic assumption of the submission is a duty upon the ITA to verify the description of the Nissan Sunny, in particular its age, before issuing the certificate of fitness. That assumption, however, has no evidentiary support. In sum, the duty of the ITA is to inspect the motor vehicle and assess its roadworthiness. When the ITA thereafter issues a certificate of fitness, it is a declaration of the motor vehicle's fitness or roadworthiness to be used on the public roads. So then, if any representation is being made by the issuance of the certificate of fitness, it is a representation about its roadworthiness. Nothing more, nothing less.

[143] The certificate of fitness which the ITA issued contained a description of the motor vehicle, including its model year. It is this description which provided fodder for the submission. The evidence is, however, that the description reflected in the certificate

was gathered from the C87 issued by Jamaica Customs and cross referenced by the motor vehicle examiner's physical inspection of the motor vehicle. It may be recalled that the C87 is a document that was completed by ACL's customs broker and that Lynvalle Hamilton signed the declaration it included. It is true that the ITA also relied on the import licence for the year of manufacture as well as the VIN. However, the import permit would have been prepared from the C87 also. In short, the description of the Nissan Sunny was no more than that initially provided by ACL itself. Therefore, it is a circular argument to say when the ITA issued the certificate of fitness to ACL, it made a representation to ACL that it verified the information.

[144] Respectfully, the conclusion, or assumption, that the ITA verified the information supplied in the C87 form was arrived at by the conflation of the ITA's function to test for roadworthiness under the ***Road Traffic Act***, with the ITA's adjudicatory role under the RMVIP. That conflation is premised on the incorrect assumption that the ITA was duty bound to verify the year of the vehicle when it was presented at the examination depot. This position is, however, at variance with the evidence.

[145] The evidence from Mr Powell was that in granting a certificate of fitness, the ITA did not verify the year of the motor vehicle. The year of the motor vehicle and its VIN are two things the ITA cannot change. The ITA accepts the correctness of that information unless there is a discrepancy. So, where there is no discrepancy, the ITA will not seek to verify the vehicle's year. I therefore find that, as a matter of procedure, the ITA did not engage in verification but rather cross referencing, of the particulars of the Nissan Sunny. Specifically, the ITA did not seek to verify the age of the Nissan Sunny before issuing the certificate of fitness.

[146] Two practical considerations support this finding. Firstly, whilst motor vehicles were examined at examination depots, age verification was not carried out there. The examination depots were said to lack the facilities and competence to undertake the exercise. Secondly, and most importantly, the age verification was done by the Chief Inspector out of the headquarters of the ITA. Against this background, age verification

plainly could not, and did not, fall within the remit of the motor vehicle examiners, operating as they were, out of the examination depots.

[147] While the RMVIP made the ITA the competent authority for "determining and adjudicating" on matters germane to the model year of a motor vehicle, the RMVIP could not properly engraft this remit onto the functions under the ***Road Traffic Act***. That would have required legislative intervention by the Parliament, not the laying of a Ministry Paper. So that, to make age verification a condition precedent to issuing the certificate of fitness required an amendment to the law, not the promulgation of a policy.

[148] Since the ITA's position as the Competent Authority remained only policy, how the policy was effectuated was left to the interpretation of the ITA. The evidence is, and I accept it, that the ITA understood the policy to mean, save where there was a discrepancy, it was not required to verify the model year of a motor vehicle. That is plainly a reasonable position to take. Applying the plain meaning to the phrase "determining and adjudicating", it suggests the existence of an antecedent dispute concerning the model year of the motor vehicle. I therefore find that there was no duty on the ITA to verify the age of the Nissan Sunny before issuing the certificate of fitness.

[149] The ITA therefore had two functions, testing motor vehicles for roadworthiness and determining and adjudicating on matters relating to the model year of motor vehicles as the Competent Authority. As I have endeavoured to show, these functions are separate and distinct. Therefore, the performance of one does not necessarily involve the other, contrary to the ancillary claimant's position. So that, to succeed in its claim against the ITA, the ancillary claimant must establish the following four factors. First, that it made it known to the ITA, actually or inferentially, that it needed information concerning, or verifying the Nissan Sunny's model year or age, at the time when the vehicle was handed over to the motor vehicle examiner. Second, that the ITA therefore knew, or ought to have known, that the information was to be communicated to the ancillary claimant. This second factor would be inferred from proof of the first since there was no third party involved. Third, that the information concerning the model year or age of the vehicle would be acted upon by ACL without independent inquiry. Four,

that ACL acted upon that information to its detriment (see for example ***Caparo***, *supra*, at page 638 D – E).

[150] As my findings of fact demonstrate, ACL never made it known to the ITA that it wished the ITA to determine the Nissan Sunny's model year or age. Knowing as it did, as the evidence shows, that motor vehicles imported from Singapore were affected by difficulty in decoding their VIN, it would have been prudent to make this indication to the ITA when the vehicle was to be examined at the examination depot. In fact, the burden on ACL to make it explicitly known to the ITA that it required this information was overwhelming, against the background that the Nissan Sunny was particularly susceptible to this problem. The evidence does not disclose reason to resort to the default position in factor one; that is, to impute knowledge by inference in the ITA that ACL required this information. The failure to establish the first factor has a domino effect on the remaining factors.

The 5th Ancillary Defendant

[151] In its amended ancillary claim form with further particulars, ACL detailed its claim against AAA Ltd. I quote para 3:

> *"The ancillary claimant claims against the 5th ancillary defendant on the grounds that such loss as the claimant shall prove, was contributed to by its negligent misstatements set out in the defence filed herewith".*

In its defence to the claim filed by Ms Shae, ACL particularised what it described as AAA Ltd's breach of contract/negligent misstatements. Those particulars appear immediately below:

> *"(i) Failing to pursue the highest or reasonable standards of the profession of motor vehicle assessors.*
>
> *(ii) Failing to take any or any sufficient steps to discover and ascertain the model year of the Car (sic).*
>
> *(iii) Falsely or negligently misstating the Car (sic) to be a 2007 model Nissan Sunny.*

> *(iv) Issuing the said valuation report dated 15th March 2011, on which the Defendant would have relied, to sell the Car (sic) as a 2007 model Nissan Sunny and induced the Claimant to accept the sale price offered".*

[152] While AAA Ltd admitted preparing an expert appraisal of the Nissan Sunny and issuing the valuation report dated 15th March 2011, "acknowledging" the car as a 2007 model, it disputed the claim. The defence correctly cited the ITA as the Competent Authority to determine the model year of vehicles imported into Jamaica but incorrectly attributed the ITA's authority to do so as emanating from the ***Road Traffic Act***. The defence asserted that all stakeholders accepted the model year and other features of an imported vehicle unless otherwise indicated by the ITA and Trade Board Limited. That assertion was based on the allegation that a vehicle, after being cleared from the wharf, is issued with an import permit after verification by the Competent Authority.

[153] Two points to note. First, as the evidence for the 1st, 2nd and 4th ancillary defendants demonstrate, the TBL was not the entity to settle issues of model year. Second, as I have found, it is false to allege that the Competent Authority verified the model year before the issuance of the import permit. Any verification which took place before the import permit was issued was focused on such particulars as would allow the just collection of taxes and duties, not the bona fides of the motor vehicle vis-à-vis its age.

[154] It is appropriate that I set out in full, paragraphs 4,5 and 6 of the defence.

> *"4. This defendant will further state that:*
>
> *i. In or around 2009, Car Dealers (sic) in Jamaica started major importing of vehicles from Singapore with importation of 2005 "model year" vehicles;*
>
> *ii. In respect of Nissans, in particular the Sunny model, prior to late 2011 (i.e. after the material evaluation) the local motor industry (local dealers and valuators) had no available resources (such as websites and/or manuals used for Japanese imports) to decode their VIN Plates (Chassis Numbers) and ascertain their model years;*
>
> *iii. Consequently, when this Defendant sought the assistance of the Nissan Local Dealer (sic), Fidelity*

> *Motors, to decode this specific Sunny at the time of the material Valuation (sic) in March 2011 it was unable to do so; and*
>
> iv. *Further, this Defendant will also note that the "seat belt tag" also suggested that this unit was a 2007 model year unit.*
>
> *5. The necessary resources (decoding manuals and/or websites) finally became available in late 2011 hence MSC/McKay being able to properly decode the VIN plate in 2012.*
>
> *6. Given the resources now available, upon the discovery of an inconsistency, this Defendant (sic) only recourse is to highlight same and direct the car owners to the ITA for the issue to be addressed".*

[155] Mr Stimpson submitted that AAA Ltd conducted the valuation based on its own knowledge and expertise. That is to say, the Nissan Sunny was sent to AAA Ltd for the assessment without any accompanying supporting documentation. It was further submitted that when AAA Ltd prepared the valuation report, and stated that the Nissan Sunny was a 2007 model, it knew or ought to have known that that representation would have been relied upon; not only by ACL but other entities such as financial institutions.

[156] Learned counsel for ACL sought to bring AAA Ltd within the principles established in ***Hedley Byrne***. The submission was that ACL needs to assail two hurdles in order to succeed. Firstly, ACL needs to show that the representation was made in the ordinary course of business or professional affairs. Secondly, ACL must establish that it was reasonable to have trusted or relied upon the skill or judgment of the defendant. I agree that ACL needs to establish these factors. In fact, both have been established by the evidence. However, the submission is otherwise wide of the mark for its omission of any reference to the standard of care.

[157] It was also submitted that AAA Ltd was an independent valuator whose expertise ACL sought in preparing valuations on numerous occasions before selling its vehicles. By the very nature of AAA Ltd's business, it was reasonable for ACL to rely on the representation in AAA Ltd's valuation report that the Nissan Sunny was a 2007 model. AAA Ltd, as an expert, knew that the age of a motor vehicle was important, not only for

its resale value, but by virtue of the fact that what it presented in its valuation report would be relied on by other entities such as banks and insurance companies.

[158] AAA Ltd, having been engaged for its expertise, had a duty to disclose in its valuation report that it was unable to verify the age of the motor vehicle, **despite its exhaustive efforts to obtain same** (emphasis supplied). AAA Ltd should therefore not escape liability because it contributed to Miss Shae's loss, due to its failure to disclose its limitations in trying to verify the age of the Nissan Sunny, Mr Stimpson argued.

[159] There cannot be any doubt that the 5th ancillary defendant owed a duty of care to ACL. Valuers were among the group of persons listed by Denning LJ as owing a duty to use care in the preparation and making of statements, quite apart from contract. The duty is owed to their clients, as well as third parties in certain circumstances (see ***Candler v Crane***, *supra*, at pages 179-180). Valuers have a duty to use reasonable care in preparing their reports: ***Cann v Wilson*** (1883) 39 Ch. D. 39, another case which was resurrected, or restored to use Denning LJ's language, by the House of Lords in ***Hedley Byrne***. Harrison JA was of the view that this is one of the principles that have been fairly established since ***Hedley Byrne***. In ***Appleton v Geddes Grant***, *supra*, at paragraph [34], he said:

> *"It is fairly established that since the decision in Hedley Byrne: (a) persons professing some special knowledge or expertise who make representations implicitly presented as having been carefully considered may, at least in some circumstances, be held to owe a duty of care in tort to whom the representation is made and/or to a person to whom they know the representation will be passed on, not to mislead him, provided that the representation is made in circumstances in which the representor knows, or should know, that the other person will rely on what he says, and (b) a breach of this duty may give rise to liability in negligence, even though loss suffered is only financial loss".*

[160] Learned counsel for the 5th ancillary defendant did not argue for an absence of a duty of care. She submitted, correctly in my view, that it is necessary to go further and find that the duty of care has been broken. The submission continued, the breach of the duty involves the representor advancing an opinion which he could not honestly have held or which involved "directly the existence of facts which are false".

[161] In my understanding, this submission raises the pivotal question of the standard of care. The standard by which AAA Ltd is to be judged is that of the reasonable man: ***Hedley Byrne***, at page 482. By this standard, AAA Ltd was required to discharge its duty of care to the standard of skill and competence for which motor assessors are renowned: ***MLCA v Evatt***, at page 803 C (paragraph [83] above). In essence, the resulting valuation report must be done to accepted motor vehicle assessors' standards. The evidence from ACL's principal director was that AAA Ltd was a company engaged in the business of providing independent expert evidence corroborating the value and age of motor vehicles. Not having the means to itself verify the age of the motor vehicle, it relied on the competence and expertise of AAA Ltd (and the other ancillary defendants) to determine and verify the age of the Nissan Sunny motor car.

[162] How, then, did AAA Ltd go about discharging its duty to use reasonable care in preparing its valuation report, which it knew, or ought to have known, ACL would rely on? It was accepted, and if not accepted not disputed, that prior to 2011 the local motor vehicle had no available resources to decode the VIN and establish the age of Nissan vehicles, particularly the Nissan Sunny. ACL's principal managing director specifically agreed that this was the situation in the local motor vehicle industry. AAA Ltd therefore solicited the assistance of Fidelity Motors, the local Nissan dealers, to decode the VIN. Fidelity Motors also failed in that task. Interestingly, Fidelity Motor's inability to assist with verifying the year of manufacture of the vehicle was confirmed by ACL's witness. Under cross-examination he said prior to purchasing the vehicle he checked with them but they were unable to assist. I entirely reject as false Mr Hamilton's evidence that there were valuators who "had a way of decoding the chassis number". It is entirely against the weight of the evidence.

[163] AAA Ltd's way around that was to do two things. One was to accept the information in the import permit as confirmatory of the particulars of the Nissan Sunny. Mr Hamilton disputed supplying the import permit but admitted to representing to AAA Ltd that it was a 2007 vehicle. I accept that the import permit was given to AAA Ltd for two reasons. Firstly, the first question asked of Mr Banks in cross-examination was why did he rely on the import permit. The assumption of the question being, that he received

the import permit as he asserted. There were no follow-up questions to destroy this assumption. Secondly, and confirmatory of the first, it was never suggested to him that he never received the import permit.

[164] I find as a fact that decoding the chassis number was the accepted standard of establishing the age of a motor vehicle generally. This is supported by the evidence in general but in particular by the evidence of Mr Banks and the RMVIP which had established methodologies to achieve this. I also accept, however, that where there was difficulty in decoding the chassis number under any of the method under the RMVIP, the industry practice was to rely on the import permit.

[165] The second thing AAA Ltd relied on was inspection of the seat belt tag (explained in cross-examination as the seat belt production date) also suggested that the Nissan Sunny was a 2007 model.

[166] In sum, AAA Ltd first resort was to attempt to decode the chassis number, evidenced by the unsuccessful effort to get assistance in that regard from Fidelity Motors Ltd. When that failed, AAA Ltd's last resort was to the import permit. The information gleaned from the production date of the seat belt tended to support the year of manufacture disclosed in the import permit.

[167] This is evidence which shows that before preparing its valuation report AAA Ltd exhausted efforts to decode the VIN of the Nissan Sunny. That is, AAA Ltd first applied the preferred industry standard of independent verification of the vehicle's age by attempting to decode the VIN. The last resort to the import permit, the information from which eventually found its way into the report, was the exception accepted by the industry. So that, it is fair to say that before producing its valuation report AAA Ltd expended the time and trouble to ascertain the vehicle's age, as the reasonable man would have done. There was, therefore, no breach of AAA Ltd.'s duty to exercise care in the preparation of the valuation report.

Disclaimer

[168] In cross-examination Mr Banks was asked since he was unable to independently verify the model year of the vehicle, if it would not have been prudent to make that notation on the valuation. His answer was that current industry practice was to rely on the import documentation when they were unable to decode the VIN. Furthermore, the information on the import documentation corresponded with the unit's seat belt production date. Based on that, it would not have been prudent. That was the basis for the submission earlier referred to that there was a duty to disclose this. In my understanding, this is another way of saying AAA Ltd should have included a disclaimer to this effect in its valuation report.

[169] In answer to the submission that AAA Ltd had a duty to include in its valuation report that it was unable to verify the age of the motor vehicle, learned counsel for AAA Ltd drew the court's attention to what may be described as a disclaimer in the valuation report. I quote, "while we have visually inspected the vehicle to the best of our ability, the possibility exists that there are hidden defects. This is not a recommendation to purchase the vehicle". In the view of counsel for AAA Ltd, this was sufficient to put customers of ACL on notice that the total accuracy of the information in the document was not guaranteed. Ergo, it was enough to alert ACL that the information may be incorrect.

[170] I disagree with these submissions. When these words are given their ordinary or grammatical meaning, the disclaimer is palpably one limited to mechanical or physical defects that were not discoverable during an ordinary inspection. That is to say, defects which could only be discovered by taking the vehicle apart. What it is not aimed at is anything concerning the age of the vehicle.

[171] Although I disagree with counsel for AAA Ltd on this point, I do not accept that there was a duty to include a disclaimer. The inclusion of a disclaimer is not a reflection of a discharge of a duty to the client but a mechanism to limit or exclude the liability of the motor vehicle assessors for negligence. In ***Hedley Byrne***, at page 492, the maker of

the statement would have been found liability had the information supplied not been given “in confidence and without responsibility on our part”. That was notice to the recipients of the information that the giver of the information never undertook any duty to exercise care in giving the information (see ***Hedley Byrne***, at page 493). Lord Morris agreed that these words effectively disclaimed any assumption of a duty of care: ***Hedley Byrne***, at page 504. The majority of their Lordships speeches were to a similar effect.

[172] Liability in negligence may be established where it is found that the defendant did not use the required care in giving the information, not upon a duty to include a disclaimer. The following passage from ***Winfield & Jolowicz on Tort***, 18th edition at paragraph 11-30 is instructive:

> *“It must not be overlooked that, in the result, judgement in **Hedley Byrne** went to the defendants and this, at least in the opinion of the majority, was because they had supplied the information “without responsibility”. In effect, therefore, the liability created by the House of Lords would exist only if the defendant has been too careless of his own interests or too proud to protect himself by such a declaration or was unable for some reason (such as professional conduct rules) to do so”.*

The learned authors went on to note that this has been neutralised in that jurisdiction by the ***Unfair Contract Terms Act 1977***. That, however, leaves the point undiminished that the disclaimer is not itself a duty to the client, to be discharged upon pain of liability for negligence. In any event, the absence of the disclaimer, as understood, is moot. It is moot since AAA Ltd had discharged its duty of care in the preparation of the value to the standard required.

Concluding observations

[173] In the preparation of this judgment I could not help being struck by the similarities between of the factual foundation and arguments of this ancillary claim and ***Crichton Automotive v FTC***, *supra*. That case similarly concerned a Nissan Sunny motor car imported from Singapore. There, as here, the initial information about the vehicle was provided by the dealer to the government agencies. In that case, as in the instant, the view was advanced that the Trade Board, Customs department and the ITA must have

verified that the car was a 2007 car when they processed the various documents. Consequently, it was there submitted, the dealer was not responsible. In this case, the defence to the main claim denied liability to Ms Shae and alleged that ACL was "induced" by the government entities along with a reliance on the valuation report, to sell the car to Ms Shae. These arguments were rejected by Sykes J. The arguments became the substance of some of the several grounds of appeal but the Court of Appeal did not find it necessary to consider them.

[174] Nevertheless, it seems a fair conclusion that this ancillary claim is no more than a veiled but vain attempt to pour old wine into new bottles. None of the leading cases on negligent misstatement arose from circumstances where the person seeking the advice or information was the very person who initially provided the information which formed the basis of the representation alleged to be negligently made. The paradigm example of negligent misstatement is one in which the advisee is relying on the expertise of the adviser. For example, in ***Appleton v Geddes Grant***, *supra*, the appellant's farm manager knew nothing about the substitute fungicide recommended by the respondent's sales representative but bought the substitute upon the assurances given by the sales representative that it was suitable for the required purpose.

[175] This example could be multiplied tenfold. However, no more than one example is needed to demonstrate that this ancillary claim is beyond the pale of the paradigm case of negligent misstatement. This ancillary claim transformed the protective shield of the tort into a sword by ACL's own admissions. Mr Hamilton agreed with learned counsel for the 1st, 2nd and 4th ancillary defendants that the documents submitted to the Trade Board contained false and misleading statements concerning the year of manufacture of the motor vehicle. He agreed too, that ACL thereby made a false representation to the Trade Board from the outset concerning the year of manufacture.

[176] Notwithstanding the statutory injunction under the ***Fair Competition Act*** and the policy dictates of the RMVIP, making the dealer (ACL) responsible to ensure there is no misrepresentation to the consumer, ACL refused to acknowledge that responsibility. The following extracts from Mr Hamilton's evidence make the point.

[177] The starting point is his patently false claim that he was not aware of the difficulty in decoding the chassis number of some vehicles from Singapore until "about 2013 or thereabouts". Learned counsel for the 1st, 2nd and 4th ancillary defendants had earlier asked him what checks he made with respect to the year of manufacture prior to purchasing the motor vehicle in question, knowing that it would have been subject to an importation process. His answer was, "we checked with Fidelity Motors, dealers for Nissan. We got no assistance from them. This was prior to purchasing". It should be recalled that the claim arose in 2011.

[178] The disclaimer in the deregistration certificate was read to Mr Hamilton and he said he was familiar with it. Thereafter he was asked whether it would have been prudent, as a used car dealer, to make concerted efforts to ensure the accuracy of what was stated in the deregistration certificate. His reply was, "the answer is no". His counsel tried to undo the impact of the answer in re-examination. He said it would not be prudent because, "according to the motor vehicle policy it [the deregistration certificate] cannot be used as proof to determine the year". That answer, however, missed the point of the cross-examiner's question which was ACL's responsibility to ensure the accuracy of the information. His contention concerning the deregistration certificate only served to reinforce the need to make concerted efforts to ensure accuracy. Mr Hamilton's mind-set is amply demonstrated by the following exchange. Learned counsel for the 5th ancillary defendant asked Mr Hamilton if he thought in his capacity he had a responsibility to get the chassis number decoded before shipping the vehicle to Jamaica. His answer was one word, no.

[179] In light of the foregoing, it is a compelling conclusion that ACL was not the victim of negligent misstatements made by any of the ancillary defendants. In fact, ACL was the purveyor of the false representation that set in train the filing of the main claim. The inducement alleged in the defence was entirely wrong sided. It was ACL that induced the ancillary defendants into the use of, and reliance on, false information about the year of the Nissan Sunny.

[180] I therefore give judgment for the 1st, 2nd, 4th and 5th ancillary defendants against the ancillary claimant. Costs to the 1st, 2nd, 4th and 5th ancillary defendants, to be taxed if not agreed.