[2017] JMCA Civ 6

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 77/2015

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE McDONALD-BISHOP JA
THE HON MISS JUSTICE WILLIAMS JA

BETWEEN	**CRICHTON AUTOMOTIVE LIMITED**	**APPELLANT**
AND	**THE FAIR TRADING COMMISSION**	**RESPONDENT**

Christopher Dunkley and Miss Jahyudah Barrett instructed by Phillipson Partners for the appellant

Dr Delroy Beckford and Miss Wendy Duncan for the respondent

7 and 24 February 2017

PHILLIPS JA

[1] I have read in draft the judgment of my sister P Williams JA. I agree with her reasoning and conclusion and have nothing useful to add.

MCDONALD BISHOP JA

[2] I too have read the draft judgment of my sister P Williams JA and agree with her reasoning and conclusion.

P WILLIAMS JA

[3] This is an appeal from the decision of Sykes J, given on 22 May 2015, where he made the following order:-

> "The breach of Section 37 (1)(a) of the Fair Competition Act has been established. The penalty is $2,000,000.00. Costs to the Fair Trading Commission to be agreed or taxed."

[4] This matter has its genesis in what may well be viewed as a simple act, that of a woman seeking to purchase a motor vehicle. On or about 31 March 2011, Miss Lisbeth Mills visited Crichton Automotive Limited, the appellant, with the objective of securing for herself a second hand car that could give her 10 years of service. She was specifically interested in the Toyota brand but upon her arrival she was quickly advised by an employee or agent of the appellant that none was available. She was however convinced to purchase a Nissan car. She was shown a list of motor cars being imported by the appellant and chose the 2007 model of a Nissan Sunny motor car. The agent confirmed that the motor car was a 2007 model. The cost of the motor car was $1,440,000.00. She paid the requisite deposit of $10,000.00 and left to return to complete her purchase.

[5] Miss Mills subsequently returned to the appellant on 5 April 2011 and was given a pro forma invoice referring to the car as a 2007 model. Sometime thereafter in May, she was advised that the car had arrived at the premises of the appellant. She was given a valuation report and a customs declaration form relative to the motor vehicle, which both referred to the car as a 2007 model. On 17 May 2011, she paid a further $630,000.00 towards the purchase price.

[6] By 25 May 2011, Miss Mills had secured the sum necessary to complete purchasing the vehicle by way of a loan from the National Commercial Bank. The appellant procured the relevant documents, namely the certificates of registration and fitness, in the name of Miss Mills and they were presented to her when she paid the balance due and took possession of the motor vehicle. Both these documents indicated the vehicle was a 2007 model.

[7] When Miss Mills took possession of the vehicle on 25 May 2011, she immediately proceeded to a nearby auto parts shop to purchase a movable rain shield for it. Upon advising the sales clerk of the model year, the engine and chassis numbers of the vehicle, he expressed surprise as to the model year. Miss Mills became suspicious about the age of the motor car and a few days later she telephoned Fidelity Motors Jamaica Limited, who she described as the official dealers of Nissan motor vehicles in Jamaica. She requested they conduct a search to verify the model year of the vehicle, providing the chassis and engine numbers to facilitate such a search.

[8] On 31 May 2011, she received an electronic mail from Fidelity Motors advising her that the car was in fact manufactured in 2005. Armed with this information, she returned to the appellant and spoke with another of its servants /agents. Miss Mills was met with an insistence that the car was a 2007 model and was directed to attend on the Island Traffic Authority ("ITA") to have the model year determined. This she did on the same day.

[9] By 2 June 2011, she collected a letter from the Chief Inspector of the ITA advising that the model year was in fact 2005. She next visited the loss adjusters who had done the original valuation of the motor vehicle. Upon producing the letter from the ITA to them, the original valuation report was withdrawn and she was provided with a second report stating the model year was indeed 2005.

[10] Miss Mills thereafter telephoned the appellant's offices and spoke with Mr Kirk Crichton, its chief executive officer, and explained all she had discovered about the vehicle. On 9 June 2011 she attended a meeting with Mr Crichton hoping for a reasonable resolution to the matter. She produced the letter from the ITA, the e-mail from Fidelity Motors and the second valuation and requested a refund of the difference in value, given the difference in the model year. She also requested that Mr Crichton arrange for the amendment of the car documents so that they read 2005. When Mr Crichton refused to entertain this proposal, she then proposed to return the vehicle to the defendant in exchange for a refund of the full purchase price together with the reimbursements for additional monies she had spent. This proposal was also rejected.

[11] She then turned to the Fair Trading Commission, the respondent, for assistance in having the matter resolved. She wrote to them on 14 June 2011 outlining her complaint. Mr David Miller, executive director of the respondent, in his affidavit stated that upon receipt of the complaint, investigations were carried out and legal advice was sought. The respondent formed the view that the appellant had committed a breach of the Fair Competition Act ("the Act").

[12] By letter dated 18 October 2011, the respondent advised the appellant of the investigations and invited its response. The appellant responded by letter dated 31 October 2011, indicating that the breach was noted, but explained that it had relied on documents which had been provided by government bodies, namely the import licence from the Trade Board, entry from Jamaica Customs and the certificate of fitness from the ITA. The appellant asserted that it had always relied on the requisite government authorities to verify information provided for each of the vehicles imported.

[13] The respondent examined the documents and formed the view that there was no basis for the appellant's contention that it had relied on the documents given that they had been issued after the representation in respect of the model year of the car had been made to Miss Mills by the appellant. The appellant was then contacted by the respondent and advised that it could be liable for a breach of the Act and was offered an opportunity to resolve the matter without recourse to litigation. The appellant failed to respond. The respondent filed a fixed date claim in 22 August 2013 seeking, inter alia:

> "1. A declaration that the Defendant has contravened the obligations and/or the prohibitions (or any part of the said obligations and or prohibitions) imposed in Part VII of the Fair Competition Act and/or in particular that the Defendant has, in the course of business, engaged in the following conduct:
>
> (i) Misleading Advertising in Breach of section 37;
>
> 2. An Order pursuant to section 47 of the Act that the Defendant pay the Crown such pecuniary penalty not exceeding Five Million dollars

($5,000,000.00) for each breach so declared or as this Honourable Court deems fit."

[14] In his affidavit in support of the defence to the claim, Mr Crichton explained the procedure involved when cars are exported from Singapore. His explanation was that the appellant was not responsible for any wrong information being given to Miss Mills because none of the information that went into the documents relative to the car, originated with the appellant. Specifically, the engine number, chassis number, model and model year came from Singapore.

[15] Mr Crichton also asserted that the appellant had sourced the 2007 Nissan Sunny motor car from a Singaporean auto broker, One Auto Limited. He explained that before this or any other vehicle could be exported, its antecedents had to be assessed by the Land Transport Authority of Singapore and a de-registration certificate issued. This certificate bearing the details of the motor vehicle along with the related invoice was supplied to the appellant by One Auto Limited. These documents were eventually submitted to the Commissioner of Customs and Excise here in Jamaica. Mr Crichton asserted that he believed that the commissioner of customs verified the model of the motor vehicle and determined the value and applicable importation duties to be paid.

[16] Mr Crichton contended that the appellant had an honest belief that the motor car sold to Miss Mills was a 2007 model as represented on the import licence received from the Trade Board, the certifying authority for motor vehicle importation into the island. Further, it was asserted that the appellant was fully entitled to place its reliance on the

processes involving the various public authorities and consequently its representations were consistent with the information contained in the documents issued by the said public authorities and the representations could not amount to any misrepresentation within the scope of the Act.

The Appeal

[17] The appellant identified 11 grounds of appeal namely:

> "1. The Learned Judge in Chambers erred by misreading the judgment of the Learned President of the Court, Forte P in **Fair Trading Commission v SBH Holdings Ltd & Anor** who contrary to the Judgment, made no pronouncement on the strict nature of a breach of section 37 (1) (a) of the Fair Competition Act.
>
> 2 The Learned Judge in Chambers erred in holding that the Fair Competition Act is not concerned with the promotion of honesty in trade, but rather and solely the insistence of accuracy in statements about goods and services.
>
> 3. The Learned Judge in Chambers erred in holding that the Fair Competition Act is not concerned about false advertising and by inescapable inference the policing of trade malpractices in offering of goods and services.
>
> 4. The Learned Judge in Chambers erred in giving no or no sufficient weight to the authorities in this area, which addressed the mischief of the malpractice of false advertising [as pleaded in the claim] to erroneously conclude that the Fair Competition Act is limited to strict liability.
>
> 5. Judge in Chambers [sic] consequently erred in failing to give any weight or at all to the application of those authorities, in an instance of no finding of

malpractice, to mitigation of the penalty to be imposed.

6. The Learned Judge in Chambers erred by misconstruing his own judicial example of **Hornsby Building Information Centre Pty. Limited v Sydney Building Information Centre Limited** which demonstrated that a literal truth could in fact be a clear case of deception for commercial gain or competitive advantage.

7. The Judgment of the Learned Judge in Chambers is flawed in that it fails to have any or any proper regard to the role, function and duties of the Trade Board and the Island Traffic Authority of Jamaica viz the duties and obligations of the registered Importer of used cars.

8. The Learned Judge in Chambers erred in holding that at the material time the Trade Board relied on the Importers to provide correct information, where his judgment has found that the Appellant tendered the documents as obtained from the Singaporean authorities in good faith.

9. The Learned Judge in Chambers erred in failing to take judicial notice that the instant claim was not a stand alone case but part of a used car industry phenomena.

10. The Learned Judge in Chambers erred in failing to give any weight or at all to the 2014 Ministry Paper either with regard to the Appellant's right to rely on the government documents or the impact of the Ministry Paper as it related to mitigation of the penalty to be imposed.

11. The Learned Judge in Chambers erred in failing to appreciate or at all the continuing legal dilemma between the government documents in force to the present, the Minister's directions and the conflicting information from the new car dealer in arriving at his judgment and penalty."

[18] The orders being sought are:-

> "a) Appeal allowed; or alternatively
>
> b) Appeal allowed in part by a reduction in the penalty of $2,000,000.00 to such amount as the Honourable Court of Appeal may deem appropriate;
>
> c) Such consequential orders for relief as the Honourable Court of Appeal shall deem appropriate;
>
> d) Cost to the Appellants here and below."

[19] Without intending any disservice to the several grounds identified and argued on behalf of the appellant, I find that the issues raised in the appeal can be distilled to three questions, namely:

> (1) Does section 37 (1) (a) of the Fair Competition Act impose strict liability on the offender?
>
> (2) On the basis of strict liability, was there liability in this case?
>
> (3) Was the penalty imposed excessive in all the circumstances?

Does section 37(1) (a) impose strict liability on the offender?

[20] Section 37 (1)(a) of the Act states:

> "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;"

[21] This court in **Fair Trading Commission v SBH Holdings Ltd and Another** SCCA No 92/2002, delivered on 30 March 2004, interpreted the section. The main decision was delivered in a judgment by K Harrison JA (Ag) (as he then was), with which the other two members, Forte P and P Harrison JA, expressly stated that they agreed with his reasoning and conclusion before going on to make their own brief comments.

[22] In his judgment Sykes J noted that the unanimous decision of the court was that the provision did in fact impose strict liability on the offender and also that the court had held that an intention to make a false representation is not required.

[23] Mr Dunkley sought to challenge the finding that the decision was a unanimous one. He submitted that the unanimity of the court was in respect to its finding of liability against the respondents in respect to the particular facts of that case. His submission was that Forte P in his comments, "has done a service to this area of the law by pronouncing beyond the facts of that appeal".

[24] The words of Forte P on which Mr Dunkley relied were as follows:

> "In the circumstances of this case, I would hold, even if on a correct construction of section 37 (1) of the Act liability is

> not strict, that the respondents at the time of the representations must have foreseen the likelihood, given the facts within their knowledge, of financial difficulties preventing them from accomplishing the fulfilment of their representation."

[25] Counsel submitted that in light of this dictum of Forte P, it can fairly be said that Sykes J ought not to have relied on the case as an authority for the principle that section 37(1)(a) of the Act imposes a strict liability where Forte P made no such pronouncement. Further, counsel submitted that the dictum of Forte P was to be preferred to the approach of K Harrison JA (Ag) as the correct construction of section 37 (1)(a) of the Act wherein, liability ought to be determined on the knowledge and the conduct of the respondent in the enforcement proceedings by the Fair Trading Commission.

[26] In response, Dr Beckford quite succinctly noted that the challenge is without merit as this court was clearly unanimous in its holding of the strict liability standard incorporated in section 37 of the Fair Competition Act and that the decision has no dissenting opinion.

[27] Dr Beckford is clearly correct. Mr Dunkley's effort to try and separate the few words by Forte P as a dissenting opinion from the conclusion reached by K Harrison JA (Ag) cannot succeed. Contrary to his assertion that the unanimity of this court was only in respect of its finding of liability against those respondents, the observation by Forte P was commenting on the fact that in the circumstances of the case, even if liability had not been strict, the respondents there would have been liable.

[28] Sykes, J was entirely correct to have relied on the case for interpreting the provisions of section 37(1)(a) of the act as imposing strict liability on the offender. He was right in concluding that in the case, all the judgments were of one accord that mens rea was not required and that liability was strict.

[29] K Harrison JA (Ag) stated at page 26:

> "To my mind, the subject matter and structure of the Act make plain that the Act belongs to that class of legislation which prohibits some acts that 'are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty', as Wright J put it in **Sherras v De Rutzen** [1895] 1 QB 918 at 922 [1895-9] All ER Rep 1167 at 1169."

[30] He then went on to conclude at page 28:

> "In light of the foregoing, I would accept the Appellant's construction of section 37 (1) (a) as correct. First, it advances the legislative purpose embodied in the Act, in that it strikes directly against the false representation irrespective of the reason for, or explanation of, its falsity . It involves, of course, construing the offence as one of absolute liability that is consistent with the social purpose of the statute."

[31] This court maintains that on its proper construction, section 37(1)(a) of the Act creates an offence of absolute liability and does not require the existence of mens rea. As such, in the instant case, the statements made by Sykes J which demonstrates a rejection of the need for proven mens rea in order to establish liability under section 37(1)(a) and a recognition of the strict liability that the section provides for cannot be meritoriously challenged by the appellant.

On the basis of strict liability was there liability in this case?

[30] The learned judge's approach to a determination as to whether there was liability was grounded in the decision of K Harrison JA (Ag) in the **Fair Trading Commission v SBH Holdings** where he held that the following four things must be established:

> "(a) The person was in pursuance of a trade;
>
> (b) the person made a representation to the public;
>
> (c) the representation is false or misleading;
>
> (d) the representation was made for the purpose of promoting directly or indirectly the supply of goods and services."

[32] He then later went on to state at paragraph 23:

> "It is open to CAL to prove that it does not fall within the provision by establishing any of the following; (a) it was not in pursuance of a trade; or (b) whatever was represented was not for the purpose of promoting the supply of goods or services; or (c) whatever was represented was not for the purpose of promoting its business interest or (d) it did not make at all or if it did it was not to the public or (e) the representation was true."

[33] It is noted that much of the complaints by Mr Dunkley of the findings of the learned judge touched on whether it was correct that section 37(1)(a) imposes strict liability. Counsel did not take issue with the approach by the learned judge as outlined above nor with the conclusions the learned judge had arrived at in answering the questions posed.

[34] Mr Dunkley did seek to remind this court that it is not an advertisement in the newspaper that has led to the enforcement action against the appellant. The learned judge however noted that the provision itself makes no reference to advertisement but speaks instead to representation, a term of wider import. In this regard also the learned judge recognised that in this context representation means an assertion of the existence or non existence of certain facts pertaining to a given subject matter.

[35] In any event, as Dr Beckford correctly pointed out, advertisement is given specific definition in section 2 of the Act in the following terms:

> " 'advertisement' means any form of communication made to the public or a section of the public for the purpose of promoting the supply of goods or services."

[36] The learned judge addressed the questions he recognised as being relevant to the determination of whether the appellant was liable and arrived at the following findings:

(1) The appellant did represent that the car was a 2007 car.

(2) At the time the appellant made the representation it honestly believed it to be true but regrettably for the appellant honesty in the belief in the accuracy of the information is irrelevant for liability.

(3) The appellant made the representation to Miss Mills who was clearly a member of the public for purposes of the provision. The representation was made to her for the purpose of getting her to purchase the motor car.

(4) The appellant was in the business of trading in used cars hence the representation was made in pursuance of a trade.

(5) The appellant was promoting the supply of used cars and also advancing its business interest.

[37] There is no basis for disturbing the conclusion eventually arrived at by the learned judge based on these findings made from the material before him. The breach of section 37(1)(a) of the Act had properly been established.

Was the penalty imposed reasonable in all the circumstances?

[38] Part **VIII** of the Act which speaks to Enforcement, Remedies and Appeals provides at section 47 the following:-

"(1) Pursuant to section 45 the Court may:-

(a) order the offending person to pay to the Crown such pecuniary penalty not exceeding one million dollars in the case of an individual and not exceeding five

> million dollars in the case of a person other than an individual;
>
> ...
>
> (2) In exercising its powers under this section the Court shall have regard to :-
>
> "(a) the nature and extent of the default;
>
> (b) the nature and extent of any loss suffered by any person as a result of the default;
>
> (c) the circumstances of the default;
>
> (d) any previous determination against the offending person.
>
> ..."

It needs be noted that the reference to section 45 in this section must be an error and should refer to section 46. This observation has been made before by this court in **Jamaica Stock Exchange v Fair Trading Commission Civil Appeal** No 92 of 1997 delivered 29 January 2001, where Forte P said at page 28:

> "Section 47 must be read however, replacing a reference to Section 45 with a reference to Section 46, the former being an obvious error in the legislation .....As it is Section 46, which refers to the exercise of the powers of the Court under Section 47, the reference to Section 45 must be incorrect."

[39] In approaching the issue of the penalty, the learned judge recognised that the appellant honestly believed that the information provided in the de-registration certificate from the Singaporean authorities was correct. He however also quite properly noted that the certificate expressly stated that the accuracy of the information

on the document is not guaranteed which ought to have put the defendant on alert that the information may have been incorrect.

[40] The learned judge considered the penalty imposed in **Fair Trading Commission v SBH Holdings Ltd** of $2,500,000.00 in a context where the court found that the offending party knew that what it was saying was false. He accepted that there is no such evidence in the instant case and that the breach was not as egregious.

[41] The learned judge however went on to note that the circumstances of this case were of concern, with the major one being that the appellant refused to take responsibility for the error. In paragraph [42] the learned judge clearly indicated the factors that impacted his decision:

> "...The court is not saying that CAL did not initially believe that the information on the document regarding the year of the car was correct but surely it could not continue in that belief when clear, reliable and unambiguous evidence showed that it was incorrect. Additionally, there is evidence from Mr David Miller that when contacted by the FTC and offered an opportunity to resolve the matter CAL did not respond to the overtures. Indeed, the FTC pointed out that its defence which was that it relied on documents from the Trade Board and Customs Department could not be accurate because those documents came into being after the representation was made to Miss Mills. Also in respect of the Trade Board, the application for the import licence was made in February, the month before Miss Mills went to CAL but the plain fact is that it was CAL that provided the incorrect information to the Trade Board so that when the licence was finally issued, the incorrect information was contained in it. Even in the face of this CAL was not prepared to alter course. CAL was presented with two

> separate opportunities to resolve the matter by Miss Mills in the first instance and by the FTC in the second instance."

[42] This approach must be what formed the basis of the appellant's submission that "post breach conduct" could have no bearing on the court's consideration of the relevant law or alternatively that the appellant's reticence in accepting the respondent's pre-litigation overtures was not unreasonable in the circumstances and ought not to have become a prejudicial factor in the court's exercise of its discretion in determining the penalty to be imposed.

[43] It is also apparently in this regard that the submissions were made regarding the failure of the learned judge to have appreciated the nature of the used car industry, and the subject of the claim. It was submitted that the learned judge ought to have taken judicial notice that the claim was part of a used car industry phenomenon and failed to have proper regard to the Motor Vehicle Import Policy Ministry Paper of 3 April 2014 which was intended to address the problem that had emerged with cars being imported from Singapore which had incorrect years of manufacture. It was further submitted, that this was causing a crisis of public confidence in the pertinent government documents issued relative to those motor vehicles.

[44] Mr Dunkley submitted that the Ministry Paper was evidence of the impact of these phenomena on public law and the learned judge ought to have given due consideration of the impact of the Ministry policy on the question of costs in a matter

where the issues clearly touched and concerned public law, which in turn ought to have impacted or mitigated any penalty the court was considering to impose.

[45] Dr Beckford in response submitted that section 47(2)(c) of the Act allows the court to consider the circumstances of the default. He further submitted that the section ought to be construed in the ordinary meaning of the words to include; not only a breach but any accompanying or attendant events or conditions which follow as a result of a breach. Counsel concluded that on the basis of this construction, the learned judge would have been correct in considering the circumstances which closely followed as a result of the breach, such as the respondent's conduct in handling the complaint and attempts by Miss Mills and the respondent at resolving the matter.

[46] It is perhaps necessary to observe that the matter of the Ministry Paper was also relied on by Mr Dunkley in relation to the issue of liability. However, having found that liability is strict, the Ministry Paper was clearly not material. However, I think it also necessary to note that the learned judge was correct to find that the Ministry Paper could have had no impact on this matter in the sense that the breach occurred in 2011, three years before the Ministry Paper was issued. Further, and in any event, the learned judge was also correct that even if the government agencies took it upon themselves to guarantee the accuracy of the year of manufacture that would not exonerate the appellant. However, the impact of the Ministry Paper acknowledging a problem in the used car industry on the possible mitigation of the penalty does not appear to have been considered by the learned judge.

[47] The appellant has successfully established that it honestly believed that the model year was accurate. The step taken by the Government to address the problems being confronted by several sellers of used cars and the purchasers of same in issuing the Ministry Paper can serve as being supportive of the appellant's attempts to show that it had not done anything deliberately wrong in passing on the inaccurate information about the model year. The appellant did not want to accept that its fault lay in relying on the accuracy of the information, without apparently any regard to the disclaimer from the Singaporean company and without seeking to verify the information for itself.

[48] Mr Dunkley's submission that the learned trial judge ought to have taken judicial note that the claim was not a "stand alone case" but part of a used car industry phenomena is plainly wrong. It is correct that the courts can take cognisance of matters which are so notorious or clearly established and so generally incontrovertible that formal evidence of their existence is unnecessary. The fact that other cases may have arisen due to the incorrect information being given by the Singaporean used car dealers did not fall within such a categorisation.

[49] The learned judge was apparently guided by the penalty imposed by this court in **Fair Trading Commission v SBH Holding Ltd and Anor** where K Harrison JA (Ag) had stated a very clear and strong message must be sent to those who make false or misleading representations. The offending parties and respondents in that case were real estate developers who had advertised the construction and sale of townhouses and had advertised that the project was being financed by the Jamaica National Building

Society. They had also made representations offering "Elegant Living at its Dignified Best" as also "Ultimate in Affordable Living" which would be effected by the provision of certain facilities, namely a swimming pool, tennis court, a club house and security fencing. Purchasers were induced to buy because of these representations which were made both orally and contained in brochures, pamphlets and newspaper advertisements.

[50] The facilities offered through these representations were not received by eventual purchasers of the townhouses. This court found that the conduct of the respondents, and the absence of any evidence of any attempt to provide the promised facilities confirmed that there was a total absence of any intention to provide the facilities which the attractive advertisements had promised. The evidence also revealed that the developers were not as financially sound as they had held themselves out to be and were in fact relying on monies advanced by purchasers to complete the facilities as advertised and not from any funding from the reputable financial institution as they had claimed. It was in these circumstances that this court found that the representations were false and misleading and were made without limitations or conditions. This court also found that the developers had committed a clear breach of section 37 of the Act and were quite insincere in their advertisements of the facilities offered to the purchasing public and imposed the penalty of $2,500,000.00.

[51] The learned judge in the instant case appreciated that the appellant's breach was not as egregious. Although there was one other case before him in which a penalty had been imposed, he did not seem to consider it when determining the

appropriate penalty. In the case of **Fair Trading Commission v Errol Bailey (Trading as Foundation Music Showcase)** Claim No 2007 CD 003 delivered 4 July 2008, Anderson J imposed a penalty of $250,000.00 in circumstances where the defendant was found to have breached section 37 of the Act by advertising that he would be staging a concert with several well known artistes and an internationally renowned singing star who all did not perform at the concert on the night. There was no explanation given for the failure and several persons were found to have been misled by the advertising that had indicated who the performers would have been.

[52] The defendant had averred that the contracted artistes who failed to perform at the concert had refused to do so when he had denied their requests for additional payments over and above that in respect of which he had contracted them. It was further asserted that the international artiste had been contracted through his booking agent, his fees paid and all his travel and hotel arrangements concluded but some three days before the concert, the defendant was made aware of the difficulties the artiste was having with putting his backing band together.

[53] Anderson J in considering what appropriate penalty to impose, commented :

> "Notwithstanding, the fact that the court has found that the liability under Section 37 is strict, there may be some sympathy for a promoter who is held to ransom by unscrupulous artistes who refuse to carry out the terms of their contract. I believe that an acknowledgment of that difficulty may be reflected in terms of the penalty which this court imposes but I hasten to add that any sympathy for [sic] promoter must be tempered with a recognition of the public policy objectives of the statute and the fact that one ought to do what is in his power to protect himself from

> consequences of unscrupulous behaviour on the part of those with whom he would do business."

[54] It is of course important to bear in mind that the maximum penalty in the case of an individual is $1,000,000.00 so in effect the sympathetic judge imposed a penalty that was a quarter of the prescribed maximum. In the instant case in circumstances where the learned trial judge recognised and accepted that the appellant honestly believed in the correctness of the information received from the Singaporean authorities a penalty of $2,000,000.00 was considered justified largely because of the appellant's behaviour in refusing to accept liability and to pursue efforts to attempt to resolve the matter amicably. This, in my view, ought not to have been the major consideration.

[55] I cannot agree with Dr Beckford that the circumstances that followed the breach should have a significant impact on the penalty imposed. Section 47(2) speaks to the circumstances of the default which suggest that it is limited to the circumstances which occurred resulting in the default itself. In this case, the apparent ease with which Miss Mills was able to verify the correct age of the motor vehicle is a factor which could properly impact the penalty to be imposed. This is especially so since the de-registration certificate from the Singaporean authority had a clear disclaimer wherein it expressly did not warrant the accuracy, adequacy or completeness of the information contained therein. The appellant could have made its own disclaimer on the invoice given to Miss Mills. It failed to do this and therefore assumed the risk and must bear the consequences thereof.

[56] In **Fair Trading Commission v SBH Holdings Ltd** K Harrison JA (Ag) had commented that there may be conduct which the court may take into account in mitigation of the penalty even though that conduct does not amount to a defence to liability. That comment guided Anderson J in the matter involving **Errol Bailey**. It is not immediately apparent that Sykes J was similarly guided. One may well think that the appellant was being punished for the stance it took, after the default or breach was committed, in refusing to seek to verify the correct age of the motor vehicle and in failing to accept responsibility and resolve the matter.

[57] In all the circumstances the amount of $2,000,000.00 does seem to be excessive. I would therefore dismiss the appeal as it relates to liability but allow it in relation to the penalty. I would set aside that penalty and impose an amount of $1,200,000.00 instead. I would award half of the costs in this court to the appellant since it has succeeded in this appeal as to penalty.

PHILLIP JA

ORDER

1. Appeal allowed in part.
2. The judgment of Sykes J delivered on 22 May 2015 is affirmed on the issue of liability.
3. The penalty of $2,000,000.00 imposed on the appellant is set aside and substituted in its stead is the sum of $1,200,000.00.
4. Question of costs reserved. Written submissions to be made by the parties within 21 days.