

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CIVIL APPEAL NO 5/2007**

**BEFORE: THE HON MR JUSTICE HARRISON JA  
THE HON MISS JUSTICE PHILLIPS JA  
THE HON MRS JUSTICE McINTOSH JA (Ag)**

**BETWEEN APPLETON HALL LIMITED APPELLANT  
AND T. GEDDES GRANT DISTRIBUTORS LIMITED RESPONDENT**

**Ransford Braham and Shaun Henriques for the appellant**

**Maurice Manning and Miss Tavia Dunn instructed by Nunes Scholefield & DeLeon for the respondent**

**10, 11, 12 March 2010 and 29 July 2011**

**HARRISON JA**

[1] This is an appeal by Appleton Hall Limited (the appellant) from an order made by Pusey J, dismissing the appellant's claim for damages arising from a breach of contract and negligent misstatement.

**Background**

[2] In 1992, the appellant, a registered company, operated a farm in YS Estates, St Elizabeth on which it cultivated papaya for export to the United States of America. The respondent, which is also a company, at that time carried on the business of, among other things, selling and distributing agricultural products and farm supplies such as

insecticides and fungicides. Sometime around 5 January 1994, Mr Samuel Ashley, a sales representative at the respondent company, holding a Bachelor of Science Degree in Zoology and Botany and who had training and experience in the application of fungicides, visited the appellant's farm. The appellant's farm manager, Mr Michael Browne, indicated that he needed to purchase a fungicide known as Mancozeb to spray the papaya plants on the farm. The respondent had none in stock at that time and Mr Ashley suggested as an alternative, another product, Ridomil but Mr Browne indicated that this was not a suitable alternative. Mr Ashley then suggested Tri-Miltox Forte (TMF) which apparently was a product that was unfamiliar to the appellant and had never been used on its farm. As a result of the conversation between the parties, Mr Browne purchased two bags of TMF. Mr Browne combined these bags of TMF with another product Malathion, which he had always used with Mancozeb, to create a 'cocktail' mixture. This mixture was used to spray the papaya plants. Subsequently, the appellant purchased several bags of TMF, combined it in the same manner and used it to spray the entire acreage of papayas.

[3] In April 1996, the appellant commenced proceedings against the respondent "for breach of a contract for the sale of fungicide and/or negligent misrepresentation in advising the plaintiff to purchase Tri-miltox Forte fungicide for use in spraying papaya plants". In support of the cause of action for breach of contract, the appellant in its statement of claim asserted that:

4. Acting on the said advice the plaintiff brought a quantity of the said Fungicide [Tri-miltox Forte] from the Defendant.
5. It was an express and/or implied condition or term of the said sale agreement that the said

- fungicide was safe and suitable or fit for its said purpose.
6. In breach of the said condition or term the said fungicide was neither safe nor suitable or fit for the said purpose and substantially affected the flowering of the plaintiff's papaya plants and reduced their yield."

The particulars of negligence in respect of the claim for negligent misrepresentation were:

- "(1) Advising the Plaintiff that Tri-miltox Forte was a suitable substitute for Mancozeb which it had requested for the spraying of its papaya plants.
- (2) Advising the use of Tri-miltox Forte for the spraying of papaya plants without taking into account sufficiently or at all, its ingredients or composition, or in particular the dangers of the substantial proportion of copper it contained.
- (3) Recommending or advising the use of Tri-miltox Forte as a fungicide for spraying papaya plants when it knew or ought to have known that it was unsafe and/or unsuitable for use for that purpose.
- (4) Failing to foresee or wilfully or negligently failing to inform the Plaintiff of the likely effects or the danger in the use of Tri-miltox Forte in the spraying of papaya plants."

[4] In its defence, the respondent denied that TMF was unsuitable or unfit for the purpose for which it was bought. It instead averred that:

- "a. Tri-miltox is a suitable substitute for Mancozeb.
- b. Tri-miltox Forte is a copper based fungicide, and in particular does contain copper compounds which are not known to damage papayas.
- c. The Defendant will aver that at all material times it took reasonable care to employ persons who were trained in agricultural/natural sciences."

The respondent further averred that if the appellant suffered any loss, it was caused by the negligence of the appellant in:

- a. Failing to apply Tri-Miltox Forte, in keeping with the clear instructions given to the Defendant.
- b. Applying Tri-Miltox in a manner wholly inconsistent with the Defendant's and/or manufacturer's recommendation and in particular the clear instructions outlined on its label.
- c. Spraying its plants at 7 day intervals and not at 2-3 week intervals as prescribed in the instructions for use.
- d. Applying a mixture of Tri-miltox Forte with the insecticide Malathion 25 WP to its papaya plant.
- e. Failing to make any preliminary test with the planned mixtures in order to observe the physical aspects of the spray and the reaction it produces on the crop to be treated.
- f. Failing to take any or any appropriate step to ensure that the mixture it intended to apply to its papaya would be safe and suitable for the purposes intended.
- g. Failing to foresee or willfully neglecting to consider the effects or danger in applying the mixture of Tri-Miltox Forte and the insecticide Malathion 25 /WP to its papaya."

[5] Each party relied on expert evidence. In support of its case, the appellant relied on the expert report of Dr Omer Thomas. Dr Thomas expressed the view that TMF is not an appropriate substitute for Mancozeb because, among other reasons, Mancozeb does not cause phytotoxicity in the same way that TMF does and TMF induces "acropetal blossom fall". The respondent's expert, Mr Standford McDonald, whose report was accepted by the learned judge, was of the view that although TMF contained copper, which, if applied in large amounts would be toxic to plants, it was a suitable substitute for Mancozeb because TMF was a combination of copper salts plus Mancozeb. He also stated that spraying compounds on papaya trees during flowering, especially on hot days, could result

in the flowers falling off.

[6] The learned judge gave an oral judgment which dealt succinctly with his reasons and indicated that should the need arise, he would deliver a written judgment at a later date. This written judgment, however, did not materialise. Both parties recorded the learned judge's findings and at the hearing before this court, the appellant indicated that it would rely on the findings as recorded by the respondent, which are as follows:

"1. ... Mr. Samuel Ashley employee of the Defendant Company did not hold himself out to be an Agronomist or agricultural expert in any way. The relationship between them was merely one of salesperson to customer.

When Mr Ashley gave his opinion as to what was suitable, it was taken in that particular light. Mr Brown having received the advice, he then tried it out, looked at the plants and he made his observations about the plants. He was not relying on the technical expertise of Mr. Ashley as an Agronomist he was merely taking his recommendations as a sales person.

The Defendant did not know of any negative effects of Tri-Milttox Forte on papaya plants.

Nor am I of the view that they (sic) had a duty to test the Tri-Milttox Forte to see its effect.

...

Tri-Milttox Forte does affect the flowering of papaya plants and consequently again on the balance of probability apparently did affect the flowering of papaya plants at Appleton Limited. However, I am not of the view that there is sufficient evidence to indicate that the loss in relation to what Appleton Hall suffered was caused by the Tri-Milttox Forte for these reasons:

1. Evidence is that Tri-miltox Forte inhibits the flowering of papaya plants. Mr. McDonald's evidence is that the flowering would fall off. There is no evidence that Tri-Miltox Forte would end any possible re-productive cycle and subsequent production of fruit of the papaya plant.
2. The evidence was insufficient in terms of the newly planted acres, as to when they were sprayed. A detailed explanation as to whether the figures that were shown as to the lack of production resulted (sic) in Tri-Miltox Forte was missing.
3. There is no evidence sufficient to indicate that the manner in which the Claimant applied the Tri-Miltox Forte or the mixture actually did cause this particular effect. (sic) Cognizant of the fact that the label indicated that one should be careful about mixing Tri-Miltox Forte and that one should do so in a trial basis. Having said that, I see nothing to indicate that this particular mixture was the reason for the damage to the plants."

[7] The appellant's 14 grounds of appeal challenged these findings of fact, save and except for the findings that Tri-Miltox Forte inhibited the flowering of the papaya plants and that the mixture was not the reason for the damage to the plants. I do not propose to set out the grounds as filed. In summary, the issues which we have to determine are:

- (a) whether there was a breach of section 15 of the Sale of Goods Act;
- (b) the extent to which the respondent is liable to the appellant for negligent misstatement; and
- (c) damages.

## **ISSUE NO 1**

### **The Action for Breach of Contract**

[8] The appellant's complaint is that the learned judge failed to consider and appreciate that the primary cause of action was breach of section 15 of the Sale of Goods Act (the Act). Before this court, Mr Braham, for the appellant, submitted that notwithstanding the fact that the pleadings had not made reference to this particular section, they embraced the section. He contended that the judge's findings indicated that he had made findings in respect of negligent misrepresentation and not in respect of breach of section 15 of the Act. He submitted that there are four conditions that must be established to succeed in an action under section 15 of the Act and that these had all been satisfied by the appellant. These, he submitted, are:

- (i) The appellant (as buyer) must expressly or impliedly make known to the respondent (as seller) the purpose for which the product was required.
- (ii) The appellant must have relied on the respondent's skill.
- (iii) The product is of a description which it is in the course of the respondent's business to supply.
- (iv) The product was not reasonably fit for the purpose.

[9] Mr Braham submitted that the first requirement had been satisfied because the evidence indicated that the appellant had made known to the respondent the purpose for ordering the product. That evidence, he said, started with the appellant ordering a particular product Mancozeb for the purpose of controlling and managing fungus. In the appellant's written submissions, reference was made to the pleadings, the evidence of Mr Ashley and the evidence of Mr Browne. Mr Braham argued that the second

condition was satisfied as Mr Ashley was the one who had suggested substitutes for Mancozeb, these substitutes being first, Ridomil and then, TMF. Mr Braham submitted further that the finding of the judge in respect of the effect of TMF on flowering, indicated that condition (iv) had been satisfied. There was no dispute between the parties that the third requirement had been satisfied.

[10] The respondent took no issue with the appellant's contention that the cause of action alleging breach of contract was really alleging a breach of the term implied by the Act that the product TMF was unfit for its required purpose. Before this court, Mr Manning argued that the fungicide TMF was fit for the purpose for which it had been required because it had been registered in Jamaica and had been used successfully in parts of Jamaica. Further, he argued, its composition included 20% of Mancozeb, the fungicide that had been requested by Mr Browne, and 21% copper compounds. It was further submitted that even if all the conditions were satisfied, the proviso should apply in that no liability should attach because the appellant had asked for the product by its trade name. It was argued that after the initial purchase, in the case of the other purchases, the appellant had requested and purchased TMF. Additionally, having used two bags of TMF, the appellant had been 'pleased' with the effect on the lush green leaves.

[11] I accept the appellant's submission that although the Act was never specifically mentioned, it is clear from the pleadings that the cause of action of breach of contract, being that the product was not suitable for its required purpose, was founded on section 15 of the Act.

[12] Section 15 of the Act reads:

"(a) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, **so as to show** that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose, provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose." (Emphasis supplied)

It is clear from the section that the conditions that must be established in order to succeed in an action are those which have been outlined by Mr Braham. It seems to me that on a literal construction of this section, conditions (i) and (ii) above are interdependent in that reliance on the seller will be imputed to the buyer based on the manner in which the buyer makes known to the seller the particular purpose for which the product is required. Nothing further is needed to prove reliance. I find support for this conclusion in **Ashington Piggeries Ltd v Christopher Hill** [1972] AC 441 where Lord Diplock had this to say about section 14 of the English Act which is equivalent to section 15 of our Act:

"So far as concerns the conduct of the buyer, the circumstances which give rise to the implied condition ... are first, that he should make known expressly or by implication to the seller what is the particular purpose for which the goods are required and, secondly, that he should do so in such a way as to make the seller reasonably understand that he is relying on the seller to exercise sufficient skill or judgment to ensure that the goods are fit for that particular purpose. This he

generally does by selecting a seller who makes it his business to supply goods which are used for purposes of that kind. It does not matter that the seller does not possess the necessary skill or judgment nor does it matter that in the then state of knowledge no one could by exercise of skill or judgment detect the particular characteristic of the goods which rendered them unfit for that purpose. This may seem harsh on the seller, but its harshness is mitigated by the requirement that the goods must be of a description which it is in the course of the seller's business to supply. By holding himself out to the buyer as a manufacturer or dealer in goods of that kind he leads the buyer reasonably to understand that he is capable of exercising sufficient skill or judgment to make or to select goods which will be fit for the particular purpose for which he knows the buyer wants them."

In fact it seems that Lord Diplock is suggesting that by the mere fact of the buyer indicating to the seller that he wishes to purchase a product and this product is within the seller's business to supply for purposes of the kind required by the buyer, the buyer is indicating that he is relying on the seller's judgment to provide him with a product that is fit for that purpose.

[13] There is no dispute that Mr Browne did make known to Mr Ashley, the particular reason for his purchase of the product. In his witness statement, Mr Ashley stated that he first recommended Ridomil but Mr Browne indicated that it would not be suitable because it would leave a residue on the fruits which were not acceptable in the US market and it was then that he recommended TMF. So then, based on the tenor of the interaction between both men, Mr Ashley was fully aware that the appellant needed fungicide to treat its papaya plants that were being cultivated for export. Although it was not explicitly admitted, I think it a reasonable conclusion to draw that the appellant was seeking a product that would have little or no deleterious effect on the papaya plant. In its defence, the respondent agreed with the appellant's assertion in its particulars of claim that it (the

respondent) "carries on the business of selling and distributing fungicides and in that connection advises customers on the use of the products". This was essentially why Mr Ashley visited the appellant's farm. Thus, by deciding to order from Mr Ashley, who was an agent of the respondent which was in the business of supplying fungicides, Mr Browne was indicating to Mr Ashley that he was placing reliance on Mr Ashley that he would be supplied with a fungicide fit for the use that he required. These facts would satisfy conditions (i) and (ii) of the requirements. Condition (iii) has been satisfied in that there was no denial by the respondent that TMF is a product which it was within its business to supply.

[14] The critical issue then is whether TMF was reasonably fit for the purpose for which it was required. The respondent's expert (Mr MacDonald) in his response to the questions posed by the appellant's attorney, indicated that TMF could be used on papayas but that he would not recommend its use on papayas when they were flowering, particularly in hot areas such as YS, St Elizabeth. The inference to be drawn from this is that, TMF is capable of having a deleterious effect on the papaya plants depending on when it is applied to the plants. Although this was not explicitly confirmed by the expert, it is interesting to note that in cross-examination, Mr Stuart Hanson, the respondent's agricultural manager, admitted that if TMF did in fact affect the flowering of the papaya plant, it would affect the yield and affect the majority of the useful life of the plant. The learned judge found that TMF inhibited the flowering of plants and that it did affect the appellant's plants. He also found that the way in which Mr Browne combined TMF with other products to make a cocktail mixture to spray the plants, did not affect the plants. The respondent did not file a counter notice challenging these findings.

[15] In light of the judge's findings and the evidence that TMF would affect the yield, it

is my view that the learned judge should have found that TMF was not reasonably fit for the purpose for which the appellant bought it. The facts that TMF had been registered in Jamaica at the time of these events and that it had been used in some parts of Jamaica without detriment, while significant, cannot be determinative of this issue, since, I would think, the individual circumstances in which the product is used is the overriding consideration.

[16] As to the question of whether the proviso applies, in his evidence, Mr Browne said that he had first ordered two bags to assess the effect and then he had ordered more. In **Baldry v Marshall** [1925] 1 KB 260, Bankes LJ said:

"The mere fact that an article sold is described in the contract by its trade name does not necessarily make the sale a sale under a trade name. Whether it is so or not depends upon the circumstances. I may illustrate my meaning by reference to three different cases. First, where a buyer asks a seller for an article which will fulfil some particular purpose, and in answer to that request, the seller sells him an article by a well-known trade name, there, I think it is clear that the proviso does not apply. Secondly, where the buyer says to the seller, 'I have been recommended such and such an article'- mentioning it by its trade name - 'will it suit my particular purpose?' naming the purpose, and thereupon the seller sells it without more, there again I think the proviso has no application. But there is a third case where the buyer says to a seller, "I have been recommended so and so" - giving its trade name- "as suitable for the particular purpose for which I want it. Please sell it to me." In that case I think it is equally clear that the proviso would apply... **In my opinion, the test of an article having been sold under its trade name within the meaning of the proviso is: Did the buyer specify it under its trade name in such a way as to indicate that he is satisfied, rightly or wrongly, that it will answer his purpose, and that he is not relying on the skill or judgment of the seller, however**

**great that skill or judgment may be?** (Emphasis supplied)

In these circumstances, I do not think that the proviso applies. The subsequent purchase, in my view, cannot be divorced from the initial purchase since the former was made based on the result of the initial order that was made as a result of the recommendation of Mr Ashley. I do not think it can be said that Mr Browne in purchasing more of TMF indicated that he was not relying, at least indirectly, on the skill or judgment of Mr Ashley.

[17] Since the question of loss concerns both causes of action, I will reserve that discussion to be dealt with more conveniently after I have considered the appeal in respect of negligent misstatement.

## **ISSUE NO 2**

### **The Action for Negligent Misstatement**

#### The Appellant's Submissions

[18] In the written submissions for the appellant, it was argued that the learned judge had erred when he thought it relevant to make a finding as to whether Mr Ashley had held himself out to be an agronomist or an expert. It was submitted that the authorities do not require the person giving the advice to be an expert of a particular type, but that it is sufficient, if in the ordinary course of business the advice is given in circumstances in which it is reasonable to ask and receive the advice and where it would be reasonable to rely on the skill and judgment of the adviser. Before this court, Mr Braham relied on the case of **Caparo Industries plc v Dickman and Others** [1990] 1 All ER 568; [1990] 2 Ac 605 as providing the requirements that should have guided the

learned judge in determining liability. He submitted that these are:

- "(1) [That] the advice is required for a purpose, whether particularly specified or generally described, which is made known, either actually or inferentially, to the adviser at the time when the advice is given.
- (2) The adviser knows, either actually or inferentially, that his advice will be communicated to the advisee, either specifically or as a member of an ascertainable class, in order that it should be used by the advisee for that purpose.
- (3) It is known, either actually or inferentially, that the advice so communicated is likely to be acted on by the advisee for that purpose without independent enquiry
- (4) It is so acted on by the advisee to his detriment."

He submitted that the question that ought to have been asked was not, "Did he hold himself out as an agronomist?" The questions to be asked should have been those that were consonant with the requirements outlined in **Caparo Industries**. The thrust of the submissions seems to be that, the learned judge ought to have considered each of the above requirements and applied them to the circumstances of this case. It was submitted, in written submissions, that the following pieces of evidence indicated that it was reasonable for the appellant to have relied on Mr Ashley:

- "(a) Mr Ashley is a graduate of the University of the West Indies with a B Sc. degree in Zoology and Botany and that he has experience in the application of fungicides.
- (b) that he travels the island and is in contact with farmers who from time to time would order products from him.
- (c) that because of his training, he is qualified to

recommend the use of a product when particular problems are brought to his attention by farmers.

- (d) Mr Ashley visited the appellant's farm from time to time in an attempt to sell the respondent's products."

[19] It was also submitted that the learned judge had fallen into error when he thought it relevant to make a finding that Mr Ashley had not held himself out to be an expert. It was argued that in any event, the judge's finding that Mr Browne had taken Mr Ashley's recommendation and had acted on it was sufficient to ground liability. It was further submitted that to the extent that the learned judge had implicitly found that Mr Browne had not been relying on Mr Ashley because he had observed the plants after the application of the two bags of TMF, the learned judge had fallen into error. This was so because the fact that when TMF was first applied the leaves became greener would have served only to increase Mr Browne's confidence in the recommendation given to him by Mr Ashley. Further, it was submitted, the appellant would not have been in any contact with TMF but for the intervention of Mr Ashley.

[20] Mr Braham pointed out that the Privy Council in **Mutual Life and Citizens' Assurance Co Ltd v Evatt** [1971] AC 793 had narrowed the scope for finding or establishing a duty in cases of negligent misstatement. In that case, the Board held that liability would attach only in two instances: (i) where, by carrying on a business or profession involving the giving of advice calling for special skill and competence, the defendant made it known that he claims or possesses and is prepared to exercise the skill and competence used by persons who give such advice in the ordinary course of their business and (ii) where, though the defendant does not carry on any such business he had let it be known in some other way at or before the time the advice is sought that

he claims to possess skill and competence in the subject matter of the enquiry comparable with that of persons who do carry on the business of advising on that subject matter and is prepared to exercise that skill and competence. He submitted that liability would still attach on an application of either of the two aforementioned categories. In respect of the first category, the respondent was not only involved in the business of selling fungicides but it was also involved in the business of advising on the use of these products. In respect of the second category, Mr Ashley had let it be known that he had both the skill and competence in the subject matter of fungicides. Further, he had asserted in his witness statement that "because of my training I am qualified to recommend the use of a product when a particular problem is brought to my attention".

[21] In respect of the judge's finding that there was no obligation on the respondent to test, it was submitted in the appellant's written submissions that the case of **Vacwell Engineering Co Ltd v BDH Chemicals Ltd** [1971] 1 QB 88 demonstrates that the answer to whether the defendant had a duty to test is an affirmative one. It was further submitted that whether or not the respondent had a duty to test the product, it had the duty to do some proper research to ensure that the advice was correct; it was not enough simply to rely on the manufacturer's label.

#### The Respondent's Submissions

[22] In its written submissions, the respondent seems to have accepted that the applicable principles as to the establishment of liability are those set out in **Caparo Industries**. It was submitted that the nub of the matter concerned a determination of whether the latter two of the four conditions in **Caparo Industries** existed viz,

whether it was known either actually or inferentially that the advice was likely to be acted upon without independent enquiry and whether it had been acted upon to the detriment of the appellant.

[23] It was further submitted on the respondent's behalf that Mr Browne's reliance on the advice of Mr Ashley was *de minimis*. In his submissions before this court, Mr Manning argued that the following aspects of the evidence indicated that Mr Browne could not have been expected to rely solely on Mr Ashley's advice:

- (a) Mr Browne admitted that he had followed the manufacturer's label and the instructions. This amounted to an independent enquiry. The instructions recommend that the user carry out a preliminary test at his responsibility and expense. In carrying out the preliminary test, the user would have ascertained the effect of the product on his crops.
- (b) The appellant was a member of an association of papaya growers which shared agricultural information.
- (b) Mr Richard Wates, a fellow farmer who was a part of the agricultural association, gave plant husbandry advice to the appellant.
- (c) Mr Browne was the one who corrected Mr Ashley

about the use of another fungicide, Ridomil.

[24] It was also submitted that even if it could be said that there was reliance, this was limited to the purchase of the first two bags. Mr Browne, it was submitted, exercised his own judgment when he bought more bags of TMF. To support this latter submission, reference was made to **McNaughton Papers Group v Hicks Anderson & Co (a firm)** [1991] 1 All ER 134. The respondent also relied on the **Mutual Life and Citizens' Assurance** case and submitted that the reliance must be reasonable and further that the reliance will not be reasonable where it was obvious that the defendant lacked the relevant expertise to dispense the advice. In this case, it was submitted, such reliance was unreasonable.

### **The Discussion and Analysis**

[25] This case raises an important point of law concerning the scope of liability for negligent misstatement. The decisions of **Donoghue v Stevenson** [1932] AC 562 and **Hedley Byrne and Co Limited v Heller and Partners Limited** [1964] A.C. 465 have been considered and adopted by our courts in a number of cases and unquestionably represent the law in this jurisdiction. However, the tort of negligent misstatement has its origins in England in **Hedley Byrne**. An appropriate starting point therefore is to remind oneself of precisely what was decided by these two cases, firstly, in relation to the tort of negligence generally and secondly, in relation to the more narrowly defined tort of negligent misstatement.

[26] The key passage about the duty of care in the speech of Lord Atkin in **Donoghue v Stevenson** at page 580 is in the following terms:

"At present I content myself with pointing out that in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances. The liability for negligence, whether you style it such or treat it as in other systems as a species of 'culpa', is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

[27] This concept was further elaborated by Lord Atkin when he pointed out at page 581 that "proximity" in this context should not be confined to "mere physical proximity", but should extend:

"to such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act."

[28] The injury for which a claimant might be compensated, however, under the general law of negligence was confined to personal injury to, or damage to the property of, a plaintiff. The **Hedley Byrne** case was a major milestone in the evolution of the law of negligence, because it extended liability to include pecuniary

loss caused by a negligent misstatement. It is important therefore to have regard to the considerations which prompted the House of Lords in **Hedley Byrne** when it held that a negligent, though honest, misrepresentation, spoken or written, could give rise to an action for damages for financial loss caused thereby, apart from any contractual or fiduciary relationship. It did so on a very specific basis, namely, that the law would imply a duty of care when a party seeking information from a party possessed of a special skill trusts him to exercise due care, and that party knew or ought to have known that reliance was being placed on his skill and judgment.

[29] Various cases in Britain in the following years attempted to define a single general principle which might be applied in all circumstances to determine the existence, parameters and scope of the duty of care. Then followed the further decision of the House of Lords in **Caparo Industries**. This is a case of particular relevance to the instant case because it involves negligent misstatement in a specific way. The plaintiff was a limited company which had taken over F. Plc. and then sued its directors alleging fraudulent misrepresentation. It also sued its (F.Plc's) auditors claiming that they were negligent in carrying out the audit and making their report, which they were required to do within the terms of the Companies Act, 1985. The plaintiff claimed that it relied on the accounts as certified and contended that the auditors owed both shareholders and potential investors a duty of care in respect of the accuracy of the accounts and should have known that the company's profits were not as high as projected. The House of Lords held, however, that liability for economic loss due to negligent misstatement was confined to cases where the statement or advice had been given to a known recipient for a specific purpose of

which the maker was aware and upon which the recipient had relied and acted to his detriment; the court further held that since the purpose of the statutory requirement for an audit of public companies under the Companies Act of 1985 was the making of a report to enable shareholders to exercise their class rights in general meeting, it did not extend to the provision of information to assist shareholders in the making of decisions as to future investment in the company. Additionally, there was no reason in policy or principle why auditors should be deemed to have a special relationship with non-shareholders contemplating investment in the company in reliance on the public accounts, even when the affairs of the company were known to be such as to render it susceptible to an attempted takeover, the auditors had not owed any duty of care to the plaintiff in respect of its purchase of F. Plc's shares.

[30] In the **Caparo Industries** case, Lord Bridge of Harwich identified a threefold test that: (1) the damage caused must have been foreseeable; (2) there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood'; and (3) the situation should be one in which the court considers it fair, just and reasonable that the court should impose a duty of a given scope upon the one party for the benefit of the other.

[31] Lord Bridge observed that the concepts of proximity and fairness are -

“not susceptible of any such precise definition as would be necessary to give them utility as practical tests, but amount in effect to little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognises

pragmatically as giving rise to a duty of care of a given scope."

[32] Lord Bridge went on to examine the authorities "relating to this relatively narrow corner of the field...to determine the essential characteristics of a situation giving rise, independently of any contractual or fiduciary relationship, to a duty of care owed by one party to another to ensure that the accuracy of any statement which the one party makes and on which the other party may foreseeably rely to his economic detriment" and said (at page 576):

"The salient features of all these cases is that the defendant giving advice or information was fully aware of the nature of the transaction which the plaintiff had in contemplation, knew that the advice or information would be communicated to him directly or indirectly and knew that it was very likely that the plaintiff would rely on that advice or information in deciding whether or not to engage in the transaction in contemplation. In these circumstances the defendant could clearly be expected, subject always to the effect of any disclaimer of responsibility, specifically to anticipate that the plaintiff would rely on the advice or information given by the defendant for the very purpose for which he did in the event rely on it. So also the plaintiff, subject again to the effect of any disclaimer, would in that situation reasonably suppose that he was entitled to rely on the advice or information communicated to him for the very purpose for which he required it."

[33] In **White v Jones** [1995] 2 AC 207 Lord Browne-Wilkinson at page 272 made the following observation:

"... since this House was concerned with cases of **negligent misstatement** or advice, it was inevitable that any test laid down required both that the plaintiff should rely on the statement or advice and that the defendant could reasonably foresee that he would do so. In the case of claims based on negligent

statements (as opposed to negligent actions) the plaintiff will have no cause of action at all unless he can show damage and he can only have suffered damage if he has relied on the negligent statement. Nor will a defendant be shown to have satisfied the requirement that he should foresee damage to the plaintiff unless he foresees such reliance by the plaintiff as to give rise to the damage. Therefore, although reliance by the plaintiff is an essential ingredient in a case based on **negligent misstatement** or advice, it does not follow that in all cases based on negligent action or inaction by the defendant it is necessary in order to demonstrate a special relationship that the plaintiff has in fact relied on the defendant or the defendant has foreseen such reliance. If in such a case careless conduct can be foreseen as likely to cause and does in fact cause damage to the plaintiff that should be sufficient to found liability."

[34] 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 a person to whom the representation is made and/or to a person to whom they know the representations 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.

[35] Now, as I have indicated earlier, both parties seem to be at one where the principles applicable to establishing liability in this area of the law are concerned, the principles being those adumbrated in **Caparo Industries** and not **Mutual Life and Citizens' Assurance**. The respondent has, however, relied on the **Mutual Life and**

**Citizens' Assurance** case with respect to the issue of the reasonableness of the reliance although it may be said that that was not vigorously pursued before this court. I think, however, that it is appropriate to point out that the question concerning which decision is to be binding on this court where there is a conflict between a decision of the House of Lords and the Privy Council has been addressed in several decisions of this court, the case of **Yvette Reid v City of Kingston Co-op. Ltd** SCCA No 32/2007 delivered 31 July 2008, being one of the most recent. In that case, Smith JA at pages 25-26 of the judgment said:

"Although the Judicial Committee of the Privy Council is indeed the highest Court for this jurisdiction, the decision of the House of Lords in relation to the common law is our law. Dicta in **Tai Hing Cotton Mill Ltd. v Liu Chong Hing Bank Ltd.** (1986) A.C. 80 at 108 support the view that a decision of the House of Lords in respect of common law is our law and is binding on us. See also dicta in **Clinton Bernard v Attorney General of Jamaica** Privy Council Appeal No: 30/2003 delivered October 7, 2004. These cases were referred to in the judgment of the Court in **Loretta Brissett v R.** SCCA 69/2002 delivered December 20, 2004."

[36] Lord Oliver of Aylmerton, in his judgment in **Caparo Industries** also reviewed the authorities including **Hedley Byrne**. In referring to Lord Reid's statement of the principle in that case, he said at page 588:

"To begin with, Lord Reid would not have confined liability to statements made or advice given in the exercise of a profession involving the giving of such advice but would have extended it to-

'all those relationships where it is plain that the party seeking information or advice was trusting the other to exercise such a degree of care as the circumstances required, where it was reasonable for him to do that, and

where the other gave the information or advice when he knew or ought to have known that the inquirer was relying on him.' "

[37] So then, it appears that there is no requirement for the person giving advice to hold himself out to be an expert. I therefore agree with the appellant that it was not necessary for the judge to determine whether Mr Ashley had held himself out to be an expert. All that was required was that the circumstances be examined to see whether the requirements in **Caparo Industries** were satisfied.

[38] There is clearly no dispute that Mr Ashley knew that his advice was being required for the particular purpose of treating and preventing fungus without any deleterious effect. The critical issue then for this court to decide is whether Mr Ashley knew that it was likely that his advice would have been acted upon without enquiry and not whether Mr Browne ought to or was expected to have carried out an independent enquiry.

In **Caparo Industries**, Lord Oliver deduced from the **Hedley Byrne** case:

" ... that the necessary relationship between the maker of a statement or giver of advice ('the adviser') and the recipient who acts in reliance on it ('the advisee'), may typically be held to exist where (1) the advice is required for a purpose, whether particularly specified or generally described, which is made known, either actually or inferentially, to the adviser at the time when the advice is given; (2) the adviser knows, either actually or inferentially, that his advice will be communicated to the advisee, either specifically or as a member of an ascertainable class, in order that it should be used by the advisee for that purpose; (3) it is known either actually or inferentially, that the advice so communicated is likely to be acted on by the advisee for that purpose without independent inquiry; and (4) it is so acted on by the advisee to his detriment."

Lord Oliver, however, immediately proceeded to disclaim any suggestion that these conditions were either conclusive or exclusive, and we have no doubt that his categorization at (1) (above) was not intended to rule out the existence of a duty of care where the advice is volunteered by the giver, as opposed to being requested. As I read the decision in the **Caparo Industries** case, what their Lordships regarded as the crucial, fatal weakness in the plaintiff's case, which negated the existence of a relationship of proximity, was the fact that the relevant statement by the auditors had been produced to enable shareholders to exercise 'informed control' of the company, and had therefore not been given for the purpose for which the plaintiff had relied on it, that is, for investment.

[39] The respondent had made reference to **McNaughton Papers**, so I need to examine that case and see what it decided. Neill L.J. helpfully identified six factors which are likely to be important in most cases in deciding whether a duty of care exists, namely, (1) the purpose for which the statement was made; (2) the purpose for which the statement was communicated; (3) the relationship between the adviser, the advisee and any relevant third party; (4) the size of any class to which the advisee belongs; (5) the state of knowledge of the adviser, and (6) reliance by the advisee. It is true that the court in that case, was of the view that in considering the issue of reliance, it is necessary to consider whether the advisee "did or should have used his own judgment and whether he did or should have sought independent advice". However, this dicta must be viewed in the light of the circumstances of that case which were that the statement on which the claimant had relied on in that case had been accounts that were prepared for the defendant company and were draft accounts. The claimant was therefore a third party. The decision therefore concerned the duty of care

owed by the maker of a statement where a statement or advice was acted on to his detriment by a recipient other than the person directly intended by the maker of the statement or giver of the advice to act on it". It seems to me that it would be within reason in those circumstances to say that the claimant, knowing that the advice was not intended for him and that it was a mere draft, should have sought independent advice. The circumstances of this case are clearly distinguishable.

[40] The answer to the issue of reliance, in my view, can be discerned only from the circumstances existing at the time when the advice was sought and given and the state of mind and knowledge that the parties had of those circumstances. It follows that those aspects of the evidence that the respondent relied on as indicating that Mr Browne could not have expected to rely on Mr Ashley's advice are of relevance only if Mr Ashley knew of them because his knowledge of those facts may have influenced whether he would have thought it likely that Mr Browne would have acted on his advice without independent enquiry. Equally, those facts on which the appellant relied as showing that it was reasonable for Mr Browne to rely on Mr Ashley would only be relevant if they were known or communicated to Mr Browne before or at the time he sought Mr Ashley's advice.

[41] It does not seem to me that the question of whether Mr Ashley had a duty to test the product is important to a resolution of the issue. What is important is whether the circumstances were such that the adviser, based on what he has said to the advisee, could anticipate that the advisee would rely on his statement. This indicates that it is left up to the adviser to decide what information he relays to the advisee. The adviser is at liberty to give the appropriate disclaimer. This will of course be influenced by his level of

knowledge including that which he has obtained from any testing. This, it seems to me, suggests that there is no obligation on the adviser to test the product that he is selling. The case of **Vacwell Engineering v BDH Chemicals** on which the appellant relied is distinguishable because in that case, the respondent company marketed the chemicals and labeled them prior to marketing. It was in those circumstances that the court found that the company had a duty to test and to include on the label a warning about the hazardous nature of the product.

[42] I turn now to examine the circumstances surrounding the giving of the advice. In this regard, I have set out below paragraphs 4-10 of the witness statement of Mr Ashley which I consider important in resolving this issue:

4. I travel islandwide to maintain contact with farmers who from time to time order products.
5. That because of my training I am qualified to recommend the use of a product when a particular problem is brought to my attention.
6. That sometime in April 1994, I visited the Defendant's farm and met with the Farm Manager Mr Micheal Browne. At that time, Mr Browne advised me that he need (sic) to purchase Mancozeb. I advised that we have (sic) no Mancozeb in stock, and I recommended a product name (sic) Ridomil which is a systematic fungicide. He said he cannot (sic) use Ridomil as it is going to a US market and they would detect the chemical residue. I then told him about Tri-Miltox Forte.
7. Tri-Miltox Forte is a contact fungicide which has a superficial coating that is- it would not go into the system of the plant, therefore it would not leave a residue inside. I advised him that before I recommend it to him I would check and ensure that it can be used on papayas.
8. Sandoz is an overseas company that manufactures

Tri-Milttox Forte. On the label, it is recommended for papayas. It tells you that the application rate is 0.5 kg to 100 litres of water per hectare every ten to fifteen days. I also researched the product.

9. I then revisited the farm and discussed my findings with Mr Browne and how much should be applied. He said to me that he has spray equipment which is 100 gallon (a Tractor-drawn sprayer). He would therefore convert from kg to lb (ie 1kg=2.2lbs=4lbs to 100 gallons) and we agreed on that.
10. After he sprayed the farm for the first time I revisited him and he was full of praises for the product as it helped his fruits tremendously and he ordered more."

[43] Under cross-examination, Mr Ashley said that he had recommended TMF on the bases of what he had seen on the label and the fact that TMF contained 20% Mancozeb. This seems to be an understatement of "researched the product". Nonetheless, it is clear that Mr Ashley indicated that he would do some checks to ensure that TMF could be used. Thus, having indicated that he would check to ensure that the product could be used on papayas, having done some research and having reported his findings, he must have been aware that Mr Browne was relying on his recommendation to use TMF. It is difficult to see how it could be said that in these circumstances Mr Ashley expected Mr Browne to get independent advice, particularly when there is no evidence to indicate that Mr Ashley knew of the facts concerning Mr Browne being a part of the association of papaya farmers or him getting advice from Mr Wates in the early stages of his papaya-growing venture. Indeed, the learned judge in stating that Mr Browne was "merely taking his [Mr Ashley's] recommendations as a salesperson" was in substance accepting that Mr Browne had acted on Mr Ashley's advice.

[44] The respondent has contended that there was independent enquiry by Mr Browne

when he consulted the label. It seems to me that there is a distinction between reliance for the purpose of purchasing the product and reliance for the purpose of application of the product to the plant, and it seems clear that Mr Browne relied on Mr Ashley's advice for the former. I would go further to say that even for the application, Mr Browne was partly relying on Mr Ashley's advice as indicated by the evidence above. Both of them discussed and agreed on the mixture to be applied to the papaya plants. As to the respondent's contention that reliance was only in respect of the initial purchase of the two bags, the evidence of Mr Browne was that he ordered two bags to see if "they would do what Mr Ashley said they would do". In my view, his purchase of the additional bags of TMF was based on his acceptance of Mr Ashley's statement that the product would do what Mr Ashley said it would do as confirmed by the results from the use of the two bags. I agree with the appellant's submission that the results of the application of the two bags served to increase Mr Browne's confidence in the recommendation given to him by Mr Ashley.

[45] The question of whether the advice was acted on to the detriment of the advisee was answered by the appellant's evidence that there had been a fall-out in production, eventually resulting in a closure of operations. Attached to Mr Browne's witness statement was a chart showing the monthly production in the years 1993-1995 which showed that production had fallen significantly in the latter part of 1995 and eventually there was no production. The appellant also relied on a document titled "Evaluation of Leaf Analysis" which indicated that there were very high levels of copper in the leaves of the plants on which TMF had been sprayed. This evaluation had been conducted sometime in November 1994. There was also evidence contained in the witness statement of Mr Wates in which he, based, on the figures for production on his

farm, gave an estimate of how much income the appellant would have been expected to make per week. Mr Braham submitted that the judge had erred in finding that the appellant had failed to adequately prove loss. He argued that the judge seemed to be of the view that the evidence had to relate to the future and had failed to consider the period after the application including the period of recovery.

[46] In its written submissions, the appellant submitted that the finding by the judge was against the weight of the evidence. The evidence from Mr Hanson, it was pointed out, was that reduced flowering meant that there would be reduced yield and reduced papaya sales. His evidence was also that if TMF was shown to interfere with flowering, it would be unsuitable for application to papaya plants. There was evidence from Mr Ashley, it was submitted, that anything that interfered with the flowering would not be suitable for the entire life of the papaya plants. There was also evidence, it was argued, that the only change in the treatment process of the papaya plants was the substitution of TMF for Mancozeb and that the plants had been in good shape prior to the application of the mixture containing TMF. Furthermore, the evidence was that using TMF on the flowering papaya plants would, due to its copper content, lead to loss of production and high levels of copper were found on the leaves of the plants. It was also submitted that there was evidence that within months of applying TMF to the papaya plants, production had declined.

[47] It is to be remembered that the learned judge's written judgment did not materialize. Thus, the reasons for his finding that the appellant had failed to prove loss resulting from the use of TMF were limited to the following:

- "1. There was no evidence that Tri-Milttox Forte would

end any possible re-productive cycle and subsequent production of fruit of the papaya plant.

2. The evidence was insufficient in terms of the newly planted acres, as to when they were sprayed. In other words, the appellants had failed to provide a detailed explanation as to whether the figures that were shown as to the lack of production had been directly caused by the application of Tri-Miltox Forte.”

[48] In its written submissions and its oral arguments before this court, the respondent sought to justify why the learned judge could have concluded that the appellant had failed to prove loss directly relating to the use of TMF. The Court of Appeal Rules (CAR) require that where a respondent wishes to affirm the decision of the court below on grounds other than those relied on by that court, the respondent must file a counter-notice. No counter-notice was filed as mentioned earlier. However, I am not inclined to disregard those submissions because in my view, the submissions do not really constitute grounds other than those relied on by the court below; they merely seek to expand on what the learned judge found. In any event, the object of the requirement for a counter-notice is, in my view, fairness to the appellant in that it seeks to ensure that the appellant is given notice of the respondent’s arguments so that the appellant may prepare to respond, if necessary. It cannot be said that in these circumstances, any prejudice would be meted to the appellant by allowing the submissions because the appellant would have been aware of the nature of the respondent’s arguments by virtue of the written submissions and it can be said that the respondent’s oral arguments were a reflection of the written submissions.

[49] The respondent’s submissions were that the appellant had failed to establish how much of the loss was caused by the use of TMF because it had failed to establish how much of the production was affected by replanting. It was also submitted that the

"Evaluation of Leaf Analysis" indicated that the levels of other nutrients were at abnormal levels and that there was expert evidence that this could affect production. Further, it was submitted that based on the production chart, there was not sufficient evidence to indicate that loss was as a result of the use of TMF. The chart, it was argued, indicated that there had been a decrease in production during some of the months in 1992 when TMF had not yet been applied and also in the months when the appellant had planted more acreage. The highest yield, it was pointed out, had been in May 1994 after TMF had been applied.

[50] In my view, it can reasonably be said that there would be loss resulting from the use of TMF. This is based on the evidence that TMF when sprayed on flowering papaya plants affected the flowering and eventually the yield. Further, Mr Browne indicated that all the papaya plants, whether they were flowering or not, had been sprayed with the cocktail mixture containing TMF. The expert, Mr McDonald was never asked and he did not volunteer any information about the effect of flowering on the life of the plant. Yet, Mr Hanson, a witness for the respondent, although not an expert, stated during cross-examination that the papaya plant flowered for most of its life and that if a product were detrimental, it would affect the majority of the useful life of the papaya. It seems to me then that based on this evidence, regardless of whether the use of TMF would end the entire life cycle of the papaya plant, it would have affected the yield of the flowering plants. I therefore agree with the appellant that the learned judge in considering the loss suffered by the appellant failed to take into account the period immediately after the application of TMF.

[51] While this evidence is obviously sufficient to establish that the use of TMF would have had a negative impact on the production or yield of the flowering papaya plants, it fell

short of showing clearly that the total loss in production was attributable only to the use of TMF. It is true that the appellant did adduce evidence as to the decreased levels of production (by way of the production chart). But in light of the other evidence, this, in my view, is insufficient to prove the effect that TMF had on the overall production. This other evidence included the fact that replanting affected the yield. It was Mr Wates' evidence that after two years, papaya plants have to be cut and that when replanting occurs, there is a reduction in the yield. It does not appear that there was any evidence to contradict this as Mr Browne did agree in cross-examination that replanting affected the yield. There was also evidence that the appellant had started growing papayas from 1992. Therefore, it is reasonable to conclude that at the time when TMF was applied to the papaya plants, there would have been replanting which would have resulted in a decrease in production in relation to the acres that were replanted. Mr Browne, in his witness statement, had stated that additional acres had been planted. He also stated that replanting was ongoing, but in cross-examination, he was unable to say how much of the field was affected by replanting. Furthermore, there was evidence that the entire farm had been sprayed with TMF, but Mr Browne was unable to say how many acres of flowering papaya plants TMF had been applied to. Also, there appears to have been no evidence as to the effect of TMF on the papaya plant that was not flowering. The inadequacy of the evidence relating to loss is further borne out by the fact that, as Mr Manning has submitted, the production chart actually showed levels of decreased production during some of the months before TMF was applied to the plants. In light of the foregoing, it can be said that even though the production chart clearly showed that there was a decline in production, there were other factors that would have influenced the loss. I am therefore inclined to agree with the learned judge's finding that the appellant had failed to prove how much of the loss in

production was as a consequence of the use of TMF.

[52] In reaching this conclusion, I have not lost sight of the fact that the appellant satisfied the threshold of establishing that loss was occasioned by the use of TMF. The learned judge having found that there was not sufficient evidence to indicate that the losses that the appellant had suffered were caused by the use of TMF, he dismissed the claim in relation to liability and did not proceed to assess damages. Liability and loss having been established, damages must be assessed.

### **Conclusion**

[53] I have come to the conclusion that if one applies the tests which have been established in the recent authorities, the existence of a duty of care has been made out. In reaching this conclusion I have taken into account the four propositions set out in Lord Oliver's speech in the **Caparo Industries** case, and have examined the facts by reference to the headings which I have mentioned earlier. I have also had regard to the concepts of foreseeability, proximity and fairness. I would therefore allow the appeal and set aside the judgment of the learned judge. As the assessment of damages requires findings of fact to be made, I would remit the matter to the Supreme Court for the learned judge to assess damages based on the evidence that was before him.

### **PHILLIPS JA**

[54] I have read in draft the judgment of my brother Harrison JA and agree with his reasoning and conclusion. There is nothing that I wish to add.

**McINTOSH JA**

[55] I too have read the judgment of Harrison JA and agree with his reasoning and conclusion.

**HARRISON JA**

**ORDER**

Appeal allowed. Judgment of the court below set aside. Judgment entered for the appellant. Matter remitted to the Supreme Court for the learned judge to assess damages based on the evidence that was before him. Costs to the appellant to be taxed if not agreed.