IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2008HCV 5488

BETWEEN	YVONNE POWELL	CLAIMANT
AND	RBTT SECURITIES JAMAICA LIMITED	DEFENDANT

Lord Anthony Gifford, O.C. instructed by Gifford Thompson and Bright for the Claimant
Mrs. Sandra Minott-Phillips and Ms Ky-Ann Taylor Instructed by Myers, Fletcher and Gordon for the Defendant

Investment Company/Client relationship – Whether advice, if given, negligently given by employee/representative of defendant – Negligent misstatement – Whether defendant vicariously responsible

Heard on: 26th January and 25th July, 2011

Coram: Morrison, J

[1] The English poet and artist, William Morris, penned these immortal lines:

> *"If your lips would keep from slips,*
> *Five things observe with care:*
> *To whom you speak; of whom you speak;*
> *And how and when, and where."*

[2] Its relevance is not the least diminished despite its then targeted audience. It is of apposite application today. The focus of attention in the case at bar is:

Did Ms. Alvarene Smalling, Investment Representative of the Defendant, in that capacity, and while in the employment of the Defendant, by way of negligent mis-statement, give advice to the Claimant on which the latter relied to her detriment and loss? In other words, did Ms. Smalling's lips "slip"?

The Claim

[3] The Claimant's action against the Defendant is for damages for breach of contract and/or negligence advice given to her by the Defendant's servants or agents. Thus, says the Claim Form that was filed on 19th November, 2005. In particularizing her claim, the Claimant relates that, the Defendant is a company duly incorporated according to the law of Jamaica and carries on the business of a securities dealer and investment adviser. In this regard she asserts that she was a customer of the Defendant.

[4] The essence of her claim is that one Alvarine Smalling, the Defendant's employee, an Investment and Securities Broker, with whom she had a discussion, gave her advice that eventuated in an investment by her of US$70,000.00 in Government of Jamaica Bonds "Bonds" and Jamaican $3,362,500.00 in a fixed deposit. Months later, at the suggestion of an employee of Royal Bank of Trinidad and Tobago (Jamaica Limited) "RBTT", the Claimant invested the proceeds of the fixed deposit investment with the financial unregulated entity named the Cash Plus Limited, "CP". The gravity of the offence she then asserts, is that, Ms. Smalling suggested to her that she should invest the remainder of her funds with "CP". She expressed to Ms. Smalling that

she was risk adverse in view of medical bills she had to meet concerning her son's medical condition, that of, Velo-Cardial-facial syndrome.

[5] Notwithstanding, Ms. Smalling's previous suggestions had burgeoned into "strong advice" to the effect that, "Carlos Hill of Cash Plus had been in business for five years, that he was solid; that she (Smalling) had invested her personal money in Cash Plus, that she (Claimant) should put the money into Cash Plus for three months and then put it into a repo instrument; that it (Cash Plus) will not go down in three months." Having received strong advice and robust encouragement from Ms. Smalling and in reliance thereon the Claimant "encashed the remainder of her funds amounting to US$70,000.00 and invested the proceeds amounting to $4,886,000.00 in Cash Plus."

[6] To superadd to the substance of the impeachment, "in giving advice Ms. Smalling was acting in the course of her employment with the Defendant and the Defendant is vicariously liable for any loss occasioned thereby," because in so doing, "the Defendant and its servants owed a duty of care to the Claimant arising from contract and/or tort to exercise such skill and care as would reasonably be expected of a securities adviser in giving advice to the Claimant."

[7] From the pleaded assertions the Claimant posits that the advice as given was negligent in that the Defendant, its servants and agents:

a) know or ought to have known that the Cash Plus scheme was paying interest to investors at rates in excess of 10% per month and was a speculative and high risk scheme;

b) knew or ought to have known that the Cash Plus Scheme was not licenced by the Financial Services Commission;

c) knew or ought to have known that Carlos Hill, the Director of Cash Plus had been convicted in the United States on two counts of conspiracy to commit wire fraud;

d) failed to advise the Claimant of the above matters so that she could make an informed decision;

e) failed to advise the Claimant that it would be prudent to spread her investment and not put all her money into one instrument;

f) advised the Claimant to invest the entirety of her funds into speculative investment.

[8] Save for some formal admissions confirming a contractual relationship between the Defendant and the Claimant, that the Defendant employed Ms. Alverene Smalling; that the Claimant used the Defendant's services to acquire an interest in certain securities which the Claimant subsequently encashed; that the Defendant does not know whether or not it is true that the Claimant invested the proceeds of the encashed funds with Cash Plus, the Defendant denies that Ms. Smalling gave the Claimant advice as alleged or, if she did, she did not do so in the course of her employment with the Defendant.

The Issues

[9] The central issue to be determined is whether Ms. Smalling, in the course

of her employment with the Defendant, gave to the Claimant unqualified advice, on which the Claimant relied and acted to her detriment.

[10] In this case was there a special relationship between the parties as would fix the Defendant with liability in tort for a negligent misstatement. Further, was Ms. Smalling negligent in giving the advice?

[11] Is the Defendant, should the above issues be determined in favour of the Claimant, vicariously liable?

What damage has ensued to the Claimant by her acting on the advice?

The Facts

Some facts are incontestable, others are not.

[12] The Defendant is a duly incorporated company in Jamaica and at the relevant time was involved in the business of a securities dealer and investment adviser.

[13] The Claimant had a contractual relationship with the Defendant at the relevant time of September 2007. At that time Ms. Smalling was an employee of the Defendant in the capacity of an Investment Representative. It is readily clear that the Claimant interfaced with Ms. Smalling while the latter was in the employ of the Defendant.

[14] It is peremptorily clear that prior to and at the relevant time there existed an unregulated, illegal entity named Cash Plus Limited that held out itself as an investment alternative scheme. Prior to the impugned transaction with “CP” the Claimant had invested funds with that unlicensed entity, not once but twice.

[15] It may be assumed that having had two previous successful investment

experiences with the impugned entity, those experiences would have served to be the lodestone of the Claimant's intention that the balance of her investment through the Defendant should go the way of her earlier investments with "CP".

[16] Nevertheless, I am persuaded that by the very nature of the exhibited public notices issued by the Financial Services Commission Exhibits 5,6, and 7, that the Claimant and Ms. Smalling, moreso, must be deemed to have been aware of the risk that the Claimant was taking by investing her money with "CP". I now endeavour to illustrate.

[17] I turn attention to the transcript of the audio recorded telephone conversation between the Claimant and Ms. Smalling. Before I do so it is well that I sketch the background.

[18] The Claimant having sold property which she owned and being put in receipt of the proceeds of sale she opened an account with Royal Bank of Trinidad and Tobago (RBTT) on 5th December 2006 into which she deposited US$128,382.83. She then spoke to one Richard Price, an employee of RBTT who advised her to place some of the said money on a certificate of deposit. As to the remainder of her money, Mr. Price, says the Claimant, referred her to Ms. Smalling, who advised her to place it in Government of Jamaica Global Bonds.

[19] Thus advised, on 29th December 2006, the Claimant purchased Bonds worth US$58,000.00 at 8.5% maturing in 2036. According to Ms Karen Mitchell, Trading Manager of the Defendant, between July 2005 to May 2009 and Senior Manager up until May 2010, the total settlement amount for the above transaction was US$62,770.50 comprised of US$58,000.00 representing its

nominal value; US$3,045.00 representing its premium on bond and US$1,725.50 representing the accrued interest purchased.

[20] Later on 5th January 2009 the Claimant invested US$50,000.00 on a US Dollar Repurchase Agreement (Repo) through the Defendant. This investment was for (90) days at an interest rate of 4.5% per annum.

[21] Mindful of the paltry rate of interest on her investments the Claimant, according to her witness statement, went to RBTT in about February 2007 and spoke to two of their employees Ms. Sabrina Anderson and one Mr. Corey Mossington. The latter told her that "she needs to go over to "Cash Plus" as "that was the only way she will get a decent rate of interest." This she confirmed with another of RBTT's employees, whereupon, she invested US$20,000.00 with Cash Plus on 19th February 2007. She had withdrawn this sum of money from the Bonds investment. Approximately, one month later, on 22nd March 2007, she "invested the rest of the C.D. in Cash Plus," and decided to keep "the rest of my money in Government Bonds", in keeping with advice she had received from the RBTT employee.

So far no complaints.

[22] At paragraph 12 of her witness statement the Claimant exults: "Between March and September 2007 I received interest from Cash Plus …I received $338,539.47 per month on the investment … about 10% per month.

[23] I pause here to say that one must read events in terms of their enshrining lessons. It seems to me that the need for better rates of return on her investment, having received enormous monthly sums from Cash Plus, was the catalyst that

galvanized her continuing interest in investing with that entity. Thus I find it not a trifle curious that following on the heels of the "CP" payment that the Claimant is a-busy: "I went to the securities department in order to negotiate a better rate of interest". This was in respect of the rate of interest on GBJ. The Claimant, in words reflective of the grip of solicitude says, "I wanted to get an extra 1%, or ½% if I could." To that end, she sought out Ms. Smalling and elicited from her information as to where to go to get better returns on her investment on G.J. Bonds. This marks the point of departure between the assertion of the Claimant and the traverse by Ms. Smalling.

[24] It has to be said, of course that where as the Claimant was cross-examined, Ms. Smalling was not. The reason being that Ms. Smalling is now residing abroad having left the employment of the Defendant. However, her witness summary was tendered and received in evidence as is permitted by the Civil Procedure Rules. In this regard, I treated her witness summary by according it with what weight it deserves.

[25] Permit me to make this observation in digression. According to Ms. Karen Mitchell and, who is supported by Ms. Alvaren Smalling, "RSTL is not in the business of giving advice about products and service other than its own, and none of its employees is authorized to do so."

[26] That apart, after explaining to Ms. Smalling that she had kept her money in G.J.B. so that she could take care of the future medical bills of her son, she inquired of Ms. Smalling about what interest rate payments she Ms. Smalling

could obtain for her. The upshot of that conversation was that, according to her Ms. Smalling said Cash Plus, "was the way to go."

[27] Her remonstrance at the suggestion, she says, brought about a swift rebuff and reassurance from Ms. Smalling as per paragraph 14: "… Yvonne, don't be a fool, you think the little interest you are getting on the government papers can help Adrian (her sick son) if he needs to go back for surgery? …" After saying to Ms. Smalling that this is not a risk that she wished to take, she capitulated under the force of Ms. Smalling's persuasion: "… I said I would do it."

[28] This, if I am allowed to comment, may seem to be an act of unaffrighted gullibility on the part of the Claimant. However, it has to be looked at against the backdrop of two prior investments with Cash Plus and the advice that had now come from Ms. Smalling. Also, it is my view that the exigency of her son's medical needs helped to seduce her out of the citadel of her guarded disposition. The rest, as the saying goes, is history as her last savings which she ill-advisedly put into Cash Plus sunk into an unfructfying loss. She is now woebegone. Notwithstanding, I urge to recall that the Claimant's tergiversation was in September 2007. Recall, too that Exhibit 6 which is dated May 2007 succeeds Exhibit 5. Having regard to the nature of a public notice, as has been argued by the Defendant, can the Claimant having been put on notice by the Financial Services Commission, claim that the advice given by Ms. Smalling be regarded as the lodestone that overruled her less than armored will? The likelihood of the impact of the alleged negligent advice given by Ms. Smalling and acted upon by the Claimant is persuasive as the evidence of the audio recorded conversation

between the Claimant and Ms. Smalling in December 2007 will show. It bespeaks the confirmation of the truth of the Claimant's staunch claim that Smalling did in fact strongly advise her.

[29] I now reproduce in full, the transcript of that conversation for its effect and purport. Before I do so, I am to say that the fact of the Claimant's astuteness in having the conversation audio-recorded befouls any suggestion that it was contrived. I say so if only for the reason that, unknown to Ms. Smalling, she was being audio-recorded. In that one-on-one unrestrained informal setting, truth inhibition is not to be expected. In this context, the answers to the accusatory tone and content of the Claimant's questions by Ms. Smalling, were a model of implicit faith and trust in the operations of "CP" inasmuch as the answers also reflected the attitude of an apologist for that entity.

Conversation with Alvarene Smalling

Yvonne …….. Alvarene

Alvarene …….. aah

Yvonne ……. Yvonne man, how yuh do?

Alvarene ……. I'm good

Yvonne ……. You're on the road?

Alvarene ……. Yes I am …….. no I'm in the branch but I'm downstairs.

Yvonne …….. Okay, tell me. You hear anything about Cash Plus?

Alvarene …… I think they are going to submit their application to the FSC.

Yvonne …… And that is all you hear?

Alvarene …… Yeah ……..aah

Yvonne ……. You know I don't get back one cent from them all now?

Alvarene ….. No because _____ They going to try pay out in April. They trying to get their house in order now.

Yvonne ….. Are you sure they'll be paying out in April? You sure they going to be paying out in April?

Alvarene …… That's what they said. That's what they put in the ad. They are trying to pay the interest and so on in April so now they are rolling. I've got some calls from they saying _____

Yvonne ….. You got calls from they saying that.

Alvarene …… Yeah man, I got calls.

Yvonne …. And those calls are ……..

Alvarene ……. _____ they're trying to regularize now _____

Yvonne …….. And you trust those people who give yuh that information?

Alvarene ….. … They are the workers.

Yvonne …….. No but, I say if you trust them?

Alvarene ….. Of course. It's not a matter of trust is just we have to wait because there is nothing that we can do until he gets a licence.

Yvonne ……. A know but what I am saying is that sometime people will give you …… I am asking you now if it's people dem who you can take their if they have any kind of credibility that you can go on because you know what my situation is right now, I am almost out on the street you know so.

Alavarne … uuh … the point is as a matter of fact tomorrow I going to be seeing somebody who has an account there as well. I think they have about $4M there. They say they have some news to give me so tomorrow I am going to go to their house and talk. So tomorrow I'll get some more information. He is also a customer here and he is a customer over there as well. He Alvarene, I have some more news so tomorrow …. And we'll talk. From November trust me, last night on the news, CVM news said that they'll be submitting their application to the FSC and we, I think we are about to put something in the media shortly and

Yvonne …… But the thing is this, I can't trust these people, I don' trust them at all.

Alvarene …. Is not a matter of trust. Whether you trust them or not you have to wait. They can't do anything. They won't allow them to payout until they get the licence. Worldwise has applied for their licence and Cash Plus is the other one. The others don't apply for any licence.

Yvonne …. But you know what the pity is, it's just a pity that people in the banking sector like financial advisors, like yourself and other people because even people at Worldwise and told clients to go Worldwise. When a look back at it now, it's a wrong thing you guys should never ever ever

Alvarene …… Hold on, you can't blame anybody you nuh … It's not a matter that the people don't have any money to pay, you have to regularize _____ particular and obey the law.

Yvonne …… No but what I am saying

Alvarene …… Hold on, it don't matter if them have money or not you nuh them have to get licenced. I have to get a licence as well yuh nuh.

Yvonne ….. I know that what's I am not saying you don't have to get a licence as well ….. I am saying being financial advisors in the banking system and knowing that these people don't have any licence unnu should a never advise anybody to go to them.

Alvarene ….. Let me tell you something, the thing with these clubs they are new, so there was no licence for them in the first place, but now it's gonna be a first because the Minister of Finance says they are going to amend the existing laws to accommodate them.

Yvonne ….. What about people like me who now I'm out on the bottom of my ass and I'm going to be on the street soon with my two children.

Alvrene …… A whole lot of people in a similar situation. I don't know what to really tell you really, but tomorrow when I go to the place, I'll call you when I get some more information.

[30] It is stubbornly obvious, to even a casual render of the transcript of the conversation, that the Claimant was trying to extract some measure of solace, some animating reassurance from Ms. Smalling that Cash Plus had not gone insolvent: "…. You hear anything about Cash Plus", was one of her initial questions to Ms. Smalling. Ms. Smalling's response is: "I think they are going to submit their application to Financial Securities Commission".

Claimant: You know I don't get back one cent from them all now.

Smalling: "No because … They going to pay out in April."

Let me pause here for a minute.

[31] If it is that Ms. Smalling had no advisory connection with the Claimant's third investment transaction with "CP" then, the question which begs to be answered, is why are these and other questions directed at her about Cash Plus?

[32] If Ms. Smalling's operational portfolio is only in respect of products offered by the Defendant, of which the product of "CP" is not one, then why is Ms. Smalling engaging in a conversation about an unauthorized product? Is it out of good public relations or is something else here at play?

[33] It seems to me that Ms. Smalling's knowledge of the affairs of "CP" betrays more than a nodding or passing interest in that entity, given its unregulated status.

[34] To rejoin, the conversation had now moved into higher gear revolving around whether the operations of "CP" has Ms. Smalling's trust. To that she answers, "Of course it's not a matter of trust is just we have to wait because there is nothing that we can do until he gets a licence."

[35] Note, "nothing we can do" until …. The use of the word "we" says something more that it confesses other than to a plurality of what can be done "until he gets a licence."

[36] To the pointed question of whether "CP" "have any kind of credibility that you can go on," Ms. Smalling's answer is that she is going to see someone who has an account there as well. She dilates, "he is also a customer here and he is a customer over there as well … trust me last night on the news, CVM news said

that they'll be submitting their application to the FSC and we think I think we are about to put something in the media shortly and …" Again the use of the word "we" bristles with signification: Ms. Smalling is involved with "CP". The conversation then segues into its accusatory aspect. Says the Claimant, "but you know what the pity is, its just a pity that people in the banking sector like financial advisors, like yourself and other people because even people at … told clients to go to … When I look back at it now, it's a wrong thing you guys should never ever ever … Ms Smalling's response is telling as it is revealing: "Hold on," she says, "you can't blame anybody you nuh … It's not a matter that the people don't have any money to pay, you have to regularize and obey the law." (Emphasis mine)

[37] It was in my view unalterable, obligatory, in the face of the charge of, 'people in the banking sector like financial advisors like yourself' and 'it's a wrong thing you guys should never ever, ever,' for Ms. Smalling to have repudiated and rebuked the accusation. But alas, the answer that she yields, 'you can't blame anybody,' did not resound with a denial of personal responsibility, but rather, in true apologist strain, ascribes the failure of "CP" to pay its customers, not for its lack of funds, but for Cash Plus's need to regularize.

[38] I find that though public notices were issued by the Financial Services Commission it does not derogate from the fact that the Claimant sought and was given advice by Ms. Smalling in the circumstances as posed by the Claimant's pleadings and enjoined by the issues that this Court has been asked to resolve.

[39] Plainly, Ms. Smalling knew that Cash Plus was an unlicensed entity notwithstanding that the Claimant is to be so deemed to know as well. Ms. Smalling knew from the allegations which I find on a balance of probabilities to be so, that the Claimant, despite her previous dealings with Cash Plus was relying on her advice in her capacity of an investment representative. That, at the time of the giving of the advice and of its receipt and it being acted on, Ms. Smalling was the investment representative of the Defendant. It was after the advice was given that the Claimant curtailed her investment in the unmature GJB bonds and invested it all with Cash Plus. That she suffered the loss of the entirety of that investment with Cash Plus is unquestionably true.

[40] In the end I accepted the Claimant as reliable, trustworthy and of unshaken candor. I found the untested witness summary of Ms Smalling to be truthlessly defiant especially in the light of the overwhelmingly persuasive video-taped conversation.

[41] In my view the audio-taped conversation throws its own retrospectant light on to and confirms that the precedent conversation, conversation so eidetic in its recall by the Claimant, did actually take place. The “we” mantra of Ms. Smalling goes to confirm that she and others knew of, persons who had investments at Cash Plus she seems to have been possessed of insider information concerning that entity emboldened and was thusly to travel outside of her authorized remit. There is convergence of the precedent conversation as is contained in the pleadings of the Claimant and the subsequent audio-recorded conversation, also

pleaded, to warrant the question, “did Ms. Smalling’s actions ran afoul of the law?” It is to the law that I now turn.

The Law

[42] From my findings of facts I now turn to the application of the law thereto. What is the principle that governs information or advice when the giver of the information or advice knows that he/she is being trusted or that reliance was being placed on his/her skill or judgment?

[43] Secondly, it is also prudent to ask: whether there is a duty imposed on the giver of the information or advice to exercise care in so doing?

[44] The answers to the posed questions found their billet on the seminal House of Lords judgment of **Hedley Byrne & Co. Ltd. v. Heller & Partners, Ltd**. [1963] 2 All.E.R. 575.

The facts are relatively straightforward.

[45] A bank sought information from the respondent merchant bankers relative to the financial position of a customer of the Respondent. The bank wished to know, in confidence and without responsibility on the part of the respondent, the respectability and standing of a particular company, E. Ltd. and whether the latter would be good for an advertising contract for £8,000. to £9,000.

[46] Later, the bank sought the Respondent’s opinion of the respectability and standing of E. Ltd. by letter which asked whether the Respondents considered E. Ltd. to be trustworthy in its business to the extent of £100,000.

The Respondent replied that E. Ltd. was respectably constituted and considered good for its normal business engagements.

[47] The Appellants relied on the replies and in consequence of which it placed orders for advertising time and space for E. Ltd. with media companies. Subsequently, the financial soundness of E. Ltd. was exposed as it went into liquidation resulting in a financial loss to the Appellants of over £17,000.00 on advertising contracts.

[48] The Appellants sued the Respondents for the amount of the loss on the basis that the Respondents' replies to its written queries were given negligently in that the replies gave a misleading impression as to E. Ltd. credit status.

[49] At first instance the Court determined that the replies were negligently given. This finding was contested on appeal. However, the appeal was decided on the assumption that there had been negligence but without a determination as to that question. The Appellants were piqued at this decision whence it sought relief from the House of Lords.

[50] The legal principle mined from the plethora of cases cited to that august body of jurists of which Lord Reid was its chief expositor, taken from the headnote of the case is this:

> *If, in the ordinary course of business or professional affairs, a person seeks information or advice from another, who is not under contractual obligation to give the information or advice, in circumstances in which a reasonable man so asked would know that he was being trusted or that his skill or judgment was being relied on, and the person asked chooses to give the information or advice without clearly so qualifying his answer as to show that the person replying accepts a legal duty to exercise such*

care as the circumstances require in making his reply, and for failure to exercise that care an action for negligence will lie if damage results.

But for the Respondent's disclaimer, on the occasion of the first inquiry, the circumstances might have given rise to a duty of care on their part.

[51] It was necessary, according to Lord Reid, to dispose of a proposition, raised in argument, that there had to be a sufficiently close relationship between the parties in order to give rise to any duty. The argument that the Respondent did not know the precise purpose of the inquiries or for whom the information was intended was rejected as there was no suggestion of any speciality which could have influenced them in deciding whether to give the information or what form it was to be given in. However, his Lordship was loathe to decide what kind or degree of proximity would be necessary in order to impose a legal duty in circumstances where a negligent misrepresentation is made directly to a person seeking opinion or advice

[52] After reviewing the principles of law declared in **Donoghue v. Stevenson,** [1932] All.E.R. Rep. 1; **Derry v. Peak**, (1889), 14 App. Cas. 337 and **Nocton v. Lord Ashburton** [1914-15] All.E.R. Rep. 40, Lord Reid extrapolated on the basis of Lord Haldane's speech in the **Nocton** case that, "… where it is plain that the party seeking information for 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 information or advice when he knew or ought to have known that the inquirer was relying on him …," then the duty of care may be established irrespective of their being a contractual relationship between

them. In other words, a fiduciary duty was not the only recognized specie of a legal duty for negligent misrepresentations. Further along, he says that, “a reasonable man knowing that he was being trusted or that his skill and judgment were being relied on, would, I think, have three courses open to him. He could keep silent or decline to give the information or advice sought: or he could give an answer with a clear qualification that he accepted no responsibility for it or that it was given without that reflection or inquiry which a careful answer would require: or he could simply answer without any such qualification. If he chooses to adopt the last course he must, I think, be held to have accepted a relationship with the inquirer which requires him to exercise such care as the circumstances require.”

[53] I should point out that the backdrop to the triad of cited cases was the distinction between negligent words and negligent conduct. In the former, the duty of care arises where people express definite opinions on social or informal occasions even where they see that others are likely to be influenced by them, that they often do so without taking such care which they would take if asked for their opinion professionally, or in a business connection, is incapable of fixing a duty of care upon them as to do so would be to impose legal obligations resulting from the expressed opinions outside of the professional setting. Social intercourse would be trammeled. The adage, “if your lips should keep from slips”, etcetera, assumes profound importance as the law recognizes.

[54] In the instant case the Defendant's association with the Claimant was a contractual one. The Defendant offered investment advice to the Claimant, albeit that the Defendant itself would do the investment on behalf of the Claimant.

[55] However, according to **Headley Byrne**, *supra,* the advisor who, in the ordinary course of business or professional affairs, gives the information or advice, despite not being contractually bound to do so, and who in those circumstances, a fictional reasonable man, if asked, would know that the advises was trusting him/her and that his/her skill or judgment was being relied on, and the advisor nevertheless chooses to give the information or advice without qualifying his/her answer as to deflect responsibility for the information or advice, then such a person accepts a legal duty to exercise such care as the circumstances require.

[56] Ms. Smalling knew that Ms. Powell was relying on her skill and expertise. As such, it did not matter whether the Defendant was to do the investment for Ms. Powell or whether Ms. Powell being so advised was to do so herself.

[57] The fact of the matter is that Ms. Powell was advised to invest her money with Cash Plus as she wanted a better yield than her investment through the Defendant was fetching. Ms. Smalling in those circumstances did not seek to qualify her advice to Ms Powell at all, *exempli gratia,* by saying that she Ms. Smalling did not and was not accepting responsibility should she Ms. Powell accept it.

[58] Did it matter that Ms. Powell's course of dealing with Cash Plus foreclosed reliance being reposed on the advice so given? I do not see from the authorities that this is so.

[59] Yes, it is a fact that Cash Plus was at the material time an unregulated financial entity. Yes, the Financial Securities Commission (FSC) made known to the public that fact by release of a series of Public Notices into the public domain. Exhibits 5,6 and 7are eminently illustrative of the efforts of the FSC to warn a suspecting or unsuspecting public. In doing so it mattered not whether an investor was aware or not of investing with that impugned entity. In fact, a registered securities entity through its employees would be well aware of the status of an entity such as Cash Plus, let alone, the unsuspecting potential investor. Having said that, even an unsuspecting investor cannot plead his ignorance on the law as the nature of a public notice is peremptory.

The principle of public notice is one in which the public is given information of a direct or definite statement of a thing as distinguished from supplying materials from which the existence of such thing may be inferred: See **Burgh v Legge**, 8 L.J. Ex. 258.

[60] Thus the Claimant's denial of her awareness of Exhibits 5,6 and 7 are immaterial, if only in relation to the undisputed fact that, up to the time of the impugned advice, she was an investor with Cash Plus. She is deemed to be possessed of the information contained in the Public Notices. Nevertheless, it is meet and just that the content of the Public Notice, in particular Exhibit 5, be made to suffer scrutiny. In extenso it reads:

"***Public Notice***

Financial Services Commission

Cash Plus Limited

The Financial Services Commission ("FSC") wishes to advise the public that Cash Plus Limited is not licensed by the FSC to conduct securities business in Jamaica and that Cash Plus Limited's securities offered to the public have not been registered by the FSC.

The Securities Act requires all persons soliciting or conducting securities business or investment advice business in Jamaica to be licensed by the FSC to do so. The Act also requires that securities must be registered by the FSC before they can be issued to the public.

The FSC urges the public to exercise due diligence when considering investment opportunities and to do the following when making financial investments:

1. *Obtain as much information as possible about the entity and the investment product involved.*
2. *Understand the risks associated with investing in the product.*
3. *Understand the costs you assume in making the investment.*
4. *Seek and accept advice only from a licensed securities dealer or investment advisor to determine whether the investment being offered is suitable for you.*
5. *If in doubt, contact the FSC before investing your funds to find out if the investment product is registered or if the dealer is licensed under the Act."*

[61] Of note, the FSC urges the public to exercise due diligence when considering investment opportunities and to do the following when making financial investments. Then follows their advice including the following: Seek and accept advice only from a licensed securities dealer or investment advisor to determine whether the investment being offered is suitable for you.

[62] Clearly, the FSC having forewarned that "CP" is not licensed by them to conduct securities business and that the securities offered by Cash Plus have not been registered by the FSC, it nevertheless urged the public to seek advice along the lines of Exhibit 5. But that is exactly what Ms. Powell did. She sought and obtained the unqualified advice from Ms. Smalling whereupon she encashed the Repo investment and invested it all with Cash Plus, much to her chagrin.

[63] Is the Defendant liable?

The Privy Council decision in **Clinton Bernard v**. **Attorney General** (2005) 65 W.I.R. 245, gives afflatus to the posed question.

[64] Mr. Bernard was a hapless man. He was among family members when he sought the use of a public telephone. Having joined a queue of persons similarly minded his turn to use the telephone finally fructified. The normally of an otherwise dull routine was disrupted by an agent of the state, a policeman, who in demanding the use of the telephone invoked his police authority. A morally indignant Mr. Bernard did not dance attendance upon the policeman's crude demand. In fine, unfortunate Bernard was shot in the head and was exposed to the further indignity of being arrested on false charges, a palpable

ruse by the defiant renegade police officer, which charges, were withdrawn by the Prosecution.

[65] Mr. Bernard sought damages from the State [pursuant to the vicarious liability principle]. The first instance judge, McCalla, J (now Chief Justice of Jamaica) gave judgment against the state which was reversed on appeal to the Court of Appeal but was re-instated on further appeal to the Privy Council. It was Lord Steyn who delivered the advice of the Board. In the course of their deliberations their Lordships received several authorities including **Lister v. Hesley Hall Ltd.** [2002] A.C. 215 and **Dubai Aluminuim Co. Ltd. v. Salaam** [2003] 2 A.C. 366. Apropos, it was stressed that there was a need to adopt a broad approach in the context of tortious conduct vis-à-vis the wrongdoer employment. Thus viewed, according to their Lordships, the test for intentional torts as formulated by the authors of **Salmond and Hewston, The Law of Torts** (21st edition, 1996), p. 443 to wit: 'whether the act by a servant is a wrongful and unauthorized mode of doing some act authorized by the master', is now inapt. This test, they reasoned, "may invite a negative answer, with a terminological quibble, even where there is a very close connection between the tort and the functions of the employee making it fair and just to impose vicarious liability." In this context, what is required, they continued, "is to concentrate on the relative closeness of the connection between the nature of the employment and the particular tort, and to ask whether looking at the matter in the round it is just and reasonable to hold the employers liable." Indeed, they elaborated, that a significant factor in determining the issue of vicarious liability, to have in mind,

"the risks to others coerced by an employer who entrusts duties, tasks and functions to an employee."

[66] In the instant case, and applying the principles in **Bernard,** *supra*, it is plain beyond a peradventure that Ms. Smalling in her capacity as an Investment representative of the Defendant and in the discharging of the function, on the evidence, offered unqualified advice to the Claimant which the latter acted on.

[67] As I have already indicated the advice which was given by Ms. Smalling to the Claimant constituted a tort. On this finding, the close connection between the tort and the functions of the employee, is pellucid. That being the case, it is fair and just to impose a vicarious liability, and I do so. Moreover, in coming to the decision I have come to, I have incorporated the relevant factor of the risks to others, such as the Claimant, created by the Defendant, who entrusts duties, tasks and functions to an employee.

[68] Permit me to add that no disrespect is intended to Counsel on either side by my conscious failure to discuss the other supplied authorities as I think the questions in the main have been answered, but for one, by the authorities which I have discussed. The question as to whether the statements made by Ms. Smalling were made within the course of her employment or within the ambit of her ostensible authority is one that the Defendants says ought to be answered in the negative on the basis of the authority of **Freeman & Lockyear (a firm) v. Bruckhurst Park Properties (Mangal) Ltd.**]1964] 2 Q.B. 480 I only need read the headnote to that case to let it throw its own light on the **Headley Boyne** case.

[69] “K” and “H” both formed a company. The articles of association contained a power to appoint a managing director but none was appointed “K” then instructed a firm of Architects, the Plaintiff to apply for planning permission and to do certain work. The Plaintiff did the work and claimed their fees. The claim was met by the Defendants who argued that “K” had no apparent authority nor ostensible authority to have engaged the Plaintiffs.

[70] It was held by the Court of Appeal, in agreeing with the first instant judge, that “K’s” act in engaging the Plaintiffs was within the ordinary ambit of the authority of a managing director and the Plaintiffs did not have to inquire whether he was properly appointed.

[71] The instant case is readily distinguishable as Ms. Smalling was employed to do what she did, that is, to give advice on investment matters. Similarly, Ms. Powell did not therefore have to inquire whether Ms. Smalling had the authority to offer up the advice which she gave to her. As such I do not find the case of **Freeman & Lockyear** helpful in that regard.

[72] However, there is one contention by the Defendant that I must confront. It is this: Whether the Claimant is able to bring proceedings without naming the joint account holder as a Claimant also?

[73] In this regard reliance was placed by counsel for the Defendant on the authority of **Cullen v Knowles** (1898) 2 Q.B. 380. The principle of law mined from that case is, as the headnote says, one of two joint promisees can maintain an action on the contract, making the other joint promisee a co-defendant of,

after tender of an indeminity against costs, he refuses to be joined as a co-plaintiff.

[74] In the instant case, the Claimant, as she says, had added her daughter's name as a co-investor to the accounts she had with the Defendant, purely out of convenience.

[75] In **Cullen's** case, Bingham J said that "… it is usual for the joint promisees to be joined as joint plaintiffs if they are bringing, and as joint defendants if they are defending, the action. In this case, however, the other joint promisee has refused to join as a plaintiff in bringing the action although he has had tendered to him an indemnity against the costs of the action. It seems that he was within his right in so refusing."

[76] Bingham, J went on to say such a refusal to be joined as a co-plaintiff was sanctioned by the Rules of Court as such a proposed co-plaintiff cannot be added without his consent.

[77] It seems to me, apart from the technicality of the principle relied on by the Defendants in the instant case, the terms of reference in the **Cullen** case makes it abundantly clear that it is inapposite in its application here. To quote Bingham, J: "The question, therefore, here is whether such refusal prevents his co-promisee from suing at all, or whether he can get over the difficulty by joining the co-promisee, who refuses to join as plaintiff, as a defendant. I think he can do so."

[78] Respectfully, I do not think that the technical point, not raised preliminarily, but raised posthumously, ought to be allowed to stymie the Claimant's case.

Certainly the consent of the co-signatory in the case at bar was not sought, let alone refused.

[79] According to **Cullen**, on the happening of the latter event, he or she can be joined as a co-plaintiff. The point, raised in objection fails.

Damages

[80] It was consequent upon the receipt of the negligent advice that the Claimant encashed the GOJ bond that was worth US$60,911.28 plus a further sum of US$9,088.72. Thus told the sum which she then re-invested with “CP” was US$70,000.00 on the 20th September 2007. Accordingly, the principle of compensation that the Claimant is to be put into a position that she would have been in had the negligent mis-statement not been acted on, is one that is to be applied.

[81] Therefore, had the sum of $60,088.72 been allowed to stay in GOJ bonds it would have attracted a rate of return of 8.5% according to the evidence of Ms. Karen Mitchell. As to the credit balance in the Claimant’s account, it is a fair assumption to say that the amount of US$9,088.72 would also have attracted a rate of interest of 8.5%.

[82] In the upshot then judgment is awarded to the Claimant in the sum of US$70,000.00 with interest thereon at 8.5% from the 20th September 2007 to the date of judgment.

[83] The Claimant is also to have her costs which is to be agreed, if not, then it is to be taxed.