Neutral Citation Number: [2019] EWCA Civ 14

Case No: A2/2018/0594

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
JUSTINE THORNTON QC
[2018] EWHC 312 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/01/2019

Before :

LADY JUSTICE MACUR
LORD JUSTICE HAMBLEN
and
LORD JUSTICE NEWEY

- -

Between :

JULIAN SEDDON	**Appellant**
- and -	
DRIVER AND VEHICLE LICENSING AGENCY	**Respondent**

- -
- -

John Black QC (instructed by **direct access**) for the **Appellant**
Raj Arumugam (instructed by **the Treasury Solicitor**) for the **Respondent**

Hearing date : 18 December 2018

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Approved Judgment

Lord Justice Hamblen :

Introduction

1. The question raised on this appeal is whether the DVLA, in circumstances where it has doubts which it has decided to investigate about the age or identity of a registered "Historic Vehicle" which it knows has been advertised for sale, owes a duty of care to prospective purchasers to inform the seller of its concerns.

2. The judge, Justine Thornton QC sitting as a judge of the High Court, held on the trial of a preliminary issue that no such duty of care was owed. The Appellant, Mr Seddon, appeals against that decision and, in particular, contends that the threefold test set out in *Caparo Industries Plc v Dickman* [1990] 2 AC 605 is satisfied in the circumstances in the present case. As the judge held, the loss was reasonably foreseeable. As the judge ought to have held, there was a sufficient relationship of proximity and it is fair, just and reasonable to impose a duty of care.

The essential outline facts

3. The DVLA is an executive agency of the Department for Transport with responsibility for the collection of vehicle excise duty and the registration of vehicles.

4. In October Mr Seddon 2014 purchased a continuation AC Cobra 289 ("the vehicle") for £250,000.

5. As set out in the registration document issued by the DVLA, the V5C, the vehicle was registered with a declared date of manufacture of 1964, a 1964 registration number (PTF 47B) and the taxation class of a "Historic Vehicle".

6. In August 2014 the DVLA knew that the vehicle was on sale and being marketed by the registered keeper. It was in possession of a print-out of the advertisement for the sale of the vehicle on the "classic cars for sale" website. The advertisement described the vehicle as a 1964 "Historic Vehicle".

7. On 13 August 2014, a Policy Adviser at the DVLA, by way of internal email, emailed another DVLA employee, referring to information in the sale advert that the car was built in 2002 and requesting that the vehicle's identity be investigated on receipt of notification of a change in keeper

8. Mr Seddon purchased the vehicle on 10 October 2014 for £250,000, relying in part on the existing V5C as evidence of the provenance of the car as a "UK registered 1964 Historic Vehicle". Had Mr Seddon known that the registration of the vehicle was in doubt, and was liable to investigation on his application for a new registration document, he would not have purchased the vehicle.

9. In November 2014 the DVLA commenced an investigation into the registration of the vehicle. In March 2015 the DVLA decided to allocate a new Vehicle Identity Number and a "Q" plate to the vehicle. A "Q" plate is issued where the age or identity of the vehicle is not known. The DVLA's "Guidelines on how you can register kit cars and rebuilt or radically altered vehicles" ("INF 26"), states in relation to "Q" registration numbers that:

> "Q"/"QNI" registration numbers are issued where the age or identity of the vehicle is not known. Although seen by many enthusiasts as a seal of disapproval, they have proved to be a useful consumer protection aid. The display of a Q/QNI registration number is a visible sign to a prospective purchaser that the age or identity of the vehicle is in doubt."

10. Mr Seddon contends that the allocation of the "Q" plate had a significant effect on the value of the car. In mitigation of his losses he sold the vehicle for £100,000, resulting in a financial loss of £150,000 which he claims as damages.

The background facts

11. The above facts reflect the agreed facts upon which the preliminary issue was tried. These are set out in more detail in the judgment at [8]-[26], as summarised below with some additional facts taken from the documents.

12. In 2008, Adrian Hamilton of Duncan Hamilton and Co Ltd commissioned Brooklands Motor Company to construct a classic sports car, a continuation AC Cobra 289. The vehicle was allocated vehicle chassis number CSX 2620. It was granted a FIA 'Historical Technical Passport' ("HTP") on 20 August 2009 stating that the vehicle had an "asserted" year of manufacture of 1964.

13. Mr Hamilton completed the requisite application for the vehicle to be registered with the DVLA as a "Historic Vehicle". This included a Built Up Vehicle Inspection Report which stated that all the major components of the vehicle were "Refurbished Original", a letter signed by John Owen, Chief Engineer of AC Cars stating that the vehicle "has been fully rebuilt by AC Cars, the original manufacturers, using the original refurbished major components and parts manufactured to the original 1964 specification" and the HTP. The application for registration stated that the date of original registration was "01/01/64" and that the year of manufacture was 1964.

14. In September 2009, the vehicle was inspected on behalf of the DVLA by Mr Tim Hanley, a vehicle inspection officer, who reported that he considered that "the vehicle is OK for a 1964 age-related mark". Ms Joy Shumack of the DVLA's Standards and Compliance department confirmed that "the evidence is acceptable to allocate a 1964 age related mark".

15. On 1 October 2009, the vehicle was allocated the Vehicle Registration Number PTF 47B, following the DVLA's investigation and physical examination. The V5C named Adrian Hamilton as the registered keeper. Section 3 of the document is headed "Special notes". The notes include the statement "Was registered and/or used. Declared Manufactured 1964". In section 4B, the date of first registration is cited as "01.01.1964", which is not correct as the vehicle was first registered in 2009. The taxation class was "Historic Vehicle" which means that no tax is payable.

16. The car was subsequently advertised for sale. The vehicle was bought by an Austrian individual and exported to Vienna.

17. In October 2013, Mr Rod Leach, sole proprietor of his firm Nostalgia, acquired the vehicle and applied for its re-registration following importation back into the UK. The

vehicle was registered and the V5C was issued by the DVLA describing the new keeper as "Rod Leach's Nostalgia". The date of acquisition of the vehicle was recorded as 16 October 2013. The chassis number remained CSX 2620 and the registration of the vehicle remained PTF 47B. There is no evidence of any vehicle inspection by the DVLA at the time of Mr Leach's application to re-register the vehicle.

18. Mr Leach subsequently advertised the vehicle for sale.

19. On 13 August 2014, Ms Beverly Morgans, a Policy Adviser at the DVLA, by way of internal email, emailed another DVLA employee, referring to information in the sale advert for the vehicle and another AC Cobra, stating that:

> "The above two vehicles are currently advertised for sale as 'recreation' vehicles built in 2002 using the 1960's original jigs. However, when registered in 2003 and 2009 they were both treated as original historic vehicles and allocated age related registration, historic tax exemption and 1966/1964 dates of manufacturer instead of newly built replicas.
>
> Please can you set ITT 246 on both records with a note to refer to policy when a change of keeper is received. No changes should be made to the record".

20. An ITT 246 involves an investigation into the registration of a vehicle.

21. Mr Seddon purchased the vehicle on 10 October 2014 for £250,000. He was a bona fide purchaser for value in good faith and relied in part on the existing V5C as evidence of the provenance of the car as a "UK registered 1964 Historic Vehicle".

22. Mr Seddon applied to be registered as the new keeper of the car on 10 October 2014. His application was made on the basis that the car was a historic vehicle. He did not receive a new V5C as expected. He received no acknowledgement or written response from the DVLA, nor did the DVLA make him aware of their investigation.

23. Not having received any response, Mr Seddon telephoned the DVLA 14 days or so after his application when he was told that the vehicle's registration was under investigation.

24. On 21 November 2014, the DVLA commenced an investigation into the registration of the vehicle. The DVLA communicated with Mr Leach in connection with the investigation, despite having received Mr Seddon's application for registration as the new keeper (usually denoting a change of ownership).

25. Throughout their investigation of the vehicle, the DVLA did not communicate with Mr Seddon or make him aware that they were dealing with the matter via Mr Leach.

26. On 26 March 2015, a representative of the DVLA wrote to Mr Leach indicating that the DVLA had decided to allocate a new Vehicle Identity Number and the allocation of a "Q" plate to the vehicle. The original registration was now void. The outcome of the investigation was not communicated by the DVLA to Mr Seddon.

27. On 13 May 2015, Mr Seddon wrote to the DVLA querying the non-receipt of the new V5C. A representative responded on 21 May 2015, informing him that she had been conferring with Mr Leach throughout the investigation. She stated that following investigation the vehicle PTF 47B could no longer be classified as historic and would be allocated a new VIN and "Q" plate. She enclosed a copy of her letter dated 26 March 2015 to Mr Leach. This was the first item of correspondence by the DVLA to Mr Seddon.

28. Further correspondence took place in May and July 2015. In response to a solicitor's letter, the DVLA advised Mr Seddon to ask an affiliated AC Owners Club to date the major components of his vehicle under reconstructed classic car guidelines.

29. In October 2015, the vehicle was inspected by a representative for the AC Owners Club and a recognised expert on AC Cobras. On 13 October 2015, the representative emailed the DVLA, giving his opinion on the provenance of the car. He concluded that the chassis, body and suspension parts were all manufactured in the 2000s, but to the correct 1964 specification. He urged the DVLA not to allocate the vehicle a "Q" plate. His recommendation was not accepted by the DVLA.

30. The DVLA wrote to Mr Seddon on 12 November 2015 confirming the decision to re-register the car with a "Q" plate.

31. Mr Seddon contacted Brooklands Motor Company, who originally built the car, and was provided with a document showing that the chassis of the vehicle had been manufactured in 2008. Until this date Mr Seddon had never seen this document.

32. Mr Seddon mitigated his losses and sold the vehicle for £100,000, incurring a financial loss of £150,000, being the difference between the purchase price and the price obtained for the vehicle on sale.

The statutory framework

33. The relevant statutory framework is set out at [27]-[31] of the judgment.

34. In summary, the Vehicle Excise and Registration Act 1994 ("VERA 1994") sets out the functions of the Secretary of State for Transport which the DVLA is to perform with regard to vehicle excise duty and vehicle registration.

35. In relation to excise duty, this is payable upon the licences issued to vehicles that are registered under VERA 1994 (section 1(1C)). Section 6 of VERA 1994 places the obligation to levy and collect duty upon the Secretary of State, and for this purpose the Secretary of State and his officers (i.e. the DVLA) have the same powers, duties and liabilities as the Commissioners of Customs & Excise and their officers.

36. In relation to registration, Part II of VERA 1994 (in particular section 21(1)) sets out the obligation for the Secretary of State to register vehicles in such manner as he thinks fit. Section 22(1)(dd) permits him to make regulations which require a person, by or through whom a vehicle is sold or disposed of, to furnish the person to whom it is sold or disposed of with documents relating to the vehicle's registration. Section 22A(3)(c) specifically permits him to make regulations which provide for the correction of errors in certificates.

37. The principal regulations made under the Act are the Road Vehicles (Registration and Licensing) Regulations 2002 (the "2002 Regulations"). Regulation 3(1) refers to the GB register which is maintained on behalf of the Secretary of State by the DVLA. Regulation 10 sets out details as to registration of vehicles and regulation 10(7) provides that the Secretary of State may refuse to issue a registration document for a vehicle if he is not satisfied that the vehicle accords with those particulars.

38. Regulations 14 and 15 set out rules as to the correction of registration documents and the issuance of new registration documents, including the power to inspect any vehicle which is sought to be registered to ensure that it accords with the particulars furnished when the licence was issued (regulation 15(1)(a)). Schedule 3, paras 3 and 4 provide a right of appeal against the decision made by the Secretary of State following any such inspection.

39. Section 45 of VERA 1994 makes it an offence for a person to make declarations or provide information which is knowingly false or misleading, including declarations made in connection with an application for a vehicle licence or allocation of a registration mark.

40. As the judge found, and as was not challenged on appeal, the purpose of VERA 1994 "is to: (a) to collect tax and raise revenue for Government; and (b) to ensure vehicles operating on the roads in the UK are registered".

The judgment

41. The judge addressed the law at [42]-[57] of the judgment. No criticism is made of her summary of the applicable law.

42. The judge noted at [42] that the parties were agreed that she should adopt the approach taken by the House of Lords in *Customs & Excise Commissioners v Barclays Bank Plc* [2007] 1 AC 181 to considering a duty of care in respect of economic loss. As stated by Lord Bingham at [4], there are three tests established on the authorities for deciding whether a defendant sued as causing pure economic loss to a claimant owes him a duty of care in tort, namely (1) the assumption of responsibility test; (2) the threefold test, and (3) the incremental test.

43. The judge considered various authorities relating to each of these tests and in particular the case of *Reeman v Department of Transport* [1997] PNLR 618. That case concerned the purchase of a commercial fishing vessel in reliance upon a Department of Transport certificate indicating compliance with regulations relating to seaworthiness. An error had been made in the calculation of stability and, when this was later discovered, the certificate was withdrawn. The purchaser sued the Department of Transport claiming damages for economic loss. The Court of Appeal held that no duty of care was owed as there was insufficient relationship of proximity and because it would not be fair, just and reasonable to impose liability for economic loss.

44. The judge then applied the law to the facts of the case, having regard to each of the three legal tests.

45. In relation to the assumption of responsibility test, she held that it was not satisfied, in particular because: (1) in issuing the V5C the DVLA was performing a statutory function and not acting voluntarily or doing anything akin to contract; (2) the statement in INF26 that "Although seen by many enthusiasts as a seal of disapproval, they have proved to be a useful consumer protection aid" could not be read as the DVLA voluntarily accepting responsibility to protect consumers, which would, in any event, be inconsistent with the ambit of the statutory regime, and (3) Mr Seddon was relying on the V5C for a purpose other than that for which it was issued.

46. In relation to the threefold test, she held that foreseeability of loss was established, finding at [69] that:

> "In my judgment, it should have been foreseeable to the DVLA that a purchaser in the position of Mr Seddon could suffer loss in circumstances where the DVLA delayed its decision to investigate the provenance of the car".

47. She held, however, that there was insufficient relationship of proximity, in particular because: (1) the class size was indeterminate as, following the guidance provided by *Reeman*, it was not capable of ascertainment or in existence at the material time, and (2) "the cases of *Caparo v Dickman* and *Reeman v Department of Transport* instruct this Court to focus on the class of those within the circle of responsibility when the statement is made. In 2009 and 2013, when the incorrect registration certificates were issued, Mr Seddon was part of an unascertainable and potentially unlimited class" [73].

48. She also held that it would not be fair, just and reasonable for the DVLA to owe a duty of care to prospective vehicle purchasers such as Mr Seddon, in particular because: (1) such a party could protect himself by stipulating for contractual warranties or arranging his own expert investigation/inspection and (2) the disparity between the excise duty (£245 a year) and the potential liabilities, in this case £150,000.

49. In relation to the incremental test, she held that *Reeman* was powerful authority for denying the existence of any duty of care.

50. Her conclusion was as follows:

> "79. I have applied the well-established legal tests set out in authorities which are binding on this Court. I have considered the tests separately. I have also 'cross checked' the factors against one another to enable me to step back from the labels and consider matters in the round. I have borne in mind that I consider it should have been foreseeable to the DVLA that a purchaser in the position of Mr Seddon could suffer loss in circumstances where the DVLA delayed its decision to investigate the provenance of the car.
>
> 80. Nonetheless, I have arrived at the clear view that I am not persuaded that the DVLA owes a duty of care to Mr Seddon. The DVLA was performing its functions under a statutory

> regime designed to raise vehicle excise duty. Mr Seddon chose to rely on the car registration document for a purpose of his own – the purchase of a historic car. Analogous case law does not permit a duty of care. In entering into a private commercial transaction for the purchase of the car, Mr Seddon could have taken steps to protect himself against the loss he subsequently incurred".

The appeal

51. The grounds of appeal challenged the judge's conclusion on each of the three legal tests. In oral submissions, however, Mr Black QC's main focus was on the threefold test.

52. He submitted that the fundamental mistake made by the judge was her misplaced reliance on the *Reeman* case, which was clearly distinguishable. The judge wrongly equated the issue of the certificate in *Reeman* with the issue of the V5Cs in this case. The key date is August 2014 when the DVLA first had doubts about the age or identity of the vehicle but decided to postpone its investigation. That is the time at which it is contended that the duty of care arises. There was no equivalent factual circumstance in *Reeman*. The judge's failure to recognise this distinction led her into error in that she mistakenly analysed the issue of proximity, and of whether the imposition of a duty of care would be fair, just and reasonable, by reference to the date of the issue of the V5Cs in 2009 and 2013, rather than August 2014.

53. Mr Black accepted that the DVLA has no general duty to maintain accurate records for the protection of prospective third party purchasers. He submitted, however, that this case is about whether, in the particular circumstances, when the DVLA has information that doubts the integrity of a registration and knows the vehicle is up for sale, it has a responsibility to ensure that a prospective purchaser is protected.

54. At the time that the doubts arose and the decision was made to delay the investigation, the class of prospective purchasers was clearly delineated, being limited to those who sought to purchase the car from the registered keeper, Mr Leach. There was therefore sufficient proximity.

55. It was also fair, just and reasonable for a duty of care to be imposed in such circumstances. It was submitted that it cannot be right for the DVLA by its actions to conceal from a prospective purchaser that they have doubts about the age or identity of the vehicle. Such doubts, whether right or wrong, may well affect a decision of whether or not to purchase the vehicle, as they did in this case. The DVLA should not be allowed to escape its responsibility for its conduct when it was or should reasonably have been known that the delayed decision to investigate the provenance might lead to a purchaser such as Mr Seddon suffering loss.

Assumption of responsibility

56. Leading cases in relation to assumption of responsibility include *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465; *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 and *Customs & Excise Commissioners v Barclays Bank Plc.*

57. Factors which will often be relevant to whether there has been an assumption of responsibility include the following:

(1) Whether the parties' relationship is akin to contract and, if so, how closely.[1]

(2) Whether, but for the absence of consideration, there would be a contract.[2]

(3) Whether the defendant possesses or professes to possess special skill or knowledge.[3]

(4) Whether that special skill or knowledge is applied for the assistance of the claimant, usually through the provision of a statement, advice or service.[4]

(5) Whether this is done voluntarily.[5]

(6) Whether the defendant would reasonably expect the claimant to rely on the statement/advice/service provided, and to do so without obtaining independent assistance or advice.[6]

(7) Whether the claimant has relied on the statement/advice/service provided and whether he has done so for the purpose for which it was provided.[7]

(8) Whether the nature and extent of the responsibility being assumed can be clearly identified and defined.[8]

(9) Whether the context is professional or business related rather than social.[9]

(10) Whether the contractual context militates against any assumption of responsibility as, for example, where there is a contractual chain or there are contractual terms defining, limiting or excluding any duty owed.[10]

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[1] See *Hedley Byrne & Co v Heller & Partners Ltd* [1964] A.C. 465 (HL) 529; *Junior Books Ltd v Veitch Co. Ltd* [1983] 1 A.C. 520 (HL) 542C; *Smith v Eric S Bush* [1990] 1 A.C. 831 (HL) 846C; *Customs & Excise Commissioners v Barclays Bank Plc* [2006] UKHL 28; [2007] 1 A.C. 181 [4], [94]

[2] See *Hedley Byrne* 529; *Henderson v Merrett* 180C; *Customs & Excise* [4]

[3] See *Hedley Byrne* 502-503; *Henderson v Merrett* 180D, 182E

[4] See *Hedley Byrne* 502-503; *Henderson v Merrett* 180D, 182E

[5] See *Hedley Byrne* 495, 529; *Caparo Industries Plc. v Dickman and others* [1990] 2 A.C. 605 (HL) 637F-G; *White v Jones* 272G-273G, 274F-G; *Rowley v Secretary of State for Work and Pensions* [2007] EWCA Civ 598; [2007] 1 W.L.R. 286 [51], [54]-[55]; *Customs & Excise* [14], [94]

[6] See *Hedley Byrne* 503, 514; *Smith v Bush* 865B, 871F,H; *Caparo v Dickman* 620H, 638C-D; *James McNaughton Paper Group v Hicks Anderson & Co* [1991] 2 Q.B. 113 (CA) 126D-F, 127A; *White v Jones* 271G, 275G-H

[7] See *Hedley Byrne* 538; *Caparo v Dickman* 621A-B, 638C-D; *White v Jones* 275G-H; *James McNaughton* 125F-G, 125H-126A, 126G-127A; *Henderson v Merrett* 180F, 182E

[8] See *Caparo v Dickman* 629B; *James McNaughton* 126D-F; *White v Jones* 273F; *Henderson v Merrett* 182E

[9] See *Hedley Byrne* 539; *Smith v Bush* 865C; *Henderson v Merrett* 181D

(11) Whether the statutory context militates against any assumption of responsibility.[11]

(12) Whether there is a disclaimer of responsibility.[12]

58. Applying those factors to the facts of this case:

(1) There is no direct relationship between the DVLA and Mr Seddon, still less one akin to contract. At no material time was the DVLA aware of Mr Seddon's identity.

(2) There would be no contract regardless of the absence of consideration.

(3) The DVLA has no particular skill or knowledge. It performs a statutory function of collecting tax and raising revenue for the government and ensuring vehicles operating on the roads in the UK are registered. In so doing it relies on declarations made and information provided by applicants for a vehicle licence or registration mark.

(4) In so far as the DVLA has any special skill or knowledge, it was not being applied for the assistance of Mr Seddon, of whom it had no knowledge.

(5) The DVLA was not acting voluntarily; it was performing its statutory functions.

(6) The DVLA would not reasonably have expected Mr Seddon to rely on any statement/advice/service provided, not least because it had no knowledge of him.

(7) In so far as Mr Seddon relied on the V5C, he did not do so for the purpose for which it was provided, namely the collection of tax, the raising of revenue for the government and ensuring vehicles operating on the roads in the UK are registered, but rather to assist him in a private, commercial transaction of vehicle purchase.

(8) There was no identifiable act of assumption of responsibility by the DVLA towards Mr Seddon and nothing crossed the line between them. There were no dealings directly between the DVLA and Mr Seddon. It is not even alleged that there was any duty owed directly to Mr Seddon. The duty alleged is to inform the registered keeper of the intention to investigate.

(9) The context was neither professional or business related nor social.

(10) There is no relevant contractual context.

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[10] See *Pacific Associates v Baxter* [1990] 1 Q.B. 993 (CA) 1020D-E, 1022A-B; *White v Jones* 268G, 274E, 279D-G; *Henderson v Merrett* 182G-H, 194A, D

[11] See *X (Minors) v Bedfordshire County Council* [1995] 2 A.C. 633 (HL) 749G-750B; *Rowley v SSWP* [49], [72]-[73]

[12] See *Hedley Byrne; Pacific Associates* 1021B-D, 1022A-B, 1022G-1023A; *Henderson v Merrett* 181D

(11) The statutory context militates against any assumption of responsibility. Mr Seddon is seeking to rely on the V5C document for purposes other than its statutory purpose.

(12) There is no disclaimer.

59. These considerations show overwhelmingly that there was no assumption of responsibility in this case. For all these reasons, and those given by the judge, she was right so to conclude.

The threefold test

60. The DVLA do not challenge the judge's finding that the loss was foreseeable.

61. On the issue of proximity, given the nature of Mr Seddon's case, I accept that the relevant time to consider proximity is at the time that the duty of care is said to have arisen in August 2014 rather than when the V5Cs were issued. That provides a ground of distinction from the *Reeman* case, but *Reeman* remains a highly relevant judgment.

62. In the *Reeman* case two general factors were identified as being of particular relevance to the issue of proximity, namely: (1) whether the statement/advice/service is being relied upon for the purpose for which it was provided and (2) the identifiability of the membership of the class of persons to whom the statement/advice/service is provided.

63. In relation to the question of purpose, for proximity to be established, it is generally necessary for the statement/advice/service to be relied upon for the purpose for which it was provided.

64. As Phillips LJ stated at p629-30:

> "Both Lord Bridge and Lord Oliver emphasised the importance in relation to proximity of showing that the advice has been used for the same purpose as that for which it was given. The purpose for which the advice was given proved a critical element in *Caparo*. The advice in question was given by auditors of a company to its shareholders in the form of a statutory audit. The shareholders relied on this advice in acquiring additional shares. The House of Lords held that no duty of care was owed to the shareholders in relation to this activity. The purpose of a statutory audit under the Companies Act 1985 was to enable shareholders to exercise their class rights in general meeting and not to inform them in relation to investment decisions.
>
> The observation of the judge at page 61 that proximity can be established notwithstanding the fact that the purpose for which the statement is communicated differs from the purpose for which the recipient relies on it demonstrates a misunderstanding of the views of Lords Bridge and Lord Oliver

on this point. The true position was clearly expressed by Lord Oliver at page 641:

> "Thus *Smith v. Eric S Bush [1990] 1 A.C. 831* , although establishing beyond doubt that the law may attribute an assumption of responsibility quite regardless of the expressed intentions of the adviser, provides no support for the proposition that the relationship of proximity is to be extended beyond circumstances in which advice is tendered for the purpose of the particular transaction or type of transaction and the adviser knows or ought to know that it will be relied upon by a particular person or class of persons in connection with that transaction."
>
> In the present case the advice, if one so describes the certification, was given in the performance of the Department's statutory duties. In *X (Minors) v. Bedfordshire County Council [1995] 2 A.C. 633* at 739, Lord Browne-Wilkinson, when discussing whether a common law duty of care arose in respect of the performance of statutory duties, observed:
>
> "… the question of whether there is such a common law duty, and if so its ambit, must be profoundly influenced by the statutory framework within which the acts complained of were done."

The statutory framework in the present case is one designed to promote safety at sea. …one can say that the purpose of issuing certificates is the promotion of safety at sea.

… I accept that there may be more than one purpose for which an advice is given. What I cannot accept is Mr Ullstein's further submission that, in the case of Fishing Vessel Certificates, a subsidiary purpose for which the certificate is issued is to inform those who may, in the future, consider entering into commercial transactions, such as purchase or charter, in relation to the certified vessels. No trace of such a purpose is to be found in the statute under which the Rules are issued".

65. Lord Bingham CJ observed at p639-40 that the conditions which must be met before a claimant can recover for economic loss caused by negligent misstatement include that "the statement must be purpose-specific: the statement must be made for the very purpose for which the actual plaintiff has used it" and that "the statement must be transaction-specific: the statement must be made with reference to the very transaction into which the plaintiff has entered in reliance on it".

66. V5Cs are provided by the DVLA for the statutory purpose of collecting tax and raising revenue for the government and ensuring vehicles operating on the roads in the UK are registered. If that is the purpose of issuing V5Cs, that is equally the

purpose of correcting them or of deciding to investigate whether a correction is required. They are not provided for the private purpose of informing the commercial decisions of those who may choose to purchase registered vehicles.

67. As the judge stated at [61]:

> "61. Whilst I accept Mr Black's submission that the accuracy of registration documents may be said to be a purpose of the statutory regime, accuracy is important for ensuring that the correct vehicle excise is charged. There is nothing in the legislative regime to suggest that accuracy is for the purpose of enabling prospective third party purchasers to rely on the registration to value a car they are intending to purchase".

68. Whilst Mr Black criticised the judge for saying that Mr Seddon relied upon the V5C to value the vehicle, even if such criticism is valid, it is beside the point. What matters is that Mr Seddon was relying upon it for the private purpose of informing his purchase of the vehicle.

69. It is correct that INF 26 recognises that "Q" registration numbers may have the incidental benefit of being a useful consumer protection aid, but that is not the purpose of issuing them. The purpose of so doing is to enable registration of the vehicle notwithstanding that the age or identity of the vehicle is not known, pursuant to DVLA's statutory function of ensuring vehicles operating on the road in the UK are registered.

70. The judge was accordingly correct to conclude that Mr Seddon was relying on the V5C for purposes other than its statutory purpose, and this supports her conclusion that there was no sufficient relationship of proximity.

71. In relation to the question of the class of persons, for proximity to be established, it is generally necessary that at the time that the statement/advice/service is provided: (1) the membership of the class is capable of ascertainment and (2) the class is in existence.

72. As Phillips LJ stated at p631-2:

> "In *Caparo* both Lord Bridge and Lord Oliver commented on the importance of the advice being given to an identifiable class if the necessary proximity was to exist. Those who, foreseeably, would read the audit and rely on it when making investment decisions did not form such a class. In the present case the judge considered that future potential purchasers of a certified vessel formed such a class. Mr Ullstein argued that he was right to do so; that there could only be a handful of potential purchasers and there was no difficulty in identifying these.
>
> Here again I find that the judge, and the submissions of Mr Ullstein, fail to appreciate the nature of the exercise required by *Caparo*. When Lord Bridge and Lord Oliver spoke of the need

> for the advice to be given in the knowledge that it would be communicated to an ascertainable or identifiable class of persons I believe that they were probably speaking of a class of persons the membership of which was capable of ascertainment at the time that the advice was given, e.g. shareholders who could be identified by consultation of the share register. I am certain that they were speaking of a class, in existence at the time of giving the advice, whose identifiable characteristics necessarily limited the number of its members. When a British Fishing Vessel Certificate is issued those who may in the future place reliance on that certificate when deciding whether to purchase the vessel do not form part of a class that is capable of definition and delimitation by identifiable characteristics."

73. The judgments of Peter Gibson LJ and Lord Bingham CJ are to similar effect.

74. Peter Gibson LJ stated as follows at p637-8:

> "In finding the requisite proximity between the plaintiffs and the Department, the judge in my view placed too much reliance on factors which went only to foreseeability. The factual assumptions which were made on the preliminary issue in the *Caparo* (*ibid.*, page 629F–H) and which related to foreseeability did not determine the cognate but different question of proximity. So here knowledge by the Department that the certificate and the statement in it would be communicated to a prospective purchaser specifically in connection with a transaction of a particular kind, *viz* a purchase, and that a prospective purchaser such as the plaintiffs would be very likely to rely on the statement for the purposes of deciding whether or not to enter upon the purchase of the vessel should not have led the judge to conclude that proximity was established. I accept the submission of Mr Aikens Q.C. for the Department that the judge failed to have sufficiently in mind the closeness and directness of the relationship which Lord Atkin in *Donoghue v. Stevenson [1932] A.C. 562* at 581 (cited by Lord Oliver in *Caparo* at page 632) thought essential. Lord Atkin referred 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". I do not accept that the *638 plaintiffs were members of "an identifiable class" (to use Lord Bridge's words in *Caparo* at page 621), to whom the Department knew that that its statement in the certificate would be communicated. Lord Bridge indicated what he meant when he quoted with approval the words of Denning L.J. in *Candler v. Crane, Christmas & Co. [1951] 2 K.B. 164* at pages 180–181:
>
> > "Secondly, to whom do these professional people owe this duty? I will take accountants, but the same reasoning applies

> to the others. They owe the duty, of course, to their employer or client and also I think to any third person to whom they themselves show the accounts, or to whom they know their employer is going to show the accounts, so as to induce him to invest money or take some other action on them. But I do not think the duty can be extended still further so as to include strangers of whom they have heard nothing and to whom their employer without their knowledge may choose to show their accounts. Once the accountants have handed their accounts to their employer they are not, as a rule, responsible for what he does with them without their knowledge or consent. … The test of proximity in these cases is: did the accountants know that the accounts were required for submission to the plaintiff and use by him?"

In my judgment the members of the identifiable class must be capable of identification at the time of the making of the negligent statement. It is not sufficient that the plaintiffs should be members of a generic class capable of description at that time, whether as potential purchasers or successors in title of the owner who asks for the certificate."

75. Lord Bingham CJ identified as a further of his stated conditions that: "The statement (whether in the form of advice, an expression of opinion, a certificate or a factual statement) must be plaintiff-specific: that is, it must be given to the actual plaintiff or to a member of a group, identifiable at the time the statement is made, to which the actual plaintiff belongs"(p639).

76. In the present case, although the class of prospective purchasers is far narrower if the question is considered in August 2014, rather than at the time of the issue of the V5Cs in 2009 and 2013, it is still a class whose membership was not capable of ascertainment at that time. As the judge pointed out at [72], unlike for shareholders, there is no register by reference to which membership of the class of prospective purchasers could be ascertained. In August 2014 there was no means by which the DVLA could identify Mr Seddon, or anyone else, as a member of the class. Equally the class was not in existence at that time. It was, by definition, prospective; a future class rather than an existing class.

77. These considerations provide strong further support for the judge's conclusion on proximity and her reliance on the *Reeman* case.

78. In relation to the issue of whether it would be fair, just and reasonable to impose a duty of care, relevant considerations will include: (1) the consequences for the defendant, and other similarly placed potential defendants, of the imposition of a duty of care and (2) the consequences for the claimant, and other similarly placed potential claimants, of the denial of a duty of care.

79. With regard to the position of the DVLA, Mr Black was keen to stress that the duty of care alleged is limited to particular circumstances such as those which arose in the present case. In my judgment it cannot be so limited. For example, there is no principled reason to limit the duty to historic cars or to issues of age or identity; there

are many details of a V5C that may be relevant to the sale of a vehicle. Equally, there is no principled reason to limit the duty to cases where the DVLA has actual knowledge of a prospective sale; the DVLA knows that all its registered vehicles may at any time be offered for sale. Further, if there is a duty where the DVLA decides to investigate a vehicle registration, it is but a short step to impose a duty where they ought to have done so. Fundamentally, once it is recognised that the DVLA owes a duty of care to prospective purchasers of a vehicle in relation to its treatment of a V5C there are a huge variety of circumstances in which such a duty may be said to arise. This may also have implications for other statutory bodies with a duty to register details of property commonly bought and sold.

80. With regard to the position of Mr Seddon, there were other means by which he could have protected himself or obtained redress. This was a factor stressed in the *Reeman* case in which Phillips LJ pointed out that it was not a case in which there was no alternative remedy and further observed that (at p635):

> "… it will always be open to a party entering into a commercial transaction in relation to a certificated vessel to take steps, such as surveying the vessel or stipulating for contractual warranties that will provide protection against the risk that the certificate does not reflect the true condition of the vessel."

81. In my judgment the judge was correct to conclude that it would not be fair, just and reasonable to impose a duty of care. Supporting reasons for that conclusion include the following:

(1) Once it is recognised that the DVLA may owe a duty of care to prospective vehicle purchasers in the performance of its statutory functions it faces the prospect of wide ranging and extensive liabilities. As explained above, there is no principled basis upon which the duty can be said to be confined to the particular facts of cases such as the present one.

(2) The imposition of a duty of care which could result in such wide ranging and extensive liabilities would potentially impact on the performance by the DVLA of its statutory functions.

(3) Such liabilities (which would be borne by taxpayers) would generally be wholly disproportionate to the vehicle duty being raised, as the facts of the present case illustrate.

(4) The protection of vehicle purchasers' commercial interests forms no part of the statutory purpose of VERA 1994 and the 2002 Regulations.

(5) Mr Seddon could have protected himself against the risk that the V5C did not reflect the true age or identity of the vehicle by other means. He could have stipulated for contractual warranties. He could have arranged for his own expert inspection of the vehicle. The substantial price he was paying for the vehicle called for all precautions to be taken.

(6) The alleged financial loss in the present case arises out of the need to correct the V5Cs issued. That loss was either going to fall on Mr Leach or Mr Seddon. There is no good reason why the happenstance of a

sale taking place when it did should shift the burden of that loss to the DVLA.

(7) In so far as the DVLA's registration of a vehicle is disputed, a right of appeal is provided.

(8) Mr Seddon had alternative means of redress.

82. For all these reasons I consider that the judge was correct to conclude that the threefold test was not satisfied.

The incremental test

83. The closer the facts of a case are or are analogous to those of a case or category of case in which a duty of care has been held to exist, the readier the court will be to find that there has been an assumption of responsibility or that the threefold test is satisfied. Conversely, the more remote the connection or analogy the less ready the court will be so to find – see *Customs & Excise Commissioners v Barclays Bank Plc* at [4].

84. Equally, the closer the facts of a case are or are analogous to those of a case or category of case in which a duty of care has been authoritatively held not to exist, the less ready the court will be to find that there has been an assumption of responsibility or that the threefold test is satisfied.

85. In the present case Mr Black has not identified any case in which a duty of care has been found to exist on facts close or analogous to those of the present case.

86. The DVLA contends that the facts of this case are close to or analogous with the *Reeman* case, in which it was held that there was no duty of care. For the reasons set out above, that case is analogous and provides strong support for the DVLA's case on proximity and whether imposition of a duty of care owed to prospective purchasers would be fair, just and reasonable. Whilst there are grounds of distinction, they do not undermine the relevance of the essential reasoning in the *Reeman* case and of the conclusions there reached.

87. The incremental test accordingly shows that the court should not be ready to find that the other tests are satisfied and provides further support for the conclusion that in this case they are not so satisfied.

Conclusion

88. For the reasons outlined above, I would uphold the judge's clear and careful judgment and dismiss the appeal.

Lord Justice Newey :

89. I agree.

Lady Justice Macur :

90. I also agree.