

**COMMONWEALTH OF THE BAHAMAS**  
**IN THE SUPREME COURT**  
**Common Law and Equity Division**

**2011/CLE/gen/01554**

**BETWEEN**

**DENALEE PENN-MACKEY**  
**(T/A Evergreen Mortuary)**

**Plaintiff**

**-AND-**

**KEVIN SAUNDERS**

**1<sup>st</sup> Defendant**

**-AND-**

**BANK OF THE BAHAMAS LIMITED**

**2<sup>nd</sup> Defendant**

**Before:** The Honourable Madam Justice Indra H. Charles

**Appearances:** Mrs. C. Yvette McCartney-Meredith for the Plaintiff  
Non-appearance of the 1<sup>st</sup> Defendant (never appeared)  
Ms. Michela Barnett-Ellis of Graham Thompson for the 2<sup>nd</sup> Defendant

**Hearing Dates:** 20 October 2020, 26 November 2020

**Negligence – Chattel mortgage – Whether bank/mortgagee owes duty of care to client/mortgagor to investigate title and disclose findings – Whether bank liable for seizure of vehicles where they had knowledge that it was reported stolen – Purchaser’s duty to investigate title to vehicle – Causation**

**Injury to reputation – Causation – Whether the Defendants injured the Plaintiff’s reputation**

On 10 November 2011, the Plaintiff commenced this action against the First Defendant from whom she purchased two used vehicles and against the Second Defendant, the Bank, which granted her the loans for the purchase of the vehicles. The Plaintiff is seeking damages against the Second Defendant for negligence arising from the seizure of both vehicles. She also seeks damages against both Defendants for injury to her reputation.

Both Defendants deny liability for each of the causes of action. Additionally, the Second Defendant counterclaimed against the Plaintiff for the sums due under the loans. The First Defendant's Defence, which was filed on 22 February 2012, consisted of bare denials. In the Second Defendant's Defence which was filed on 10 January 2012 and then amended to a Defence and Counterclaim filed on 6 June 2012, the Second Defendant denied being negligent in its role as lender, denying that it ever assumed the responsibility of investigating title on the Plaintiff's behalf. The Second Defendant counterclaimed against the Plaintiff for \$64,369.69 being the sums due under both loans.

The Second Defendant argued that it did not assure the Plaintiff that the First Defendant had good title to the vehicles and that, in any event, it did not owe a duty of care to the Plaintiff in that regard. The Second Defendant also argued that there is a lack of causation between the alleged negligence on its part and the seizure of the vehicles, alleging that the Plaintiff failed to show that the defects in the Carfax report was the cause of the seizure. Instead, says the Second Defendant, the seizure of the vehicles resulted from the non-payment of customs duties.

The Second Defendant counterclaimed for the principal sum of \$64,369.69 which it says is owing under the chattel mortgages, along with penalties in the sum of \$118.70, late fees in the sum of \$139.92 and interest on the principal in the amount of \$3,368.53.

**HELD: Dismissing the Plaintiff's claim for negligence and injury to reputation against both Defendants and entering judgment for the Second Defendant on its Counterclaim for the outstanding loan repayments as well as penalties, late fees, interest and costs to the Second Defendant to be taxed if not agreed.**

1. Notwithstanding that a mortgagor and mortgagee have the same objective of determining whether the mortgagor has good title to the asset, the purposes of their investigation are different and the mortgagee does not owe a duty to the mortgagor to investigate title and disclose their findings for the purpose of satisfying the mortgagee's interests.
2. The purchaser/mortgagor bears the duty of investigating the title to a vehicle he considers purchasing. He takes a risk that the seller may not have good title if he chooses not to conduct adequate investigations, specifically where he has not obtained the original title documents: **Isaac v Scotiabank (Bahamas) Limited** [2018] 1 BHS J No 153 considered. **Selangor United Rubber Estates Ltd v Cradock (a bankrupt) (No 3)** [1968] 2 All ER 1073 and **North Shore Ventures Limited v Anstead Holdings Inc and Ors** [2010] EWCH 1485 (Ch) distinguished.
3. The buyer accepts risk unless he verifies each link in the title to the vehicles including the original title documents: **Isaac v Scotiabank (Bahamas) Limited** [2018] 1 BHS J No 153.
4. In any event, the terms of the chattel mortgages are clear. By those mortgages, the Plaintiff warranted that the vehicles were clear from liens and encumbrances when in fact they were not.
5. The vehicles were seized because the customs duties in respect thereof had not been paid. They were not seized because they had been stolen. The Plaintiff has not proved that the vehicles were seized because of the irregularities shown by the Carfax reports.

6. The fact that the vehicles were seized and the manner in which they were seized was no fault of the Second Defendant.
7. The Plaintiff did not plead negligence against the First Defendant yet, she claims the consequential loss of injury to reputation. Without establishing the First Defendant's negligence, her claim for injury to reputation is unsustainable. Her claim of injury to her reputation by the Second Defendant fails as there is no causal link between her claim for damages resulting in damage to her reputation and the actions of the Second Defendant.

## **JUDGMENT**

**CHARLES J:**

### **Introduction**

- [1] By Specially Indorsed Writ of Summons filed on 10 November 2011, the Plaintiff ("Mrs. Penn-Mackey") claims against the Second Defendant, Bank of the Bahamas Ltd ("the Bank") damages for negligence which resulted from the seizure by the Customs Department of two vehicles from Mrs. Penn-Mackey after she purchased them from the First Defendant ("Mr. Saunders"). The purchases were financed by two loans from the Bank. Mrs. Penn-Mackey alleged that the Bank was negligent in financing the loans in the face of the Carfax report which disclosed that one vehicle had been reported stolen and the other had a lien over it.
- [2] In its Defence filed on 22 February 2012 and subsequently amended to a Defence and Counterclaim, filed on 6 June 2012, the Bank denied liability and claimed for the sums outstanding under the loans. They claimed that they had not advised Mrs. Penn-Mackey as to the marketability of Mr. Saunders' title. In its submissions, the Bank asserted that the duty to investigate title to the vehicle was outside the scope of the Bank/Customer relationship. Additionally, the Bank argued that there is a gap in causation in Mrs. Penn-Mackey's claim, in that the Bank's alleged negligence was not related to her purported loss and damage. The Bank says that the loss and damage suffered (being the seizure of the vehicles) were not the direct result of the failure to disclose the Carfax report (the alleged negligence) but from the non-payment of custom duties. Mr. Saunders, who made no appearance at trial or at any stage in the proceedings, merely denied all allegations made against him.

## **Background Facts**

- [3] Most of the facts are undisputed between Mrs. Penn-Mackey and the Bank. Mrs. Penn-Mackey is and was at all material times, a funeral director trading as Evergreen Mortuary. The Bank is and was at all material times, a commercial banking institution carrying on the business of banking within the Commonwealth of The Bahamas.
- [4] In or about January 2010, Mrs. Penn-Mackey observed Mr. Saunders driving a 2007 Cadillac Escalade ("Vehicle 1"). With a view to purchasing Vehicle 1, she approached him. He confirmed that he was the owner and agreed to sell Vehicle 1 to her for \$40,000.
- [5] Thereafter, Mrs. Penn-Mackey approached the Bank to obtain a loan to finance the purchase of Vehicle 1. She was already an existing customer of the Bank. She had with them an overdraft facility of \$15,000. For the processing of said loan, the Bank required the Bill of Sale for Vehicle 1 along with a quote from an insurance company to insure Vehicle 1. Mrs. Penn-Mackey provided them with both documents.
- [6] On 12 April 2010, the Bank obtained a Carfax report on Vehicle 1 which revealed that the vehicle had been reported stolen in Florida on 9 July 2009.
- [7] By report from an officer of the Bank dated 15 April 2010, the loan was approved.
- [8] On 16 April 2010, Mrs. Penn-Mackey signed the commitment letter for the loan. The agreement was for \$34,000 repayable over 60 months at \$792.00 per month. On that same day, Mrs. Penn-Mackey and the Bank executed a chattel mortgage in respect of Vehicle 1.
- [9] The chattel mortgage provided, among other things, that the vehicle was conveyed to the Bank subject to the mortgagor's right to have it re-conveyed upon the repayment of the loan. By the mortgage, she offered as security Vehicle 1 and the

assignment of the comprehensive insurance over Vehicle 1 with the Bank noted as loss payee. Paragraph 4 of the Operative Part of the Deed states as follows:

**“AND IT IS AGREED as follows that:**

...

...

...

**4. The mortgagor warrants that the Property is free and clear of all liens and encumbrances. The Mortgagor shall continue to keep the Property free and clear of all lies and encumbrances and shall at all times use the Property strictly in accordance with all statutes, by-laws and regulations from time in force. If any lien or encumbrances is placed or acquired against the Property, the Mortgagee may pay off the same and charge the amount thereof with all costs and expenses incidental thereto the Mortgagor.”**

- [10] Mrs. Penn-Mackey made a deposit of \$6,000 toward the loan.
- [11] Also, on 16 April 2010, the Bank wrote a Manager’s Cheque for \$40,000 to Mr. Saunders for the purchase of Vehicle 1.
- [12] In or about June 2010, Mrs. Penn-Mackey again approached Mr. Saunders inquiring as to whether he owned and was willing to sell other cars similar to Vehicle 1. He offered to sell a 2008 Cadillac Escalade (“Vehicle 2”) for \$50,000.
- [13] Mrs. Penn-Mackey again approached the Bank for a loan, this time for \$40,000 to finance the purchase of Vehicle 2, the full cost of which was \$50,000. The Bank again requested a Bill of Sale which she provided.
- [14] Mrs. Penn-Mackey made a down payment of \$10,000 toward the loan for the purchase of Vehicle 2.
- [15] By report dated 26 July 2010 from the Bank’s officer, the second loan was approved. At this time, the balance owing under the first loan was \$33,409.00. The two loans were then consolidated with the monthly payments set at \$1709.00 for 5 years.

- [16] On 26 July 2010, Mrs. Penn-Mackey signed a commitment letter and, on that same day she entered a chattel mortgage with the Bank with respect to Vehicle 2. The terms of this mortgage were the same as the chattel mortgage over Vehicle 1.
- [17] On 28 July 2010, the Bank wrote two manager's cheques to Mr. Saunders, one for \$40,000 and the other for \$10,000.
- [18] On 4 August 2010, the Bank obtained the Carfax in relation to Vehicle 2.
- [19] On 16 September 2011, Vehicle 1 and Vehicle 2 were both seized by the Customs Department for non-payment of customs duties contrary to sections 115, 128 and 129 of the Bahamas Customs Management Act, 1976 ("the Act"). The seizure of Vehicle 1 took place at Mrs. Penn-Mackey's workplace. Customs Officers then followed her to her home where Vehicle 2 was seized.
- [20] Displeased with the seizure of her vehicles, Mrs. Penn-Mackey sought legal advice from V. Alfred Gray, attorney-at-law. He advised her to request from the Bank her file. She requested her file from the Bank and reviewed them with Mr. Gray. On the file were the Carfax reports with respect to each vehicle showing that Vehicle 1 had been reported stolen in Florida and that Vehicle 2 had a lien over it.

### **Factual Disputes**

- [21] There are two factual disputes which will fall away at the determination of the issues.
- [22] Mrs. Penn-Mackey alleged that the Bank (i) assured her that Mr. Saunders had good title to the vehicles; (ii) that her loan officer, Anthony Williams, told her that they would procure the Carfax to determine whether Mr. Saunders had good title and (iii) that the loan would be refused if the report was unfavourable. The Bank disputed her account and argued that it did not advise Mrs. Penn-Mackey on title; that she was not told about the Carfax reports and knew nothing of it until after the vehicles were seized.

[23] The second factual dispute relates to whether the Bank relied on the insurance to the exclusion of the Carfax report to determine that it would approve the loans.

### **Issues**

[24] The issues to be determined are:

1. Whether the Bank had a duty to investigate title to the vehicles and to disclose the findings of the said investigation to Mrs. Penn-Mackey;
2. Whether the seizure of the vehicles was related to the unfavourable Carfax reports which revealed the stolen report in relation to Vehicle 1 and the lien over Vehicle 2;
3. Whether the Bank caused injury to Mrs. Penn-Mackey's reputation when the vehicles were seized; and
4. Whether Mr. Saunders caused injury to Mrs. Penn-Mackey's reputation by selling her the vehicles which were subsequently seized.

[25] If the answer to issue "1" is in the negative, the factual disputes become non-consequential and would fall away.

### **Law on mortgages**

[26] The learned authors of Cheshire and Burn, Modern Law of Real Property, 15<sup>th</sup> edn, 1994, London: Butterworths, at page 657, defines a mortgage as:

**“a conveyance or other disposition of an interest in property designed to secure the payment of money or the discharge of some other obligation.”**

[27] In Commonwealth Caribbean Property Law, 4<sup>th</sup> edn, Routledge: Taylor & Francis Group, Kodileyne describes a mortgage at page 195 as:

**“A mortgage is essentially a real security for the repayment of money lent. The creditor (“the mortgagee”) obtains rights over the property of the debtor (“the mortgagor”), which are exercisable in priority to the claims of the debtor’s general – that is, unsecured creditors.”**

[28] Put differently, a mortgage is a conveyance of land or some other asset as security for a loan; the security being redeemable upon repayment of the loan. There are three essential elements of a conveyance namely (i) a personal contract for repayment of the loan, (ii) the mortgagor's conveyance of the asset as security for the loan and (iii) a proviso for equity of redemption. The mortgagor's equity of redemption is his equitable interest in the asset, which provides that upon repayment, he has the right to redeem the security to hold it as legal and equitable owner and to have it reconveyed to him. It is a valuable interest which can be assigned, sold, devised or passed on intestacy.

## **Discussion**

### **Issue 1 - Whether the bank had a duty to investigate title to the vehicles**

[29] Learned Counsel for the Plaintiff, Mrs. McCartney-Meredith argued that the Bank owed a duty of care to Mrs. Penn-Mackey to disclose to her their findings from their investigation on title to the vehicles on the basis that it was an ordinary feature of the creditor/guarantor relationship. She further argued that, under that duty, the contents of the Carfax reports were relevant to the transaction which the Bank was bound to disclose to Mrs. Penn-Mackey. She next argued that the failure to disclose material information which would have led Mrs. Penn-Mackey to avoid the loan agreement was contrary to the duty of care owed, thereby rendering the Bank negligent.

[30] Ms. Barnett- Ellis appearing as Counsel for the Bank argued that the Bank did not owe a duty to Mrs. Penn-Mackey to investigate and assure her as to the title of the vehicles. She said that, as mortgagor, Mrs. Penn-Mackey asserted to the Bank that she had good title to both vehicles, offering them as security for the loans. She maintains that the Bank did not assume a duty to advise Mrs. Penn-Mackey as to the viability of her investment. According to learned Counsel, the Bank's relationship with Mrs. Penn-Mackey was merely for the financing of the purchases. Accordingly, says Ms. Barnett-Ellis, the verification of the seller's title to the property was well outside their relationship.

- [31] The Bank does not deny that it obtained Carfax reports for the vehicles or that it had notice of its contents. The Bank maintained, correctly, in my view, that the reports were exclusively for internal purposes similar to an opinion on title in a mortgage over land.
- [32] Mrs. McCartney-Meredith relied on **Selangor United Rubber Estates Ltd v Cradock (a bankrupt) (No 3)** [1968] 2 All ER 1073, to support her contention that the Bank had a duty to disclose the knowledge it received from the Carfax reports. She relied on quotes from the judgment of Ungood-Thomas J where he dealt with strangers' liability as constructive trustees and paying banks' negligence where they default on their duty to make reasonable inquiries where there is suspected fraud. In my judgment, this case does not assist Mrs. McCartney-Meredith. The case is clearly distinguishable from the present case and is not instructive. The extracting of quotes favourable to one's case in a vacuum is not helpful.
- [33] The issue for the Court in **Selangor** was whether the bank had constructive notice that funds were being misapplied or whether it was reasonable to expect that they ought to have inquired further in the circumstances and disclose same to the Plaintiff so as to avoid the fraud. Some brief facts are that the branch of District Bank advanced a sum of money at the request of a customer. The customer asked for the advance to effect the illegal acquisition of the shares in Selangor through an intermediary. It was the customer's intention that the shareholding in Selangor would be purchased by using the company's own funds in breach of section 54 of the Companies Act 1948. The customer told officers of the bank that he might influence the transfer of Selangor's account from its existing bank, National Bank to District Bank. He asked for a bankers' draft in favour of an intermediary and in exchange promised that the bank would receive a draft to cover the advance.
- [34] District Bank subsequently complied with the customer's request but the bank did not receive a draft in exchange. Instead, it received a cheque drawn on Selangor's account, which was duly transferred from the National Bank. This cheque was made out in the name of a third party which had endorsed it in turn to the customer.

The cheque was then debited against the company's new account, in which he had placed funds sufficient to meet the cheque. The amount of the cheque was credited to the customer's account. Effectively, the customer illegally acquired Selangor by using its own funds for the purpose of acquiring its shares. Selangor commenced the action to recover proceeds of the cheque

- [35] Mrs. McCartney-Meredith sought to equate what she says is the Bank's duty to investigate title to vehicles which it holds as security for loans with the duty imposed on the bank in **Selangor** to investigate whether funds were being properly applied and to subsequently disclose its suspicions of fraud. I do not find these circumstances to be comparable.
- [36] Another case relied on by Mrs. McCartney-Meredith is **North Shore Ventures Limited v Anstead Holdings Inc and Ors** [2010] EWCH 1485 (Ch). This case was similarly unhelpful and inapplicable to the facts of the present case. **North Shore Ventures** dealt with whether documents in the possession of a third party are in a litigant's control and therefore fall within disclosure obligations. Again, this case is distinguishable and is not instructive for purposes of deciding the present case.
- [37] Some pertinent facts in the present case are that Mrs. Penn-Mackey entered chattel mortgages with the Bank over both vehicles. Her relationship with the Bank was merely for the financing of the purchases, separate and apart from her contract with Mr. Saunders to buy the cars. It follows that the Bank's concern was ensuring that Mrs. Penn-Mackey was a creditworthy borrower and that she could pay back what she had borrowed. The Bank produced evidence of its inquiries as to Mrs. Penn-Mackey's creditworthiness by producing officer's remarks with respect to each loan application. In each report, the Bank concluded that Mrs. Penn-Mackey, a business-woman, who had credit with the Bank even before the application loan for Vehicle 1, was satisfactorily managing her credit with the Bank at both material times and that her income was sufficient to repay the loans.

[38] Indeed, it would have been prudent for the Bank to have refused both loan applications having regard to the irregularities revealed in the Carfax reports. However, this does not negate the mortgagor's obligation to give good title.

[39] I agree with Ms. Barnett-Ellis that, as purchaser of the vehicles in her agreement with Mr. Saunders and as mortgagor of the chattel mortgages with the bank, it was incumbent on Mrs. Penn-Mackey to satisfy herself that she would be receiving good title from Mr. Saunders and that, consequently, the title she was purporting to transfer to the Bank in exchange for the loan was good and marketable. By paragraph 4 of both chattel mortgages, Mrs. Penn-Mackey warranted that the vehicles were free from liens and encumbrances. It follows that she ought to have ensured that she was making good on that warranty by embarking on a reasonably thorough investigation.

[40] Although neither Counsel referred to the Court of Appeal decision of **Isaac v Scotiabank (Bahamas) Limited** [2018] 1 BHS J No 153, this Court, in conducting its own research, found it to be very useful and in line with the Bank's submissions so there is nothing new derived from this case. It merely fortifies the Bank's position. In **Isaac**, our Court of Appeal upheld the Supreme Court's decision that the purchaser of a vehicle bore the duty to investigate its title and took a risk where he/she did not obtain the original title documents. The facts are useful to canvass. Jason Deveaux mortgaged two used vehicles to the respondent bank. In contravention of the mortgage which prohibited him from parting with possession or control of the vehicles and selling or transferring any interest without the bank's approval, he sold one of the vehicles to a company who then sold it to a Mr. Wiethuchter. Mr. Wiethuchter registered the vehicle with Carfax when repairs were done. The appellant (Ms. Isaac) purchased the car from Mr. Wiethuchter. She conducted a Carfax search to assure herself that the vehicle was in good condition and submitted the vehicle to Road Traffic Inspectors and Royal Bahamas Police Force Central Detective Unit Officers to obtain their approval that the vehicle had not been stolen. Her vehicle was seized and she was informed that the original owner of the vehicle, who was not known to the appellant, had defaulted on the

loan with the respondent bank for which the vehicle was security. The appellant claimed to be a bona fide purchaser for value without notice and the relevant assessment of facts by the trial judge were found in paragraph 9 of the lower court's judgment:

**“It is accepted that both parties have documents claiming to own the subject jeep. The title of the Bank is certainly earlier in time than the Plaintiff's and is recorded in the Registry of Records. The title of the Bank should prevail in ordinary circumstances. The Plaintiff however claims that she is bona fide purchaser for value. It seems clear, having regard to our system of recording documents, that the Bank's recording of the chattel mortgage could not have come to the attention of the Plaintiff based upon the information at her disposal when she purchased the vehicle. There is no register of chattel mortgages and without specific information, as to the interest of Scotiabank or Jason Deveaux, a search of the Registry of Records could not lead to a discovery of the Bank's registered chattel mortgage. Interestingly however, it does not appear that she did any search or investigation at the time of her purchase in order to become aware of the chain of title of the vehicle back to the manufacturer. She is also not in possession of the original title document from the manufacturer and did not obtain it when she purchased the vehicle. Counsel, from the bar table, asserts that documents were left in the vehicle when it was repossessed. This however is not supported by the evidence. Had she been in possession of this original deed she would have had a strong claim to being a diligent purchaser without any notice of a mortgage claim on the vehicle.”**

[41] The Court of Appeal accepted the trial judge's reasoning as to why the appellant was not a bona fide purchaser for value without notice. By not conducting a sufficiently thorough investigation, she accepted the risk that her seller did not have good title. In delivering the Judgment of the Court, Evans JA had this to say at [23] to [24] of the Judgment of the Court of Appeal reads as follows:

**“[23] The learned judge accepted the submission of the respondent on this point and found that as the appellant's/plaintiff's predecessor in title Neils Wiethuchter did not have (could not show) title to the vehicle from the original owner, she could not be vested with a better title than he had. She, therefore, could not, by her purchase, acquire any legal estate, legal right or advantage in the vehicle. The judge was also of the view that the fact that the appellant did not embark on any title investigation but simply accepted the word of Neils**

**Wiethuchter that he had good title is an indication that she was prepared to accept the risk that he may not have had good title.**

[24] The judge was of the view **that the absence of title documents for the vehicle should have put the appellant on inquiry. He opined that had the appellant insisted on back title documents she would have either uncovered the prior ownership of Deveaux or not followed through with the purchase.** In these circumstances he was of the view that the appellant could not properly be considered a bona fide purchaser for value without notice.”

[42] The Court of Appeal agreed with the findings of the learned trial judge and, at [25] stated”

**“As we understood the rationale of the learned judge, he was of the view that having regard to the fact that the registry system will not easily reveal a chattel mortgage a purchaser takes a calculated risk in purchasing a vehicle from someone who is not able to produce title documents for the vehicle. The risk is that the car may have been stolen or, as in this case, mortgaged. We agreed. The fact that the appellant obtained a Carfax report and also obtained a report from the Central Detective Unit could only suffice to show previous damage to the vehicle and whether it was reported stolen. As in this case the absence of the title documents proved fatal. As a result, we found no fault with the judge's finding that the appellant was not a bona fide purchaser for value without Notice.”**

[43] It is plain that a purchaser bears the duty of investigating the title to a vehicle he considers purchasing. He takes a risk if he chooses not to conduct such investigations, specifically where he has not obtained the original title documents.

[44] Like the appellant in **Isaac** [supra], Mrs. Penn-Mackey did not embark on any title investigation, but simply accepted the word of the seller, Mr. Saunders, that he had good title. This is an indication that she was prepared to accept the risk that he may not have had good title.

[45] The absence of the title documents for the vehicles ought to have put Mrs. Penn-Mackey on inquiry. Had she insisted on back title documents, she would have either uncovered the prior ownership or not followed through with the purchase.

[46] The Court of Appeal in **Isaac** said that even obtaining a Carfax report and a report from Central Detective Unit was not a satisfactory title investigation because they would only show whether there was previous damage or was reported stolen. The only investigation that would have indicated that a buyer was not willing to accept risk would have been to request back title document including the original title documents. Accordingly, the fact that Mrs. Penn-Mackey embarked on absolutely no title investigation of her own meant that she was willing to accept every risk.

[47] Even if, as Mrs. Penn-Mackey contended should have happened, the Bank had told her about the Carfax reports and that the loans would be refused if the reports were not satisfactory, she had not adequately guarded herself against the risks. Obtaining the Carfax reports was merely the Bank's method of determining whether it would be getting good security for its loan. Notwithstanding that the Bank may have acted without due care in accepting the vehicles as security, the interests of the Bank and Mrs. Penn-Mackey with respect to the title of the vehicles were different. The Bank's objective was to be satisfied that there was adequate security in the event of default by Mrs. Penn-Mackey. Mrs. Penn-Mackey's interest was to ensure that (i) in accordance with her warranty that the vehicles were unencumbered and Mr. Saunders had good title and (ii) upon the repayment of the loan, she would have good legal and equitable title to the vehicles. Although both parties would have benefitted from Mrs. Penn-Mackey having clear title, the Bank did not have a duty to investigate title for the purpose of ensuring Mrs. Penn-Mackey's interest.

[48] The factual issue as to whether the Bank advised Mrs. Penn-Mackey on title is of no moment because (i) the Bank did not have a duty to investigate title for the purpose of satisfying her interests and any investigation which they did or failed to do was for their own purposes; (ii) it was her duty to investigate for herself (iii) the Carfax reports, which she says she relied on, were nowhere near conclusive for determining title. She ought to have obtained the title documents from Mr. Saunders whom it appeared, she trusted, but who, for reasons best known to him,

did not participate in these proceedings after putting what appears to be a bare defence.

[49] Having established that the Bank does not have a duty to ensure Mrs. Penn-Mackey's title (notwithstanding that it may have been in its interest to do so), the factual dispute as to whether the Bank relied on the insurance to the exclusion of the Carfax report in deciding to grant the loans falls away.

[50] In any event, the terms of the chattel mortgages are clear. Mrs. Penn-Mackey warranted that the vehicles were clear from liens and encumbrances and in fact they were not.

[51] I therefore find that Mrs. Penn-Mackey ought to have taken reasonable steps to satisfy herself that the vehicles were in fact free from encumbrances before obtaining the loans to purchase them. Although it would have been prudent for the Bank to take steps to ensure that it had good security for the loans, it owed no duty to Mrs. Penn-Mackey to do so.

[52] The fact that the vehicles were seized does not absolve Mrs. Penn-Mackey from her liability to repay the loan under the chattel mortgages. The loan, although now unsecured, remains. Accordingly, Mrs. Penn-Mackey is obligated to repay the Bank.

[53] The evidence of the Bank as to the fact of the arrears and the amount was uncontroverted by Mrs. Penn-Mackey. When the loans were consolidated, the principal amount was \$73,409.00 at an interest rate of 14%. The Bank says that Mrs. Penn-Mackey has repaid \$24,121.78, from which they have applied \$12,666.46 to the principal, \$11,416.39 to the interest and \$33.93 to late fees and penalties. According to the undisputed evidence, Mrs. Penn-Mackey's last payment was on 5 November 2011.

[54] In its Counterclaim filed on 6 June 2012, the Bank claimed the principal sum of 60,742.54 plus penalties in the sum of \$118.70, late fees in the sum of \$139.92 and interest on the principal being \$3,368.53 for a total of \$64,369.69. The Bank also claims as well as interest on the principal due under the loan from 6 March 2012 under judgment at the rate of 14% per annum which it is entitled to. It also claimed interest at the statutory rate of 6.25% per annum from the date of Judgment to the date of payment which the Court grants. I will leave the final mathematical calculations for Counsel to work out.

[55] Mrs. Penn-Mackey did not make a claim of negligence against Mr. Saunders. Therefore, whether Mr. Saunders was negligent is something I need not consider.

**Issue 2: Lack of casual connection between cause of action and loss sustained**

[56] Ms. Barnett-Ellis argued that Mrs. Penn-Mackey failed to show a direct causal link between the Bank's alleged actions and her alleged loss and damage. The ground for seizure of the vehicles by the Bahamas Customs Department was non-payment of customs duties contrary to sections 115, 128 and 129 of the Act. She says that the term is defined in the Act as dutiable goods on which the full duties due have not been paid and goods, whether dutiable or not, which are imported or in any way dealt with contrary to the customs laws. Then section 115 states that it is an offence to import goods which are: concealed in any way, packed in a manner to deceive custom officers or the application for shipment does not correspond with the items shipped. Sections 128 and 129 set out the power and procedure regarding seizure. Ms. Barnett-Ellis submitted that nowhere in the correspondence with Bahamas Customs are the vehicles referred to as stolen.

[57] On the other hand, Mrs. Penn-Mackey alleged that the Bank was negligent in not advising her that one vehicle had been reported stolen and the other had a lien on it. However, Mrs. Penn-Mackey, upon whom the burden lies to prove her case on a balance of probabilities, has not proven that the vehicles were seized because of the irregularities shown by the Carfax reports.

[58] For the reasons above, I agree with Ms. Barnett-Ellis that Mrs. Penn-Mackey incorrectly sought to connect the vehicles' seizure with the Carfax reports as no such connection exists. As already iterated, the vehicles were seized because custom duties were not paid on them and because of the manner in which they were imported into the country. The Bank did not import the vehicles.

[59] As I see it, the damage suffered by Mrs. Penn-Mackey occurred as a result of an unknown third party failing to properly import the vehicles but for their actions, she would not have suffered loss and damage. A Carfax report could not have revealed whether the vehicles were properly or improperly imported into The Bahamas.

### **Issues 3 and 4: Injury to reputation**

[60] Issues 3 and 4 are subsumed under this head. Mrs. McCartney-Meredith argued that both Defendants are responsible for Mrs. Penn-Mackey's reputation having been injured by the seizure of the vehicles at her workplace and the publicity surrounding their seizure. Ms. Barnett- Ellis contended that there is no causal link between Mrs. Penn-Mackey's claim for damages resulting from damage to her reputation and the Bank's actions.

[61] Succinctly put, I agree with Ms. Barnett-Ellis. The fact that the vehicles were seized and the manner in which they were seized was no fault of the Bank. I have already determined that, although the issues disclosed in the Carfax report were known to the Bank, the seizures were unrelated to those issues. I have also determined that the Bank had no duty to Mrs. Penn-Mackey to investigate what she had warranted to the Bank including that the title to the vehicles were unencumbered. Further, I find that if the seizure of the vehicles and the manner in which they were seized may have caused some embarrassment to Mrs. Penn-Mackey but it was not caused by the Bank nor was it the result of any breach of duty owed by the Bank.

[62] Although Mrs. Penn-Mackey claims consequential damages for injury to her reputation against Mr. Saunders, she did not plead negligence against him.

Without establishing Mr. Saunders' negligence, I think that her claim for injury to her reputation is unsustainable.

## **Conclusion**

[63] The Bank was not negligent in failing to disclose the contents of the Carfax reports because there was no duty on the part of bank to conduct an investigation for Mrs. Penn-Mackey. I find, in any event, that disclosure of the contents of the Carfax reports would not have been an adequate title investigation.

[64] Moreover, the terms of the chattel mortgages were palpably clear. Mrs. Penn-Mackey warranted to the Bank that she had good and marketable title to the vehicles but she failed to undertake any proper investigation in that regard. She therefore remains liable for the sums owing notwithstanding that she does not have possession of the vehicles.

[65] With respect to Mrs. Penn-Mackey's claim for negligence against the Bank, she failed to establish a duty on the part of the Bank. In addition, she failed to establish causation with respect to her assertion that the Bank caused the seizure of the vehicles.

[66] There is also a huge gap in causation with respect to the assertion that her reputation was injured by the seizure of the vehicles because she failed to prove that the seizure was directly the result of the Carfax reports.

[67] Mrs. Penn-Mackey's claim against the Bank is therefore dismissed and I find in favour of the Bank on its Counterclaim. Her claim against Mr. Saunders was abandoned so I will also dismiss that claim.

[68] Mrs. Penn-Mackey shall pay the Bank's costs to be taxed if not agreed.

## **The Order**

[69] The Court makes the following order:

1. The Plaintiff's claim against the First Defendant is abandoned and consequently, dismissed;
2. The Plaintiff's claim against the Second Defendant is dismissed with costs to be taxed if not agreed;
3. Judgment for the Second Defendant on its Counterclaim as follows:
  - (i) Under the loan, the principal sum of \$64,369.69; penalties in the sum of \$118.70 and late fees in the sum of \$139.92 as at 19 March 2012;
  - (ii) Interest at the rate of 14% per annum on the principal sum due under the loan from 6 March 2012 to the date of judgment, i.e. 20 August 2021;
  - (iii) Interest at the rate of 6.25% per annum from the date of Judgment (20 August 2021) to the date of payment made pursuant to the Civil Procedure (Awards of Interest) Act, 1992;
  - (iv) Costs to be taxed if not agreed.

**Dated this 20<sup>th</sup> day of August, 2021**

**Indra H. Charles  
Justice**