ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CIVIL SUIT NO ANUHCV1998/0123

BETWEEN:

JOY ANN MATTHEW

Claimant

and

PATRICK CHRISTIAN
NEIL CONSTANT
VICTOR "PAT" PHILLIPS t/a Universal Auto and Appliances
THE BANK OF NOVA SCOTIA

Defendants

Appearances:

E Ann Henry, Debra Burnette with her, for the Claimant
Kelvin John for Neil Constant
Justin L Simon for the Bank of Nova Scotia

2003: July 1, 28, August 19

JUDGMENT

[1] MITCHELL, J: This is a case of a Toyota Corolla motor car sold by Barclays bank which held a bill of sale over it. Ms Matthew has sued Patrick Christian, who sold her the car; Neil Constant, who introduced her to Mr Christian; Victor Phillips who had employed Mr Constant in his car dealership; and the Bank of Nova Scotia, which had lent her the money to buy the car. Mr Christian has not filed a defence, and a default judgment has been entered against him. Mr Phillips has filed a defence, but he did not comply with the case management directions nor did he appear in court to testify. I gather that he has in the meantime gone out of business in Antigua. Bank of Nova Scotia has counter claimed against Ms Matthew for the balance of the loan it had made to her.

THE ISSUES

[2] A number of issues arise in this case. One question for the court is, given that Ms Matthew has obtained a judgment in contract against Mr Christian, is she entitled to continue the case and to obtain judgment against one or more of Mr Constant and Mr Phillips in their capacity as agents for Mr Christian? Is the Bank of Nova Scotia liable in negligence to Ms Matthew for not having searched for and discovered the prior bill of sale held by Barclays Bank? Is Ms Matthew liable in her turn to the bank for the balance of the unpaid loan it made to her and which she has stopped repaying since she lost the car.

THE FACTS

[3] There is not much of a dispute on the history of the events. The facts as I find them are as follows. In the year 1997, Mr Christian had a Toyota Corolla motor car which he wished to sell for the price of EC$30,000.00. He had previously borrowed a sum of money from Barclays Bank and had given Barclays a security for the loan over the car by way of a bill of sale registered in the Registry as required. The legal consequence was that the car belonged to Barclays Bank, with him having only an equity of redemption. He, therefore, had no right to sell the car to anyone without the permission of Barclays Bank. The existence of the bill of sale should have been apparent to anyone making a thorough search of the Registry of Bills of Sale.

[4] The Registry of Bills of Sale is, according to the Bank of Nova Scotia's witness, in a state of permanent disorder. The index to the Registers of Bills of Sale is so poorly kept that it is in practice impossible for any lender to make a search to determine whether a particular vehicle is encumbered. It should hardly need mentioning that no one from the Registry of Bills of Sale has had an opportunity to answer whether this is in fact so. Scotia Bank has, in consequence of its concerns about the state of the Registry of Bills of Sale, and as a substitute for conducting such a search, developed over the years a practice for the protection of itself. It lends money on the security of a car only if the car is one newly imported from a foreign country. Such a vehicle is unlikely to have been previously encumbered in Antigua. It will accept a used car as security for a loan only if it is

purchased through a reputable car dealership. These dealers, if they wish their customers to continue to receive funding for their car purchases, are obliged by the bank to ensure that any car that they sell carries a clear title. The bank does not lend money for the purchase of used cars that are privately sold. It does not make any attempt to have its solicitor search the Registry of Bills of Sale, as it is convinced that such a search would be futile. It simply will not lend money secured by a used car that has been privately owned in Antigua and Barbuda. The dealers, no doubt, know this policy and are expected to govern themselves accordingly if they are to have their customers have the benefit of the use of the loan facilities offered by the bank. Any dealer failing to comply with this bank policy can expect to receive a letter telling him that the bank's loan facilities are no longer available to his customers.

[5] In August 1997, Ms Matthew wished to purchase a used Toyota Corolla. She was aware that Mr Phillips was in the business of selling such cars through his dealership Universal Auto and Appliances, at his business place in St John's in Antigua. She had also known Mr Constant, Mr Phillips' sales agent, for many years as he was a neighbour of hers. She told Mr Constant about the sort of car she was looking for. She went to the premises of Universal Auto and Appliances to examine the used cars in stock. None of Mr Phillips' vehicles was within her price range. Mr Constant was aware that Mr Christian wanted to sell his car. He realised that it was just what Ms Matthew was looking for. He arranged for Mr Christian to visit Ms Matthew to discuss the sale of his car with her. Mr Christian did so. Ms Matthew agreed with Mr Christian a purchase price of $30,000.00. She negotiated that price directly with Mr Christian, and not with either Mr Constant or Mr Phillips. There is no evidence that Mr Constant received any commission for making this contact.

[6] Ms Matthew had some of the money that was needed to pay for Mr Christian's car. She did not have all of it. She required to borrow the sum of $25,600.00 to cover the balance of the purchase price and the related costs of licensing and insurance. She went to visit her bank, the Bank of Nova Scotia, to arrange a loan to assist with the purchase. The loans officer at the bank discussed with her the forms that were required to be filled out by

a used car dealer to finance a car-purchase loan. She in turn discussed them with Mr Constant at Mr Phillips' dealership.

[7] The problem that arose was, given the restriction described above, how to go about setting up the sale so that Ms Matthew would be able to borrow the money. Mr Constant knew just how to go about doing it. He arranged with Mr Christian and Ms Matthew that the sale would be processed through Universal Auto and Appliances. I have to assume that Mr Christian concealed from him, as he did from Ms Matthew, the fact that the car was encumbered with a bill of sale in favour of Barclays Bank. Mr Phillips, on being told of the scheme, agreed to go along with the deception, for a fee of $2,000.00 to be paid by Ms Matthew to his agency. There is nothing in the evidence to suggest that he purchased the vehicle from Mr Christian for resale to Ms Matthew. Rather, the evidence suggests that he agreed to broker the transaction between Mr Christian and Ms Matthew for a fee of $2,000.00. Ms Matthew does not dispute that at all times she knew the car belonged to Mr Christian.

[8] Ms Matthew agreed to pay the increased price of $32,000.00, and to have the sale processed through Mr Phillips' dealership. She went to the bank, collected the forms, and took them to Mr Constant for him and Mr Phillips to do what was necessary to process her loan. There is no suggestion that she was expressly told by the bank that it would not lend her the funds to purchase the car from a private seller. There is no evidence that she was aware that this amounted to a deception being played on the Bank of Nova Scotia. She would have been unaware of the alleged problem in the Registry of Bills of Sale. She would not have known about or understood the complicated arrangements that the bank had made with used car dealers to avoid the consequences of the problem. That would only come out much later in the evidence in court. Her position is that she left it to the experts to do whatever was proper to permit her to purchase the car, and that she only did what they advised.

[9] Ms Matthew filled out the loan application form to borrow the amount of $25,600.00, stating that she was purchasing the car from Mr Phillips, as advised by Mr Constant. She thereby

warranted that the car was free and clear from encumbrances. The bank duly received from Universal Auto and Appliances the necessary invoice. The invoice was on Mr Phillips' letterhead and signed by Mr Constant. This was proof that the car was owned by the dealership and was being sold by it. This invoice was required by the bank for it to be able to instruct its solicitor to prepare the bill of sale. It supplied the details of the engine number and suchlike needed for inclusion in the bill of sale. It was in the form that the bank was accustomed to receive when dealing with a reputable used car dealer whose sale of a vehicle it was financing. The form prepared by Mr Constant represented to the bank that the car in question was a 1995 Toyota Corolla owned by Mr Phillips' dealership, and that the purchase price was $32,000.00.

[10] In August 1997, the bank informed Ms Matthew that the loan funds were ready to be disbursed. She attended as instructed at the offices of the bank's solicitor, Mr Trevor Kendall. He explained to her the consequences of the bill of sale that he had prepared in favour of the bank as the Bills of Sale Act requires. She duly signed it and left it with him for registration and delivery of a copy to the bank. The bill of sale was for the loan amount of $25,600.00 repayable in 42 months at 8% interest to a total of $32,778.12. Ms Matthew provided the balance of the purchase price, and the bank issued a cheque for the full amount of $32,000.00 made payable to Mr Phillips. This cheque Mr Phillips duly presented to his bank for collection. Mr Christian attended at the premises of Mr Phillips to collect his cheque. Mr Phillips gave Mr Christian one of his car dealership cheques for the purchase price of $30,000.00. Mr Christian received his money. So did Mr Phillips. Ms Matthew drove away the car. In due course, the bank duly received its bill of sale from its solicitor.

[11] Mr Christian did not pay off the Barclays Bank loan. He kept the entire proceeds of the sale. The inevitable happened. Barclays Bank in due course instructed a bailiff to seize the car. By December, Ms Matthew had paid for the licensing and insurance of the car, and had also paid three loan instalments. At this point, the car was repossessed. Barclays Bank subsequently sold it to someone else. To rub salt into the wound, this purchaser borrowed the necessary funds from the same Bank of Nova Scotia, and gave a

bill of sale to the bank. This third bill of sale was prepared by a different solicitor. The car is now described as a 1993 Toyota Corolla. Perhaps the bank was misled and believed it was another Toyota Corolla.

[12] After the car was repossessed by Barclays Bank, Ms Matthew contacted Mr Phillips at the car dealership to complain. The bank put pressure on him as well. Mr Phillips initially discussed with Ms Matthew the replacement of the car with another that he would supply to her free of cost. The suggestion was that Ms Matthew would give a new security over the replacement car to cover the original loan. The bank had been prepared to go along with the arrangement. But, nothing came of these discussions. Mr Phillips declined to go through with the arrangement. The bank subsequently wrote Mr Phillips informing him that no loans would be issued in future to customers of the bank wishing to borrow funds to purchase used cars from him. Mr Phillips eventually closed down his used car dealership in Antigua.

[13] Ms Matthew was not able to raise funds to purchase another vehicle until August 1998. She declined to give the bank a security over it. The bank has been pressing her to repay the loan it had made to her, the proceeds of which had gone to Mr Christian and Mr Phillips. She has refused to pay any more of the instalments. The bank is without a security. Its bill of sale has turned out to be worthless. Ms Matthew has joined the bank to this suit. She holds it liable for negligence in having failed to discover the existence of the previous bill of sale held by Barclays. The bank, as we have seen, has counter sued her on the promissory note she gave when she received the loan funds.

[14] Mr Constant's evidence is that both he and Mr Phillips at all times made it clear to Ms Matthew that they were only preparing and forwarding the invoice to the bank as a gratuitous favour. He is insistent that at all times both he and Mr Phillips made it clear that the arrangement was not intended to create a contract between herself and Phillips Universal Auto and Appliances, and that Ms Matthew said to them that she clearly understood that. His position is that all the negotiations for the sale of the car were between Ms Matthew and Mr Christian directly. His and Mr Phillips' only role was to

prepare the invoice and submit it to the bank to ensure that the loan would be issued with the least difficulty. Whatever the facts, the point is not in issue, as Ms Matthew has not sued either of them on any contract made between them and her.

[15] The problem with the facts disclosed in the evidence in this case is that they are shot through with shady dealings and short cuts. Mr Phillips should never have played dice with his agency's reputation to facilitate this transaction. He put it all at risk for a mere $2,000.00. Mr Constant should never have persuaded Mr Phillips to allow his agency to be used in this way to help out his friend. His salary would still have been paid. Ms Matthew should never have permitted the scheme to have been set up for her assistance, without having first discussed it with the loan staff at the bank and got their approval, if they would have approved it, to the arrangements. Mr Christian should never have planned to defraud Barclays Bank and Ms Matthew in the way that he did. He must have known in advance the inevitable outcome of the action he was taking. The entire arrangement was a false pretence designed to induce the bank to release funds in circumstances which, if the bank had known about them, it would not have accepted.

[16] Ms Matthew's claim against the first three Defendants is couched in very restrictive language. Despite what she told the bank on the loan application form, the only person she alleges in her statement of claim sold the car to her is Mr Christian. She does not claim in contract against Mr Phillips for his sale of the car to her. Her claim is that she paid the purchase monies to Mr Constant and Mr Phillips as agents for Mr Christian. She sues Mr Constant and Mr Phillips, according to the second paragraph of her statement of claim, only for breach of a warranty as to Mr Christian's title.

THE CLAIM AGAINST MR CONSTANT

[17] Mr Constant's attorney, Mr John, submitted in closing argument that the default judgment entered since May 1998 by Ms Matthew against Mr Christian was a bar to her obtaining a further judgment against Mr Constant. The submission is that, Ms Matthew having obtained a judgment against Mr Christian, she had made an election to proceed against him and cannot proceed to a second judgment against Mr Constant in respect of the

identical cause of action. Mr Constant relies on the unreported Antiguan Court of Appeal judgment of John Hopkin v Robinson Lumber Co Ltd (CA 8 of 1998). He also relies on the Antiguan Court of Appeal judgment reported as Halstead (Donald) v Attorney General of Antigua and Barbuda (1995) 50 WIR 98. Whatever the merits of this argument, it is not contested. Ms Henry has made no reply to it.

[18] Mr Constant's attorney further submitted that Mr Constant was at no time the agent of Mr Christian. He submitted that there was no evidence that he had ever received any fee or commission from Mr Christian. He submitted that it was Ms Matthew and Mr Christian who had approached Mr Constant for assistance to facilitate the transaction. He submitted that the evidence was that it was only because of Mr Constant's long-standing friendship with Ms Matthew that he had agreed to assist her as much as possible in the purchase of the vehicle. His role was not that of agent, but of gratuitous facilitator. As a result, he submitted, Mr Constant cannot be sued by Ms Matthew for an alleged breach of the implied condition in the contract that Mr Christian had a good right and title to sell the car to her. Ms Henry, Ms Matthew's attorney, in reply relied on the judgment of Parker J in the Chancery Division in the case of Chapman v Smith [1907] 2 Ch 97. That case dealt in part with the question whether the misdescription in a deed of a landlord as being an agent could affect the right of an assignee from the landlord to enforce against a tenant a covenant running with the land. The judge concluded that the question whether a person expressing himself to contract as agent either for a named or an unnamed principal can himself be personally liable on the contract is in each case a question of construction having regard to the surrounding circumstances. I regret that I fail to see the relevance of this authority to the facts in this case.

[19] The law, according to Bowstead on Agency, 15th edition, at page 42, is that an agreement between principal and agent may be implied in a case where each has conducted himself towards the other in such a way that it is reasonable for the other to infer from that conduct consent to the agency relationship. The position of a dealer is always problematic. As Lord Morris of Borth-y-Gest put it in Branwith v Worcester Works Finance Ltd (1969) 1 AC 552, it is not possible to define the position of dealers in

terms which can be of general application. Issues as to agency are mainly to be determined as questions of fact. Lord Morris quotes from the earlier case of Mercantile Credit Co Ltd v Hamblin (1964) 3 All ER 592 to the effect that there is no rule of law that in a hire purchase transaction the dealer is never, or always is, acting as agent for the finance company or as agent for the customer. There is no need to attribute to him an agency in order to account for his participation in the transaction.

[20] If Mr Constant is to be deemed the agent of Mr Christian for the purposes of this case, then the further question is whether he can as agent be sued by Ms Matthew. The general rule on relations between agents and third parties is that in the absence of other indications, when an agent makes a contract, purporting to act solely on behalf of a disclosed principal, whether named or unnamed, he is not liable to the third party on it. The only person who can be sued on the contract at common law is the principal. This has been the rule at least since Montgomerie and others v United Kingdom Mutual Steamship Association Ltd (1891) 1 QB 371. A disclosed principal is a principal whether named or unnamed whose existence as principal is known to the third party at the time of the transaction. The question of joint liability arises only in tort. The general rule is that the principal is jointly and severally liable with the agent for every tort committed by the agent in the course of his employment. Ms Matthew's cause of action in this case is founded in contract, and not in tort. In any event, there is no shred of evidence that either Mr Constant or Mr Phillips ever warranted Mr Christian's title to Ms Matthew. No such warranty appears in the evidence or can be implied from the evidence.

THE CLAIM AGAINST MR PHILLIPS

[21] The case of Ms Matthew against Mr Phillips is not contested by evidence from Mr Phillips. He had filed a defence in which he denied that he had been the agent of Mr Christian or had ever warranted Mr Christian's title. He has not filed his witness statement as directed in case management, and he did not appear at the trial to give any evidence in support of his filed defence. If he had properly defended the case, he might well have had the benefit of similar argument as put forward on behalf of Mr Constant. If he had attended the trial in person, even though not represented by counsel, the court could have asked whether the

argument made on behalf of Mr Constant should not be applied to Mr Phillips equally. A party who fails to come to court to defend his case must expect it to go against him.

THE CLAIM AGAINST BANK OF NOVA SCOTIA

[22] In relation to the negligence claim against the bank, Ms Henry submitted that on the general neighbour principle in Donoghue v Stevenson [1932] AC 562 the bank owed a duty to Ms Matthew to ensure that the vehicle was free from encumbrances by conducting a search of the Registry of Bills of Sale. Lord Atkin in his judgment in that case had defined a neighbour for the purposes of the law of negligence as any person who is so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question. She submitted that the possibility of a prior encumbrance being in existence was an entirely foreseeable result of the bank's failure to conduct the appropriate search.

[23] Mr Simon on behalf of the bank made several submissions on the issue of whether the evidence disclosed negligence on the part of the bank towards Ms Matthew. One submission was that while it is accepted that Ms Matthew was not advised to retain her own attorney, the Bills of Sale Act, Cap 51, places a statutory duty on the solicitor preparing the bill of sale to explain the effect of the bill of sale to the borrower. It has not been suggested that Mr Kendall did not properly do so. Mr Simon submitted that the bank owed Ms Matthew no duty of care in the matter of the preparation, execution and registration of the bill of sale. The bank was seeking to protect its own interest, not that of Ms Matthew. If it failed to make the appropriate search in the Bills of Sale Registry, the bank was acting only against its own interest. The consequence was that its bill of sale would not have priority over a bill of sale registered earlier against the same property. A duty of care would only arise if the bank could reasonably be expected to foresee that Ms Matthew would be likely to be injured by its conduct: Hedley Byrne v Heller [1964] AC 465. In this case, Ms Matthew had suffered loss because she had failed to obtain a good title to the car. The bank had not been a party to the transaction. He argued that it had

only been granting the loan on her assurance that she had good title free from liens and encumbrances.

[24] I prefer the arguments of Mr Simon. There is no authority for the proposition that a lender owes a duty of care to the borrower to ensure that the seller of the goods being purchased with the borrowed funds has good title. I do not accept that in conducting or in failing to conduct a search of the Registry of Bills of Sale any party to a bill of sale has any duty to pass on any information found. Nor is there any liability to be ascribed to any such party for failure to carry out a search of the Registry of Bills of Sale. A search by a lender in the Registry of Bills of Sale is solely for the purpose of protecting the lender by its gaining the assurance that the chattel in question is not the subject of a prior bill of sale.

[25] There is one matter that was not raised, but it might be mentioned for the purpose of completion. From general commercial experience it is to be expected that the fees of the solicitor who prepares a bill of sale are paid by the borrower, not by the lender. It is a condition of every promissory note given to a bank that the expenses of the security documents are at the cost of the borrower. It might have been argued that, though the bill of sale in this case was required by the bank for its protection, it was the borrower who was the solicitor's client and to whom he was contractually bound. If such a solicitor had any duty to carry out a search in the Registry of Bills of Sale, that was a duty he owed to the borrower. It might be argued that, if there was any negligence in the preparation of the bill of sale resulting in loss and damage, an action might in certain circumstances lie against the solicitor preparing it, not the bank that was lending the funds in question. However, no such issue arises in this case for the court to determine.

THE COUNTERCLAIM AGAINST MS MATTHEW

[26] The Bank of Nova Scotia has not only denied negligence towards Ms Matthew, it has counterclaimed for the balance of the debt, interest, late fees, and costs due under the promissory note given by Ms Matthew. Ms Matthew has not filed any defence to this counterclaim. The only issue is the amount of the judgment that Bank of Nova Scotia is entitled to against Ms Matthew. The promissory note relied on by the bank has not been

properly completed. In particular, it does not indicate the date when the term ends, save that it appears to be some 40 months after 30 October 1997. The default rate of interest under the note is the same 8%. There will, therefore, be judgment against her on the counterclaim for the amount of $23,753.31 principal, late fees of $120.00, and interest thereafter on the above sum of $23,753.31 from the date of the end of the 40th month at the rate of 8% to the date of judgment, collection costs and commission of 10% of the above sums, and the prescribed costs of this action on the balance as of the date of this judgment.

[27] Given the above,

(a) there will be judgment:

(i) for Ms Matthew against Mr Phillips for the amount of the claim of $32,000.00 together with interest at 8% from the date of the writ until the date of judgment. She will be entitled to her prescribed costs;

(ii) for Bank of Nova Scotia against Ms Matthew for the sum of $23,873.31 debt together with interest at the rate of 8% from the end of the term of the loan to the date of judgment, and collection costs of $2,387.33, together with costs of suit on the prescribed costs basis;

(b) The claim of Ms Matthew against Mr Constant is dismissed. In exercise of the discretion given by the rules to the trial judge in relation to the costs of a successful party, and for the reasons earlier alluded to, there will be no order for costs;

(c) The claim of Ms Matthew against Bank of Nova Scotia is dismissed with no order as to costs;

Don Mitchell, QC
High Court Judge