

**EASTERN CARIBBEAN SUPREME COURT
SAINT CHRISTOPHER AND NEVIS
NEVIS CIRCUIT**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

Claim Number: **NEVHCV2021/0059**

Between

S.L.Horsford & Company Ltd

Claimant

-and-

Oral Mitchell

Defendant

Before: His Lordship Justice Patrick Thompson Jr.

Appearances: Ms. Sandra Hector of counsel for the Claimant
Mr. Kris Liburd of counsel for the Defendant

2022: May, 30th
July, 4th

JUDGMENT

Factual Background:

1. **Thompson, JR J:** On or about March 15th, 2017, the Defendant ("Mr. Mitchell") borrowed the sum of EC\$154,440.00 from the Claimant's company ("Horsford's"). The loan was for the purpose of purchasing a Nissan Urvan motorbus ("the bus") of which EC\$99,000.00 represented the price of the bus and EC\$55,440.00 represented the interest due under the loan.
2. Everyone agrees that Mr. Mitchell agreed to pay Horsford's the sum of EC\$1,838.57 per month as the agreed monthly loan payment.

3. Regrettably for the parties, Mr. Mitchell failed to keep up with the agreed payments. Horsford's, as they were entitled to do, repossessed the bus in or about October 2019. At the time that Horsford's repossessed the bus, Mr. Mitchell owed Horsford's EC\$93,744.75.
4. Horsford's obtained two valuations of the bus. The average of the two valuations was EC\$53,000.00 and this sum of EC\$53,000.00 was applied to the balance owed by Mr. Mitchell.
5. The bus was sold on March 30th, 2021 via private sale in St Kitts for EC\$39,524.79 [Horsford's, for reasons known only to them had credited the sum of EC\$53,000.00 to Mr. Mitchell's debt even before the sale of the bus and even after the bus was sold for EC\$39,524.79, Horsford's did not seek to recover the difference of EC\$13,475.21 between the sum credited and the sale price.
6. On or about April 19th, 2021, Horsford's filed a claim against Mr. Mitchell seeking to recover the following sums.

Balance owing on loan	-	EC\$40,744.75
Late fees	-	EC\$ 3,533.62
Court Fees	-	EC\$ 174.00
Legal Practitioner's fixed costs	-	<u>EC\$ 1,500.00</u>
Total	-	<u>EC\$45,952.37</u>

7. In his defence, Mr. Mitchell contended that he did not owe Horsford's the sums they were claiming for two reasons. Firstly, he argued that the bus was insured at EC\$100,000.00 at the time that it was repossessed by Horsford's. In his view, the bus was sold by Horsford's at a massive undervalue and Mr. Mitchell counterclaimed the sum of EC\$2,721.63 being the difference between the insurable value of EC\$100,000.00 and the sums owed by Mr. Mitchell to Horsford's.
8. Secondly, Mr. Mitchell contended that Horsford's were in breach of the duties they owed to him as mortgagee's exercising the power of sale. It was his contention that Horsford's did not take all such reasonable steps to obtain the true market value of the bus and that he was entitled to damages.

Court's analysis and findings:

9. It is not in dispute that Mr. Mitchell was required under the loan agreement to maintain and keep the bus insured under a comprehensive policy of insurance. The bus was thus initially insured in 2017 for the sum of EC\$143,910.00. In 2018 the bus was insured for the sum of \$120,000.00 and in 2019 the bus was insured for the sum of EC\$100,000.00.
10. This Court notes in passing that the bus was initially insured for a sum significantly more than the bus was purchased for (EC\$99,000 vs EC\$143,910.00). There are clear reasons as to why Mr. Mitchell and Horsford's would have appeared to agree to such an insurance policy. If for instance some harm had befallen Mr. Mitchell or the bus between 2017 and 2018 then the sum likely to have been paid by the insurance company would have gone a significant way towards the debt owed. The efficacy of this practice is not a matter that has to be resolved in these proceedings but the fact that the insurance value is expressed to be far in excess of the actual value of the bus is significant.

11. In this Court's view, this confirms that the insurable value of an asset is not necessarily and thus conclusively the true value of the asset. Justice of Appeal Barrow at paragraph 23 in **Isaac Peters v Grenada Electricity Services** confirmed as much.
12. Therefore, the insured value may provide useful evidence but is not determinative of the actual value of an asset. One need look no further than the actual insurance agreement which provided that **"please be reminded that this company's motor insurance policies are policies of indemnity only. As a result the actual value of your vehicle at the time of any accident will be taken into consideration in settling a claim. Please therefore appraise your property prior to renewal."**
13. This is not to say that a depreciating asset, such as a vehicle, cannot appreciate in value but there would have to be some evidence of how the asset had appreciated in value to justify its increased value. There was no evidence from Mr. Mitchell to explain how the bus was worth EC\$100,000.00, 2 years after it had been purchased for EC\$99,000.00.
14. Mr. Mitchell's counterclaim is premised on a finding that the bus was worth EC\$100,000.00. This court is unable to come to such a finding for the reasons set out above and as such Mr. Mitchell's counterclaim is dismissed with costs to the Claimant.
15. Implicit in Mr. Mitchell's counterclaim is an acceptance that he was indebted to Horsford's in the sum of EC\$93,744.75 as at the time the bus was repossessed. This Court must therefore determine whether Horsford's reasonably exercised its power of sale as mortgagee in determining what sum is owed by Mr. Mitchell to Horsford's.
16. The law is clear. The duty of the selling mortgagee was outlined by the late Lord Salmon in the case of **Cuckmere Brick Co Ltd v Mutual Finance Ltd [1971] 2 All E.R 633 at 643-644,646** that:

"It is well settled that a mortgagee is not a trustee of the power of sale for the mortgagor. Once the power has accrued, the mortgagee is entitled to exercise it for his own purposes whenever he chooses to do so. It matters not that the moment may be unpropitious and that by waiting a higher price could be obtained. He has the right to realise his security by turning it into money when he likes. Nor, in my view, is there anything to prevent a mortgagee from accepting the best bid he can get at an auction, even though the auction is badly attended and the bidding exceptionally low. Providing none of those adverse factors is due to any fault of the mortgagee, he can do as he likes. If the mortgagee's interests, as he sees them, conflict with those of the mortgagor, the mortgagee can give preference to his own interests, which of course he could not do were he a trustee of the power of sale for the mortgagor..... Given that the power of sale is for the benefit of the mortgagee and that he is entitled to choose the moment to sell which suits him, it would be strange indeed if he were under no legal obligation to take reasonable care to obtain what I call the true market value at the date of the sale. Some of the textbooks refer to the 'proper price', others to the 'best price'. Vaisey J in Reliance Permanent Building Society v Harwood-Stamper ([1944] 2 All ER 75 at 76, 77, [1944] Ch 362 at 364, 365), seems to have attached great importance to the difference between these two descriptions of 'price. My difficulty is that I cannot see any real difference between them. 'Proper price' is perhaps a little nebulous, and 'the best price' may suggest an exceptionally high price. That is why I prefer to call it 'the true market value'..... I accordingly conclude, both on principle and authority, that a mortgagee in exercising his power of sale does owe a

duty to take reasonable precaution to obtain the true market value of the mortgaged property at the date on which he decides to sell it. No doubt in deciding whether he has fallen short of that duty, the facts must be looked at broadly and he will not be adjudged to be in default unless he is plainly on the wrong side of the line.

17. Horsford's witness at trial on this issue was Ms. Latesha Bendeito. Ms. Bendeito confirmed that the bus went over to St Kitts and was sold in St Kitts via a private sale. Crucially she did not provide any details of the private sale. Essentially, it was her evidence that the bus when repossessed was kept by Horsford's in a garage area. The garage was covered at the top but the sides were open. The bus was kept by Horsford's at their property in area where vehicles were listed for sale.
18. It was Mr. Bendeito's evidence that the vehicle was advertised on Horsford's website but no copy of the advertisement was tendered in evidence. Ms. Bendeito was present when the bus was initially repossessed by Horsford's but accepts that she took no pictures of the condition of the bus when it was repossessed. In her view, the bus was in a 'tattered' condition when it was repossessed.
19. Mr. Mitchell's evidence was that he never saw the bus on the front lot at Horsford's or saw a 'for sale' sign on the bus or any advertisement with the bus on it. Stanley Grant (one of the two valuers) admitted in cross examination that it was possible that with effective advertising the bus could have been sold for more than it was sold for.
20. In Mr. Grant's view EC\$57,000.00 was a fair price for the bus when he examined it in February 2020. He arrived at that price not by assessing comparable prices for similar buses but took into account the cost of the bus plus its book value plus depreciation. Mr. Grant took into account the mileage on the bus and was of the view that the bus was in a fair condition. Finally, in answer to a question from the Court, Mr. Grant was of the view that in his professional opinion the bus could have been sold for a maximum value of EC\$65,000.00 and a minimum value of EC\$50,000.00.
21. This Court's makes the following findings. Firstly, each case is case sensitive and therefore it would be prudent to determine a range or bracket within which the bus could have been sold. Secondly, as a matter of law, the onus is on the mortgagor, in this case, Mr. Mitchell to demonstrate that the mortgagee failed in their duty to exercise the power of sale. Thirdly, in assessing whether Horsford's has complied with this duty this Court is required to consider the 'effort rather than the result' in determining whether Horsford's has complied with its duty. See per Madam Justice Actie at paragraph 8 of her judgment in Grenada Development Bank v Dexter Chance.
22. In assessing the nature of Horsford's efforts this Court is required to consider
 - (i) The method of marketing and whether the bus was exposed to the appropriate market for a sufficient period
 - (ii) Whether particulars of sale were circulated in the appropriate market
 - (iii) Whether expressions of interest were followed up with and
 - (iv) Whether there is any 'paper trail' outlining the steps taken by Horsford's in exercising the power of sale

23. At the outset, this Court has not been provided with any 'paper trail' outlining Horsford's efforts in exercising the power of sale. A paper trail is not mandatory but if one had existed it would have provided written confirmatory evidence of the steps taken by Horsford's. Emails, copies of advertisements or even screenshots from the Horsford's webpage could all have sufficed for the purpose of a paper trial. Even without a paper trial, detailed oral evidence of the chronological nature of the efforts made by Horsford's would have more than sufficed in this matter since the burden imposed on Mr. Mitchell is a high one.
24. In this Court's view, Ms. Bendeito was not best placed to speak to Horsford's efforts in this matter since the bus was eventually sold in St Kitts via private sale. Ms. Bendeito could only speak to the steps (such as they were) taken by Horsford's in Nevis. Additionally, the evidence provided to this Court of the method of marketing and advertising and circulation of the sale in the local market was scanty.
25. The fact that notices to pay off and the sale of distressed properties are routinely advertised on social media puts into square focus the paucity of the efforts made by Horsford's in this matter. This is not to say that every sale of a distressed bus requires extensive advertising of the kind undertaken in land sales but social media has simplified the advertising process. A blend of social media and/or website listings combined with traditional methods would have more than sufficed in this matter.
26. Ultimately, this court is satisfied that Mr. Mitchell has discharged the burden of demonstrating that Horsford's has failed to comply with their duty to take all reasonable steps to obtain the true market value of the bus. This finding is not the end of the matter since as a matter of law the sale is not set aside. See per Mr. Justice Glasgow at paragraph 38 of **RBTT Bank Grenada Ltd v Erron Williams**.
27. This Court has taken into account the evidence of Stanley Grant is of the view that the sum of \$60,000.00 represents an accurate market value of the bus at the time that Horsford's sought to exercise the power of sale. In this Court's view, EC\$65,000.00 would have been the 'best price' while the true market price is something more than EC\$50,000.00 but not as much as EC\$65,000.00.
28. This Court thus enters judgment for the Claimant as follows

Debt owing as at repossession	-	EC\$93,744.75
Less true market value	-	<u>EC\$60,000.00</u>
Subtotal	-	<u>EC\$33,744.75</u>
Plus late fees	-	EC\$ 3,533.62
Plus court fees	-	EC\$ 174.00
Total	-	<u>EC\$37,452.37</u>

Costs:

29. Both parties enjoyed partial success on this matter. Mr. Mitchell remains indebted to Horsford's for a substantial sum of money. Mr. Mitchell's reliance on the insured value in support of his counter claim was unreasonable. On the other hand this Court was clearly satisfied that Horsford's failed in

their exercise of their duty to obtain the true market value for the bus. In this Court's view, Horsford's are entitled to their prescribed costs as follows:

- (i) \$3,745.24 being two thirds of the prescribed costs of the value of the claim and;
- (ii) \$408.24 being the prescribed costs of the value of the counter claim

30. Finally, this Court wishes to put on record its gratitude to all counsel for their assistance in this matter.

**Patrick Thompson Jr
High Court Judge**

By the Court

Registrar