THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANTIGUA AND BARBUDA

CLAIM NO: ANUHCV 2006/0631

BETWEEN:

GEORGE PURCELL
trading as
HORTICO LANDSCAPING AND NURSERY

Claimant

and

GEORGE W. BENNETT BRYSONS & CO. LTD.
trading as
BRYSONS SHIPPING

Defendant

Appearances:

Mr. Kelvin John and Mr. Loi Weste for the Claimant
Ms. Fidela Corbin Lincoln for the Defendant

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2010: November 23
2011: May 20
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JUDGMENT

[1] **MICHEL, J.:** By Claim Form and Statement of Claim filed on 30th November 2006 the Claimant, George Purcell (trading as Hortico Landscaping and Nursery) claimed against the Defendant, George W. Bennett Brysons & Co. Ltd. (trading as Brysons Shipping) the following relief:

1. Damages in the sum of $85,523.46;
2. Interest pursuant to the Eastern Caribbean Supreme Court Act, Cap. 143 at such rate and for such period as the Court thinks fit;

3. Further or other relief as this Honourable Court deems fit;

4. Costs.

[2] By Defence filed on 1st February 2007 and amended on 2nd November 2007, the Defendant joined issue with the Claimant on his claim, while the Claimant in turn (by Replies filed on 15th March and 12th November 2007) joined issue with the Defendant on its Defence and Amended Defence.

[3] The trial of the matter took place on 23rd November 2010, with evidence given by the Claimant on his own behalf and by Mr. Nathan Dundas on behalf of the Defendant.

[4] In his witness statement, the Claimant stated that in or around the month of September 2000 he was contracted by Jolly Beach Resort to execute a landscaping project for the hotel to be completed by 25th December 2000; that in or around the month of October 2000 he was approached at Jolly Beach Resort by Ms. Jacqueline Wehner (representing the Defendant) regarding the shipping services being offered by the Defendant; that Ms. Wehner intimated to him that the Defendant was aware of his business practices of purchasing plants overseas and that the Defendant wished to be contracted as the sole shipping agents for his business; that Ms. Wehner provided him with her business contact card for use in contacting her if he should decide to conduct business with the Defendant; that on 26th November 2000 he travelled to Miami to purchase plants not available in Antigua and which were needed to complete the project for Jolly Beach Resort; that he purchased a quantity of live plants in Miami for the project, informed his Miami suppliers that he was using the services of the Defendant for the transfer of the plants to Antigua and gave Ms. Wehner's card to his suppliers; that the suppliers immediately contacted Ms. Wehner in his presence to make the necessary arrangements with the Defendant for the shipment of the plants to Antigua; that he returned to Antigua on 30th November 2000, made a further purchase of plants from the Miami suppliers and made full payment to the suppliers of the cost of the plants purchased.

[5] The Claimant also stated in his witness statement that on or about 12th December 2000 he was informed by the Defendant that the container with his plants had arrived in Antigua; that he made payment to the Defendant of the sum of $19,561.68 for freight and other handling charges with respect to the shipment to Antigua of a refrigerated container of plants; that after he had completed the necessary paperwork to have his container cleared from the port, he was informed by the Defendant's agents that there were no chassis available to load his cargo for onward transport to Jolly Beach Resort; that on several occasions between 12th December 2000 and 19th December 2000 he contacted Ms. Wehner to inquire of the availability of the chassis and was on each occasion assured by her that his cargo would be loaded onto the Defendant's chassis as soon as one was available; that on or about 19th December 2000 he was informed by Ms. Wehner that the chassis had been provided and that his cargo had been loaded onto the truck for delivery to Jolly Beach Resort; that the cargo was delivered to Jolly Beach Resort on or about 19th December 2000; that upon opening the container, it was discovered that the temperature in the container was alarmingly hot and a foul stench emanated from the plants in the container.

[6] The Claimant stated that he determined that the entire cargo had deteriorated irrecoverably and was wholly damaged; that he contacted Ms. Wehner to lodge a verbal complain regarding the damaged state of the cargo, whereupon Ms. Wehner assured him that he would be compensated by the Defendant for his loss and that she would send an investigator on site to investigate and record the evidence and quantum of his loss; that the investigator arrived on site on or about 20th December 2000 and took pictures of the damaged plants.

[7] The Claimant stated that he wrote to Mr. Dundas on 27th December 2000 informing him that he (the Claimant) had incurred loss in the amount of $85,523.46 as a direct result of the destruction of his cargo and demanded immediate compensation to avoid the continued application of a contractual penalty clause enforced against him by Jolly Beach Resort as of 25th December 2000 for his failure to honour his contractual obligations to them within the agreed time period; that he never received a response to his letter to Mr.

Dundas, but on several occasions between 27th December 2000 and 21st June 2001 he received verbal assurances from Mr. Dundas that the Defendant would compensate him for his loss; that on 21st June 2001 his lawyer wrote to Mr. Dundas demanding payment by the Defendant of the sum of $85,523.46, to which letter Mr. Dundas responded by facsimile letter dated 9th July 2001 that the claim for compensation had been submitted to Maersk Sealand in Madison New Jersey for their review and that the lawyer should contact the ship owners directly regarding the compensation claim; that by facsimile letter dated 17th July 2001 Mr. Dundas informed the Claimant's lawyers that Maersk Sealand had requested the provision of a copy of the delivery receipt or gate pass (which the Claimant had obtained from the Antigua Port Authority) to assist Maersk Sealand in determining the extent of their liability.

[8] The Claimant stated that by letter dated 20th April 2001 addressed to Hortico Landscaping & Nursery, Maersk Sealand declined liability for the loss that the Claimant had incurred as a result of the deterioration and destruction of his cargo; that attached to the letter was the temperature logs for the cargo between the 4th and the 14th of December 2000 and an independent surveyor's report from Taylor Engineering Services to Maersk Sealand advising that Maersk Sealand was not liable for the destruction of the contents of the cargo; that both the temperature log and the survey report definitively indicate that the cargo was not maintained at the agreed temperature at all material times while it was in the custody and control of the Defendant and, in particular, the surveyor's report indicates that as at 15th December 2000 (while the cargo was still in the Defendant's custody) there was no further power supply provided to the cargo to maintain its temperature at 68 degrees Fahrenheit.

[9] The Claimant stated that he was of the view that the Defendant – in direct breach of its express contractual obligations – failed and/or refused to maintain and preserve the cargo at the agreed temperature at all material times while the cargo remained in its custody and control; that a clear contract of bailment existed between the Claimant (as bailor) and the Defendant (as bailee) from 12th December 2000, when the cargo arrived in Antigua, until 19th December 2000, when he accepted delivery of the cargo; that since the Defendant

was a bailee for reward, it was in law under a duty to use due care and diligence in keeping and preserving the cargo entrusted to it upon its delivery in Antigua until the Claimant accepted delivery of the cargo; that the Defendant failed to exercise proper care and custody and, in particular, failed to maintain the agreed temperature of the cargo, with the result that the plants contained therein were damaged and destroyed and he has been deprived of them; that furthermore, in breach of its duty as bailee, the Defendant failed and/or refused to deliver the cargo to him in the same good order and condition as shipped.

[10] Under cross examination by Counsel for the Defendant, the Claimant testified that he has for some time been in the business of shipping goods from abroad and that it is optional for the consignee to take out insurance on his goods, but he would not say that it is normal for the consignee to do so.

[11] In his witness statement, Mr. Nathan Dundas stated that he was the Manager of Brysons Shipping and was authorized to give the witness statement on behalf of the Defendant. He stated that the Defendant was at all material times the agent for a Danish company trading under the name of Maersk Sealand and carrying on the business of shippers and forwarders; that on 13th December 2000 the Claimant contracted with Maersk Sealand for the shipment from Miami to Antigua of a 40 foot refrigerated container said to contain live plants; that the terms of the contract were contained in a Combined Transport Bill of Lading dated 13th December 2000; that pursuant to the contract, the Claimant paid to the Defendant, as agents for Maersk Sealand, the sum of $19,561.68 as the cost of the shipment to Antigua; that the Claimant's cargo was pre-carriaged by the Claimant's suppliers in Miami; that the temperature of the container was set by the Claimant's suppliers at 68 degrees Fahrenheit at the start of the voyage and neither the Defendant nor its principals at any time had any knowledge regarding the condition of the cargo as shipped; that once the temperature of the container has been set at the commencement of a voyage, the temperature remains unaltered for the remainder of the voyage; that at no time between the arrival of the carrier in Antigua and the handing over of the delivery documents to the Claimant did the Defendant adjust the temperature of the container.

[12] Mr. Dundas stated that it is the policy of the Defendant that once the cargo is offloaded from the vessel it remains the responsibility and in the custody of the Port and Customs authorities until it is picked up by the consignee; that the Defendant has no control over the cargo which it offloads from the respective vessels at the port of discharge once the cargo is in the custody of the Port and Customs authorities; that pursuant to clause 5 of the Bill of Lading "the Carrier undertakes responsibility from the place of receipt if named herein or from the port of lading to the port of discharge or the place of delivery if named herein," so that the Defendant's responsibility to the Claimant ended at the port of discharge upon delivery of the cargo to the port, since no place of delivery was named in the Bill of Lading; that the Claimant's delivery documents were delivered to him by the Defendant on 12th December 2000, as indicated by the Defendant's "PLEASE DELIVER" stamp which was placed in the bottom right side of the front cover of the Bill of Lading dated 13th December 2000; that once the cargo was discharged from the vessel by the Defendant it was placed in the custody of the Port Authority; that the cargo cleared Customs on 14th December 2000, as indicated by the "CLEARED CUSTOMS & EXCISE Antigua & Barbuda" stamp placed at the bottom left side of the Bill of Lading; that the Defendant was not under a duty of care with respect to the cargo after delivery at the port of discharge or at any time between delivery at the port of discharge and when the Claimant cleared Customs and picked up the cargo.

[13] In his witness statement Mr. Dundas stated that, pursuant to clause 3.2 of the Bill of Lading, the Defendant is exempt from liability for any loss and damage to the Claimant's cargo. He also stated that, by clause 27 of the Bill of Lading, all disputes arising thereunder are to be governed by the laws of the United States and, in particular, the United States Federal Court of the Southern District of New York. He also stated that, by clause 2 of the Bill of Lading, loss or damage which occurred between the time of receipt of the goods by the carrier at the port of loading and the time of delivery by the carrier at the port of discharge shall be determined in accordance with the US Carrier of Goods by the Sea Act, so that the claim should have been brought before the courts in the State of New York.

[14] In his oral testimony in Court, Mr. Dundas testified that after discharge of cargo on the vessel by the Defendant's stevedores, the cargo is handed over to Port Authority, which immediately assumes responsibility for and custody of the cargo, and the Defendant is not allowed thereafter to touch, tamper or interfere with the cargo; that in the case of refrigerated cargo, the Port Authority employs store clerks with responsibility to plug those containers into outlets provided by the Port and to monitor the temperatures that are prescribed and set as indicated on the Bill of Lading and the manifest provided to the Port Authority; that the Port charges a daily monitoring fee that is paid by the consignee; that the Port also charges a daily storage fee (once 6 days have passed) and this is to be paid by the consignee.

[15] Mr. Dundas testified that he disagreed with the Claimant that the delay in moving his cargo was the result of the delay by the Defendant in providing a chassis; that the contract of the Bill of Lading clearly indicated that the terms of shipment were from container yard to container yard, so that the Defendant, as agents of Maersk Sealand, were not responsible for moving the container from the container yard to any other location; that chassis are provided on a gratuitous basis if available at the time when they are needed by the consignee; that chassis are also available on rental from local trucking companies, which companies also transport the consignee's cargo from the Port to the consignee's premises and that these arrangements are made and paid for by the consignee.

[16] Mr. Dundas insisted that the Defendant did not deliver the Claimant's cargo on 19th December 2000 and that the Defendant is not involved in the transportation or delivery of containers to consignees' premises, except in the case where the Bill of Lading stipulates a door to door service as opposed to a container yard to container yard service.

[17] Under cross examination by Counsel for the Claimant, Mr. Dundas testified that he knows Jacqueline Wehner; that she is employed by the Defendant; that he was not present in October 2000 when Ms. Wehner spoke with the Claimant and he is not aware of what took place in that conversation; that he was not present on 27th November 2000 when the

Miami suppliers contacted Ms. Wehner via teleconference and he is not aware of what representations Ms. Wehner made during the teleconference meeting; that the Defendant has not called Ms. Wehner to give evidence on its behalf; that he does not agree that Ms. Wehner agreed with the Claimant to deliver his cargo to Jolly Beach Resort.

[18] Mr. Dundas agreed under cross examination that, throughout the period of carriage of the cargo aboard the vessel, it was agreed that the cargo had to be maintained at 68 degrees Fahrenheit; that the cargo arrived in Antigua on 12th December 2000; that it is normal business practice that when refrigerated cargo arrives at the Port, the Defendant would have an employee at the Port to ensure that the cargo is plugged in and maintained at the required temperature. He also testified under cross examination that when the Claimant's cargo arrived at Port in Antigua on 12th December 2000, the Defendant did not have employees at the Port to ensure that the container was plugged in and maintained at a temperature of 68 degrees Fahrenheit; he said that this was because the Port does that.

[19] At the conclusion of the trial, both parties were ordered to file written closing submissions on or before 14th December 2010 and judgment was reserved.

[20] Written closing submissions were filed on behalf of the parties on 14th December 2010.

[21] Reviewing the pleadings, the exhibits, the evidence, the submissions and the authorities, the Court makes the following findings:

1. That there was a contract entered into between the Claimant and Ms. Jacqueline Wehner on behalf of the Defendant, under the terms of which the Defendant undertook to cause to be shipped from Miami, Florida in the United States of America to St. John's, Antigua in the Caribbean, a refrigerated container of plants which would, upon arrival in Antigua, be delivered by the Defendant to the Claimant at Jolly Beach Resort. This finding is based on the unchallenged evidence of the Claimant that in or around October 2000 he was approached at Jolly Beach Resort by Ms. Wehner, as a representative of the Defendant, offering

the services of the Defendant for the shipping of plants purchased by him from overseas; that she left with him her business contact card for use if he decided to accept her offer to do business with the Defendant; that on 27th November 2000 he accepted Ms. Wehner's offer made on behalf of the Defendant when he purchased a quantity of plants from a supplier in Miami who, at his instance and in his presence, contacted Ms. Wehner via teleconference to make the necessary arrangements for the shipment of the plants to Antigua; that on 12th December 2000 he was informed by the Defendant that the container with his plants had arrived in Antigua and he paid the sum of $19,561.68 to the Defendant for freight and other handling charges with respect to the shipment to Antigua of the refrigerated container of plants; that the Defendant did not cause the container to be delivered at Jolly Beach Resort until 19th December 2000 when the Defendant had a chassis available with which to haul the container.

2. That it was an express term of the contract between the Claimant and the Defendant that at all stages of the shipment of the refrigerated container from Miami to Antigua and until delivery of the container to the Claimant, the Claimant's cargo would remain refrigerated at 68 degrees Fahrenheit. This too is based on the unchallenged evidence of the Claimant.

3. That upon delivery of the cargo at Jolly Beach Resort on 19th December 2000, it was discovered that the temperature in the container had not been maintained at 68 degrees Fahrenheit, that the plants had a foul stench and that the entire cargo was completely damaged. In particular, a report of a surveyor, apparently commissioned by the carrier of the cargo, Maersk Sealand, stated that as of 15th December 2000 there was no further power supply provided to the cargo to maintain its temperature at 68 degrees Fahrenheit. This finding too emerges from the unchallenged evidence of the Claimant as per the witness statement of the Claimant constituting his evidence in chief and on which he was not cross examined.

[22] The Court notes that Mr. Nathan Dundas gave evidence, via his witness statement and his testimony in Court, which contradicted some of the evidence of the Claimant, but the weight and credibility of this evidence was considerably diminished by the fact of the Claimant's witness statement having been filed over two and a half years preceding the trial, yet at the trial he was not asked a single question in cross examination on anything contained in his witness statement, no contrary position of the Defendant was put to him in cross examination, and the employee of the Defendant who he said had contracted with him on behalf of the Defendant and who Mr. Dundas admitted was still employed with the Defendant, was not called by the Defendant to contradict anything the Claimant said about the contract entered into by her on behalf of the Defendant. The Court therefore had little difficulty in preferring the evidence of the Claimant to that of the witness for the Defendant, who did not appear to have been involved in any of the dealings with the Claimant until after the claim had arisen.

[23] The Court accordingly finds that the Defendant has breached its contract with the Claimant by failing to maintain the cargo at the agreed temperature of 68 degrees Fahrenheit until the delivery of the cargo to the Claimant on 19th December 2000, resulting in the damage to the cargo and the loss to the Claimant of sums totaling $85,523.46.

[24] The Court finds it unnecessary to make a specific finding on the contract of bailment alleged by the Claimant to have also existed between the Claimant and the Defendant, but - if a finding on this issue is necessary - the Court finds that the Defendant did become the bailee of the Claimant's cargo during the period between the offloading of the cargo on 12th December 2000 and its delivery at Jolly Beach Resort on 19th December 2000, and that the Defendant breached the contract of bailment by failing to take proper care of the cargo by maintaining it at the agreed temperature whilst it was stored in the container.

[25] The Court also finds it unnecessary to make a specific finding on the contract of carriage of the cargo from Miami, Florida to St. John's, Antigua, but – if a finding on this issue is necessary - the Court finds that a specific contract of carriage may well have existed between Maersk Sealand and the Claimant, as evidenced by the Combined Transport Bill

of Lading dated 13th December 2000, which contract came about through the instrumentality of the Defendant as the local agent for Maersk Sealand. The contract of carriage would however have been determined on 12th December 2000 when the cargo was delivered to the container yard at the port in St. John's, Antigua, whereupon the contract between the Claimant and the Defendant would come into play. Any issues of jurisdiction or of limitation of liability arising under the contract of carriage between the Claimant and Maersk Sealand are not therefore material to the claim before the Court, which is a claim for breach by the Defendant of the contract between itself and the Claimant.

[26] This Court finds that the Defendant has breached the contract entered into between the Claimant and the Defendant in October-November 2000 for the shipment of the Claimant's plants from Miami, Florida to St. John's, Antigua and for delivery of same to the Claimant at Jolly Beach Resort in St. John's, and for the maintenance of the plants during shipment and until delivery at a temperature of 68 degrees Fahrenheit. The Claimant is accordingly entitled to damages for the losses incurred by him in purchasing, shipping, clearing, transporting and offloading the plants, which were irretrievably damaged by reason of the Defendant's breach of contract in failing to maintain the plants at the agreed temperature level. The Claimant is also entitled to interest from the date of his loss to the date of judgment and to his costs.

[27] The Claimant would be similarly entitled to damages, interest and costs if he had to rely on the contract of bailment between the Defendant and himself.

[28] The Court's Order is as follows:

1. The Defendant is hereby ordered to pay special damages to the Claimant in the sum of $85,523.46;
2. The Defendant shall pay interest to the Claimant on the sum of $85,523.46 at the rate of 2 ½ % per annum from 19th December 2000 until the date of this judgment, totaling $22,271.73.

3. The Defendant shall pay the Claimant's costs in accordance with Rule 65.5 of the Civil Procedure Rules 2000 in the sum of $25,169.28.

Mario Michel
High Court Judge