EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ANTIGUA & BARBUDA

ANUHCVAP2011/0023

BETWEEN:

GEORGE W. BENNETT BRYSON'S & CO. LTD.
trading as
BRYSON'S SHIPPING

Appellant

and

GEORGE PURCELL
trading as
HORTICO LANDSCAPING AND NURSERY

Respondent

Before:

The Hon. Dame Janice Pereira, DBE	Chief Justice
The Hon. Mde. Louise Esther Blenman	Justice of Appeal
The Hon. Mde. Gertel Thom	Justice of Appeal

Appearances:

Mr. Justin L. Simon, QC with him, Mr. Kwame Simon for the Appellant
Mr. Kelvin John with him, Mr. Loy Weste and Ms. Lisa John Weste for the Respondent

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2014: November 24;
2018: February 28.

Civil appeal – Bailment – Judge's failure to deal with cause of action pleaded – Whether learned judge erred in grounding his decision in breach of contract when bailment was pleaded – Whether bailment existed – Elements of bailment – Bailee's duty – Breach of duty

Mr. George Purcell, trading as Hortico Landscaping and Nursery, ("Mr. Purcell") was contracted by Jolly Beach Resort to execute a landscaping project to be completed by 25th

December 2000. On 26th November 2000, Mr. Purcell travelled to Miami to purchase plants for this project. Upon purchasing the plants, he and his Miami suppliers made arrangements with George W. Bennett Bryson's & Co. Ltd., trading as Bryson's Shipping ("Bryson's Shipping") for their transport to Antigua.

On or about 12th December 2000, Bryson's Shipping informed Mr. Purcell that his shipment had arrived at the port in Saint John's, Antigua and he paid them the freight and handling charges with respect to same. After Mr. Purcell completed the necessary paperwork to have the shipment cleared from the port, on inquiry, Bryson's Shipping informed him that there was no chassis available to load his cargo for onward transport to Jolly Beach Resort. On or about 19th December 2000, Ms. Jacqueline Wehner ("Ms. Wehner"), a representative of Bryson's Shipping, informed Mr. Purcell that the chassis had become available and on that same day the cargo was delivered to Jolly Beach Resort. However, upon opening the container, Mr. Purcell determined that the entire cargo had deteriorated irrecoverably and was wholly damaged.

After numerous unsuccessful attempts by Mr. Purcell to obtain compensation from Bryson's Shipping and its principal, Maersk Sealand, Mr. Purcell brought a claim in bailment against Bryson's Shipping. He alleged that a contract of bailment existed between himself (as bailor) and Bryson's Shipping (as bailee) from 12th December 2000, when the cargo arrived in Antigua, until 19th December 2000, when he accepted delivery of the cargo, and that Bryson's Shipping breached its duty as bailee in failing to deliver the cargo to him in the same good order and condition in which it was shipped. He further alleged that as bailee Bryson's Shipping failed to maintain and preserve the cargo at the agreed temperature while it remained in its custody and control.

At trial, the learned judge found that Bryson's Shipping was liable for breach of contract. The learned judge found it unnecessary to make a specific finding in relation to the alleged contract of bailment, but that if a finding on the issue were necessary, he would hold that Bryson's Shipping did become the bailee of Mr. Purcell's cargo during the period of the offloading of the cargo and its delivery at Jolly's Beach Resort; and that Bryson's Shipping therefore 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 at the port. The learned judge ruled that as a result of Bryson's Shipping's breach of contract in failing to maintain the plants at the agreed temperature, Mr. Purcell was entitled to damages for the loss he had incurred, interest from the date of his loss to the date of the judgment and costs.

Bryson's Shipping being dissatisfied with the decision of the learned judge, appealed. The main issues for this Court's consideration were whether the learned trial judge erred in making findings of law and fact on breach of contract when the issue that was joined was bailment and whether a relationship of bailment existed between Bryson's Shipping and Mr. Purcell.

Held: allowing the appeal, setting aside the judgment of the learned trial judge and awarding costs in the appeal to Bryson's Shipping in the sum of $16,779.52, being two-thirds of the costs in the court below, that:

1. It is a rule of pleadings that a party is bound by his pleadings unless he is allowed to amend them. It is the duty of the court to firstly examine the pleadings and then to decide the case on the basis of the pleadings. The court is bound by the parties' pleadings and can only adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. In the present case, the learned judge overstepped his mandate in crafting and ruling on an issue not pleaded nor addressed by the parties, namely breach of contract, and using it as the basis upon which to grant Mr. Purcell's claim for breach of duty in bailment. Accordingly, the learned judge erred in determining the case on matters that were not properly before him.

   South East Asia Energy Holding AG v Hycarbex-American Energy Inc SKBHCVAP2016/0015 (delivered 4th December 2017, unreported) followed; **Cedric Liburd v Eugene Hamilton et al** SKBHCV2010/0020 (delivered 13th October 2010, unreported) applied; **Yorkshire Provident Life Assurance Co v Gilbert & Rivington** [1895] 2 QB 114, 152 considered; **Jones v National Coal Board** [1957] 2 QB 55 applied; **London Passenger Transport Board v Moscrop** [1942] 1 All ER 97, 105 considered; **Hadmor Productions v Hamilton** [1983] 1 AC 191, 233 considered.

2. A bailment arises where the bailee is voluntarily in possession of property belonging to the bailor. A bailment for reward confers a mutual benefit on the parties, usually a monetary payment in exchange for some service to the goods. In a gratuitous bailment, the bailor agrees to take possession of and cares for the goods of another, on terms that the custody is to be unrewarded. In order to prove that a bailment exists, and therefore that the bailee had a duty to reasonably protect the property, the bailor must show that the actual or constructive possession of the property was passed to the bailee, and that the bailee knowingly accepted possession and/or control of the property.

   Coggs v Bernard [1558-1774] All ER Rep 1 applied; **Joseph Travers & Sons Ltd. v Cooper** [1915] 1 K.B. 73 considered.

3. In this case, possession and control of the place at which Mr. Purcell's cargo was kept was retained by the Antigua and Barbuda Port Authority and Bryson's Shipping did not own, operate or have unfettered access to the location. Thus, the cargo was not under the control of Bryson's Shipping, its servants or agents, nor did Bryson's Shipping have title to or right to possess the goods, since ownership remained in Mr. Purcell. Furthermore, there is no evidence as to when the alleged bailment was created, any evidence of its terms or of consideration passing from Mr. Purcell to Bryson's Shipping under this alleged bailment, or of steps taken by the parties in furtherance of the alleged bailment. Therefore, in the circumstances, there was no bailment for reward nor was there a gratuitous bailment.

4. Mr. Purcell's own evidence that he had completed the necessary paperwork to have his container cleared as well as the indorsement on the bill of lading shows that Mr. Purcell accepted delivery of his cargo and that the Port Authority released his goods to him upon satisfaction of all of the requirements of the Antigua and Barbuda Customs and Excise department on 14th December 2000. The agreement between Mr. Purcell and Bryson's Shipping taken at its highest can only be considered to be a request for transport of his cargo to Jolly Beach Resort. This request for transport does not in itself create a bailment and Mr. Purcell was free to arrange alternative means of transportation when Bryson's Shipping informed him that they had no chassis available to load his cargo for transport to Jolly Beach Resort.

5. A determination as to when the property in question was damaged is crucial in a bailment claim. If the property is damaged while in the bailee's possession, there is a presumption that he is at fault and the bailor can bring action against him in either contract or in tort. However, based on the facts in the present case, it is uncertain as to whether the damage occurred to the cargo in transit from Miami and before its discharge to the port in Antigua, or whether the damage occurred after the discharge of the cargo to the port in Antigua. Having failed to prove that the cargo was damaged while in the possession of Bryson's Shipping, Bryson's Shipping cannot be held responsible for the damage and loss Mr. Purcell suffered.

Joseph Travers & Sons Ltd. v Cooper [1915] 1 K.B. 73. applied.

JUDGMENT

Introduction

[1] **BLENMAN JA**: This is the judgment of the Court. This is an appeal from the decision of the learned trial judge made on 20th May 2011 in which he held that George W. Bennett Bryson's & Co. Ltd., trading as Bryson's Shipping ("Bryson's Shipping") breached its contract with George Purcell, trading as Hortico Landscaping and Nursery, ("Mr. Purcell"). By his claim form and statement of claim, Mr. Purcell claimed for the loss and damage he suffered as a result of Bryson's Shipping's breach of duty as bailee of his cargo and failure to deliver same to him in good order and condition as shipped. It is noteworthy that Mr. Purcell in his pleadings did not claim for breach of contract but framed his claim in bailment.

[2] We now propose to refer to the factual background in order to provide some context.

Background Facts

[3] Mr. Purcell was contracted by Jolly Beach Resort to execute a landscaping project for the hotel to be completed by 25th December 2000. On or around October or November 2000, Ms. Jacqueline Wehner ("Ms. Wehner"), a representative of Bryson's Shipping approached him regarding the shipping services offered by the company. Ms. Wehner intimated to Mr. Purcell that her company was aware of his business practice of purchasing plants overseas and that it desired to be contracted as the sole shipping agents for his business.

[4] On 26th November 2000, Mr. Purcell travelled to Miami to purchase plants for the Jolly Beach Resort project. Upon purchasing the plants, he and his Miami suppliers made arrangements with Bryson's Shipping for their transport to Antigua.

[5] On or about 12th December 2000, Bryson's Shipping informed Mr. Purcell that his shipment had arrived and he paid them the freight and handling charges with respect to same. After Mr. Purcell completed the necessary paperwork to have the shipment cleared from the port, on inquiry, Bryson's Shipping informed him that there was no chassis available to load his cargo for onward transport to Jolly Beach Resort. On or about 19th December 2000, Ms. Wehner informed Mr. Purcell that the chassis had become available and on that same day the cargo was delivered to Jolly Beach Resort. However, upon opening the container, it was very hot and a foul stench emanated from the plants therein. Upon inspection, Mr. Purcell determined that the entire cargo had deteriorated irrecoverably and was wholly damaged.

[6] Mr. Purcell alleged that he immediately made a verbal complaint to Ms. Wehner regarding the damaged state of the cargo whereupon she reassured him that he would receive compensation from Bryson's Shipping for his loss. On 27th

December 2000, Mr. Purcell wrote to the manager of Bryson's Shipping, Mr. Nathan Dundas ("Mr. Dundas"), informing him of the loss had he incurred in the amount of $85,523.46 as a direct result of the destruction of his cargo and demanded immediate compensation. Mr. Purcell claimed that he received no written response from Bryson's Shipping, however on several occasions between 27th December 2000 and 21st June 2001, he received verbal assurances from Mr. Dundas that Bryson's Shipping would compensate him for his loss. No compensation forthcoming, on 21st June 2001, Mr. Purcell's attorney-at-law wrote to Mr. Dundas demanding payment by Bryson's Shipping of the sum of $85,523.46, to which letter Mr. Dundas responded by facsimile letter indicating that the claim for compensation had been submitted to Bryson's Shipping's principal, Maersk Sealand for their review and that Mr. Purcell's attorney should contact the ship owners directly regarding the compensation claim.

[7] By letter dated 20th April 2001 addressed to Hortico Landscaping & Nursery, Maersk Sealand denied liability for the loss incurred by Mr. Purcell. Attached to the letter were the temperature log for the cargo between 4th and 14th December 2000 and an independent surveyor's report to Maersk Sealand advising that Maersk Sealand was not liable. Both the temperature log and the survey report indicated that the cargo was not maintained at 68 degrees Fahrenheit. The surveyor's report indicated that as at 15th December 2000 there was no further power supply provided to the cargo to maintain its temperature at 68 degrees Fahrenheit.

[8] On 29th November 2006, Mr. Purcell brought a claim against Bryson's Shipping in which he alleged, among other things, that Bryson's Shipping failed to maintain and preserve the cargo at the agreed temperature while it remained in its custody and control and that a contract of bailment existed between Mr. Purcell (as bailor) and Bryson's Shipping (as bailee) from 12th December 2000, when the cargo arrived in Antigua, until 19th December 2000, when he accepted delivery of the cargo and further alleged that Bryson's Shipping breached its duty when it failed to

deliver the cargo to Mr. Purcell in the same good order and condition in which it was shipped.

[9] It is important to briefly refer to the relevant aspects of the judgment below.

Judgment Below – Findings

[10] Bearing in mind that the claim was one for bailment, at the trial of the matter, the learned trial judge found that Bryson's Shipping was liable for breach of contract. In the judgment, the learned trial judge made the following findings[1] based on what he deemed as the unchallenged evidence of Mr. Purcell:

(i) That there was a contract entered between Mr. Purcell and Ms. Wehner acting on behalf of Bryson's Shipping, under the terms of which Bryson's Shipping undertook to cause to be shipped from Miami, Florida in the United States of America to Saint John's, Antigua a refrigerated container of plants which would, upon arrival in Antigua be delivered to Mr. Purcell at Jolly Beach Resort.

(ii) That it was an express term of the contract between Mr. Purcell and Bryson's Shipping that at all stages of the shipment of the refrigerated container from Miami to Antigua and until the delivery of the container to Mr. Purcell, that his cargo would remain refrigerated at 68 degrees Fahrenheit.

(iii) 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 the agreed temperature and that the entire cargo had been completely damaged. Further, based on the report of a surveyor commissioned by Maersk Sealand, as of 15th December 2000, no further power supply was provided to the cargo to maintain its temperature.

[1] See paragraph 21 of the judgment in the court below.

[11] In the judgment, the learned trial judge indicated that he had found it unnecessary to make a specific finding in relation to the contract of bailment that Mr. Purcell pleaded to have existed between Bryson's Shipping and himself. The trial judge stated however that if a finding on the issue is necessary, he would hold that Bryson's Shipping did become the bailee of Mr. Purcell's cargo during the period of the offloading of the cargo on 12th December 2000 and its delivery at Jolly's Beach Resort on 19th December 2000; and that Bryson's Shipping thus 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.[2]

[12] In the judgment, the learned trial judge stated also that he found it unnecessary to make a specific finding on the contract of carriage of the cargo from Miami, Florida to St. John's, Antigua. He however stated that if a finding in relation to same is necessary, he would find that a specific contract may well have existed between Maersk Sealand and Mr. Purcell, as evidenced by the Combined Transport Bill of Lading dated 13th December 2000, which came about due to Bryson's Shipping's position as the local agent for Maersk Sealand. The learned trial judge noted however that such a contract would have been determined on 12th December 2000 when the cargo was delivered to the port in Antigua whereupon the contract between Mr. Purcell and Bryson's Shipping would come into play.[3]

[13] In the determining the case the learned trial judge concluded that Bryson's Shipping breached the contract it entered with Mr. Purcell in October-November 2000 for shipment of Mr. Purcell's plants from Miami, Florida to St. John's, Antigua and for delivery of same to Mr. Purcell at Jolly Beach Resort in St. John's and for the maintenance of the plants during shipment until delivery at a temperature of 68 degrees Fahrenheit. The learned trial judge ruled that Mr. Purcell was on this basis entitled to damages for the loss suffered by him in purchasing, shipping, clearing, transporting and offloading the plants, which were irrecoverably damaged

[2] See paragraph 24 of the judgment in the court below.
[3] See paragraph 25 of the judgment in the court below.

due to Bryson's Shipping's breach of contract in failing to maintain the plants at the agreed temperature. The learned trial judge awarded to Mr. Purcell interest from the date of his loss to the date of the judgment and costs.[4]

Grounds of Appeal

[14] Bryson's Shipping being dissatisfied with the decision of the learned judge appealed his decision. Though formulating seven grounds of appeal, with no disrespect intended to learned Queen's Counsel, the same can be conveniently crystallised as follows:

Whether the learned trial judge erred in making findings of law and fact on breach of contract when the issue that was joined was bailment.

Appellant's Submissions

[15] Learned Queen's Counsel Mr. Justin Simon for Bryson's Shipping argued that Mr. Purcell's entire claim was based on a contract of bailment. He advocated that in light of this, the learned trial judge's omission to consider the evidence and submissions made on this issue and make a finding on when the damage occurred amounted to an error in law since firstly, the issues of bailment clearly arose from the pleadings; secondly, a finding on the same was crucial to a determination of the issues in dispute between the parties; and thirdly, a finding could have materially affected the outcome of the case.

[16] In addition, Mr. Simon, QC complained that the learned trial judge made findings of fact that were not open to him based on the evidence that was adduced by the claimant. In this regard Mr. Simon, QC pointed out that the learned trial judge's finding that the failure by Bryson's Shipping to maintain Mr. Purcell's cargo at 68 degrees Fahrenheit is the cause of its damage runs contrary to very expert evidence upon which Mr. Purcell relied and fails to consider that Mr. Purcell did not discharge the evidentiary burden with respect to this claim. He stated that in the

[4] See paragraph 26 of the judgment in the court below.

report dated 5th February 2001 prepared by chartered engineers Taylor Engineering Agencies Limited ("Taylor Engineering") and tendered by Mr. Purcell, the surveyor determined that he could not agree with a conclusion that identifies temperature as being the cause of damage to the plants. Learned Queen's Counsel pointed out that the report indicated that on a balance of probabilities the damage to the plants was more likely to be a combination of factors (which the expert identified such as age of the plants and lack of water) as opposed to temperature.

[17] Mr. Simon, QC was of the view that a finding as to when Mr. Purcell's cargo was damaged is also crucial to the determination of the claim for bailment, as based on the facts before the court, there was a dispute as to whether the damage occurred during the voyage of the goods from Miami and before its discharge to Antigua, or whether the damage occurred after the discharge of the cargo to the port in Antigua on 12th December 2000.

[18] Learned Queen's Counsel Mr. Simon reminded the Court that in his claim form Mr. Purcell pleaded 'loss and damage caused as a result of the breach of the Defendant's duty **as bailee** of the Claimant's cargo' (emphasis added). He submitted that Mr. Purcell pleaded that after the discharge of the cargo in Antigua on 12th December 2000 Bryson's Shipping became bailee of the cargo and had a duty to care for the same until delivery, despite making no assertion as to when the goods were damaged.

[19] Mr. Simon, QC posited that the bill of lading applied if the goods were damaged during the voyage and before discharge at the port in Antigua. He argued however that after discharge of the cargo in Antigua on 12th December 2000, the bill of lading ceased to apply and Bryson's Shipping did not become the bailor of Mr. Purcell's cargo since a crucial element of bailment was 'possession', and possession was by that time with the Antigua and Barbuda Port Authority (the "Port Authority").

[20] Mr. Simon, QC contended that there is no evidence of steps taken by the parties in furtherance of an alleged contract for Bryson's Shipping to receive and care for the cargo after delivery to Antigua and until delivery was accepted by Mr. Purcell. He submitted that in addition to there being no evidence of when this contract was formed, there is also no evidence that money was paid under this alleged contract of bailment as the only sum pleaded by Mr. Purcell was $19,561.68 for shipment of his cargo. Learned Queen's Counsel Mr. Simon posited that in the circumstances there was no bailment for reward.

[21] As it relates to the existence of a gratuitous bailment, specifically a bailment by deposit, Mr. Simon, QC submitted that a key element is that the 'actual or constructive possession' of the chattel must be transferred by the bailor to the bailee. Relying in part on the oral evidence of Mr. Dundas, Learned Queen's Counsel Mr. Simon maintained that the goods were in the possession of the Port Authority upon discharge as, inter alia, Bryson's Shipping did not have unfettered access to the premises operated and controlled by the Port Authority; it was the Port Authority's responsibility to ensure that the containers stored on the premises were monitored and that reefer containers were plugged into outlets they provided; the Port Authority released Mr. Purcell's goods to him upon satisfaction of all of the requirements of the Antigua and Barbuda Customs and Excise department; at no time was there a transfer of possession of the cargo from Maersk Sealand to Bryson's Shipping, nor was there a transfer of possession from Mr. Purcell as owner of the goods to Bryson's Shipping; and the cargo was not under the control of Bryson's Shipping, its servants or agents nor did Bryson's Shipping have title to or right to possess the goods since ownership remained in Mr. Purcell.

[22] Mr. Simon, QC asserted that in the absence of the essential element of 'possession', no contract of bailment could have been created between Mr. Purcell and Bryson's Shipping in respect of the cargo once the same was discharged at the port in Antigua. He concluded that in the circumstances the learned trial judge fell into error by not making a proper determination on the crucial issue of bailment

and making findings that were clearly not open to him in relation to breach of contract.

Respondent's Submissions

[23] Learned counsel Mr. Weste argued that the learned trial judge did not err in his treatment of the claim and that this Court should not interfere with the decision. The main thrust of his argument was that the learned trial judge was correct in holding that Bryson's Shipping had breached the contract that it had made with Mr. Purcell.

[24] Mr. Weste asserted that the indisputable facts of the case are that the plants were healthy when packed in Miami, and were destroyed by the time of delivery. He maintained that throughout the period of time when the cargo was destroyed, the plants were in the custody, care and control of Bryson's Shipping. He submitted that Bryson's Shipping having undertaken to have the cargo shipped and delivered, it is immaterial to the determination of the case to pinpoint the precise moment that the cargo was destroyed. He argued that Bryson's Shipping's assertion regarding the need for an assessment of when the cargo was damaged serve only to 'muddle the waters' and distract from the simple fact that the cargo was in their possession when same was damaged.

[25] In answer to the complaint that the learned judge made findings of fact that were not open to him based on the evidence that Mr. Purcell had adduced, Mr. Weste contended that Taylor Engineering is not an expert in plant life and that the survey provided by them was only relied upon by Mr. Purcell to the extent that it shows Bryson's Shipping's failure to maintain the cargo at the required temperature at all stages of the shipment and until delivery to Mr. Purcell at Jolly Beach as per the express terms of their contractual agreement. He stated that the report indicated that the cargo was not maintained at 68 degrees Fahrenheit while it was en route to Antigua and that there were losses of power on numerous occasions, two such occurrences on 8th December 2000 and 12th December 2000, for four and five

hours, respectively. Mr. Weste reminded this Court that the cargo was delivered to Mr. Purcell 7 days after its arrival in Antigua and that according to the report the cargo remained without power from 15th December 2000 until delivery to Mr. Purcell.

[26] Learned counsel Mr. Weste pointed out that Mr. Dundas admitted on cross-examination that it was normal business practice that when a reefer cargo requiring a power supply to maintain its contents at a specific temperature arrives at the port in Antigua that the employee of Bryson's Shipping stationed at the port must ensure that the cargo is plugged in at the port until delivery to the customer. Learned counsel Mr. Weste opined that inherent in this admission is the fact that once the cargo arrived at the port, Bryson's Shipping assumed responsibility to ensure that the cargo was maintained at the desired temperature until delivery to Mr. Purcell.

[27] Learned counsel Mr. Weste argued that in light of Bryson's Shipping's admissions and Taylor Engineering's report, the inescapable conclusion is that Bryson's Shipping was under a duty to ensure that at all stages of the shipment, particularly up until delivery, that Mr. Purcell's cargo would remain refrigerated at 68 degrees Fahrenheit. He submitted that the learned trial judge was thus entitled to conclude based on the totality of the evidence that the failure to maintain the cargo at the requisite temperature resulted in its destruction.

[28] Learned counsel Mr. Weste posited that the only significant issue was that the cargo was in the possession of Bryson's Shipping and was destroyed while in their possession. He argued that the onus was on Bryson's Shipping at trial to give an alternative and plausible reason for the destruction of the plants to absolve itself of responsibility and such reasons were not provided to the court. He contended that as the cargo was in the possession of Bryson's Shipping, the evidentiary burden of proof was on them to show that the cargo was not destroyed due to any conduct on its part. Mr. Weste concluded that based on the circumstances, Bryson's

Shipping is without more accountable for the destruction of the cargo and that accordingly the learned trial judge did not err in coming to his decision.

Discussion and Analysis

[29] Upon carefully reviewing the submissions of both learned counsel, as well as the pleadings, evidence and judgment in the court below, the crux of the appeal is whether the learned trial judge erred in his treatment of the evidence and submissions made on the issue of bailment, or, put differently, whether the trial judge erred in grounding his decision in breach of contract when Mr. Purcell did not plead breach of contract as a cause of action neither did he pursue that in his claim. It is clear that the issue that was joined between the parties was one of bailment.

[30] The legal principles regarding the importance of pleadings are well-settled by authorities. It is a rule of pleadings that a party is bound by his pleadings unless he is allowed to amend them, and he is therefore bound by his particulars, which represent part of the pleading under which they are served.[5] In the case of **Spedding v Fitzpatrick**[6] Cotton LJ held that '[t]he object of particulars is to enable the party asking for them to know what case he has to meet at the trial, and so to save unnecessary expense, and avoid allowing parties to be taken by surprise.'

[31] In **London Passenger Transport Board v Moscrop**, Lord Russell of Killowen had this to say:

> "Any departure from the cause of action alleged for the relief claimed in the pleadings should be preceded, or, at all events, accompanied, by the relevant amendments, so that the exact cause of action alleged and relief claimed shall form part of the court's record, and be capable of being referred to thereafter should necessity arise. Pleadings should not be 'deemed to be amended' or 'treated as amended'. They should be amended in fact."[7]

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[5] See: Yorkshire Provident Life Assurance Co. v Gilbert & Rivington [1895] 2 QB 114,152.
[6] (1888) 38 Ch. D. 410, 413.
[7] [1942] 1 All ER 97, 105.

[32] In the St. Christopher and Nevis election petition case of **Cedric Liburd v Eugene Hamilton et al**,[8] the High Court referred to **Yorkshire Provident Life Assurance Co v Gilbert & Rivington**[9] in which Lindley LJ discussed the effect of particulars:

> "I take it the effect of these particulars is this, that the issues to be tried are limited by these particulars in the first instance. I do not mean to say that leave cannot be obtained to add to the particulars – of course it can; but the moment these particulars are delivered, and until some further order is obtained for the delivery of further particulars, the effect of delivering the particulars is to cut down the matters in question in the action to the particulars."

[33] In short then, the function of pleadings is to "give fair notice of the case which has to be met[10] and "to define the issues on which the court will have to adjudicate in order to determine the matters in dispute between the parties."[11] It is duty of the court to firstly examine the pleadings and then to decide the case in view of, or more properly, on the basis of the pleadings. In the present case, as alluded to earlier, it is immediately apparent from Mr. Purcell's pleadings that the substance of his claim was that the loss and damage he suffered was as a result of Bryson's Shipping's breach of duty as bailee of his cargo in its failure to exercise proper care and custody of said cargo. Mr. Purcell had not pleaded breach of contract in his claim form nor in his statement of claim; he based his entire claim on breach of duty in bailment. This Court is in complete agreement with learned Queen's Counsel Mr. Simon that proper consideration of the submissions and evidence on bailment was crucial to a determination of the issues in dispute between the parties and could have materially affected the outcome of the case. In our opinion, it was fundamentally unfair to Bryson's Shipping for the learned trial judge to find in favour of Mr. Purcell on the basis of a breach of contract without that cause of action having been specifically pleaded as it deprived the parties of the opportunity to make their case on that issue.

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[8] SKBHCV2010/0020 (delivered 13th October 2010, unreported).
[9] [1895] 2 QB 114,152.
[10] Esso Petroleum Co. Ltd v Southport Corporation [1955] 3 All ER 864.
[11] Halsbury's Laws of England 4th edition. Vol. 36: Pleading, para. 5. 'Function of pleadings'.

[34] The learned trial judge's failure to properly deal with the matter as pleaded and to instead base his decision on a matter that was not pleaded was indeed a grave error that resulted in a miscarriage of justice. The dicta of Lord Diplock in **Hadmor Productions v Hamilton**[12] is very instructive on this point:

> "Under our adversary system of procedure, for a judge to disregard the rule by which counsel are bound, has the effect of depriving the parties to the action of the benefit of one of the most fundamental rules of natural justice: the right of each to be informed of any point adverse to him that is going to be relied upon by the judge, and to be given the opportunity of stating what his answer to it is".

[35] Applying the above principles, it is clear that by unilaterally framing the issue of breach of contract for determination that was not pleaded nor responded to by the parties, the learned trial judge fell into error. In **South East Asia Energy Holding AG v Hycarbex-American Energy Inc**,[13] this Court held that it was wrong for the court below to have decided an issue that was neither raised on the pleadings nor argued before it.

[36] We are fortified in this position by an article written by Sir Jack Jacob in the law journal Current Legal Problems entitled "**The Present Importance of Pleadings**"[14] where at pages 174-175 the author stated that:

> "As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings […]. For the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without the leave of the court. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. **The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties**. To do so would be to enter upon the realms of speculation and perhaps of even fancy. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim

[12] [1983] 1 AC 191, 233.
[13] SKBHCVAP2016/0015 (delivered 4th December 2017, unreported).
[14] Current Legal Problems (1960) Volume 13 Issue (1) 171.

> or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice. The court does not provide its own terms of reference or conduct its own enquiry into the merits of the case, but accepts and acts upon the terms of reference which the parties have chosen and specified in their pleadings. (emphasis added).

[37] If any further support for this view is needed, it is found in the dicta of Lord Denning MR in **Jones v National Coal Board**,[15] the seminal decision on the duty of a judge to refrain from any form of advocacy in his treatment of proceedings. In this case, Lord Denning stated:

> "In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries."

[38] Lord Denning here was making reference to the primary difference between an adversarial system of justice, as we have in the Eastern Caribbean, in which the judge is or ought to be more of an impartial umpire and the inquisitorial system,[16] where the judge is an active investigator in examining evidence and seeking truth. In explaining the role of judge in the trial of a civil matter, his Lordship said:

> "The judge's part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevances and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the robe of an advocate; and the change does not become him well."[17]

[39] It is trite law that a party is bound by its pleadings. The importance of the court taking a neutral stance and adjudicating only the pleaded case was reiterated by

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[15] [1957] 2 QB 55.
[16] Fallon v Calvert [1960] 1 All ER 281.
[17] ibid.

the Malaysian Federal Court in **RHB Bank BHD v Kwan Chew Holdings SDN BHD**[18] where James Foong FCJ said:

> "…**it is not the duty of the court to invent or create a cause of action or a defence under the guise of doing justice for the parties lest it be accused of being biased towards one against the other. The parties should know best as to what they want and it is not for the court to pursue a cavalier approach to solving their dispute by inventing or creating cause or causes of action which were not pleaded in the first place**. Such activism by the court must be discouraged otherwise the court would be accused of making laws rather than applying them to a given set of facts." (emphasis added).

Although this authority is not binding on this Court, the principle enunciated therein is very instructive, finds favour with this Court and is applicable to the circumstances of this case.

[40] Applying the principles above, we have no doubt that the role of the court is not active, but only passive in relation to raising issues for its consideration and determination. The court must therefore find out from the parties themselves as to what exactly are matters in dispute between them and to adjudicate on those matters. In our opinion, the learned trial judge overstepped his mandate in crafting and ruling on an issue not pleaded by Mr. Purcell nor addressed by the parties, namely breach of contract, and using it as the basis upon which to grant Mr. Purcell's claim, thereby essentially assisting him in an impermissible manner. The learned trial judge, no matter how well-intentioned, went well beyond the grounds raised by Mr. Purcell and responded to by Bryson's Shipping and thereby determined the claim based on matters that were not properly before him. Therefore, learned Queen's Counsel Mr. Simon's complaint is well-founded. This Court agrees with Mr. Simon, QC that the learned trial judge erred in law in determining the case on an issue that was not joined and not argued by the parties. The appeal is therefore allowed on this basis.

[18] 2010 1 CLJ 665, para 35.

The issue of bailment

[41] Insofar as the issue of bailment that was joined between the parties has not been fully ventilated, the justice of this case requires that it be determined as a matter of urgency before this Court. We are of the view that sufficient evidence is before this Court to allow for the proper disposal of the matter now.

[42] A bailment arises where one person (the bailee) is voluntarily in possession of property belonging to another person (the bailor).[19] It is a legal relationship that is distinct from both tort and contract.[20] In a bailment, the general property in the goods remains in the bailor, while the bailee obtains a special property.[21] In order to prove that a bailment exists, and therefore that the bailee had a duty to reasonably protect the property, the bailor must show that the actual or constructive possession of the property was passed to the bailee, and that the bailee knowingly accepted possession and/or control of the property.

[43] The duties of a bailee arise out of the voluntary assumption of possession of another's goods. Once the bailor proves bailment, the onus shifts to the bailee to rebut the presumption of negligence and he must prove that he took reasonable care of the property[22] and exercised the standard of care demanded by the circumstances of the particular case.[23]

[44] In the seminal decision of **Coggs v Bernard**,[24] Holt CJ identified six categories of bailment. The ones relevant to the present case are bailment for reward and gratuitous bailment. Bailment for reward, as its name suggests, is one that confers a mutual benefit on the parties. Normally in this type of bailment, the bailee gets a monetary payment, while the bailor obtains the benefit of some service to the goods.

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[19] Halsbury's Laws of England 4th edition. Vol. 4: Bailment and Pledge, para. 1. 'Meaning of bailment'.
[20] Building and Civil Engineering Holidays Scheme Management Ltd. v Post Office [1966] 1 QB 247, at p. 261, per Denning MR.
[21] Re Bond Worth Ltd [1980] Ch 228, at p. 247, per Slade LJ.
[22] Houghland v RR Low Luxury Coaches Ltd. [1962] 2 All ER 159.
[23] Joseph Travers & Sons Ltd. v Cooper [1915] 1 K.B. 73.
[24] [1558-1774] All ER Rep 1.

[45] Mr. Purcell in his claim form pleaded that he suffered loss and damage as a result of Bryson's Shipping's breach of duty as bailee of his cargo. In his witness statement, Mr. Purcell stated as follows:

> "…I am of the view that a clear contract of bailment existed between the Defendant Company (as bailee) and me (as bailor) from the 12th day of December 2000, when the cargo arrived in Antigua, until the 19th day of December 2000, when I accepted delivery of the said cargo. Since the Defendant was a bailee for reward, he was in Law, under a duty to use due care and diligence in keeping and preserving the cargo entrusted to him, upon its delivery in Antigua until such date as I accepted delivery of the said cargo. … Furthermore, in breach of the Defendant Company's duty as bailee, the Defendant Company failed and/or refused to deliver the cargo to me in the same good order and condition as shipped."[25]

[46] The contents of Mr. Purcell's claim form and witness statement indicate that the only contract contemplated between the parties was for the 'shipment of live plants' as per the contract of carriage contained in the bill of lading. Although Mr. Purcell in his witness statement seems to be referring to the existence of a bailment as distinct from the shipping contract detailed in the bill of lading, he has not provided any indication as to when the bailment was created or any evidence of its terms. Moreover, there is no evidence of steps taken by the parties in furtherance of a 'contract of bailment' as alleged by Mr. Purcell. By Mr. Purcell's own evidence in his statement of claim, he paid to Bryson's Shipping "the freight and other handling charges in the sum of Nineteen Thousand Five Hundred and Sixty One Dollars and Sixty Eight Cents ($19,561.68) for a shipment to Antigua of a refrigerated container of plants…"[26] As itemised in the bill of lading, this sum covered the cost of freight, bunker ADJ factor and documentation fees. Mr. Purcell has not presented evidence of any other sums paid by him to Bryson's Shipping or any other act done by him in furtherance of this alleged bailment. As there is no evidence as to when this alleged bailment was created, nor evidence of any consideration passing from Mr. Purcell to Bryson's Shipping under this alleged bailment for Bryson's Shipping to receive and care for Mr. Purcell's cargo until

[25] Paragraph 25 of the witness statement of George Purcell.
[26] Paragraph 3 of George Purcell's statement of claim.

delivery was accepted by Mr. Purcell, this Court finds that there is no bailment for reward.

Was there a gratuitous bailment?

[47] In a gratuitous bailment, the bailor agrees to take possession of and cares for the goods of another on terms that the custody is to be unrewarded.[27] In a bailment by deposit, a form of gratuitous bailment, the property is to be kept for the bailor and returned upon demand. It is not a contract because the bailor supplies no consideration, but the bailee appears to be bound by promises he makes in relation to the goods, from the moment he takes possession.

The requirement of possession

[48] As alluded to previously, to constitute a bailment there must be a passing of possession or custody in circumstances involving an assumption of responsibility for the safe keeping of the goods.[28] The actual or constructive possession of the specific chattel must be transferred by its owner or possessor (the bailor) to another person (the bailee). It may be necessary that there has been not only a transfer of access to or dominion over a chattel, but for this to have conferred on the recipient the physical control or some other insignia of possession over the chattel to the exclusion of the bailor.

[49] In order to prove the existence of a bailment, both possession and the bailee's consent to possession must also be proved. Determining whether or not there is possession is a conclusion to be reached from a consideration of all the circumstances of the case. The fact that Bryson's Shipping did not own, operate or have unfettered access to the location at which Mr. Purcell's cargo was kept shows that Bryson's Shipping did not have possession of the cargo. Possession and control over the premises in which the goods were kept was retained by the Antigua and Barbuda Port Authority. The evidence before this Court points to fact

[27] Halsbury's Laws of England 4th edition. Vol. 4: Bailment and Pledge, para. 1. 'Gratuitous Bailment'.
[28] Torsten Schmitz, (2011) "The bill of lading as a document of title", Journal of International Trade Law and Policy, Vol. 10 Issue: 3, pp.255-280, p. https://doi.org/10.1108/14770021111165526.

that it would be the Port Authority's responsibility to ensure that the containers stored on the premises were monitored and that reefer containers were plugged into outlets they provided. The foregoing illustrates that at no time was there a transfer of possession of the cargo from Mr. Purcell as owner of the goods to Bryson's Shipping. We conclude, in agreement with learned Queen's Counsel Mr. Simon that the cargo was not under the control of Bryson's Shipping, its servants or agents nor did Bryson's Shipping have title to or right to possess the goods since ownership remained in Mr. Purcell. Having assessed all the evidence before the Court, we find that a gratuitous bailment has not been made out as Bryson's Shipping did not possess the requisite possession of Mr. Purcell's goods.

Acceptance of delivery

[50] In the landmark decision of **Sanders Brothers v MacLean & Co**., Bowen LJ stated that:

> "the indorsement and delivery of the bill of lading operates as a symbolical delivery of the cargo. Property in the goods passes by such indorsement and delivery of the bill of lading, whenever it is the intention of the parties that the property should pass, just as under similar circumstances the property would pass by an actual delivery of the goods."[29]

The evidence shows that Mr. Purcell's delivery documents were delivered by Bryson's Shipping to him on 12th December 2000 as indicated by Bryson's Shipping's "PLEASE DELIVER" stamp placed on the bill of lading dated 13th December 2000. In his witness statement, Mr. Purcell said that, '[t]he Defendant Company provided me with a Release Form to indicate that I had paid all the requisite charges and could therefore obtain delivery of my cargo'. He also referred to the fact that on 12th December 2000 he had completed the necessary paperwork to have his container cleared. Mr. Purcell's own evidence as well as the indorsement on the bill of lading shows that Mr. Purcell accepted delivery of his cargo and that the Port Authority released his goods to him upon satisfaction of all requirements of the Antigua and Barbuda Customs and Excise department on 14th December 2000.

[29] (1883) 11 Q.B.D. 327.

[51] Having established that Mr. Purcell accepted delivery, the agreement between himself and Bryson's Shipping taken at its highest can only be considered to be a request for transport of his cargo to Jolly Beach Resort. This request for transport does not in itself create a bailment. After Mr. Purcell cleared his goods, satisfied the requirements of the Customs and Excise Department and signed the release forms, he was free to arrange alternative means of transportation when Bryson's Shipping informed him that they had no chassis available to load his cargo for transport to Jolly Beach Resort. He failed to do so and consequently the plants remained at the port until 19th December 2000 when Bryson's Shipping transported them to Jolly Beach Resort where they were discovered to be wholly damaged.

When did the damage occur?

[52] In any event, even if a case of bailment was made out, Mr. Purcell has not established when exactly the cargo was damaged and thus who was in possession of it at the material time. A determination as to when the property in question was damaged is crucial in a bailment claim. If the property is damaged while in the bailee's possession, there is a presumption that he is at fault and the bailor can bring action against him in either contract or in tort.[30] However, based on the facts before the Court in the present case, it is uncertain as to whether the damage occurred to the cargo in transit from Miami and before its discharge to the port in Antigua, or whether the damage occurred after the discharge of the cargo to the port in Antigua on 12th December 2000. Having failed to prove that the cargo was damaged while in the possession of Bryson's Shipping, the company cannot be held responsible for the damage and loss Mr. Purcell suffered. The appeal is allowed on this additional basis.

[30] Joseph Travers & Sons Ltd. v Cooper [1915] 1 K.B. 73.

Conclusion

[53] For the reasons provided, we would allow the appeal and set aside the judgment of the learned judge dated 20th May 2011 in its entirety and award costs on this appeal and in the court below.

Accordingly, this Court makes the following orders:

(1) The appeal is allowed and the judgment of the learned judge dated 20th May 2011 is set aside in its entirety.

(2) Costs in the appeal awarded to Bryson's Shipping in the sum of $16,779.52 being two-thirds of the costs in the court below.

[54] The Court gratefully acknowledges the assistance of all counsel and apologises for the unusual and inordinate delay in rendering this judgment.

I concur.
Dame Janice M. Pereira, DBE
Chief Justice

I concur.
Gertel Thom
Justice of Appeal

By the Court

Chief Registrar