REPUBLIC OF TRINIDAD AND TOBAGO

Civil Appeal No. P249 of 2012

IN THE COURT OF APPEAL

OF

COMPRESSION & POWER SERVICES (1988) LIMITED
APPELLANT

AND

POWER GENERATION COMPANY OF TRINIDAD AND TOBAGO
RESPONDENT

PANEL: **Mendonça, JA**
Bereaux, JA
Jones, JA

APPEARANCES: **Mrs. L. Maharaj SC and Mr. R. Bissessar and Mr. V. Gopaul-Hosein for the Appellant**

Mr. R. Martineau SC and Mr. R Heffes-Doon and Ms. M. Ferdinand for the Respondent

DATE OF DELIVERY: January 25th, 2018

I agree with the judgment of Mendonça J.A. and have nothing to add.

N. Bereaux,
Justice of Appeal

I too agree.

J. Jones,
Justice of Appeal

JUDGMENT

Delivered by A. Mendonça, J.A.

1. This case concerns the damage to a gas generator owned by the Respondent in the course of being transported to the United Kingdom (UK) to be repaired. Harris, J., the trial Judge, found the Appellant liable for the damage and awarded damages against it in favor of the Respondent. The Appellant has appealed to this Court from the judgment of the trial Judge. The Appellant contends that it is not liable for the damage or alternatively has sought to argue that the award of damages is erroneous.

2. The Appellant is Compression & Power Services (1988) Limited (hereinafter referred to as Compression). Compression was at all material times engaged in the business of engineering

equipment and instrument sales representation and was the local agent of Rolls Wood Group (Repairs and Overhauls) Limited (hereinafter referred to as Rolls Wood).

3. Rolls Wood is a UK based company engaged in the repair and overhauling of gas generators.

4. Power Generation Company of Trinidad & Tobago Limited (hereinafter referred to as PowerGen) is the Respondent. It was at all material times the owner of a Rolls-Royce manufactured gas generator which was used in the generation of electrical power which PowerGen sold to the Trinidad and Tobago Electricity Commission (hereinafter referred to T&TEC).

5. In April 2000, following a routine inspection of the generator at PowerGen's Plant on Wrightson Road, Port of Spain, by personnel of Rolls Wood, it was discovered that the generator was in need of repair. Shortly thereafter, following discussions between Rolls Wood, PowerGen, and Compression, it was decided that the best option to repair the generator was to send it to Rolls Wood's facility in Aberdeen, Scotland, where it could be worked upon. At that time, however, there was no budgetary item in PowerGen's 2000 budget to allow for the immediate repair of the generator. After discussions between PowerGen and Compression, it was agreed that the generator would go to Rolls Wood for repair in 2000 and that payment would be deferred until the following year.

6. By letter dated July 13, 2000, Compression wrote to PowerGen as follows:

> July 13, 2000
>
> The Power Generation Company of
> Trinidad and Tobago Limited
> Wrightson Road
> PORT OF SPAIN
>
> ATTENTION: Mr. Michael Chuckaree
>
> Dear Sir:
> RWG RFQ 262/98761 dated May 8, 2000
> Budgetary Proposal POS Set 6 Repairs
>
> We refer to your discussion of July 7, 2000, and our subsequent telephone conversation of July 11, 2000, on the above and confirm that all arrangements would immediately be made to forward the Generator Set to Rolls Wood Group, Aberdeen facility, to effect the necessary repairs.
>
> It is expected that Compression and Power Services (1988) Limited will handle all transactions covering the export and re-importation of the repaired machine.
>
> The payment for the repairs is to be made in January 2001. We trust that the above meets with your approval and await your further instruction.
>
> Yours faithfully,
> COMPRESSION AND POWER
> SERVICES (1988) LIMITED
>
> M H P Singh
> Managing Director

7. Compression then entered into an agreement with Freight Consultants Limited (hereinafter referred as FCL), a freight forwarding company, to carry out and complete all aspects of and involving the transportation of the generator from the premises of PowerGen to Rolls Wood's facility in Scotland.

8. As a consequence of this agreement, FCL made arrangements with the following entities to carry out the following tasks:

    (i) Twin Island Shipping Agencies to collect the generator from PowerGen's Plant on Wrightson Road in Port of Spain and transport it to the port in Port of Spain for shipment;

    (ii) Geest Line to transport the generator by sea to Southampton, England on the MV Southampton Star (from where it would then be taken to the Rolls Wood facility in Aberdeen, Scotland);

    (iii) Port Authority of Trinidad and Tobago to carry out and complete all stevedoring operations with respect to the generator.

9. In preparation for the collection of the generator by Twin Island Agencies, from PowerGen's premises for transportation to the port in Port of Spain, it was the responsibility of PowerGen to pack the generator in a moisture-proof bag and secure it to a metal transportation frame. It is the evidence of PowerGen that this was properly done. I will return to this later in this judgment.

10. The generator, it should be noted, is a fairly large piece of equipment weighing approximately 2,950kg (or approximately 6,503lbs). The dimensions of the generator including the transportation frame are 309cms x 155cms x 188cms (or approximately 13ft x 5ft x 6ft).

11. On August 18, 2000, a vehicle owned by Twin Island Shipping Agencies arrived at the premises of PowerGen for the purpose of collecting the generator for transportation to the

port in Port of Spain. PowerGen declined to release the generator until it was shown evidence that insurance coverage was in place in respect of the transportation of the generator. On being shown an insurance document from insurance brokers for Compression, the generator was released by PowerGen for transportation. The generator was insured in the name of Compression.

12. An employee of PowerGen accompanied the generator to the Port of Spain port for the purpose of identifying it to customs authorities. This was done for the purpose of the re-importation of the generator on its return after repair.

13. The generator was shipped in a container on-board the MV Southampton Star. On arrival in Southampton in the UK on or about September 8, 2000, the generator was found to be damaged beyond the condition in which it was in when it left the premises of PowerGen on August 18, 2000.

14. The damage to the generator was as a consequence of it moving to and fro within the container and repeatedly hitting the sides of the container.

15. Additional cost was incurred in repairing the damage to the generator during its transportation.

16. PowerGen commenced these proceedings against Compression to recover the cost of repair. PowerGen also claimed what it described as ‘liquidated damages’ paid to T&TEC under its

agreement with T&TEC. PowerGen, in its statement of claim, alleged that because it did not have the use of the generator for several months while it was undergoing repair necessitated by the damage it sustained while in transit to the UK, it could not generate the electricity capacity it was required to do under its agreement with T&TEC. As a consequence, it became liable to pay liquidated damages to T&TEC. That claim was, however, abandoned at the trial and I will make no further mention of it.

17. PowerGen's claim for the cost of repairs was framed in contract, bailment, and the tort of negligence. It was PowerGen's case that by virtue of its agreement with Compression as is evidenced by the letter of July 13, 2000, referred to earlier, that Compression had agreed to make all arrangements to forward the generator to Rolls Wood and to handle all transactions covering the export and re-importation of the generator. The agreement between the parties was in PowerGen's argument an agreement to effect carriage of the generator.

18. PowerGen averred that there were implied terms in the agreement that, *inter alia*, Compression would use due and/or proper and/or reasonable care and skill "in and/or arranging and/or managing and/or supervising the packing and/or loading and/or securing the said generator for shipment by sea and or transporting the generator by sea" and would deliver the generator in the same order and condition it was in when it left PowerGen's premises. In breach of the said terms, however, PowerGen alleged that Compression failed to use the appropriate care and skill and delivered the generator in a damaged condition thereby necessitating further repairs by Rolls Wood.

19. In relation to negligence and bailment, PowerGen claimed, *inter alia*, that Compression took custody and control of the generator and negligently packed, loaded, secured, transported and/or arranged, conducted and/or manged the packing, loading, securing or transporting the generator for shipment. PowerGen claimed the sum of £326,974.50 as the cost of repairs in addition to interest and costs.

20. Compression denied liability on several grounds. First it claimed that there was no contract between it and PowerGen or that there was no binding contract between it and PowerGen as it was not supported by any consideration. Alternatively, if there was a binding contract, it was not a contract to effect carriage, as was claimed by PowerGen. It was one merely to arrange the carriage of the generator, which it did and as such it could not be liable for the negligence of any of the entities that were involved in the transportation of the generator from the premises of PowerGen to the UK. With respect to PowerGen's claim on the basis of negligence and bailment, Compression denied that the generator was ever in its custody or control. The claims, therefore, based on negligence and bailment could not be maintained.

21. Further, or in the alternative, Compression contended that in any event, the damage to the generator was caused by the negligence of PowerGen in failing to properly secure it to the transportation frame as was PowerGen's obligation so to do.

22. I may mention that Compression issued third-party proceedings against its insurance brokers and FCL for an indemnity or contribution in the event that any damages were awarded against it. The claim against its brokers was on the basis that the insurance policy it obtained

for Compression with respect to the generator, covered only the total loss of the generator and not the damage to it. Compression alleged that the brokers had acted negligently or in breach of contract in failing to provide insurance cover in respect of the damage to the generator. As against FCL, Compression alleged that in breach of its common law duty or in breach of contract, FCL inadequately, improperly or negligently packed, loaded or secured the generator for shipment.

23. These third party claims were, however, dismissed by the trial Judge and there has been no appeal from their dismissals. I will, therefore, make no further mention of them.

24. The trial Judge found that the letter of July 13, 2000, formed the basis of the legal relations between PowerGen and Compression. "The essential terms of this relationship were given life by the subsequent conduct of the parties leading up to the departure of the generator from the shores of Trinidad". The Judge held that the nature of the relationship was one to effect the carriage of the generator as opposed to arrange the carriage of it. Compression contracted as a principal to transport the generator from the compound of PowerGen to Scotland and back and "did so contract with PowerGen, with PowerGen appreciating that Compression would have performed the contract vicariously through the employment of sub-contractors. Compression did, in fact, do so, utilising Freight Consultants and Twin Island". He stated;

> "Compression was duty-bound to ensure the safe transit of the generator as alleged and perform the contract (and implied terms) evidenced by the letter dated July 13, 2000…, to uphold its duty as bailee to take reasonable care of the generator…and to satisfy its common law duty of care to take reasonable care of the generator…"

25. He further held that the duty to ensure the safe transit of the generator was not discharged by Compression "sub-contracting the work" or "taking reasonable steps in selecting agents/sub-contractors who carried out the transportation service."

26. With respect to the cause of the damage, the Judge accepted that the generator was properly secured to the transportation frame by PowerGen and that the damage was caused by the negligence of Compression by failing to secure the transportation frame with the generator attached within the container.

27. The Judge awarded damages in the sum of £306,475.50. This was approximately £20,500.00 less than the sum claimed by PowerGen. The Judge indicated that this sum, which represented the cost of stripping down the generator, would more likely than not have been incurred in effecting the necessary repairs to the generator that were identified by the routine inspection of the generator in April 2000 and "to award that cost on top of £306,474, would bring a windfall to [PowerGen] without justification".

28. Before this Court, the Appellant has essentially argued the same grounds as were argued in the Court below. It was submitted that the Judge erred in finding, (i) that there was a binding contract between the parties; (ii) that it was a contract to effect carriage and not a contract merely to arrange the transportation of the generator; (iii) that Compression was liable as bailee; (iv) that the damage to the generator was not caused by the negligence of PowerGen; and (v) that the cost to repair the transportation damage was in the amount he allowed; it was a substantially lesser amount.

29. I will consider each of the grounds in turn.

30. The first ground is that the Judge erred when he found that there was a binding contract between the parties. It was submitted that the Judge ought to have found that there was no contract between the parties or no binding contract as PowerGen failed to plead and prove that there was consideration to found an enforceable contract between the parties.

31. I do not accept this submission. No issue arises on the pleadings that there was a binding contract between PowerGen and Compression. In fact, on Compression's amended defence read as a whole, Compression accepted that there was an agreement. This is borne out by paragraph 12 of Compression's amended defence. This paragraph was in response to paragraph 11 of the statement of claim where PowerGen pleaded that there was an implied term of the agreement with Compression that Compression would deliver the generator to Rolls Wood in the same order and condition as it was when it left the premises of PowerGen and that it failed to do so in breach of the said term. Compression, at paragraph 12 of its amended defence denied paragraph 11 of the statement of claim and said that it "will contend that it was an implied term of the agreement that [PowerGen] would accept the risk of the damage". Its seems to be clear from that paragraph that Compression accepted the existence of a contract with PowerGen and raised no issue that it was not supported by valuable consideration.

32. Further, there was evidence from Compression that there was a binding agreement between itself and PowerGen. In a letter dated February 13, 2001, from PowerGen to Compression, PowerGen stated, *inter alia*, that:

> "Our contract relating to the provision of transportation services for our POS6 Gas Generator to and from Aberdeen, Scotland. An implied term is that the Gas Generator would have arrived in Aberdeen in the same condition as it was when it left the plant."

33. To this, Compression in its letter of March 06, 2001, replied that:

> "It is clear to us that we were neither negligent nor in breach of contract in this transaction…If any term is to be implied in our transportation contract, it must be that PowerGen accepted the risk of damage, but not of total loss, during the transportation."

34. Further, in cross-examination of the author of the letter of February 13, 2001, who was Mr Singh, the then managing director of Compression, he confirmed that in that letter he was referring to the transportation of the generator and by the letter he recognised that there was a "transportation contract" between PowerGen and Compression.

35. It was also the evidence that Compression was to be paid by PowerGen for its services and therefore the contract was supported by consideration. In paragraph 4 of the witness statement of Mr Singh, he stated that:

> "…PowerGen…wanted Compression…to arrange for Rolls Wood to carry out repairs to the generator and for PowerGen to defer its payment to Rolls Wood until January 2001. PowerGen also wanted to defer its payment to Compression until that time."

It seems clear on the basis of that statement that there was an agreement that PowerGen would pay Compression for its services. The amount of that payment is not identified. But the point here is that on Compression's own evidence there was an agreement that it would be paid and that is evidence that supports the fact that the agreement was supported by valuable consideration.

36. On the basis of the pleadings and the evidence therefore, there is no issue in this case that there was an agreement between the parties and that agreement was supported by consideration. The submission that there was no agreement or no binding agreement because of the absence of consideration is in my judgment without merit.

37. The second issue relates to the nature of the contract between Compression and PowerGen and raises the question whether the Judge was correct to hold that the contract between the parties was one whereby Compression contracted to effect the carriage of the generator as opposed to arrange the carriage of it.

38. There was no issue between the parties that if there was a binding agreement it was one relating to the carriage of the generator. As outlined earlier it was PowerGen's contention that its agreement with Compression was one whereby Compression accepted it will effect the carriage of the generator and as such is responsible for the safe delivery of the generator. On the other hand, Compression contended that its obligation under the contract was merely to arrange the carriage of the generator by the employment of others to do so and is not liable for their default.

39. The difference between the two positions is obviously significant. I do not think there was any dispute between the parties that if the contract were one to effect carriage then Compression would be liable for the damage to the generator while in transit unless it can be shown that the damage was caused by some failure on the part of PowerGen in preparing the

generator for shipment or that it was otherwise not negligent. Here it is to be noted that, as mentioned earlier, Compression contends that the damage to the generator was caused by PowerGen's failure to properly secure the generator during the transportation firm. This is an issue to which I will come to later in this judgment. If on the other hand, Compression was merely an arranger or in other words its contractual obligation was only to arrange the transportation of the generator to Scotland and not to effect the carriage of it, then in that case, subject to whether it has any liability as bailee, it would not be liable for the failure of those who undertook the carriage of the generator.

40. There are, of course, situations where the arranger of the carriage would be liable for the damage caused by the failure of the persons retained to transport the goods. These include instances where the arranger failed to exercise reasonable care in the selection of competent persons to undertake the carriage. Those situations, should Compression's obligations be to arrange carriage and not to effect it, are not issues in this case. The question is as to the nature of the contract; is it one to arrange the carriage of the generator or to effect the carriage of it.

41. The difference in the liability of the parties to a contract to arrange as opposed to effect carriage is borne out in several cases. One such case is ***Marston Excelsior Ltd v Arbuckle, Smith & Co. Ltd. [1971] 2 Lloyd's Rep. 306***. In this case, whether the defendant (Arbuckle Smith) was liable for the loss claimed turned on whether it contracted as carrier or as forwarding agent. Lord Denning M.R. in the course of his judgment stated:

> "I will take the points in order. First, Marston Excelsior say that Arbuckle Smith were not mere forwarding agents, but were themselves carriers. They say that

> Arbuckle Smith were head contractors who made a contract of carriage whereby they promised to carry the goods through from Rotterdam to Vienna; that Arbuckle Smith sub-contracted the transit from Rotterdam to Vienna to Rhenania, and Rhenania, in turn, sub-contracted the road portion from Bamberg and Regensburg to Schmidbauer.
>
> In answer, Arbuckle Smith say that they were forwarding agents in the ordinary sense of the word. They were not themselves carriers. They were only making arrangements with others to carry. They rely on the well-known words of Mr. Justice Rowlatt in Jones v European and General Express Co. Limited (1920) 25 Com. Cas 296 at p298:
>
> > "It must be clearly understood that a forwarding agent is not a carrier; he does not obtain possession of the goods; he does not undertake delivery of them at the other end unless prevented by some excepted cause of loss or something which affords an excuse. All that he does is to act as agent for the owner of the goods to make arrangements with the people who do carry – steamships, railways, and so on – and to make arrangements so far as they are necessary for the intermediate steps between the ship and rail, the customs or anything else…"

42. Another example is the ***The Maheno [1977] 1 Lloyd's Rep. 81***, where a similar question arose as in ***Marston***. ***Marston*** was applied and the judge, in the course of his judgment stated (at pp. 86-87):

> "If I find that the defendant's responsibility for the sea leg of the journey across the Tasman Sea was purely that of an "arranger", then it appears that it is not liable for the failings of persons with whom it makes contracts on behalf of its principal, unless it knew of those failings and ought to have taken action either to remedy them or at least to inform its principal so that the damage might be avoided or mitigated. *See Marston Excelsior Ltd v Arbuckle, Smith & Co. Ltd. [1971] 2 Lloyd's Rep. 306, 311***,** per Lord Denning M.R. At p 312, Lord Justice Phillimore observes that a forwarding agent is under no duty to supervise the actions of carriers whom he reasonably and properly expects to perform their normal obligations competently."

43. So what was the nature of the contract in these proceedings; is it one to effect the carriage of the generator or merely to arrange the carriage of it. Before I discuss this issue, there is a point on the pleadings to which I should refer.

44. The Judge accepted the submission made by counsel for PowerGen that the issue whether Compression was merely "an arranger or forwarder" in relation to the transportation of the generator was not pleaded and therefore it was not open to Compression to contend at the trial that it was. The Judge stated (at para 34):

> "Senior counsel for PowerGen contends that the issue as to whether Compression is a forwarding agent/arranger only, was not pleaded so that it is not now open to Compression to raise that issue at the trial. I agree."

Notwithstanding that statement, the Judge went on, nevertheless, to deal substantively with the issue and I will come to it shortly. But, however, I do not agree that Compression could not contend on the pleadings as they stood that it was a forwarder or arranger of the transportation.

45. PowerGen had pleaded that by the letter of 13 July 2000, Compression agreed with it to make all arrangements to forward the generator to Rolls Wood and further agreed to handle all transactions covering the export and re-importation of the generator. This was pleaded at paragraph 6 of the statement of claim. It was not pleaded in that paragraph specifically that the nature of the contract was one to effect carriage, but it is not disputed by Compression that the effect of the statement of claim as a whole, was that PowerGen was contending that the agreement was one to effect carriage. This is apparent from the implied term pleaded at paragraph 11 of the statement of claim that Compression would deliver the generator to Rolls Wood in the same condition as it was in when it left the premises of PowerGen, which is consistent with the contract being one of carriage.

46. Compression, however, did not admit the contract as pleaded and denied the existence of the implied term. It further pleaded the existence of an implied term that was not consistent with the contract being one of carriage. It also pleaded, *inter alia*, that it entered into an agreement with FCL to carry out and complete all aspects of and involving the transportation of the generator from PowerGen's premises to Rolls Wood's premises in Scotland. It alleged that the damage was caused by, *inter alia*, the fault of FCL. Compression was, therefore, by its amended defence denying liability on the basis that it delegated the transportation of the generator to FCL, which is also inconsistent with a contract of carriage.

47. On the pleadings, PowerGen bore the burden of proving that the nature of the contract was one of carriage. It was evident that Compression was not accepting that it was such a contract. It was open to Compression to argue that the contract was not one to effect carriage and it was entitled to point to other possibilities from the proven facts and the relevant law as to the nature of the contract. Compression, therefore, could properly maintain on the basis of the pleadings in the action that having regard to the relevant facts and law, it was an arranger of the transportation of the generator, not a carrier. I therefore agree with counsel for Compression that Compression could argue that it was merely an arranger in the light of the pleadings as they stood.

48. In any event from the opening address of counsel for PowerGen before the trial Judge, it appears to me, that counsel appreciated Compression would be contending that the contract was not one to effect carriage but rather to arrange carriage of the generator. Counsel, in opening his case before the Judge, noted that PowerGen's position is that Compression

"undertook to handle the whole transaction", that it dealt with Compression as principal and did not contract with Compression "to put [PowerGen] in contact with someone else". That appears to me to demonstrate an understanding that Compression's position as to the nature of the contract would be that its obligation was to arrange the carriage not to effect the carriage of the generator. At the very least, counsel appreciated that that could be argued. The case was certainly fought on that basis. In those circumstances, even if the amended defence of Compression as it stood did not permit it to advance that it was a forwarder or arranger, an amendment to the pleading could properly have been accommodated even at the close of the parties' cases without any prejudice to PowerGen.

49. Although this conclusion differs from that of the trial Judge, it must be emphasised, as I have mentioned earlier, that the Judge went on to consider the substantive issues raised by counsel for the parties and in my judgment, it is not material to the outcome of this appeal.

50. In coming to the conclusion that the contract between the parties was one to effect carriage of the generator and not one whereby Compression undertook the responsibility merely to arrange for the carriage, the Judge found that the nature of the relationship best captured in the following from ***Halsbury's laws of England Vol 5 4th ed. P 299,*** at para 442 which he quoted as follows (at para. 34) :

> "The fact that a person describes himself as a forwarding agent is not conclusive; and it is a question of fact to be decided according to the circumstances of each case whether a person normally carrying on business ... contracts solely as agent so as to establish a direct contractual link between his customer and a carrier (or possibly with several carriers, each undertaking a different part of the transit), or whether he contracts as principal to carry the goods, the customer appreciating that he will perform the contract vicariously through the engagement of sub-contractors. The nature of the carriage, the language used by the parties in

> describing the role of the persons concerned, and any course of dealing between the parties will be relevant factors." (**Emphasis added by the Judge**)

51. He stated that on a plain reading of the letter of July 13, 2000, he did not accept Compression's submission that the dominant interpretation of the letter, and the surrounding circumstances, that the contract was merely to arrange carriage of the generator. He noted that it was not pleaded that Compression contracted with FCL as agent for PowerGen. He, therefore, found that PowerGen contracted with Compression as the principal to carry the goods with PowerGen appreciating that Compression would effect the carriage vicariously through the employment of sub-contractors. The contract, therefore, was one to effect carriage.

52. Senior counsel for Compression, forcefully argued that the Judge erred in concluding the contract was one to effect carriage. She submitted that the Judge failed to appreciate the context in which the contract was made and that context is that Compression was not in the transportation or carriage industry. The passage in ***Halsbury's Laws*** which the Judge referred to contain the words "as a forwarding agent" after the words "normally carrying on business". The Judge, however, omitted those words and counsel submitted that as they were not reproduced by the Judge, eloquently illustrated the fact that the Judge failed to appreciate and take into account the relevant context. The passage was a summary of the case law where the question was whether a person carrying on a business of forwarding agent took on the role of a carrier. It should therefore be taken with a "health warning" where one is dealing with a person who is not in the carriage industry. For whereas a freight forwarder may assume the obligation of a carrier, it is highly unlikely that someone not in the carriage

industry would do so. There the starting point is entirely different. If a person not in the carriage industry became involved in a carriage exercise, it is more likely he would assume the role of forwarder or arranger where he merely arranges the carriage of the goods. Clear words were needed to show that such a person assumed the role of a principal to effect the carriage of the goods. Counsel further submitted that the language used by the parties as evidenced by the letter of 13 July 2000, was of prime importance. That language is very clearly that of agreeing to arrange carriage rather than agreeing to carry. Counsel also submitted that other factors pointed to the contract being one to arrange carriage. These were that Compression issued no carriage document outlining the terms of carriage as would be expected of a carrier and there was no charge structure agreed which might suggest a contract to carry. Counsel further submitted that reliance could not be placed on any events occurring after 13 July 2000, to aid in the construction of the express terms of the contract and so they cannot shed light on the nature of the contract.

53. ***Halsbury's Laws*** Vol. 7 (2015) at para. 92 speaks to the characteristics of a forwarder. It is put in these terms:

> "A forwarding agent is one who carries on business of arranging for the carriage of goods for other people; his task is to arrange carriage rather than to effect it. A forwarding agent is not, in general, a carrier; he does not ordinarily obtain possession of the goods and he does not ordinarily undertake the delivery of them at their destination. In normal circumstances his function is merely to act as agent for the goods owner to make arrangement with those contractors who do carry "such as ship owners, road hauliers, railway authorities and air carriers" and to make whatever arrangements are necessary for the intermediate steps between the ship and the rail, the customs or anything else."

54. The passage identifies that the main function of a forwarder is to act as agent for the goods owner to make arrangements for the carriage of the goods (see also ***The Maheno*** and the

Marston cases referred to above). There then follows the passage referred to by the Judge which he says best describes the nature of the relationship between the parties. That passage (see para 50 above) in essence states that the question whether a person contracts as a forwarder is a question of fact to be decided according to the circumstances of each case. It was indeed stated in that paragraph, as counsel for Compression submitted, that the question whether a person "normally carrying on business as a forwarding agent' acts solely as an agent so as to establish a direct contractual link between his customer and a carrier (or possibly with several carriers, each undertaking a different part of the transit), or whether he contracts his principal to carry the goods, the customer appreciated that he will perform the contract vicariously through the engagement of sub-contractors. Although the passage does refer to a person "normally carrying on business as a forwarding agent", that does not mean that someone other than a forwarding agent cannot contract as principal to effect the carriage of the goods and so take on the obligation of a carrier. Anyone can. Even someone who is not in the carriage industry.

55. I accept that the fact that the contracting party may not be in the carriage industry is a relevant factor to be considered (see ***Lukoil v Tata [1999] 2 Lloyd's Rep 129***), but the core consideration remains the same. Has that person contracted as principal to effect carriage of the goods or merely as agent of the goods owner to arrange the carriage of the goods.

56. It is relevant to note that the fact that the contracting party does not, himself move the goods but sub-contracts the actual performance of the whole of the carriage does not mean that he cannot be a carrier. This is evident from the passage in ***Halsbury's Laws*** which says that the

carrier may perform the contract vicariously through others. This is an accurate summary of the case law (see for eg. ***Tetroc Ltd v Cross-Con (International) Ltd [1981] 1 Lloyd's Rep. 192*** and ***Ulster Swift Ltd anor v Taunton Meat Haulage Ltd. and Fransen Transport Nv [1977] 1 Lloyd's Rep. 346***).

57. It may also be noted that a person may contract as carrier even though he owns no vessels or other vehicles for carriage. Indeed according to ***Bugden and Lamont-Black, Goods in Transit and Freight Forwarding*** (3rd Ed) at p. 376, non-vessel owning carriers are now not uncommon. And the authors went on to make the point that, "the fact that it is known that another person will or may perform the services or part of them does not mean that the contract is one of agency. In each case, it has to be asked, as a matter of construction into which category the contract falls".

58. Although in determining whether a party has contracted as carrier, a relevant factor is whether he is in the carriage industry, I believe it would be overstating the case to say that Compression was not in the carriage industry. As PowerGen, in its written submissions has pointed out, there was evidence that pointed to Compression being involved in the carriage of machinery, specifically the transport of machinery for repairs, because of the nature of its business.

59. The evidence to which reference was made by PowerGen was that of Compression's managing director, Mr Singh and Ms. Yee Ching, his executive assistant. According Ms. Yee Ching, since 1988 or thereabout, its insurance brokers had provided marine insurance

coverage for Compression for the transportation of generators and other items of equipment. And Mr Singh stated, "We do export equipment for repair occasionally". In those circumstances, where the nature of Compression's business had caused it to become involved in the transportation of equipment, it is less unlikely that it would have assumed the role of carrier.

60. I do not agree with the submission of counsel for Compression that in determining the nature of the contract, matters occurring after 13 July 2000, when the contract was made, cannot be considered to determine the nature of the contract.

61. In ***James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd 1970 A.C. 572***, it was held that "it is not legitimate to use as an aid in the construction of a contract anything which the parties said or did after it was made". That rule, however, does not apply where the contract is not wholly in writing and is either an oral contract or partly oral and partly in writing.

62. In ***Carmichael and another v National Power plc [1994] 4 All ER 897***, the question was whether the respondents and the appellant were in an employee/employer relationship. The issue before the House of Lords was whether in answering that question it was permissible to have regard to the way in which the contract was operated and the evidence of the parties as to how it had been understood or only the offer and acceptance documents by which the contract was created. The Court of Appeal had treated the matter simply as one of the

construction of the written documents. The House of Lords considered that it was appropriate to consider the other evidence. Lord Hoffman, in his judgment stated (at p 903):

> "…the Court of Appeal pushed the rule about the construction of documents too far. It applies in cases where the parties intend all the terms of the contract (apart from any implied by law) to be contained in a document or documents. On the other hand, it does not apply when the intention of parties, objectively ascertained, has to be gathered partly from documents but also from oral exchanges and conduct."

63. Similarly, in ***Maggs (t/a BM Builders) v Marsh & anor [2006] EWCA Civ 1058***, it was held that the ***Miller*** case did not apply where the contract was oral. The Court of Appeal of England and Wales explained the rationale in the ***Miller*** case in these terms (at para 25):

> "The rationale of the well-established rule in *Miller's* case is this. The parties have made a complete record of their agreement at the time in writing. The written words must be objectively construed and interpreted. Such construction is a matter of law. As Lord Hoffman said in *Investors Compensation Scheme Ltd v Bromwich Building Society [1998] 1 WLR 896* at p 912, the question is what meaning the document would convey to a reasonable person having all the background knowledge which could reasonably have been available to the parties in the situation in which they were at the time of the contract. It is therefore irrelevant to call evidence of how one party behaved after the event. That only sheds light on what that party subjectively thought he had agreed."

64. In ***Maggs***, it was held that the recorder was wrong to exclude evidence after the contract was formed as it was relevant to what the parties had agreed.

65. It has also been held that the rule in ***Miller's*** case does not apply where the contract is partly oral and partly in writing. (See ***BVM Management Ltd v Yeomans [2011] EWCA Civ 1254***). So that in those circumstances, things said and done after a contract is made are admissible to help decide what the parties had actually agreed.

66. These cases demonstrate that where a contract is not wholly in writing but is one that is oral or partly oral or partly in writing, evidence of what the parties said or did after the contract was made, may be considered to determine what the parties agreed or the nature of the contract.

67. In this case, the contract was not wholly in writing. An example of this is provided by the evidence relating to the payment for the services of Compression. The letter of 13 July 2000, said nothing of payment but there was evidence that Compression was to be paid. I believe the Judge recognised that the contract was not wholly in writing when he said that the essential terms of the parties "relationship were given life by the subsequent conduct of the parties..." In my judgment, therefore, it would be appropriate in this case to also consider evidence of events after 13 July 2000, in so far as it may shed light on the nature of the contract.

68. In any event, it seems that even where there was a written contract that in determining whether the party contracted with the goods owner as a carrier that the issue is not confined to the construction of the written contract. In ***Aqualon (UK) Ltd/Shipping Co v Vallana [1994] 1 Lloyd's Rep. 669***, Mance, J (as he then was) considered that, "the course of any dealings, including the manner of performance – at least in so far as it throws light on the way in which the parties understood their relationship", was relevant to determining whether a party contracted with the goods owner as forwarder or carrier. Similarly, in ***Electronska Industrija Oour TVA v Transped Oour Kintinentalna Spedicna and ors [1986] 1 Lloyd's Rep. 49***, the Court held that the question whether the defendants contracted to carry the

goods was to be decided having regard to all the evidence which included matters occurring after the contract was made.

69. In ***Aqualon***, it was indicated that various factors had been identified in decided cases which threw light on the role undertaken by the contracting party. The following were identified as the most obvious (at p. 674):

    a. the terms of the particular contract including the nature of the instructions given, for example whether they were to carry or for carriage or were to arrange carriage (although in *Tetroc* the use of the words "kindly arrange onward transport" was not regarded as of much importance in the face of what were regarded as other indications of responsibility as carriers); in this connection the nature and terms of any governing conditions also arise for consideration;

    b. any description used or adopted by the parties in relation to the contracting party's role;

    c. the course of any dealings, including the manner of performance – at least in so far as it throws light on the way in which the parties understood their relationship; thus whether or not the contracting party informed the goods-owner of or identified the actual arrangements made for carriage may be one factor in determining the former's role (see *Tetroc* at p. 195 col.2);

    d. the nature and basis of charging (in particular whether an all-in fee was charged, leaving the contracting party to make such profit as he could from the margin between it and costs incurred); this was a factor to which Mr Justice Hobhouse in the circumstances of *Elektronska* attached considerable significance (cf. p. 52, col.2), although in *Texas Instruments* it was outweighed in by other factors;

    e. the nature and terms of any CMR note issued…"

It appears patent that the significance of any particular factor is itself dependent on the circumstances of the case.

70. Looking at these factors in turn, the first consideration is the terms of a particular contract including the nature of the instructions given, or in other words, the words used in the contract. The words are evidenced by the letter of 13 July 2000. In considering the words of the letter as in any contract, the aim is to interpret what the parties meant by the language used, which involves what a reasonable person, having all the background knowledge would have understood them to mean (see ***Rainy Sky SA & Ors v Kookmin Bank [2011] UKSC 50*** and ***Arnold v Britton [2015] UKSC 36***)

71. Counsel for Compression drew reference to paragraph 15 of the ***Arnold*** case where Lord Neuberger explained the approach of the Court in interpreting a written contract. This paragraph is as follows:

> "When interpreting a written contract, the court is concerned with identifying the intention of the parties by reference to "what a reasonable person having all background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 AC 1101*, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) in the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions.

72. Counsel for Compression submitted that in the light of all these circumstances, the words were very clearly arranging carriage not effecting it. She drew attention to the first paragraph of the letter which she submitted was the language of making arrangements. As regards the second paragraph, it was submitted that that meant that what Compression had agreed to do was to make arrangements, i.e., to bring about appropriate transactions, i.e., contracts with

forwarders and carriers. It was not going to handle the generator by carrying it but to handle the transactions relating to its carriage.

73. Counsel for the respondent laid emphasis on the second paragraph of the letter. He submitted that the natural and ordinary meaning of the word "handle" as used in that paragraph meant to carry out or perform. He argued that what that paragraph meant was that Compression had assumed the responsibility for all arrangements, whether by actually performing them itself or by its agents.

74. It is clear from the letter of 13 July 2000 that the first paragraph refers to Compression making arrangements to forward the generator. The second paragraph, however, conveys something more than merely making arrangements for the transportation of the generator. If all the letter intended to say was that Compression would make arrangements for the transportation of the generator, the second paragraph would not be necessary. It conveys that something more than making arrangements to forward the generator was intended. Notably the letter makes no mention of Compression acting as agent for PowerGen. The reasonable person would not understand Compression to be acting in an agency role simply to make arrangements on behalf of the goods owner. Particularly, in the light of the second paragraph, the reasonable person would have understood that Compression had undertaken to do more than make arrangements. It had undertaken to handle all transactions covering the export and re importation of the generator in the sense of performing or carrying them out. Having regard to the approach as set out in the ***Arnold*** case, in my view, the reasonable person would have understood the letter to mean that Compression had assumed the role of

itself performing all transactions, in relation to the export of the generator which included the carriage of it to Rolls Wood facility in Scotland.

75. With respect to the description used or adopted by the parties in relation to the contracting parties role ((b) of ***Aqualon***), that description, as counsel for Compression submitted was to be derived from the letter of 13 July 2000 and as I have indicated above, this is to be understood as Compression undertaking the role as a carrier.

76. Before I turn to (c) of the factors identified in ***Aqualon***, I can quickly address (d) and (e). There is in this case no evidence of the nature and basis of charging by Compression. What we do know, however, from the evidence is that there was a payment to be made to Compression by PowerGen. This is clear from the evidence of Mr Singh, the managing director of Compression, when he stated that PowerGen wished to defer its payment to Rolls Wood as well as to Compression until January 2001. It is also the case that no carriage document was issued by Compression. While these are factors that may point to the contract not being one of carriage, in my view, they are outweighed by the evidence relating to the manner of performance of the contract that shed light on the way the parties understood their relationship, which is (c) at ***Aqualon***. It is to that factor that I now turn.

77. According to the evidence of Mr Singh, FCL was "our freight forwarder", or in other words, the freight forwarder of Compression. He indicated that he asked FCL to do the transportation on behalf of Compression, that FCL undertook to do transport operations on Compression's behalf and FCL undertook to do certain things on behalf of Compression.

This is a clear statement that FCL was retained by Compression as principal and not as agent for PowerGen, the goods owner, which would normally be the case where the contracting party is acting as merely the forwarder or arranger of the transportation. As was noted in the paragraph from ***Halsbury's Laws*** (see para 53 of this judgment), the forwarder/arranger's function is merely to act as agent for the goods owner. Mr Singh, however, did not see it that way.

78. It was also indicated in that paragraph from ***Halsbury's Law***s that the forwarding agent or arranger does not ordinarily obtain possession of the goods. Mr Singh, in his evidence, however, stated that the generator was released into Compression's custody through its agent, FCL. Compression, therefore, understood that it was taking possession of the generator which is not the usual role of a forwarder.

79. The bill of lading in relation to the transportation of the generator by sea refers to the exporter as Compression. In fact, PowerGen is not mentioned in the document at all. This again is evidence that Compression saw its role as one where it was itself responsible for the carriage of the generator and not simply making arrangements for its carriage. In Bugden and Lamont-Black, **Goods in Transit and Freight Forwarding** (3rd Ed.) (at p. 376) it is noted that where a contracting party names himself as the shipper is strong evidence that he has contracted to carry the goods and not as agent to arrange the carriage.

80. Compression also insured the generator in its own name. According to Mr Singh's evidence he relied upon Compression's brokers to arrange insurance having regard to all foreseeable

risks, in particular the risk of damage to the generator. While the generator was not insured in respect of damage to it, the fact is that Compression saw itself as responsible for any damage caused to the generator while in transit. This obviously is inconsistent with assuming the role of mere arranger on behalf of the goods owner for the transportation of the generator.

81. These matters show that Compression understood its role as one to effect the carriage of the generator, not merely to make arrangements for the carriage of it. As Mr Singh himself said in cross-examination, Compression did take on the role of performing the various services of export but performing it through other companies.

82. In all the circumstances, I cannot disagree with the Judge's finding that Compression contracted with PowerGen as principal to carry the goods with PowerGen appreciating that Compression will perform the contract vicariously through the employment of sub-contractors. The nature of the contract was one to effect carriage and not merely to arrange the carriage of the generator.

83. It should be noted that it is possible that a contacting party may contract as a forwarder or arranger with the goods owner but may contract as principal with others to do the carriage. In ***Aqualon***, supra, Mance J observed that it does not mean that such a role is "either likely or lightly to be inferred" and that a "finding that a contracting party was intended to fill an intermediate role of this nature would require to be supported by evidence demonstrating clearly that this was the intention." There is however no evidence in this case that such a role

was intended. The evidence points clearly to Compression assuming the obligation to effect carriage of the generator.

84. The next ground advanced by Compression relates to the finding by the Judge that Compression was also liable as a bailee of the generator. Counsel for Compression submitted that the Judge erred in so holding for essentially three reasons. First it was submitted that PowerGen did not plead that Compression was a bailee of the generator nor did it plead a breach of its duties as bailee. The issue, therefore, did not arise on the pleadings and the Judge was wrong to have dealt with it. Second, and in the alternative, there could be no bailment as Compression was not a contractual carrier, in other words did not contract to effect the carriage and did not at any time have possession of the generator. Even if it were found that the contract was one to effect carriage, then Compression would still not be a bailee in the strict sense and the correct analysis would be that there was a quasi-bailment.

85. With respect to the first submission, I am unable to agree that the pleadings did not permit the issue of bailment to be raised. It is, I think, significant to note that in the Court below, counsel, then appearing for Compression, seemed to have no difficulty in understanding PowerGen's statement of claim as alleging a breach of duty by Compression as a bailee of the generator. I believe counsel was correct to view it in that way.

86. PowerGen pleaded in its statement of claim that Compression "by its servants or agents collected the generator from the" premises of PowerGen and that it failed to "take due and proper care and custody of the said generator by reason whereof it sustained damage". It

further pleaded that while the generator was in Compression's custody and control, it negligently failed to, *inter alia*, secure the generator. They then followed particulars of Compression's negligence.

87. In the written submissions on behalf of PowerGen, reference was made to a form of statement of claim on bailment. In that form, the material averments are the fact that the defendant had custody of the chattel or in the words of the form "was entrusted with the chattel." And failed to exercise proper care and custody of it. Similar averments are pleaded in PowerGen's statement of claim and in my view it properly raises a case in bailment and a breach of the duties of the bailee to take due and proper care of the generator.

88. With respect to the second submission, if by that submission it is intended to convey that a bailment cannot arise independently of a contract, then that is clearly not correct. The relationship of bailor and bailee can exist independently of contract (see ***Gilchrist, Watt & Sanderson Pty. Ltd v York Products Pty. Ltd [1970] 3 ALL ER 825***). As was said in ***Building & Civil Engineering Holidays Scheme Management Ltd v Post Office [1965] 1 ALL ER 163, 167***, an action in bailment can "be put as an action on its own, *sui generis*, arising out of the possession held by the bailee of the goods". Taking possession of the goods involves an assumption of responsibility to take reasonable care of the goods entrusted to him (See ***Gilchrist supra*** at p 831).

89. In this case the evidence of Compression's possession of the goods is quite clear. Contrary to the submission of counsel for Compression, there was no uncertainty that Compression

was in possession of the generator. According to Mr Singh, the managing director of Compression, "PowerGen released the generator into Compression's custody through its agent", FCL. The release was effected at PowerGen's premises on Wrightson Road in Port of Spain. Further, in cross-examination Mr Singh stated that FCL undertook to do certain things on Compression's behalf. And that FCL was Compression's freight forwarder. He further stated that he asked FCL to do the transport operation on behalf of Compression and that he expected them to ensure the safe storage of the generator on Compression's behalf in the container.

90. As regards counsel's submission that even if there was a contract to effect carriage, that Compression was not strictly a bailee but that there was quasi-bailment, it is relevant to note that this goes to the onus of proof rather than the question liability.

91. In the case of a bailee, whether he be a bailee for a reward or a gratuitous bailee, the onus is on him to prove that the loss or damage to any goods bailed to him was not caused by his fault or that of his servants or agents to whom he may have entrusted the goods for safe-keeping (see ***Port Swettenham Authority v TW Wu & Co (M) SDN BHD [1979] AC 580***). In the case of a quasi-bailment, the burden remains on the bailor to show that the damage to goods was as a consequence of the negligence of the bailee.

92. The following from ***Halsbury's Laws Vol 7 (2015)*** para 65 sets out the characteristics of a quasi-bailment and the burden of proof in such a case:

> "Where a carriage contractor lawfully exercises a discretion to delegate the whole of the performance of the contract of carriage to a third party, and the carriage

> contractor neither receives possession of the goods nor reserves any right of possession against the party to whom the carriage is delegated, the relationship is one of quasi bailment. The carriage contractor must take reasonable care in selecting the actual carrier and is answerable, in like manner to a conventional bailee, for the actual carrier's failure to take reasonable care of the goods, irrespective of whether the carrier's default was accompanied by personal fault on the part of the carriage contractor himself. But the carriage contractor is not strictly a bailee and does not carry the normal bailee's burden of negativing default on the part of himself or any delegate. The actual carrier to whom performance of the carrier is delegated owes the duties of a bailee directly to the original bailor, irrespective of contract…"

93. It is apparent from that that a quasi-bailment would arise where the carriage contractor neither receives possession of the goods nor reserves any right to possession against the party to whom the carriage is delegated. That, however, does not describe this case. But as I mentioned, even if a quasi bailment did arise, it goes to the burden of proof and as I have mentioned later, it would not make any difference to Compression's liability.

94. In my judgment therefore, the pleadings raise the issue of a bailment of the generator to Compression and the breach of Compression's duty as bailee. The trial Judge was therefore correct to have entertained the issue. The evidence establishes that Compression was a bailee of the generator as it took possession of the generator through its agent and the Judge was also correct to so find. In the circumstances Compression assumed the responsibility to take reasonable care of the generator. Further I agree with the written submissions of PowerGen that Compression was a bailee for reward. I do not understand Compression's position to be that should the Court conclude there was a bailment that it has disputed that the correct analysis is that it was a bailee for reward.

95. I turn now to the ground in relation to the cause of the damage. The Judge, having found that there was a contract to effect carriage and that Compression was a bailee of the generator and

that it was under a duty to take reasonable care of it, correctly noted that "if the damage was caused, not by the insecure attachment of the generator to the frame, but by committing the breaches set out in the "Particulars of Negligence", and including acts such as inadequately securing of the frame (with generator securely attached) to the container and/or ship, for instance, then Compression is at fault, having breached" its duty under the contract, its duty as bailee, and its common law duty to take reasonable care of the generator thereby causing loss and damage.

96. From the evidence, the damage to the generator was sustained by it moving to-and-fro within the container and repeatedly hitting the side of the container during the sea voyage. This more than likely accounted for the banging noise heard during the sea voyage to Scotland. The short point, however, is that the damage to the generator was caused by its movement within the container hitting the sides of the container. According to the evidence, there were two possible causes. Either the generator was not properly secured to the transportation frame or the frame with the generator secured to it was not secured within the container allowing it to move within the container.

97. It is common ground that the responsibility for securing the generator to the frame rested on PowerGen. It is for that reason that the Judge noted that if the damage was not caused by the insecure attachment of the generator to the frame but by some other breach, including the failure to adequately secure the frame with the generator attached to the container, that Compression would be liable. It would be liable as the Judge correctly noted as being in

breach of its contractual duty, in breach of its duty as bailee, and in breach of its common law duty of care.

98. The Judge found that the generator was properly secured to the frame and therefore he found the damage to it was not the fault of PowerGen, but the failure by Compression to take reasonable steps to secure its safe passage to the UK. He stated (at para 41):

> "The necessitity to adequately secure the generator was obvious and was in no small part to guard against the usual perils of the sea, such as rough and stormy seas. I find that Compression did fail in its duty to PowerGen in relation to the transportation of the generator to Aberdeen. I find that Compression was required to ensure the safe passage to Aberdeen, regardless of whether or not it subcontracted the work or, took all reasonable steps in selecting its agents/sub-contractors who carried out the transportation. I see no evidence to suggest that the damage was caused by any other reason than the negligence of the defendant and/or its agents/sub-contractors."

99. Counsel for Compression submitted that that finding is wrong. The Judge should have found that the generator was not properly secured to its transportation frame and therefore the cause of the damage was PowerGen's nrgligence. Counsel referred to the report of Mr J. Shepley, which was in evidence before the trial Judge. Mr Shepley was of Lloyds Register of Shipping. He was requested by PowerGen to inspect the generator at Southampton and prepare a report on his observations. Counsel referred to the following which is contained in Mr Shepley's report:

(i) "…the Gas Generator to Air Freight Frame attachment bolts are missing and therefore the Gas Generator requires to be properly secured to the Air Freight Frame before being transported…"

(ii) "…in addition the Engine to Air Frame mounting bolts were missing…"

(iii) (Reference was made to a photograph and Mr Shepley stated) "…shows scuffing between engine casing and the cradle. This leads me to believe

> that the Gas Generator was moving within the cradle. Subsequent examination showed that holding-down bolts were not in place i.e. had sheared, had worked loose, had not been fitted, had been forced out of their fittings, had been removed by HM Customs and not replaced."

The more likely conclusion from those observations, it was submitted, is that the damage to the generator was PowerGen's failure to properly secure it to the transportation frame.

100. In light of counsel's submissions, it is necessary to review the relevant evidence.

101. According to Mr Nicholls, who was a member of PowerGen's crew tasked with preparing the generator for collection and who gave evidence on behalf of PowerGen, the generator was bolted on to the transportation frame. He stated (at para 2 of his witness statement):

> "I was one of the crew selected to remove the gas generator and have it ready for collection at the power station by [Compression]. This involved disconnecting the gas generator and removing it from the other pieces of equipment to which it was attached and then bolting it onto a special metal transportation frame designed specifically to transport the gas generator. The metal transportation frame belongs to PowerGen and is used only for the transportation of this type of gas generator. The gas generator was bolted on to the metal transportation frame and it was placed in a special protective bag known as the MVPS bag and sealed. I followed the procedures set out in the manufacturer's maintenance manual…"

102. This evidence was corroborated by Mr Ow Buland. He was, at the time, the maintenance manager in the employ of PowerGen and had given instructions to prepare the generator for collection. He acknowledged that Mr Nicholls was a member of the PowerGen team that was responsible for preparing the generator for collection. He stated (at para 8 of his witness statement):

> "I checked to ensure that the procedures had been followed and that all the bolts were in place. I am certain that all the bolts were in place. I checked the trunnions to ensure that the 2 trunnion bolts of each of the 2 trunnions were in

> place and tightened and I checked the railing around it to ensure that it was properly bolted down and securely tightened. I also checked to make sure that the gas generator was securely attached to the metal transportation frame and that the two bolts located at the front under the arch were in place and that they were all properly bolted and tightened."

Although Mr. Nicholls had referred to the procedures in the manufacturer's maintenance manual, there was evidence that Compression had obtained advice from Rolls in relation to the preparation of the generator for transit and had passed this onto PowerGen.

103. The Judge accepted that PowerGen knew what had to be done and had acted on it. He stated (at para 40):

> "I accept the evidence of Mr Singh for Compression, that having requested and subsequently received the packing and transportation guidance from Rolls, he forwarded that information to Mr Chuckeree of PowerGen along with his own advice to locate to the MVP bag for packing the generator… It is clear from the evidence that PowerGen received this information and acted upon it by securing the generator to the transit frame and sealed the generator in the MVP bag before turning it over to Compression's shipping agent, [FCL]....There is no evidence that PowerGen did not understand the instructions or otherwise did not understand what was required for securing the generator to the frame and sealing it. "

104. The Judge then considered whether the cause of the damage to the generator was because it was not properly secured to the frame. As noted above, he considered correctly that if it was not, then PoweGen would be liable. He came to the finding at paragraph 41 of his judgement which is referred to above that he saw no evidence to suggest that the damage was caused by any other reason than the negligence of Compression and or its sub-contractors.

105. Apart from Mr. Shepley's report there were two other reports in evidence before the Judge. One was prepared by Mr Kevin Simpson which was commissioned by Compression and the other by Mr Steve Burke.

106. Mr Simpson's observations were consistent with those of Mr Shepley in that he too observed that the mounting bolts (generator to frame) were not in place. He, however, noted that it was not possible to see if the bolts had sheared. He did not, however, express an opinion as to how the damage to the generator occurred.

107. Mr Burke's report also does not contain an opinion as to the cause of the damage and his observations do not appear helpful in determining whether or not the generator was properly secured to the transportation frame.

108. With respect to Mr Shepley, although he made the observations in his report to which counsel for Compression referred, he concluded in his report that:

> "The damage sustained to the frame, bag and engine would initially appear to be due [to] the engine having rolled to-and-fro within the container and then turned on its side and repeatedly hit the side of the container during the journey, possibly because it was insufficiently secured within the container which may have lead to failure/working loose of the engine to frame holding down bolts…"

Mr. Shepley therefore acknowledged as a possibility that the reason that the mounting bolts were not in place could have been because the frame was insufficiently secured within the container.

109. The Judge considered the three reports and concluded (at para 50) as he had done earlier in his judgment that the cause of the damage was not the failure of PowerGen to secure the generator to the transportation frame but that of Compression to secure the generator and frame within the container. He stated:

> "I come now to the cause of the damage to the generator during the marine voyage to the UK. It does not appear to me that there is much contention between the parties on this point. However, if there is, my findings are that of Mr Shepley's more specifically found at para 14.1(1) of his report… [which is the paragraph quoted above from Mr Shepley's report]. The report of Rolls, prepared by Mr Simpson, although relied upon by Compression, in my view is not particularly helpful or certainly not sufficiently helpful to their case. In the end, his report like that of Mr Shepley (and to a much less extent that of Mr Steve Burke), suggest that it is more likely than not that the genesis of the cause of the damage was the inadequate securing of the generator and frame within the container. This remains my finding, notwithstanding the apparent compromised attachment between the generator and transit frame, such as the "sheared bolts" and missing bolts even. These compromises, it appears, are more likely to have resulted from the generator and frame being bounced and rolled around the container. In the end, the generator remained substantially secured to the transit frame. The responsibility for properly securing the engine and frame in the container and/or aboard any safe location of the ship and, the immobilizing the transit to frame rules, if necessary was that of Compression."

110. In my judgement, the Judge was entitled to come to that conclusion on the evidence. It was open to him to accept the evidence of PowerGen that the generator was properly secured to the frame. Mr Shepley's report does not provide an adequate basis to reject that evidence. He recognised that a reason that the mounting bolts were not in place could be because the generator was insufficiently secured within the container. The movement of the generator by the failure to secure it within the container could have caused the bolts to work loose or fail. There was no basis to doubt the veracity of PowerGen's evidence. The evidence of Mr. Nicholls and Mr. Ow Buland was not contradicted. Indeed their evidence is supported by Mr. Simpson's report in one particular. Mr Simpson, in his report observed that the trunnions

were bolted to the generator using two of four bolts normally fitted. "However, these bolts were secured as were the bolts securing the trunnion feet to the stand itself". This is consistent with the evidence of Mr Ow Buland that he ensured the trunnion bolts were in place and tightened and points to the truthfulness of PowerGen's evidence.

111. Not only was there no basis to doubt the truthfulness of the evidence of Messrs Ow Buland and Nicholls, there was no evidence from which it can properly be concluded that Compression or its agents had done anything to properly secure the generator within the container. The evidence as to the cause of the damage was really consistent only with the conclusion that PowerGen was not at fault but rather the damage was caused by the failure of Compression or its agents to properly secure the generator within the container.

112. Counsel for Compression submitted that Mr Shepley's expressions of opinion contained in his report were not admissible as PowerGen had not sought to admit the report as expert evidence. However, this was a matter to which the Rules of the Supreme Court, 1975 applied and the expert evidence regime of the Civil Procedure Rules (CPR) was not applicable to it. Further, all the reports were in evidence by consent. Indeed, in the amended defence of Compression, it was indicated that Compression intended to rely on the reports of Mr Shepley's and Mr Simpson for their "full-terms true purport and effect". Compression cannot now be heard to say that the opinions expressed in Mr Shepley's report or any part of it is inadmissible.

113. In my judgment, the Judge was plainly correct to find that the cause of the damage to the generator was not the fault of PowerGen by failing to secure the generator to the frame, but that of Compression by failing to secure it within the container. This, in my judgment, is a conclusion he was able to come to on a balance of probabilities where the onus rested on PowerGen to prove the cause of damage.

114. However, as I have mentioned above, in the case of a bailment, the onus is on the bailee to prove that the loss of any goods bailed to him was not caused by any fault of his or his servants or agents, to whom he entrusted the goods for safe-keeping (see ***Port Swettenham* supra**). In those circumstances, the onus would be on Compression to show that the damage to the generator was not caused by its negligence or that of its servants or agents. . There is however no evidence that Compression had properly secured the generator within the container. If, therefore, the onus was on Compression to discharge the duty that was on it as bailee, it hopelessly failed to do so. For that reason also the Judge was plainly correct to conclude that Compression was responsible for the damage to the generator.

115. The final ground raised by Compression relates to the award of damages. The contention is that the award is erroneous as being too high. This ground was, however, not contained in the Notice of Appeal. And in the written submissions filed on behalf of Compression, it was never raised. Counsel sought the leave of the Court to argue this ground and it was indicated that the Court would hear her submissions but would reserve its decision on whether it would entertain the ground after it heard any objection to it so doing that counsel for PowerGen may wish to make. Counsel for PowerGen objected to the ground being pursued on the basis that

he had had no prior notice that it was to be raised and had no prior notice of the arguments in support of it. He, therefore, was in no position to assist the Court. In the circumstances, to allow counsel for Compression to raise the point would be unfair to PowerGen and we are therefore, not prepared to entertain it.

116. In these circumstances, this appeal is dismissed with costs to be paid by Compression to PowerGen to be taxed in default of agreement.

A. Mendonça
Justice of Appeal