IN THE COURT OF APPEAL OF BELIZE AD 2015

CIVIL APPEAL NO 2 OF 2013

BEL-CAR IMPORT & EXPORT COMPANY LIMITED Appellant

v

NATIONAL CANNERS LIMITED Respondent

_____

BEFORE

The Hon Mr Justice Sir Manuel Sosa	President
The Hon Mr Justice Dennis Morrison	Justice of Appeal
The Hon Mr Justice Samuel Awich	Justice of Appeal

F Lumor SC for the appellant.
N Ebanks for the respondent.

_____

25 and 27 June; 27 and 29 October 2014; and 27 March 2015.

SIR MANUEL SOSA P

[1] This appeal should, in my opinion, be dismissed. I concur in the reasons for judgment given, and the orders proposed, by my learned Brother, Awich JA, in his judgment, which I have read in draft.

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SIR MANUEL SOSA P

MORRISON JA

[2] I have had the benefit of reading in draft the judgment prepared by my learned brother, Awich JA. I agree with his reasoning and conclusion, and have nothing to add.

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MORRISON JA

AWICH JA

[3] Inspite of the several submissions skilfully made by learned counsel Mr. Lumor SC, for Bel-Car Export and Import Company Limited, the appellant, I propose in this judgement that, this appeal be dismissed, the judgement of the learned trial judge then, Hafiz – Bertram J be affirmed, and National Canners Limited, the respondent, have its costs in the appeal, and in the court below in the terms ordered by the trial judge. My reasons are set out below.

The facts.

[4] In March, 2007, the appellant, Bel-Car Export & Import Company Limited, of Belize, acting on a commercial purchase order placed by the respondent, National Canners Limited, of Trinidad and Tobago, sold to the respondent 1512 bags of beans, each weighing 100 pounds. The description of the beans given in the order was: "2007 crop, double cleaned canning quality light red kidney beans from a sample lot received for evaluation February, 2007 and approved March 02, 2007." It was stated further that:

"Shipment to be representative of sample lot, sample (sic) should not contain stones and/or extraneous matter."

[5] The purchase price was US$46.25 per bag, the total price being US$69,930.00 CIF. It was paid in advance of shipping the beans. Shipment was to be in 3 containers from Belize to Trinidad and Tobago, each container carrying 504 bags. The first container was to arrive at port in Trinidad and Tobago on or about 17, March 2007, and the second and third before the end of March 2007. The contract of sale was comprised of several memoranda.

[6] The appellant had sent a sample of the beans to the respondent before the sale. The sample was examined and approved by the respondent. A report on the examination, and the approval was adduced as evidence. There was no issue about the description, condition and appearance of the sample.

[7] The appellant shipped the first container of the beans and issued a CARICOM invoice No. 7107 on 7 March, 2007 for US$23,356.25, part of the purchase price. The first shipment was not part of the respondent's claim in the court below, and is not a subject matter of this appeal. However, the appellant complains that, the learned trial judge, erred by accepting in the trial evidence regarding delivery and examination of the beans in the first shipment, and of payment for that shipment.

[8] The complaint is merited only to the extent that, much of the evidence about the state of the beans in the first shipment was adduced to prove that the bad state of the

beans in the first shipment was the same as the state of the beans in the second shipment, that is, the state of the beans in the second and third containers. It does not appear, however, from the records that the evidence complained about led to or influenced the findings of fact and the decisions that the trial judge reached regarding the state of the beans in the second and third containers when the beans were received and examined by the respondent. There were several items of other and sufficient direct evidence regarding the description and state of the beans in the second and third containers that supported the findings of fact and the decisions that the judge reached.

[9] Besides, the evidence regarding the first shipment was relevant and admissible as proof of what parties had accepted or not, in the course of dealing with each other, as reasonable opportunity to be afforded to the respondent to examine the beans, and to decide whether to accept or reject them. The evidence was also relevant and admissible as proof of a sum, if any, that would be refunded from the global purchase price which included the price of the beans in the first shipment, and as proof of damage, if any. I would at the outset reject the ground of appeal that, all the evidence regarding the beans in the first shipment was wrongly admitted by the trial judge.

[10] A summary of some of the important direct items of evidence about the beans in the second and third containers are the following. On 26 or 27 March, 2007 the appellant presented at the port in Belize the two loads of beans, each comprised of 504 bags, for shipping. The two containers were dispatched on 28 March, on the same ship, the MV Palencia. The shipment arrived at the port in Port -of- Spain, Trinidad and Tobago, on the 23 or 25 April, 2007. There was no issue about the date of shipping and the date of

arrival. The two containers of beans were cleared, that is, checked by Trinidad and Tobago authorities and handed over to the respondent, about a day after the date of arrival. The respondent took the beans to its warehouse. Its witness Afzal Rahamut, stated: "upon receipt of the second and third containers we conducted a sorting exercise, 22 (twenty two) bags from each container were inspected, canned and subsequently released." He stated further: "We proceeded with the sorting of the full container loads on April 27, 2007, our agents examined the beans and discovered [that] the shipments of beans were contaminated with live and dead snails. When we detected the presence of snails, we immediately stopped processing the beans and contacted the supplier and his agent for their feedback."

[11] But in email exchange between Eris Garvin, acting for the respondent, and Ramesh Jaimani, acting for the appellant, Garvin stated something different, she stated that, "sorting of the first container started on May 10, 2007", and "sorting of the second container started on May 11, 2007." The emails were the following:

> "Ramesh.
> ---Original Message---
> **From:** Ramesh & Babes
> **To:** National Canners Limited
> **Sent:** Wednesdays May 23, 2007 1:49 PM
> **Subject:** Questions on RKB container from Bel-Car
>
> Dear Mrs. Garvin,
>
> The Board of Directors of Bel- Car is aware of the complaint from National Canners on the last two containers of RKB shipped to you.
>
> They require answers to the following questions as well as the lab report. Please supply the information at your earliest convenience.

What day was (sic) the two containers cleared?

When did the sorting exercise began (sic) on the first containers?

When did it began (sic) on the second container?

After how many bags in the sorting exercise was (sic) snail shells discovered?

How many snails per bag?

I await your response on the above."

" **From:** eris garvin
To: Ramesh Jaimani
Sent: Thursday, May 31, 2007 4:46 PM
Subject: REJECTED RED KIDNEY BEANS WITH SNAILS FROM BELCAR

Good Afternoon Mr. Jaimani,

We refer to your email of May 23, 2007 and hereby respond to the questions raised as follows:

No: 1 – The two (2) containers were cleared on April 23, 2007.
No: 2 – Sorting of the first container started on May 10, 2007.
No: 3 – Sorting of the second container, started May 11, 2007.
No: 4 – In the first container, after sorting 74 bags, snails were discovered.
No: 5 – In the second container, after sorting 3 bags, snails were discovered
No: 6 – Snails were found among the bags sorted in a range of 0-12.

Please let us have your urgent comments by return email.
With thanks and kind regards
ERIS R GARVIN
Purchasing Department
NATIONAL CANNERS LIMITED
EMAIL: nclerisgarvin@yahoo.com"

[12] On 18 June, 2007 by a letter of that date, the respondent stated that it rejected, "the entire shipment", on the ground that live and dead snails had been found in the bags that had been "sorted." By the expression, "the entire shipment", the respondent meant all the beans in the second and third containers shipped together on the MV Palencia. The letter further informed the appellant that, the respondent was waiting for disposal

instruction from the appellant, and demanded refund of the purchase price. Furthermore, the letter advised that a statement of account for “clearance charges” would be forwarded to the appellant for payment. The respondent sent a reminder letter on 29 June, 2007.

[13] On 8 July, 2007 the appellant wrote to the respondent rejecting the claim that, the beans had snails among them. The appellant stated that, the beans had been cleared by Belize Agriculture Health Authority – BAHA, and the National Plant Protection Authority of Trinidad and Tobago, and then stored by the respondent, “somewhere until the sorting on 10 May 2007.” Further, the appellant stated that, the respondent had conducted an, “initial evaluation,” and had stated that, “the beans were acceptable.”

[14] On 19 July, 2007, Mrs. Garvin for the respondent, made an, “application for survey of goods”, to Messrs Huggins Services Limited, said to be, “Lloyd’s agent in Trinidad”. On the same date Mrs. Garvin made a written request to Food and Drugs Division Inspectorate of Trinidad and Tobago for, “inspection of rejected red beans shipment.” An employee of Huggins Services Limited attended and inspected the beans on 20 July, 2007. Representatives of the “suppliers” (the appellant) and of Plant and Quarantine, and Food and Drugs Division Inspectorate also attended. Mr. Jaimani was the representative of the appellant who attended. Ms. Karen Jones was the representative of the Food and Drugs Inspectorate Division.

[15] The inspector for Huggins Services Limited took at random a small number of bags and examined them. He reported: “a small quantity of red kidney beans were found with foreign matter alleged to be that of snail remains. After 9 bags were unpacked and

segregated, a total of 6 snail shells only and a quantity of nibbling in each bag were found." His report, exhibit No. AR II, was dated 13 August, 2007.

[16] The Food and Drugs Division Inspectorate of Trinidad and Tobago reported its observation or examination in a letter to Mr. Paul Rahim of Customs Department of Trinidad and Tobago as follows:

> "Dear Sir,
>
> **RE: DESTRUCTION - ONE THOUSAND AND TEN (1010) BAGS RED KIDNEY BEANS**
>
> **EXPORTER: BEL – CAR XPORT/IMPORTS**
> **P.O. BOX 427**
> **SPANISH LOOKOUT**
> **CAYO,**
> **BELIZE**
>
> **CONTAINER(S) #: CLHU 287142-0**
>
> **VESSEL: PALENCIA/216**
>
> **DATE OF ARRIVAL: April 11th, 2007**
>
> With reference to my examination of the above-highlighted product from the above mentioned consignment on PALENCIA/216, please be advised that the product was deemed unfit for use in further processing/human consumption as a result of adulteration due to the presence of snail shells and other unidentified foreign matter, some of which were physically attached to the product.
>
> As a result, it is recommended that the consignment be destroyed under the supervision of Customs and the Food and Drugs Inspectorate.
>
> Please be guided accordingly."

[17] On 8 August, 2008 a "disposal certificate", was issued by the Executive Manager of Messrs Waste Disposals (2003) Limited. It stated that, 20 cubic yards of red kidney beans had been disposed of on 27 May, 2008 by "soiling", which the witness for the

respondent said meant by burying in the ground. The appellant disputed at the trial and in the appeal that the beans were buried away, alternatively that, the quantity buried was 840 bags.

[18] A report made by BAHA, an entity in Belize in its letter dated 14 February, 2012 to Mr. Friesen of the appellant, admitted as exhibit No. BC 22, contrasted sharply with the report made by Huggins Service Limited and by Food and Drugs Division Inspectorate of Trinidad and Tobago. The material part of the letter by BAHA stated:

> "February 14, 2012
>
> **Mr. Otto Friesen**
> BEL –CAR Import/Export Co. Ltd
> Spanish Lookout
> Cayo District, Belize C.A
>
> **Dear Mr. Friesen:**
>
> We are in receipt of your letter dated 12th February, 2012 regarding assistance from the Belize Agricultural Health Authority (BAHA) in an ongoing Supreme Court case between your company and a company in Trinidad on beans exported to that country in 2007.
>
> The Plant Health Department of the Belize Agricultural Health Authority inspected the said consignment which consisted of two 20 feet containers (#CLHU287142-0) of beans in 2007 and as far as we can ascertain, and is standard procedures in the inspection of grains for export, the consignment was sampled and found to be free of any visually detectable pest of quarantine importance. The consignment was then fumigated with Aluminium Phosphide at a concentration of forty (40) tablets per container. After satisfying the import requirements of the importing country (Trinidad and Tobago) Phytosanitary certificate No. 23560 was issued on March 21, 2007 for that consignment.
>
> ***As per international standard and procedures, International Standard for Phytosanitary Measures (ISPM) No. 12, a consignment of agricultural commodities maintains Phytosanitary security from the point of certification and sealing in the export country, until the importing regulatory agencies breaks the seals, conduct their inspections and determine if the consignments are complaint with the import requirements.***
>
> The Belize Agricultural Health Authority was never informed by the National Plant Protection Organization (NPPO) of Trinidad and Tobago that there was a problem with the

consignment exported to them. BAHA finds it very difficult to comprehend how claims of live snails could be found in the consignment given the following:

- Note needs to be made here that the dosage of phostoxin (40 tablets.20 ft. containers) and the percentage moisture content of the beans would not allow any snail to survive…"

The claim:

[19] On 30 July, 2010 the respondent filed a claim in the Supreme Court of Belize. The statement of claim was subsequently amended. The respondent claimed that the appellant had breached terms of the contract of sale between them in that, the beans conveyed to the respondent in the second and third containers were, "infested with live and dead snails." In particular, the respondent stated that, the beans:

"a. were not reasonably fit for the said purpose communicated by the Claimant in that they were not of canning quality or reasonably fit for canning for human consumption.

b. did not correspond to the sample provided by the Defendant in that they contained extraneous matter, namely live and dead snails; and

c. were defective rendering them unmerchantable."

[20] The respondent then claimed that, as a consequence of the breach of the terms of the contract, the respondent rejected delivery of 840 bags out of the bags of beans conveyed in the second shipment, and made them available to the appellant. The respondent stated that, the claim was founded on s. 16 (a) and s. 17 of the Sale of Goods Act, chapter. 261, Laws of Belize.

[21] Under s. 16 (a), the respondent claimed that: it had made known to the appellant the purpose for which the respondent wanted to purchase the goods, the beans; the purpose was canning for human consumption; the beans shipped and rejected were not fit for that purpose, averred the respondent. ***Section 16*** states as follows:

> **"16. Subject to this Act, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contact of sale, except as follows-**
>
> **(a) where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller' skills or judgement, and the goods are of a description which it is in the course of the seller's business to supply, whether he be the manufacturer or not, there is an implied condition that the goods shall be reasonably fit for such purpose; but in the case of a contract for sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose.**
>
> **(b) where goods are bought by description from a seller who deals in goods of that description, whether he is the manufacturer or not, there is an implied condition that the goods shall be of merchantable quality, but if the buyer has examined the goods there shall be no implied condition as regards defects which such examination ought to have revealed;**
>
> **(c) an implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade;**
>
> **(d) an express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.**

[22] Under s. 17, the respondent claimed that, the contract of sale was for sale by sample of the beans, by the appellant, it was the requirement of the law that, the beans would correspond with the sample, and would be free from any defect which would not be apparent on reasonable examination of the sample, rendering the beans unmerchantable. **Section 17** states as follows:

Sale by Sample

17. – (1) A contact of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect.

(2) In the case of a contract for sale by sample, there is an implied condition-

(a) **that the bulk shall correspond with the sample in quality;**

(b) **that the buyer shall have a reasonable opportunity of comparing the bulk with the sample;**

(c) **that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.**

[23] For relief the respondent claimed:

"I. the price of the goods being US$38,850.00 or BZ$ 77, 700.00;

II. alternatively, damages for breach of contract;

III. in addition, special damages of US$4,051.77 or BZ$8,103.54;

IV. costs;

V. interest pursuant to the Supreme Court of Judicature Act;

VI. such further or other relief as the Court sees just; and

VII. loss of profit of US$38,359.31 or BZ$76,718.62."

The defence.

[24] In its defence, the appellant made several admissions and several denials. The primary admission was that, in March 2007, the appellant and the respondent entered into an agreement for the sale of 1512 bags of double cleaned red kidney beans of 2007 crop; the appellant was the seller and the respondent was the purchaser. The appellant averred that, the terms of the agreement of sale were that:

> "(c) the goods would comply with the sample provided.
>
> (d) the goods would be free from defect rendering them unmerchantable.
>
> (e) the goods would be inspected within a reasonable time by the Claimant.
>
> (f) at the time of delivery the goods would be in good condition and in a deliverable state.
>
> (g) the goods would be of marketable quality.
>
> (h) 1/3 of the goods would be shipped immediately and the other 2/3 at a later date."

[25] The terms of the contract averred in the admission by the appellant were not materially different from those averred by the respondent. The differences between the case for the respondent and the case for the appellant were in the averments regarding performance.

[26] The appellant averred that: it delivered beans that corresponded with the description given in the agreement, and with the sample provided; and that, "the beans

were of superior merchantable quality"; were "reasonably fit for human consumption;" and that there were no snails and other objects among the beans, there were no defects in the beans. The appellant averred furthermore that: the beans had been inspected by BAHA in Belize and the bags of beans were sealed before shipment; and upon arrival at the port in Port-of-Spain the National Plant Protection Authority, and Food and Drugs Division Inspectorate of Trinidad and Tobago inspected and approved the beans before the beans were released to the respondent.

[27] The appellant contended that, the beans had been stored in the respondent's warehouse for an unreasonably long time before they were examined on 10 and 11 May, 2007, and, "purportedly rejected", by the respondent. Further, the appellant contended that, after the respondent had, "purportedly rejected", the beans it did not return them, instead the respondent dealt with the beans as if it was the owner of the beans.

[28] The appellant denied that, the beans were infested with snails and had among them, "extraneous matter", when the beans were shipped, and when they were released to the respondent at the port in Port - of - Spain. Accordingly the appellant denied that it was responsible for the snails and other objects, if found among the beans. It denied that, it breached the contract of sale, and denied that, it was liable under section 16 or s.17 of the Sale of Goods Act, for the loss claimed by the respondent. The appellant asked the trial court to dismiss the claim.

The crucial evidence

[29] The important items of evidence were largely common evidence. It was common evidence that, there was a contract of sale between the appellant and the respondent, of red kidney beans of the 2007 crop, for canning for human consumption, and the sale was by description as well as by sample. It was common evidence that, the respondent paid the agreed purchase price in advance of shipping the three containers of beans, the last two only were the subjects of the claim. It was common evidence that, the beans in the second and third containers arrived at the port in Port - of - Spain on 23 or 25 April, 2007 and the respondent had the beans cleared by Trinidad and Tobago authorities and took custody of the beans about a day after.

[30] An item of evidence which the respondent regarded as very important for its claim and this appeal was that, immediately after the beans had been cleared by the authorities, the respondent sorted out 22 bags from each container and canned them for sale in its business, and that some more bags were later sorted and canned; in some bags snails and shale were found among the beans. The appellant accepted that evidence, and relied on it for its own contention that, the beans were examined and found to be free of infestation by snails and free of other defects when the beans were handed over to the respondent, but after the beans had been stored in the respondent's warehouse, snails and other matters were found among the beans. The respondent also regarded as very important for its case, the item of evidence that, it rejected 840 bags of beans and made them available to the appellant.

[31] On the other hand, items of evidence that the appellant regarded as very important for its defence and the appeal were that: the beans were inspected by BAHA in Belize at the time of shipping and BAHA did not find snails and other matters among the beans; and that, upon arrival of the beans at the port in Port - of- Spain, Plant Protection Authority examined the beans and did not find any snails and other matters among the beans. On those items of evidence it was contended by the appellant that, if snails and other matters were found among the beans on 10 and 11 May 2007, it was a long time after the respondent had taken custody of the beans, inspected them, and accepted the delivery of the beans, and stored them at its warehouse. The appellant also contended that, "despite the defendant's request, the claimant [respondent] refused to return the remainder of the purportedly rejected goods of the defendant [appellant] as has been the course of dealing between the parties."

The judgement appealed.

[32] The trial judge summarised her decisions on the facts which she considered important in the final determination of the case at paragraph 93 of her judgement. She stated:

> **"Summary of findings**
>
> (i) ...
>
> (ii) The second shipment of beans which comprised of two containers was contaminated with snails and other extraneous matters.

(iii) Belcar breached the express terms of the agreement by failing to provide beans which were of canning quality as shown in a sample provided to National Canners by Belcar.

(iv) There was a breach of ***section 16(a)*** and ***section 17*** of the ***Sale of Goods Act, Chapter 261***.

(v) National Canners rejected and destroyed 840 bags of beans.

(vi) National Canners did not refuse to return the 840 bags of beans rejected.

(vii) National Canners is entitled to US $50,083.50 / BZ $100,167.00 in damages."

[33] The final order that the judge made was this:

> **"Order**
>
> National Canners is entitled to BZ$ 100,167.00 in damages for breach of the agreement by Belcar to provide beans of canning quality.
>
> Belcar to pay the cost of National Canners in the sum of BZ $22,500.25."

The grounds of Appeal.

[34] The appellant appeals against the judgement and order on several grounds, they are the following:

"2. **The decision Appealed Against**

The whole decision.

3. **Grounds Of Appeal**

(1) The Learned Trial Judge erred in law in deciding that the Appellant/ Defendant bears the burden to prove that the storage of the beans in the Respondent's warehouse in Trinidad caused the beans to be contaminated (para. 48).

(2) The Learned Trial Judge misdirected herself on the evidence by coming to the wrong decision that, 'though the fact that the initial evaluation showed that twenty two bags of beans were clean does not prove that the entire shipment was clean', she found as a fact that –

(a) there was no evidence that the warehouse was clean; and/or

(b) there was no evidence that the warehouse did not contain snails or other extraneous matters; and/or

(c) the initial evaluation of the beans by the Respondent found them acceptable.

(3) There was no admissible expert scientific evidence that the snails "found" in the beans were species unknown to Trinidad.

(4) The Learned Trial Judge erred by accepting the incomplete report of Huggins without supporting expert scientific evidence that the species of snails "found" in the beans is unknown to Trinidad.

(5) The Learned Trial Judge misdirected herself when she ignored the evidence –

(a) That Belize Agricultural and Health Authority (BAHA) inspected the shipment, sealed the containers and issued a phytosanitary certificates prior to the shipment of the containers to Trinidad.

(b) That Plant Quarantine Authority of Trinidad inspected the shipments on arrival in Trinidad.

(c) That Plant Quarantine Authority of Trinidad inspected and supervised the discharge of the beans into the warehouse of the Respondent.

(d) That the Respondent claims as special damages the fees paid to Plant Quarantine Authority of Trinidad.

(e) That Huggins and Food and Drugs of Trinidad carried out inspections on the beans in July 2007 when the beans were discharged into the warehouse of the respondent in the last week of April, 2007.

(6) The Learned Trial Judge did not take into consideration in arriving at her decision –

(1) Discrepancies shown in the evidence as to the quantity of beans in the possession of the Respondent prior to the inspection by Karen Jones of Foods & Drugs and Huggins,

(2) Discrepancies shown on the evidence as to the quantity of beans allegedly destroyed by the Respondent without the supervision of Karen Jones and Huggins.

(7) The Learned Trial Judge misdirected herself and reached the wrong conclusion on the evidence.

Particulars

(1) The Learned Trial Judge made adverse findings of fact against the Appellant on the first shipment (which was not the subject of the claim) and used those findings to arrived at her decision on the “second and third shipments”.

(2) The Learned Trial Judge paid little or no regard to the evidence that out of the first shipment the Respondent processed 350 bags out of the 550 exported in the first shipment.

(3) Despite the fact that the Respondent was left with only 200 bags out of the first shipment, the Respondent was able to deliver to Pepe’s the full 550 bags initially exported and received a refund of the purchase from the Appellant.

(8) The decision or judgement is against the weight of the evidence.

The Appellant will seek an order that the decision, the subject of the appeal, be set aside."

Determination

General

[35] Despite the many and long grounds of appeal, the issues in the appeal are, in my view, short and well identified. They all depend on one all- inclusive question of fact in the trial court, namely: whether there were snails and other matters among the beans in the second shipment when the appellant (the seller and shipper) presented the beans to the carrier or agent in Belize for shipping, or when the beans were handed over to the respondent (the purchaser and consignee) at the port in Port – of – Spain, Trinidad and Tobago. It remains the all inclusive question of fact in this appeal. If there were no snails and other matters among the beans, the claim would end on that finding of fact by the trial judge; and if it did not so end, this Court would end it. That is because the claim of the respondent was founded entirely on the assertion of fact that, snails and other matters were among the beans conveyed and tendered by the appellant to the respondent; and all the questions of law pleaded depend on that assertion of fact.

[36] If there were snails and other matters among the beans, then given the rest of the facts, there would be two crucial questions of law in the appeal. The first would be, whether the respondent did not deliver or tender delivery of beans that accorded with the terms of the contract of sale between the parties, and what would be the consequence of the laws applicable. The second question would be, if the appellant delivered beans which did not accord with the terms of the contract, then would it be said that the

respondent accepted the beans anyway, and what would be the consequence of the laws applicable.

[37] The laws applicable are, the common law regarding c.i.f. sale of goods contract, and the law in ***ss. 16, 17 32(3) and 37 and 17 of the Sale of Goods Act***, regarding the state of the goods, the beans, sold by description and sample, and bought for a purpose namely, canning for human consumption and resale, notified to the appellant in the contract of sale, and the law regarding full or partial acceptance of goods.

[38] In the grounds of appeal there was no complaint that the trial judge erred in her view about the meanings of ***ss.16, and 17***, or about when the law therein would apply. In this Court learned counsel for the parties agree on the meanings of ***ss.16 and 17,*** and that the sections would apply to this case, if snails and other matters were found among the beans. They also agree, at least there was no contest, that the consequence would be that, the appellant would have failed to deliver beans that corresponded with the description given in the contract and with the sample supplied, and also which were fit for the purpose of canning for human consumption and resale. In the court below the question of delivery and acceptance of delivery was important; it has also been argued in the appeal.

A c.i.f. contract of sale.

[39] I start with examining the nature of the contract of sale between the parties. It is a c.i.f. (cost, insurance, freight) contract of sale of goods. In a c.i.f. contract of sale of

goods, it is the duty of the seller, in addition to supplying the goods by presenting them to the carrier, to make a contract of carriage of the goods with a carrier to convey the goods to the purchaser or his consignee, and to make a contract of insurance with an insurer against risk of damage to, or loss of the goods while in transit, for the benefit of the purchaser.

[40] Labelling a contract as a c.i.f. contract is not enough. In ***Comptoir d' Achat et de Vente du Boerendond Belge S.A. v Luis de Ridder Limitada ("The Julia") [1949] AC 293***, the contract for sale of Argentine rye provided for "shipment c.i.f. Antwerp, and payment "on first presentation of and in exchange for the first arriving copy/copies of bill/bills of lading and or delivery orders and policies and/or certificate of insurance." On the particular facts however, the House of Lords held that, the contract in question was a contract for the actual delivery of the goods. The case is relevant to this appeal for the fact that Lord Porter considered it necessary to describe the basic obligations and rights in a c.i.f. contract. On page 309 he stated this:

> **"My Lords, the obligations imposed upon a seller under a c.i.f. contract are well known, and in the *ordinary case* include the tender of a bill of lading covering the goods contracted to be sold and no others, coupled with an insurance policy in the normal form, and accompanied by an invoice which shows the price and, as in this case, usually contains a deduction of the freight which the buyer pays before delivery at the port of discharge. Against tender of these documents the buyer must pay the price. In such a case the property**

may pass either on shipment or on tender, the risk generally passes on shipment or as from shipment, but possession does not pass until the documents which represent the goods are handed over in exchange for the price."

[41] In two appeals decided together, ***Arnhold Karberg & Co v Blytha, Green, Jourdain & Co;*** and ***Theodor Schneider & Co v Burgett & Newsam [1916] 1 K.B. 495***, Banks LJ in explaining what a c.i.f. contract was, discouraged the view that, a c.i.f. contract of sale was not a contract for the sale of goods, but for the sale of documents. At page 510 he stated:

" Scruton J [the trial judge] in his judgement has used one expression with which I do not agree… he says that, ' (1) the key to many of the difficulties arising in c.i.f. contracts is to keep firmly in mind the cardinal distinction that a c.i.f. sale is not a sale of goods, but a sale of documents relating to goods.' I am not able to agree with that view of the contract that, it is a sale of documents relating to goods. I prefer to look upon it as *a contract for the sale of goods, to be performed by the delivery of documents,* and what those documents are must depend upon the terms of the contract."

[42] The ***Arnhold Karberg & Co*** and ***Theodor Schneider & Co***. were cases in which goods in China were sold on a c.i.f. Naples and Rotherdam contracts respectively. The sellers and purchasers were businesses in London, England. The carriers were German

ship - owners. Delivery to Naples and Rotherdam respectively, was to be within 3 months, and the bills of lading would expire in 3 months. After the ships had set sail from China, the Second World War was declared between England and Germany. The two ships were diverted. The goods were never delivered at Naples and Rotherdam. The sellers, however, presented the documents to the purchasers after three months in London for payment. The bill of lading had expired. The purchasers refused to accept the documents and to make payment. The Court of Appeal (England and Wales) held that, the purchasers were entitled to refuse to accept the tender of an invalid bill of lading as delivery. It also held that, it would be illegal for the purchasers to perform the contract of carriage with enemy alients. The appeal was dismissed. For comparison see ***C. Groom Ltd Barber [1915] 1 K.B. 316.***

Delivery, acceptance or rejection and price.

[43] Rejection of delivery, and the price paid are the main issues in this claim and appeal. The general rule in a c.i.f. contract is that: *where there is no agreement to the contrary*, the seller is deemed to have delivered the goods to the purchaser by delivery or tendering delivery of the bill of lading, the invoice and the policy of insurance, the documents of the transactions required by the law; and the purchaser must make payment, “in exchange of,” that is, upon receipt of the documents. The rule was applied in the old cases of ***Ireland v Livingston (1872) L.R. 5 H.L. 395; C. Groom Limited v Barber [1915] 1 K. B. 316;*** and ***Sanders Brothers v Mclean & Co. 11 Q.B.D 327.*** It remains the rule.

[44] The invoice specifies the goods sold and their price. The bill of lading is evidence of the contract of freight (carriage). The policy of insurance is for indemnity against the risk of damage or loss of the goods at sea, for the benefit of the purchaser. But parties may agree to include in the c.i.f. contract of sale additional documents. The common agreed additional documents are usually documents that are intended to ensure that, the correct goods, and of acceptable commercial standard are shipped. Examples are: a polcargo certificate and, a certificate such as "the certificate of quality of Merchants Exchange, San Francisco", in ***Biddell Brothers v E. Clemens Horst Co. [1911] 1 K.B 934*** case. Sometimes a certificate or report certifying that, the goods have been examined at the specific request of the purchaser for specific defects and other features required under the contract of sale is also agreed on. A bill of exchange may be included where the seller has assigned his right to payment.

[45] In ***Ireland v Livingston*** Lord Blackburn stated at page 406 about documents in a c.i.f contract and payment, the following:

> " **The terms 'at a price, to cover cost, freight, and insurance, payment by acceptance on receiving shipping documents', are very usual, and are perfectly well understood in practice... Should the ship arrive with the goods on board he [the purchaser] will have to pay the freight which will make up the amount he has engaged to pay. Should the goods not be delivered in consequence of a peril of the sea, he is not called on to pay the freight, and he will recover the amount of his interest in the goods under the policy..." If the non-delivery is in**

consequence of some misconduct on the part of the master or mariners, not covered by the policy, he will recover it from the ship-owner."

[46] Since the above straightforward statement of the law made in ***Ireland v Livingston***, about circumstances where there was straightforward performance of a c.i.f. contract, there have been developments in the law to be applied to circumstances where performance was not exactly according to the contract, or where a question arose about at what exact point in a set of particular facts the seller was entitled to and could demand payment.

[47] In ***Sanders v Maclean***, the c.i.f. contract provided for payment to be made in "exchange for bills of lading." The question arose whether the seller, a correspondent of the plaintiff, was entitled to payment when he presented to the purchaser in London two sets of a bill of lading drawn in a set of three, the third set having been retained by the seller (shipper) in St Petersburgh, Russia. It was admitted that, the third set of the bill of lading was never in any way dealt with or kept for fraudulent purposes. The Court of Appeal (England and Wales) held that: the purchaser was bound to pay when the duly indorsed bill of lading, effectual to pass property in the goods, was tendered to him, although the bill of lading was drawn in triplicate, and all the three sets were not tendered or accounted for; if he refused to accept and pay, he did so at his risk. The claim of the seller for payment succeeded.

[48] In 1911 in the ***Biddell Brothers v E Clemens Horst*** case, the Court of Appeal (England and Wales) had to decide the question: what were the conditions of the right of the seller to payment under a c.i.f. contract of sale where the contract did not include the words, “payment against shipping documents”, or “payment in exchange of shipping documents.” It was submitted for the seller-defendant who refused to deliver the goods, 1909 hops crop and 1906 to 1912 hops crops from San Francisco USA, to London or Liverpool or Hull that, in a c.i.f. contract, the expression, “c.i.f. to London, terms net cash,” meant, “cash against documents”, not “cash on actual delivery of the hops”. The majority of the court decided that, based on the particular terms of the contract the purchaser was not bound to pay on tender of the shipping documents, but upon arrival of the hops, and after the purchaser had opportunity to examine the hops. The House of Lords reversed the majority judgement and adopted the minority judgement of Kennedy LJ, in particular, his words at page 956 as follows::

> **“At the port of shipment – in this case San Francisco, the vendor ships the goods intended for the purchaser under the contract. Under the Sale of Goods Act, 1893, s 18 [s 20 at Rule 5(b) Cap. 261 Belize] by such shipment the goods are appropriated by the vendor to the fulfilment of the contract, and by virtue of s 32, [s.34 (1) Belize] the delivery of the goods to the carrier - whether named by the purchaser or not - for the purpose of transmission to the purchaser is *prima facie to be deemed* to be *a delivery of the goods to the purchaser*. Two further legal results arise out of the shipment. The goods are at the risk of the purchaser against which he has protected himself by the**

stipulation in his c. i. f. contract that the vendor shall, at his own cost, provide him with a proper policy of marine insurance intended to protect the purchaser's interest, and available for his use, if the goods should be lost in transit; and the property in the goods has passed to the purchaser, either conditionally or unconditionally…But the vendor, in the absence of special agreement, is not yet in a position to demand payment from the purchaser; his delivery of the goods to the carrier is, according to the express terms of s. 32 [s. 34 (1) Belize], only *'prima facie deemed to be a delivery of the goods to the buyer'*; and under s. 28 of the Sale of Goods Act, as under the common law… a tender of delivery entitling the vendor to payment of the price, must in the absence of contracted stipulation to the contrary, be a tender of possession. *How is such a tender to be made of goods afloat under a c.i.f. contract? By tender of the bill of lading, accompanied in case the goods have been lost in transit by the policy of insurance. The bill of lading in law and in fact represents the goods. Possession of the bill of lading places the goods at the disposal of the purchaser."*

[49] In this claim and appeal, the appellant delivered to the respondent the bill of lading, the policy of insurance and the invoice for the goods, the three documents required by the law in a c.i.f. contract of sale. All three were valid documents, they were not challenged. No other document was agreed to under the contract. The appellant also tendered actual physical delivery of the beans at Port-of-Spain; and the respondent took custody of the beans. The delivery, according to the law, was subject to the right of the respondent to examine the beans to ascertain whether the beans conformed to the terms of the

contract. That is required under ***s. 36 of the Sale of Goods Act***. Payment of the price under the c.i.f. contract would have been due upon handing over the c.i.f. documents, had payment not been required in advance, and had been made in advance. So, payment was no longer due on the delivery of the three documents. Return of the price paid and damages were the issues.

[50] But the making of payment in advance did not mean that, the purchaser - respondent could not reject beans which did not meet the terms of the contract of sale. In the latter part of the judgement of Kennedy LJ in the ***Biddell Brothers v E. Clemens Horst*** case referred to above, he made the comment at page 960 that:

> **"No one suggests that the plaintiffs, if they pay against documents, become thereby precluded from rejecting the goods, if on examination after their arrival, they are found to be not goods in accordance with the contract, or from recovering damages for breach of contract, if they prefer that course."**

Decisions on the submissions: the state of the beans.

[51] Mr. Lumor SC for the appellant, made among others, the submission that, since the appellant delivered to the respondent the required c.i.f. documents, and the beans which were not infested with snails when the respondent collected them from the port in Port – of - Spain, the appellant was entitled to the full price, it was not liable for breach of the contract. The learned judge erred, the appeal should be dismissed, said Mr. Lumor.

[52] On the other hand, learned counsel Mr. Ebanks, for the respondent, submitted that, the appellant delivered beans which did not conform to the terms of the c.i.f. contract of sale, the beans were infested with snails and other matters; the appellant breached the contract of sale and was not entitled to payment of the price, rather the respondent was entitled to the return of the price or damages. He urged the Court to hold that, the decision of the trial judge was not erroneous, and to dismiss the appeal with costs.

[53] For absence of defects in the beans at the time of shipping, the appellant relies on the report in the letter dated 14 February, 2012 by BAHA, written subsequent to shipping the beans, and for the purpose of the appellant's claim. Of course, BAHA's report which was prepared subsequent to tendering delivery, was not, and could not have been presented to the respondent together with the three legally required documents delivered to the respondent. I do not lose sight, however, that BAHA's report was about the examination of the same beans carried out in March, 2007 at the time of shipping, and has some relevance to the general state of the beans. The appellant also relies on the inspection at the port in Port – of –Spain carried out by the National Plant Protection Authority. Again I note here that, the Plant Protection Authority of Trinidad and Tobago did not inspect the beans at the request of either party, or with the parties' contract of sale in mind, but the inspection that the Authority carried out also has some relevance to the general state of the beans.

[54] No part of the judgement of the trial judge indicates that the judge disregarded the evidence about the two inspections; instead, the judgement indicates that, the judge accepted, or attached more weight to the evidence that, there were snails in the farm at

Little Belize, Corozal District, Belize ,where the beans were harvested, and the evidence that, snails were found among the beans just two days after arrival at Port- of- Spain. The judge was entitled to do so, given the evidence available.

[55] The submissions by both counsel lead me to mention that, courts have long explained in detail the general rule that, delivery of goods in a c.i.f. contract is deemed carried out by delivering or tendering delivery of the required documents. The explanation included acknowledging that, there are three stages in the delivery of goods in a c.i.f. contact: The first stage is the “provisional delivery”, stage when the goods are presented by the seller to the carrier for shipping, it is deemed *prima facie delivery*, Kennedy LJ explained this in the ***Biddell Brothers v E. Clemens Horst*** case. ***Section s 34 of the Sale of Goods Act, Belize*** also states it as the law***.*** The second stage is the “symbolic delivery” stage which is the delivery of the required documents to the buyer, generally in exchange for payment. The third stage is, “the complete delivery of the cargo” stage, which is the physical handing over of the goods to the buyer at the destination agreed. This explanation does not change the general rule that, delivery of the three documents is gernerally the delivery of the goods in a c.i.f. contact. At each of these stages practical questions of fact and of law may arise, as did arise in this appeal.

[56] Courts will examine the evidence about these stages of delivery and decide where to place risk to the goods, transfer of property in the goods and possession of the goods in a given contract to where they belong conditionally or unconditionally, in accordance with the terms of the contract. ***Arnhold Karberg & Co. and Theodore Schneider & Co.*** cases***;*** and ***Kwei Tek Chao v British Trader and Shippers [1954] 2 QB 459*** do illustrate

some of the difficulties that arise in the process of delivery, and help in explaining the obligations and rights of the appellant and the respondent in this appeal.

[57] ***Kwei Tek Chao,*** was a case in which the goods (chemical known as Rongalite) was shipped later than the date agreed. The purchaser knowingly collected the goods. It had contracted to resell them, it was unable to resell them because the price had plummeted. It then claimed, and for the first time, in the writ of summons issued 12 months after, the return of the price it had paid. The court held that, a long time had passed, the purchaser was deemed to have accepted the goods and affirmed the c.i.f. contract of sale. Devlin J speaking about the consequences in law of delivering the three c.i.f. documents to the purchaser, and about the purchaser dealing with the goods before it examined them stated at page 487 of his judgement, the following:

> **"I think that the true view is that what the buyer obtains, when the title under the documents is given to him, is the property in the goods, subject to the condition that they revest if upon examination he finds them to be not in accordance with the contract. That means that he gets only conditional property in the goods, the condition being a condition subsequent. All his dealing with the documents are dealing only with that conditional property in the goods. It follows, therefore, that there can be no dealing which is inconsistent with the seller's ownership unless he [the buyer] deals with something more than the conditional property. If the property passes altogether, not being subject to any condition, there is no ownership left in the seller with**

which any inconsistent act under section 35 could be committed. If the property passes conditionally the only ownership left in the seller is reversionary interest in the property in the event of the condition subsequent operating to restore it to him."

[58] I now apply the preceding statements of law and observations to this appeal. The appellant delivered to the respondent the c.i.f. documents, so, as a matter of the general rule, he delivered, or at least tendered delivery, of the beans in the second and third containers to the respondent, subject to the respondent being afforded opportunity to examine the beans before it would be regarded as having accepted them. The appellant also presented the beans to the respondent, it tendered delivery of the actual cargo of beans.

[59] The first question of law raised in the submissions is, whether the respondent having examined the beans, found that they did not conform to the terms of the contract, and the respondent was entitled under the c.i.f. contract, to reject the tender of delivery on the grounds that, the goods did not correspond with the description and with the sample, and were not fit for canning for human consumption and resale.

[60] It is the extended form of the all-inclusive question that I mentioned earlier. If upon examination of the beans the respondent found them to be truly infested with snails, or other matters were among them, then the respondent was entitled to reject the beans. That was in fact the view of both parties; they conducted their cases on that footing. The property in the beans and possession conditionally transferred by the delivery of the

documents and physical tender would revert to the appellant – see the ***Kwei Tek Chao*** case. The respondent could reject the beans and claim return of the price and damages for incidental losses, or could keep the infested beans and claim damages. The latter option would be confirmation of the contract, subject to a claim for damages to the extent of the loss occasioned by the breach.

[61] On the other hand, if the respondent upon examination of the beans, did not in fact find snails and other matters among the beans, then the respondent had no ground for rejecting the beans and claiming return of the price or damages, the appeal would succeed.

[62] The second question raised was, assuming that the beans were contaminated with snails, would the respondent still be entitled to reject the rest of the beans after having canned and resold part of the beans in 44 bags out of the 1008 bags.

[63] The third question was whether in any event, the respondent accepted the beans by informing the appellant, or by intimating to the appellant so, or by retaining the beans beyond a reasonable time after rejecting them.

[64] The appellant's submissions were, or course that, the respondent was not entitled to reject the beans, that is, to reject the delivery tendered, the beans were not infested with snails, they conformed to the terms of the c.i.f. contract of sale, and in any event, the respondent accepted delivery of the beans. The respondent's answers were that, it was entitled to reject and did reject the beans because the beans did not conform to the terms

of the contract, they were contaminated with snails and other matters, and the respondent did not accept delivery in any manner, or under ***s. 37*** of the Sale of Goods Act.

[65] The explanation in the submissions by Mr. Lumor SC, for urging this Court to accept that, the beans were not contaminated and to reject the appellant's answers, is that, the learned judge erred in "deciding" (drawing the conclusion of fact) that, the second shipment of beans was contaminated with snails and other matters, and that, there were no snails in the respondent's warehouse. Mr. Lumor SC argued that, the error in the (finding of fact) resulted from a misdirection by the judge on a point of law that, the burden of proof was on the appellant to prove that, the snails got among the beans at the respondent's warehouse, and from the judge accepting non-expert evidence from the representative of Huggins Services Limited that, the species of the snails found among the beans was unknown to Trinidad and Tobago. Mr. Lumor SC also argued that, the respondent must be deemed to have accepted delivery of the beans because it canned and resold some of the beans. That was an act inconsistent with the seller's (the appellant's) ownership of the beans in the second and third containers, he argued.

[66] In my view, the finding of fact by the trial judge that, "the second shipment of beans which comprised of two containers was contaminated with snails and other extraneous matters", meant that, the judge had concluded that, snails and other matters were already among the beans when shipped from Belize. That finding of fact was based on her other and prior two findings of fact, or could, in any case, be supported by the evidence adduced, if believed. The first prior finding of fact was that: the snails got among the beans at the farm at Little Belize, Corozal District, Belize, during harvesting. There was

evidence that, there were snails on the farm. The second prior finding of fact was that: when the beans in the two containers were inspected by the respondent on 27 April, 2007 soon after arrival at the port in Trinidad and Tobago, and also on 20 July, 2007 by the representative of Huggins Services Limited and Mrs. Jones of Food and Drugs Inspectorate Division, snails and other matters were found among the beans.

[67] Whether or not the evidence presented by the representative of Huggins Services was of the category of evidence by an expert was unnecessary, given the rest of the evidence on the point. The representative saw snails among the beans anyway, the judge did not need the evidence about the species of the snails. In my view, the judge did not misunderstand the evidence adduced, her finding of fact that, the second shipment was contaminated with snails and other extraneous matters was not plainly wrong, aberrant; or absurd. She had evidence before her on which to draw the conclusion, the finding of fact. The judge did not misdirect herself on the facts. This Court, an appellate court, should not in these circumstances interfere with the finding of fact by the trial judge that, the second shipment was contaminated with snails and other extraneous matters, and that the snails were from the farm in Belize and not from the respondent's warehouse.

[68] What I have stated above is only a very brief way of stating the principle which restrains appellate judges from freely and liberally interfering with a finding of fact by a trial judge sitting alone, or a finding of fact by a jury. – see ***Cerk v Edingburgh & District Tramways Co Ltd***. ***1919 S.C. (H.L) 35; Robins v National Trust Company Ltd. [1927] AC 515; Powell and wife v Streatham Manor Nursing Home [1935] AC 243 (HL), Walt***

or Thomas v Thomas [1947] AC 484 (HL); and Designers Guild LTD v Russell Williams (Textiles) LTD. [2001] 1 WLR 2416 (HL).

[69] In ***Watt or Thomas v Thomas***, the Second Division of the Court of Session (England Wales) reversed the decision of the trial court refusing divorce on the ground of cruelty. The appellate division based its decision mainly on the ground that, it took a different view from the trial court on the facts as disclosed by the evidence given at the trial, and of inferences to be drawn. The main question in the House of Lords was whether there was sufficient justification for reversing the conclusion of fact reached by the trial judge. Lord Thankerton speaking about the rule that, an appellate court should attach great weight to findings of fact by a trial judge stated on page 487 the following:

> **"I do not find it necessary to review the many decisions of this House, for it seems to me that the principle embodied therein is a simple one, and may be stated thus:**
>
> **I. Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen; and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion;**

II. The Appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence;

III The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will, vary according to the class of case, and, it may be, the individual case in question."

Decision on the submissions: rejection of some of the beans.

[70] In this claim and appeal, the trial judge held that: the appellant supplied beans which were contaminated, the appellant breached the contract of sale; it failed to supply beans of canning quality, and which corresponded with the sample; it failed its duties under ss. 16 (1) and 17 of the Sale of Goods Act. The judge further, held that, the respondent was entitled to reject 840 bags of the beans; and the respondent did not refuse to return the rejected beans.

[71] I agree with the trial judge that, the respondent rejected 840 bags of the beans, and that the respondent was entitled to reject them. But the respondent canned the contents of 44 bags and sold them. The respondent could not retrieve the beans in the 44

bags and return them to the appellant. It dealt with them in a manner inconsistent with the appellant's ownership. So, I would hold that, the respondent accepted delivery of 44 bags from the second and third containers. ***Section 37 of the Sale of Goods Act*** states what the law recognises as acceptance of delivery of goods as follows:

> **37. The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, *and he does any act in relation to them which is inconsistent with the ownership of the seller*, or when after the lapse of a reasonable time he retains the goods without intimating to the seller that he has rejected them.**

[72] I also agree with the decision of the trial judge that, after the respondent rejected the 840 bags of the beans, the respondent did not refuse to return the rejected beans. The evidence showed that the beans were available for collection by the appellant. The respondent informed the representative of the appellant of the defects in the beans soon after the examination on 27 April, 2007 and stated that, the respondent would wait for instruction about the goods from the appellant. On 18 June, 2007, some 52 days after, the respondent put the rejection in a letter. There was evidence on which the judge based her decision. The respondent was not obliged to do more than notify the appellant that the respondent rejected the beans. The law is that, there is no obligation on the purchaser to transport rejected goods back to the seller, unless agreed in the contract of sale. There was no agreement in the contract between the appellant and the respondent about transporting back rejected beans. ***Section 38 of the Sale of Goods Act States***:

Unless otherwise agreed, where goods are delivered to the buyer and he refuses to accept them, having the right to do so, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he has rejected them.

[73] The respondent - purchaser selected 44 bags of beans which obviously it thought corresponded with the description in the contract and with the sample, and were fit for the purpose agreed. The respondent could have rejected the entire two shipments. It was entitled to select the 44 bags and claim damages. The law, in ***s. 32 (3)*** permits a buyer to select goods that he accepts and to reject those that he does not accept. The section states:

32 (3) Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole.

Decision on the submissions: the burden of proof.

[74] Given my decision above affirming the decision of the trial judge regarding the finding of fact that, “the beans were contaminated with snails and other extraneous matters” I need not decide the submissions about how the trial judge viewed the burden of proof. However, in deference to counsel, I set out here how I decided the question of burden of proof.

[75] The burden of proof *(onus probandi*) that the appellant complains about was "evidential burden", not "persuasive burden" (the "legal burden" or "the final burden"). Burden of proof means the duty of a party to prove a particular fact, or facts in issue. It is the general rule that, he who asserts a matter of fact must prove it – see the ***Robins v National Trust Company Limited [1927]*** case cited above***,*** and ***Abrath v North Eastern Railway (1883) 11 Q.B.D 440.*** Usually it is the claimant who asserts facts in order to establish the grounds which he claims entitle him to an order for relief who bears the burden of proof. He must prove those facts. But, often the defendant may want to introduce into the case a matter of fact which is not self- evident. In that event, the defendant must prove that fact. It must be remembered however that, a judge is not bound to make a finding one way or the other with regard to a fact or a set of facts adduced as evidence; if either version is improbable, the party who bears the final burden loses his case – see "The POPI M" ***[1985] 2 Lloyd's Rep.1.***

[76] ***Robins v National Trust Company,*** was a case primarily about the rule of practice of the Judicial Committee of the Privy Council that, concurrent findings of fact by courts of first instance and appellate courts below should not be interfered with by the Board, "in the absence of very definite and explicit grounds". However, a very important statement of law about the burden of proof was made in the case at page 520 in the judgement of their Lordships, delivered by Viscount Dunedin, in these words:

> **"Their Lordships cannot help thinking that the appellant takes rather a wrong view of what is truly the function of the question of onus in such cases. Onus is always on a person who asserts a proposition of**

> **fact which is not self-evident. To assert that a man who is alive was born requires no proof. The onus is not on the person making the assertion, because it is self-evident that he [the man] had been born. But to assert that he was born on a certain date, if the date is material, requires proof; *the onus is on the person making the assertion*. Now, in conducting any inquiry, the determining tribunal, be it judge or jury, will often find that the onus is sometimes on the side of one contending party, sometimes on the side of the other, or as it is often expressed, that in certain circumstances the onus shifts. *But onus as a determining factor of the whole case can only arise if the tribunal finds the evidence, pro and con, so evenly balanced that it can come to no such conclusion. Then the onus will determine the matter. But if the tribunal, after hearing and weighing the evidence, comes to a determinate conclusion, the onus has nothing to do with it, and need not be further considered."***

[77] The above statement of the law confirms the general rule. In this claim and appeal there were sufficient items of evidence on which the judge could make up her mind one way or the other. She made up her mind accepting the evidence for the respondent – claimant. There was no room for the question of burden of proof. ***Robins v National Trust Company*** was in fact, not decided on the general rule. It was decided on the specific common law rule of burden of proof in a contested will. The common law rule is that, the burden of proof is on he who propounds the will, he must show that, "the will of

which probate is sought is the will of the testator, and that the testator was a person of testamentary capacity."

[78] ***Abrath v N.E. Railway*** case, raised the question, on whom did the persuasive burden, the final burden of proof lie. The brief facts were these. N.E. Railway, the respondent, had paid Mr. McMann in an earlier claim for injuries said to have resulted from a collision with the train of the respondent. Subsequently, the respondent's solicitor received information that, McMann's injuries were self-inflicted and that, the appellant Dr. Abrath, conspired in it. The respondent had inquiries carried out, and on recommendation, prosecuted the appellant for conspiracy to defraud. He was acquitted. The appellant brought a claim against the respondent for malicious prosecution. His claim was dismissed. He appealed on the ground that, the direction given to the jury by the trial judge on the burden of proof was erroneous. The directions were: (1) that it was for the plaintiff to establish a want of reasonable and probable cause, and malice, in prosecuting him; and (2) it was for the plaintiff to show that the defendants had not taken reasonable care to inform itself of the true facts, and did not honestly believe the grounds for prosecuting him.

[79] The Divisional Court allowed the appeal and ordered a retrial. The Court of Appeal reversed the decision of the Divisional Court. The House of Lords affirmed the judgement of the Court of Appeal. The Earl of Selborne in his judgment at page 249 stated:

> **"The burden of satisfying the jury that there was no reasonable and probable ground for the prosecution, lies upon the plaintiff…**

In my judgement the Learned judge did not misdirect the jury, and the Court of Appeal were right in their view of the law; and the only question is, 'is there any ground for saying that upon the weight of the evidence, the jury miscarried, and that a new trial ought to be directed; "

[80] Lord Watson simply stated at page 250 about the burden of proof that:

"The authorities cited by Mr. MacClaymont in the course of his able argument do not form, in my opinion, any exception to the ordinary rule that the burden of proof lies upon the plaintiff."

[81] The appellant in the present claim and appeal, asserted for its defence that, snails got among the beans after a reasonable time for examination of the beans had elapsed, and, "after storage by the claimant." The storage was at the respondent's warehouse. It was not self – evident that warehouses would harbour snails. The evidential burden, the duty to adduce evidence to raise as an issue the assertion that, the snails got among the beans at the respondent's warehouse rested on the appellant who made the assertion. The final burden, the duty to prove all the facts at issue to the standard of a balance of probabilities, in order to establish the rights claimed by the respondent, remained on the respondent. There is nothing in the judgement of the trial judge that suggests that, she lost sight of the law that, the final burden of proof rested on the plaintiff - the respondent.

[82] The records of proceedings show some important material items of evidence that the judge could, and must have accepted as persuasive enough to discharge the final burden of proof which rested on the respondent. Some of the items of evidence are these. Snails and other matters were found among the beans just less than two days after the beans had been collected by the respondent from the ports authorities in Port-of-Spain. The respondent fumigated its warehouse monthly, and testified that there were no snails at the warehouse, there was no evidence that snails were seen at the warehouse. Mr. Friesen, witness for the appellant, admitted that there were snails at the farm at Little Belize, Corozal District, where the beans were harvested. Mr. Witty, a witness from BAHA, testified that, some snail eggs could survive treatment of the beans by BAHA, and that not all the bags were inspected by BAHA.

[83] Based on these items of evidence I cannot say that, the trial judge erred "by deciding without evidence", when she stated that, "the appellant needed to prove that there were snails in the respondent's warehouse". In the context, the judge meant no more than that, the appellant had the responsibility of coming forward with sufficient evidence to raise as an issue of fact, the assertion that snails were in the respondent's warehouse, otherwise there was sufficient *prima facie* evidence proving the contrary.

Decision on the submissions: the duty of an appellant.

[84] In my respectful view, the complaint that, the judge erred in that she, "decided that the appellant - defendant bears the burden to prove that the storage of the beans in the respondent's warehouse in Trinidad caused the beans to be contaminated", is of no

consequence in the circumstances of the claim and the appeal. It has been subsumed in the larger question about the duty of an appellant to demonstrate to an appellate court such as this Court, that the judgement of the trial judge was wrong. The burden is on the appellant.

[85] The first fundamental principle which an appellate court applies when exercising its appellate jurisdiction is that, on an appeal from a decision of a trial judge sitting alone (without a jury), the presumption is that the decision appealed against is correct; the burden of showing that the trial judge was wrong lies on the appellant, and if the appellate court is not satisfied that the judge was wrong, the appeal will be dismissed – see ***Savage v Adam [1895] WN 109; Mersey Docks and Habour Board v Procter [1923] AC 253 HL; Colonial Securities Trust Co Limited v [1896] 1 Q.B. 41; Khoo Sit Hoh v Lim Thean Tong [1912] AC 323, PC;*** and ***Watt v Thomas [1947] AC 484, HL.***

[86] So, Bel – Car, the appellant, must demonstrate to this Court that the trial judge erred about a question of law, which error led to her decision that, the appellant was liable for breach of the contract between the parties and in the order for relief that the judge made. Alternatively, Bel-Car must demonstrate that, the decision was unjust because of a serious procedural or other irregularity in the proceedings before the judge – See ***Keith Davy (Contractors) Limited V Ibatex Limited [2001] EWCA Civ 740.*** The appellant has failed to do either. I would affirm the judgement of the trial judge that, the appellant breached the contract of sale between the parties by not supplying beans that corresponded with the description given in the contract, and with the samples agreed, and which were fit for the purpose agreed.

Damages:

[87] There is no ground of appeal that, the judge made a mistake in the heads of damages that she identified, including special damages, and in the computation of the sums making the total damages that she awarded. The computation was based on the rejected bags of beans being 840. The judge was of the view that, 50 more bags were rejected, but she nevertheless took the figure of 840 bags which she said was the number claimed by the respondent. She was right in that decision. So, the judge calculated damages based on 50 bags less than the number of bags rejected. That favoured the appellant. In any case, this court cannot examine the assessment of damages made by the trial judge when it is not a ground in the appeal.

[88] A remotely connected ground of appeal is ground 6 that, the learned trial judge did not take into consideration discrepancies in the evidence about the quantity of the beans that the respondent had, and the quantity destroyed. The ground is factually mistaken. The judge considered the evidence and acknowledged some discrepancies. She concluded that, the number of bags rejected were 50 more than the respondent based its claim on, and that it favoured the respondent. The relevant parts of the judgement are paragraphs 69 to 72.

[89] I would dismiss the appeal and affirm the judgement and order made by the learned trial judge, with costs to the respondent. The order for costs is provisional; either party may apply in 7 days for a different order for costs, otherwise the provisional order

will become final. In the event that an application is made, it shall be determined on the application papers.

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AWICH JA