

SUPREME COURT OF NIGERIA
13TH DECEMBER, 1996. SC. 126/1989
CORAM:- A. B. WALI, M. E. OGUNDARE,
U. MOHAMMED, S. U. ONU, A. I. IGUH, JJSC.

ALFOTRIN LIMITED
(THE OWNERS OF MY FOTINI) APPELLANTS
AND
1. ATTORNEY-GENERAL OF
THE FEDERATION RESPONDENTS
2. THE PERMANENT SECRETARY
MINISTRY OF DEFENCE

CONTRACTS - *Carriage of goods - Contract to ship goods from one destination to another - terminates upon the arrival of the vessel.*

CONTRACTS - *Privity of contract - One who is not a party to a contract - Cannot claim in respect thereof.*

CONTRACTS - *Contractual relationship - Where not created between the parties - No contract can be enforced - Unto recovering any demurrage.*

CONTRACTS - *Binding contract - Parties must be in consensus ad idem - On the essential terms - For there to be a binding contract.*

CONTRACTS - *Offer and acceptance - Whether acceptance can arise by doing the act - Or must there be notification of the acceptance.*

CONTRACTS - *Precise terms and conditions - Where a contract is lacking in necessary details - It is not legally valid.*

CONTRACTS - *Quantum meruit - Proof of rendering services under an unenforceable contract - Plaintiff can recover on the value of the services rendered*

CONTRACTS - *Unenforceable contract - Where appellants executed their own part of the obligation thereunder - Whether they would be entitled to reasonable compensation - On the basis of quantum meruit.*

CONTRACTS - *Quantum meruit - reasonable rate of compensation -*

Whether ascertainable from the evidence.

CONTRACTS - *Waiver - Payment of demurrage - Where it arises under a totally different arrangement - No question of waiver will operate against the appellants.*

CONTRACTS - *Interest on amount due - In the absence of express agreement - Or some custom to that effect - Will not be granted by court.*

EVIDENCE - *Unchallenged evidence - Where a particular evidence is not challenged by cross-examination - The court is free to act on such evidence*

FACTS

Before the Federal High Court Lagos, the plaintiffs/appellants claimed the total sum of US \$518,496.30 being balance of due demurrage and interest thereon. The defendants/respondents refuted the claim for lack of any privity of contract with the appellants. Respondents entered a contract with a foreign Company, Gilt Investment Ltd. for the supply of a cement from Spain to Nigeria. Gilt Ltd entered into a contract with the appellants for the hire of their vessel, MV Fotini, which was used in shipping the Cargo. Upon the arrival of the vessel to Lagos, the respondents caused it to proceed to Ghana for the discharge of the cement due to congestion at tin Lagos port. In all, the vessel entered into demurrage for a total period of 292 days. The respondents paid part of the demurrage to Gilt Investment Ltd, leaving some balance which the appellants now seek to recover.

The trial court dismissed the claim for want of privity of contrail. Appellants' appeal to the Court of Appeal was equally dismissed. Being aggrieved appellants have further appealed to the Supreme Court raising 5 issues. Whilst upholding the finding that there is no privity of contrail between the parties, the ultimate court had to determine whether the appellants can succeed on any other ground.

ISSUES FOR DETERMINATION

“(a) From the totality of the available evidence in this matter at the court of first instance, can it be rightly said in law that there was no privity of contract between the parties hereto? (The implied contracts issue)

(b) Further or alternatively, can it be said that payments of demurrage by the Respondents to Gilt Investments Ltd. amounted in law to a waiver of the Appellants' rights herein to collect demurrage of their own which became due and payable on a totally different and independent contract from that which initially existed between the Respondents and Gill

investment Ltd. pursuant to which the Respondents paid the demurrage through Gilt Investment Ltd.” Etc see p. 1930

HELD(Unanimously allowing the appeal per lead judgment of **IGUH JSC**)
Carriage of goods - Contract to ship goods

1. It is therefore clear to me that the appellants contract with Gilt by their agents. Equatorial Lines, the original charterers of MV Fotini terminated the moment the vessel arrived at the Lagos port on or about the 1st July, 1975 and gave notice of its readiness to discharge her cargo in accordance with the relevant clauses of the cement contract, Exhibits P-P1, the Letter Credit, Exhibit R and the charter-party, Exhibits A-A3. (p. 1936 C)

Privity of contract

2. It is indisputable as a general rule that one who is not a party to a contract cannot make a claim in contract in respect thereof unless, of course, he is ivy thereto or has acquired some legal interest, say by way of assignment of any rights thereunder. The doctrine of privity of contract, as a general rule, is that a contract cannot confer rights or impose obligations on strangers to it. The appellants being total strangers to Exhibits P-P1 may not establish a case in contract against the respondents. (p. 1938 A)

Contractual relationship

3. As I have repeatedly observed, there is, in the present case, no contractual relationship between the parties in so far as demurrage as a contractual term or condition is concerned. Neither of the three documents involved in this case, namely, Exhibits P-P1, Exhibit R and Exhibits A-A3 created any contractual obligation or relationship, whether directly or indirectly, between the appellants and the respondents. And as a general rule, a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party thereto, even if the contract was made for his benefit and purports to give him the right to sue or to make him liable upon it. (p. 1939 D)

Binding Contract

4. To constitute a binding contract, there must be an agreement in that the parties must be in consensus ad idem with regard to the essential terms and conditions thereof; the parties must intend to create legal relations and the promise of each party, in a simple contract, not under seal, must be supported by consideration. There must be a concluded bargain which has settled nil essential conditions that are necessary to be settled and leaves no vital term or condition unsettled. It is a question of fact whether the parties

have agreed on the essential elements of a contract. If the terms are unsettled, uncertain or vague that they cannot be ascertained with reasonable degree of certainty, there will be no vali contract enforceable at law unless the uncertain part of the contract is unsubstantial and can be separated from the vital parts thereof. (pp. 1939 G & 1940 A)

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Offer and acceptance

5. An offer can be accepted in such manner as may be implied by the nature of the offer. Thus it may be accepted by the doing of the act which one is requested by the terms of the offer to do. Accordingly the performance of a condition is sufficient acceptance without the notification of it under circumstances where an offeror in his offer impliedly indicates that he does not require notification of the acceptance of the offer. See *Carlill v. Carbollic Smoke Ball Co.*, supra. I therefore entertain no doubt that the aforesaid respondents' offers were duly accepted by the appellants when they sailed out of Lagos and proceeded to Takoradi and later to Tema as requested but was delayed there until the 4th May, 1976 on which date the discharge of her cargo was completed. Fresh and independent contract, therefore, came into existence by the respondents' engagement of the appellants1 vessel to sail to Ghana. The respondents' offer was duly accepted by the appellants when their vessel sailed to Ghana. I think a contract thereby matured between the appellants and the respondents. (p. 1940 E)

Contract lacking in necessary details

6. It was however a contract with hardly any precise or essential terms and conditions. It was Jacking *in* necessary details and conditions and I cannot conceive that it is the duty of the courts to make contracts for the parties by way of supplying the essential necessary details, terms or conditions thereof. I am therefore unable to hold that the said contract is either legally valid or enforceable at law. (p. 1940 H)

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Quantum meruit - Proof of rendering services

7. The law is settled that where a plaintiff can prove the rendering of services under an unenforceable contract, the contract is admissible as evidence of the value of the services rendered and he may recover on a quantum meruit basis. Put differently, where work is done or services are rendered by the plaintiff at the request of the defendant and of which the defendant has had the benefit, the plaintiff can recover the value of the work done or services rendered on a quantum meruit. The law provides remedies for cases of unjust enrichment and thus to prevent one from retaining some

benefit derived from another which it is unconscionable that he should keep, p remedies, strictly speaking, are different from remedies in contract or tort and are recognized to fall within the common law remedy of quasi-contract. (p. 1943 B)

Whether appellants can be compensated on quantum meruit

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8. It is not in dispute that the appellants fully executed their own part of the obligation and/or services requested of them by the respondents under what, in my view, is an unenforceable contract. It is also common place that the respondents had the benefit of the appellants' services and that no scale in inspect of demurrage, remuneration or compensation was fixed or agreed upon with regard to the unforeseen and additional voyage to Ghana. It is further clear that the services rendered by the appellants to the respondents which entailed definite loss of earnings by way of demurrage as a result of the subsequent voyage from Nigeria to Ghana and/or the delay suffered by the appellants before the respondents' cargo was fully discharged from their vessel were never intended to be gratuitous. It seems to me clear that the appellants would be entitled to a reasonable compensation for their loss on the basis of quantum meruit (p. 1944 B)

Quantum meruit - Reasonable rate of compensation

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9. There is abundant evidence from the contracts. Exhibits A-A3, P-P1 and R and from the uncontroverted oral evidence before the trial court that the rate of demurrage agreed upon was US \$3,000.00 per diem. This rate of demurrage was payable to the appellants by the respondents through Gilt right from the 16th July, 1975 when MV Fotini entered into demurrage until the subsequent arrangement between the appellants and the respondents for the voyage from Nigeria to Ghana was struck. It therefore seems to me obvious that the reasonable rate of compensation or loss payable by the respondents, as demurrage in respect of the appellants' subsequent engagement from Nigeria to Ghana must be the same US \$3,000.00 per diem and I so find. (p. 1944 E)

Unchallenged evidence

10. It ought to be noted from the record of proceedings that D.W.2 was never cross-examined on the proof of those payments, Exhibits T-T6. It cannot be overemphasized that where evidence given by a party to any proceedings was not challenged by the opposite party who had the opportunity to do so, it is always open to the court seized of the matter to act on such unchallenged evidence before it. The above finding of fact that the

respondents paid a total of US \$730,030.00 to the appellants through Gilt and not US \$591,483 or US \$591,500.00 as claimed by the appellants was neither challenged in the court below nor before us. I am therefore prepared to accept that the respondents paid a total of US \$730,030.00 to the appellants through Gilt as demurrage thus leaving an outstanding balance of US \$145,970.00 unpaid as against the balance of US \$264,500.00 claimed by the appellants. (pp. 1946 A & 1946 H)

No question of waiver will operate

11. With profound respect, it ought to be borne in mind that payments of demurrage made to the appellants by the respondents through Gilt was strictly in accordance with the terms of the charter-party, Exhibits A-A3; Exhibits P-P1 and the Letter of Credit covering the price of the cargo with demurrage, Exhibit R. These contracts pertained to the original “*contractual*” carrying voyage and had nothing to do with the appellants’ right to collect demurrage they might be entitled to under a totally different and independent arrangement from Exhibits A-A3, P-P1 and R. In my view, the appellants’ present claim has nothing to do with Gilt and no question of waiver therefore arises to operate against the appellants. (p. 1947 D)

Interest on amount due

12. On the appellants’ claim for US \$233,996.00 being interest at 11.5% from 9th February, 1978 to 9th February, 1985, the general rule, at common law, is that interest is not payable on a debt or loan in the absence of express agreement or some course of dealing or custom to that effect. Interest will however be payable where there is an express agreement to that effect and such agreement may be inferred from a course of dealing between the parties, or where an obligation to pay interest arises from the custom or usage of a particular trade or business. In the present case, there is no express stipulation or agreement between the parties on the payment of interest. There is also no evidence that from the nature of the transaction, the course of dealing between the parties or by any custom whatever, interest is payable on the demurrage claimed. The appellants’ claim for interest must therefore fail. (pp. 1947 F & 1947 G)

H *NOTABLE POINTS OF INTEREST*
IGUH JSC

What the term demurrage connotes

1. It therefore seems to me well settled that “*demurrage*” connotes agreed reasonable compensation or damages to be paid for delay or allowed de-

tention of a chattel, such as a ship or truck on hire or charter beyond the agreed of such hire or charter. The distinction between “*demurrage*” and *compensation or damages for detention*” is that the one is liquidated damages the other unliquidated. A claim under either head is a claim in Bet of detention and is invariably in the nature of a claim of damages. Indeed, in mercantile world, demurrage is often used in a wider sense as including B both demurrage strictly speaking and damages for detention. (p. 1934 H)

OGUNDARE JSC

Whether any act of state is in issue

C

2. I only need to add that I am unable to accept the submission of the learned Solicitor-General of the Federation that the request made by the Respondents in Exhibits B to the Appellants was not an offer but an act of state and executive action for which there was no judicial protection or remedy. “*act of state*” is defined by the learned authors of Halsbury’s Laws D of England (4th ed) vol. 18 paragraph 1413 as “*a prerogative act of policy in the field of foreign affairs performed by a sovereign state in the course of relationship with another state or its subjects*”... .. In the appeal on hand, the Defendants did not plead act of state as a defence nor was it ever E basis of their case. They based their defence on there being no privity of contract between them and the Plaintiff. The facts point more to a commercial transaction between the parties rather than exercise of political power the Federal Military Government of Nigeria. There was no case of seizure of a ship by Government. Nor could the Defendants, in exercise of act of state, order a foreign ship to proceed to a foreign country to discharge its (Defendants’) cargo in that other country. The argument of the F learned Solicitor-General of the Federation, with respect, is not supported by Exhibit B nor the occasion; I have no hesitation in rejecting it. (pp. 1948 G & 1949 D)

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REPRESENTATION

J. Oduba Esq. with Mr. O. Faji for the appellants

T. Onwugbufor Esq. Solicitor-General of the Federal with Mrs. F.N. Molokwu, D.C.L.R. Mr. J. Ayenibiowo, A.D.C.L. Mr. C. I. Okpoko, L.O. and C.C. Ibe (Miss), L.O. for the respondents

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CASES REFERRED TO

Carlill v. Carbolic Smoke Ball Co. (1893) 1 Q.B. 256

Lckhart v. Falk (1875) L.R. 10 Ex 132 at 135

Shobogun v. Sanni (1974) 11 S.C. 35

Great Western Railway Company v. Phillips & Co. Ltd. (1908) A.C. 101 at 107

Moor Line Ltd. V. Distillers Co. Ltd. (1912) A.C. 514 at p. 520

Dunlop v. Selfridge (1915) A.C. 847

B Ikpeazu v. A.C.B Ltd. (1965) N.M.L.R. 374

Maxsted v. Durant (1901) A.C. 240 H.L.

Nephew Ltd. v. Ouston (1941) A.C. 251

Harvey v. Pratt(1965) 1 W.L.R. 1025

Fakorede v. A.G. of Western State (1972) 1 All N.L.R. (Part 1) 178 at 189

C Way v. Latilla (1937 3 All E.R. 759 H.L.

Powell v. Braun (1954) 1 All E.R. 484

Omoregbee v. Lawani (1980) 3-4 S.C. 108 at 117

London Chatham and Dover Railway v. South Eastern Railway (1893) A.C 429

D

LEAD JUDGMENT BY IGUH JSC

In the Federal High Court of Nigeria, holden at Lagos, the plaintiffs, who are now the appellants, instituted an action against the defendants, now the respondents, claiming, as subsequently amended, as follows:-

“(a) Balance of demurrage found due - US \$284,500.00

(b) Interest at 11 1/2% from 9/2/78 to 9/2/85 and continuing - 233.996.30

F *US \$518.496.30*

(c) Alternatively to (b) above: such rate of interest on the outstanding balance of demurrage of US \$284,500.00 as the Court may deem equitable. Alternatively the plaintiff claims the sum of \$518,496.30 as pleaded in paragraph 22.”

G The plaintiffs claimed that the demurrage was occasioned by the detention of their vessel, “MV Fotini” at the ports of Lagos (Nigeria), and at Takoradi and Tema (Ghana) for a total of 292 days.

Pleadings were ordered in the suit and were duly settled, filed and exchanged.

H In paragraph 18 of the plaintiffs’ further amended statement of claim, it was averred as follows:-

“18. Further or alternatively, not being able to provide a berth at Apapa, the port originally designated for the discharge of the cargo of cement consigned to the 2nd defendant and carried by the vessel, and

having diverted the vessel to Tema, Ghana to discharge its said cargo for receipt by the 2nd defendant and having received its said cargo at Tema, Ghana as aforesaid, the 2nd defendant became bound/liable to the plaintiff to pay demurrage/damages for detention for the delay/diversion of the vessel as aforesaid."

(Underlining supplied for emphasis)

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The plaintiffs also averred in paragraph 22 of their further amended statement of claim that they suffered loss and damage by reason of the facts therein pleaded.

At the subsequent trial, both parties testified on their own behalf and called witnesses.

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The facts of this case, as presented by the plaintiffs, are that on the 14th day of March, 1975, the 2nd defendant, as purchaser, entered into the contract of sale, Exhibits P-P1, with a foreign company, Gilt Investment Ltd., as sellers, for the supply of 240,000 metric tons of bagged cement to be shipped from Barcelona, Spain to Lagos, Nigeria. Pursuant to the said contract, the Central Bank of Nigeria, acting on behalf of the defendants, opened a Letter of Credit, Exhibit R with the Deutsche Bank in Frankfurt, West Germany in favour of the said Gilt Investment Ltd., hereinafter referred to simply as "Gilt", to cover the cost of cement and demurrage that might be incurred as a result of the shipment of the cargo of cement from Barcelona to Lagos.

On the 16th May, 1975, Gilt, through their agent and/or representative, Equatorial Lines of Lagos, entered into a charter-party, Exhibits A-A3, with the plaintiffs for the hire of the plaintiffs' vessel, MV Fotini, for the purpose of conveying the defendants cargo of cement from Barcelona to Lagos as aforesaid. I think it ought to be stressed at this stage that neither of the defendants was a party or privy to the said charter-party. There was also no evidence that either of them was at all material times aware of the provisions and contents thereof. Exhibits A-A3 expressly made similar provisions relating to payment of demurrage as were contained in Exhibits P-P1 and R. Under these provisions, demurrage not exceeding U.S. \$3,500.00 per diem shall be for the account of the buyers but payable under the terms of the said Letter of Credit, Exhibit R, opened in favour of Gilt.

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The vessel, duly loaded with the said cargo of bagged cement, arrived at the Lagos Port, its terminal destination, on the 1st July, 1975 and promptly gave due notice of readiness to discharge. Unfortunately Lagos port was heavily congested at the material time. The vessel, having waited for some two months and had not commenced discharge was ordered by the defendants acting through their agents, to proceed first to the port of

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Takoradi and then to Tema, both in Ghana for the discharge of its cargo.

The plaintiffs who are the owners of MV Fotini agreed to divert their vessel to Ghana as directed by the defendant's agents. However, before the vessel could be finally discharged of its cargo of bagged cement, it had entered into demurrage. It is the plaintiff's case that their vessel was in demurrage for a total of 292 days from 16th July, 1975 to the 4th May, 1976. They also claimed that in accordance with the provisions in the charter-party, Exhibits A-A3, demurrage was on a basis of U.S. \$3,000.00 per day. Accordingly they were entitled to a total of \$876,000.00 as demurrage for the said period of 292 days out of which the defendants only paid \$591,500.00 leaving an outstanding balance of \$284,500.00 unpaid.

The defendants, on the other hand, claimed firstly, that they had no contractual relationship of whatever nature with the plaintiffs, and secondly, that they had paid Gilt with which they entered into contract the agreed price of the cement supplied together with a further sum of \$730,030.00 which represented the full demurrage incurred up to the date MV Fotini completely discharged its cargo at Tema port in Ghana as negotiated by their agent, the Cement Contracts Negotiating Committee and accepted by Gilt. They claimed that this demurrage was liquidated by seven instalmental payments and that they owed nothing to the plaintiffs as evidenced by Exhibits T-T6 and U. They explained that Gilt hired the vessel MV Fotini from the plaintiff company and that Gilt received all the amount due to the plaintiffs from the defendants for payment to the said plaintiffs.

At the conclusion of hearing, Anyaegbunam, C.J., after a review of the evidence found for the defendants and dismissed the plaintiff's claims. He upheld the defendants' contention that there was no privity of contract between the plaintiffs and the said defendants in respect of which the plaintiffs were entitled to any demurrage as against the defendants. He held that the contract in issue was between Gilt and the respondents and that demurrage had infact been paid by the respondents to the said Gilt as evidenced by Exhibits T-T6. The learned trial Chief Judge stated:-

"The main question that calls for determination is not who pays demurrage fee but to whom it should be paid. In Exhibits P-P1, it is stated inter alia in Exhibit P1 under clause (IX):-

"Demurrage shall be payable (in addition to the full purchase price) under the terms of the Letter of Credit, on presentation at the Bank designated in sub-clause (V) above of time sheet and statements of facts duly certified as correct by the ship's master, and by the ship's agents in Lagos." The above is a portion of an Agreement between the Federal Military Government of Nigeria on the one hand as the buyer and Gilt Investment

Limited on the other hand as the seller. The plaintiff/company is not anywhere mentioned in the said agreement.

Exhibits A-A3 is an agreement between the plaintiff/company and Equatorial Lines. The defendants are not mentioned in it at all. ...

The contract for purchase, carriage and delivery of the cement was between the Federal Ministry of Defence and Messrs Gilt Investment B Limited. All the parties accepted this fact. "

He considered the letter the Permanent Secretary, Federal Ministry of Transport wrote to the plaintiffs, Exhibit B, together with the Agreement of Discharge between Gilt and the defendants, Exhibit U, and concluded thus:-

"All these go to show that the only company that had contract in connection with demurrage is Gilt Investment Limited and that the contract had been fulfilled to the satisfaction of all the parties concerned hence Exhibit U.

With this I have no option except to dismiss the plaintiff's claim. It is hereby dismissed."

Dissatisfied with this decision of the trial court, the plaintiffs lodged an appeal against the same to the Court of Appeal, Lagos Division, which in an unanimous judgment dismissed the appeal on the 7th day of July, 1988 and affirmed the decision of the trial court. Delivering the judgment of the Court of Appeal, with which Babalakin, J.C.A. as he then was, and Awogu, J.C.A. agreed, Akpata, J.C.A., as he then was, concluded as follows:-

"I am satisfied that, in the light of the pleadings and the totality of the evidence adduced by the parties and the relevant legal authorities applicable to this case, the respondents were not liable to pay demurrage or damages to the appellants either in contract or in tort. The appeal fails and the judgment of Anyaegbunam C.J. delivered on 2/7/86 is upheld. The appeal is dismissed with costs assessed at N300.00 in favour of the respondents."

Aggrieved by this decision of the Court of Appeal, the plaintiffs have further appealed to this court. I shall hereinafter refer to the plaintiffs and the defendants in this judgment as the appellants and the respondents respectively.

Five grounds of appeal were filed by the appellants. These grounds of appeal, without their particulars, are as follows:-

"1. The learned Justices of the Court of Appeal in their unanimity erred in law when they held that there was no privity of contract between the appellant and the respondents.

2. The learned Justices of the Court of Appeal in their unanimity

erred in law and on the facts in holding that since payments of the demurrage had been made by the respondents to the appellant through Gilt Investment, it therefore amounted to a waiver of all rights, if any, the appellant may have to claim outstanding demurrage from the respondents directly.

- B 3. Having found that the cargo interest was in the Federal Military Government acting through the Permanent Secretary, Ministry of Defence, the Court of Appeal fell into error by artificially splitting the persona of the Federal Military Government in relation to the further instruction in Exhibit 'B' thereby implying that the Federal Military Government would only have
C been liable if sued in its capacity as the administrative persona responsible for such instruction to divert to Ghana when on the face of the action/claim by plaintiffs against the respondents, the presence of the Attorney-General of the Federation as a party indicated the potential liability of the Federal Military Government in whatever capacity it may have been found and
D however it may have arisen and further, the Federal Military Government however the Court of Appeal may find convenient to split its persona cannot either by domestic or international law have power/authority to instruct any ships in Nigeria or more particularly 'MV FOTINI' to sail into particular/specified ports in Ghana, an independent sovereign state, except it was
E so doing as receiver of cargo laden on such vessel which was being received as shown in evidence under a prior arrangement with the Government of Ghana in relation to receipt of such cargo.

4. *The learned Justices of the Court of Appeal erred in law in rejecting appellant's contention that by the respondent's various representations as contained in Exhibits P-P1 and R before the court, they (respondents) have brought the appellant within the definition of the "neighbour" principle giving rise to a duty of care, a breach of which is actionable.*

5. *The judgment is against the weight of evidence."*

- G The parties, pursuant to the rules of this court filed and exchanged their written briefs of argument.

The five issues identified on behalf of the appellants which this court is called upon to determine are as follows:-

- H "(a) *From the totality of the available evidence in this matter at the court of first instance, can it be rightly said in law that there was no privity of contract between the parties hereto? (The implied contracts issue)*

(b) *Further or alternatively, can it be said that payments of demurrage by the respondents to Gilt Investments Ltd amounted in law to a waiver of the appellant's rights herein to collect demurrage of their own which became due and payable on a totally different and independent*

contract from that which initially existed between the respondents and Gilt Investment Ltd. pursuant to which the respondents paid the demurrage through Gilt Investment Ltd. In other words, can the appellants in subsequent and totally independent contracts be held bound to collect/receive demurrage through the same agency and in the same way as it did in an earlier contract merely because it had collected demurrage in one like manner before? As a corollary to that, even if, which the appellants deny, it collected the demurrage from Gilt Investment Ltd. in one particular contract, will that and nothing more amount to a waiver of appellant's rights to collect further demurrage on other independent contracts? (The waiver issue) C

(c) Further, and in any event, have the respondents fully paid demurrage for 292 days to Gilt Investment? (The full payment issue).

(d) From the totality of the evidence in this case and usual governmental and administrative set-up vis-a-vis the position and involvement of 2nd respondent, can it be said that the steps taken by the Federal Government in diverting the appellants' vessel carrying respondents' cargo to Takoradi, Ghana were not taken for and on behalf of the respondents and/or authorised by the respondents? (The agency issue) D

(e) Even if, which the appellants humbly contest, this court were to reject appellants' submission that a contract ought to be found to exist between the appellants and the respondents herein, have the respondents by their various representations contained in the Cement Contract, and the letter of credit not brought the appellants within the definition of the "neighbour principle" with the attendant legal duty of care, a breach of which is actionable in tort, quite apart from, and independent of any contract? (The duty of care issue)" E F

The respondents, on the other hand, contended that the single issue for the determination of this court is:-

"whether there is any contractual obligation on their part to pay demurrage to the appellant under any of the following documents on which G the appellant relies for its claim against the respondents for demurrage, namely:

(1) The cement supply contract between Gilt and the 2nd respondent, that is, Exhibit P-P1;

(2) The letter of Credit (Exhibit R) dated 22nd April, 1975 issued H by the Central Bank of Nigeria (C.B.N.) in favour of Gilt."

It is plain that the lone issue raised on behalf of the respondents is identical with issue I set out by the appellants. There are, however, other issues raised by the appellants which, in my view, are relevant in this ap-

peal. I therefore propose, in this judgment, to adopt the issues formulated by the appellants in my determination of this appeal.

At the oral hearing of the appeal before us, both learned counsel for the parties proffered additional arguments in amplification of the submissions contained in their respective written briefs of argument.

B Learned counsel for the appellants, J. Oduba Esq. in his submissions argued that the first issue for consideration in this appeal is whether in fact and in law, on the evidence before the trial court, there was not another enforceable contract between the parties hereto apart from that evidenced by Exhibits P- P1. He referred to the respondents directive to the C appellants for their ship, which was then at the Lagos Harbour, to proceed to Takoradi port in Ghana for the discharge of her cargo. He also drew attention to Exhibit B addressed by the respondent's agents to the appellants diverting the appellant's vessel, MV Fotini, from Takoradi to the port of Temar, Ghana where her cargo would be expeditiously discharged. Learned D counsel described those directives by the respondents to the appellants for the diversion of the appellant's vessel as offers. He explained that these offers were accepted by the appellants the moment their vessel, after arriving at the agreed original port of discharge, Lagos, Nigeria in accordance with the contract. Exhibits A-A3 proceeded, in furtherance to the said directives, to Takoradi, and subsequently to Tema ports, Ghana. He relied on E *Carlill v. Carbolic Smoke Ball Co. (1893) 1 Q.B. 256* for this proposition.

Learned counsel next went on to argue that the original contract in respect of which express provisions for demurrage were made was meant to and in fact, terminated in Lagos. He contended however that as soon as F the carrying vessel reached its destination, Lagos, but was diverted to Ghana by the respondents which diversion the appellants acceded to, a fresh contract for the carriage of the respondent's cargo from Nigeria to Ghana was thereby struck. The acceptance of this fresh contract, he stressed, was performance by the appellants. He further submitted that the consideration in G the fresh contract was the payment of demurrage which is now claimed. He contended that once time started to run under a voyage charter, it continued to do so with the agreed demurrage payable which, in the present case, is U.S. \$3,000.00 per diem. In this regard, learned counsel commended the decision in the English case of *The "Tassos N" Ricargo Trading H S. A. v. Spliethoff's Barrachtingskantoor B. V. (1983) 1 Lloyd's Rep. 648* to this court. He was of the view that the facts of *The "Tassos N"* are very similar to those of the present case. He also relied on the decision in *Lockhart v. Falk (1875) L.R. 10 Ex 132 at 135*. Learned counsel finally argued that on the basis of the original and the fresh contracts between the parties, a

total of U.S. \$876,000.00 became due to the appellants on demurrage, of which the respondents only paid U.S. \$591,483.00 leaving a balance of U.S. \$284,500.00 to be paid together with the interest of U.S. \$233,996.30. He urged the court to allow this appeal and for judgment to be entered for the appellants as claimed.

Learned Solicitor-General of the Federation, T. Onwugbufo Esq. B in his reply stressed that the case of *Carlill v. Carbolic Smoke Ball Co.*, supra, relied on by the appellants to establish a fresh contract between the parties is totally inapplicable to the facts of the present case. He explained that in *Carlill's* case, the defendant's offer was made to the whole world at large, of which *Carlill* was a member. In the present case, the cement C supply contract, Exhibits P-P1 which contained the demurrage clause in issue was concluded exclusively between the respondents, as buyers, of the one part and Gilt Investment Ltd, as sellers, of the other part. He stressed that no other person else was involved as a party in the said Exhibits P-P1. He also drew attention to the fact that the charter-party, Exhibits A-A3 was D between the appellants and Gilt, by their agents, Equatorial Lines of Lagos. Learned counsel submitted that there was no privity of contract or any contractual relationship whatever between the respondents and the appellants and that the appellants cannot consequently found any contractual claim in respect of Exhibits A-A3 or P-P1. E

Learned respondent's counsel further contended that an order cannot be the same thing as an offer. He argued that the respondents' directive to the appellants for their vessel to proceed from Lagos port to Ghanaian ports for the purpose of discharging its cargo was not an offer but an act of state and an executive action for which there is no judicial F protection or remedy.

On the alternative claim by the appellants for the award of compensation or damages for undue detention of the appellants' vessel the respondents submitted that the appellants did not claim this relief and could not therefore be granted the same. The case of *Shobogun v. Sanni* G (1974) 11 S.C. 35 was cited in support of this proposition. Learned respondents' counsel dismissed the decision in '*The Tassos N*' , supra which the appellants so heavily relied on as irrelevant and inapplicable to the facts of the present case. He explained that whereas in *The Tassos N*" case, there was an existing agreement which created a contractual relationship H between the parties in that case in respect of which the action was taken, there is no such agreement between the appellants and the respondents in the present case. He submitted that if the appellants felt aggrieved for the loss of any amount in terms of demurrage, it was to Gilt which chartered

their vessel that they should address their claim and not to the respondents with which they had no contractual relationship whatsoever. He finally made reference to the proof of payment of the said U.S. \$730,030.00 as demurrage by the respondents to Gilt, Exhibits T-T6, and the agreement between the Central Bank of Nigeria, otherwise referred to as C.B.N. and Gilt relieving C.B.N. of further obligations and indemnifying the bank of future proceedings on the Letters of Credit, Exhibit R and he urged the court to dismiss the appeal.

It is clear to me from all the issues formulated by the parties for the determination of this court that they relate to one basic question, namely, whether on the facts of this case as pleaded and testified to by the parties, the appellants are entitled to any further payment in respect of demurrage as claimed or at all. I therefore find it convenient in this judgment to consider these issues together, a course adopted by the appellants in their brief of argument in this appeal. I think it will be necessary at this stage to determine what precisely the word “demurrage” really means.

In the House of Lords decision in *Great Western Railway Company v. Phillips and Co. Ltd.* (1908) A.C. 101 at 107, Lord Macnaghten, in a claim on demurrage or damages caused by the undue detention of a truck, was content to take the meaning of the word “demurrage” from the considered judgment of the Court of Exchequer in *Lockhart v. Falk* (1875) L.R. 10 Exch. 132 at 135. Said the noble Lord:-

“The question there turned on the construction of a charter-party. The judgment was delivered by Cleasby, B. “The word demurrage”, said the learned Judge, “no doubt properly signifies the agreed additional payment (generally per day) for an allowed detention beyond a period either specified in or to be collected from the instrument; but it has also a popular or more general meaning of compensation for undue detention”. Here it cannot have its proper signification. It must mean compensation. But it imports, I think, or connotes something more. Considering the source from which the word is borrowed and the subject to which it is commonly applied, I think it denotes that a truck unduly detained is to be regarded (just like a ship under charter) as a profit earning chattel, as a vehicle running for profit and unduly detained in the course of its journey without any fault on the part of its owner.”

I am in total agreement with the above meaning of the word “demurrage” and must, with respect, fully endorse the same. It therefore seems to me well settled that “demurrage” connotes agreed reasonable compensation or damages to be paid for delay or allowed detention of a chattel, such as a ship or truck on hire or charter beyond the agreed period of such hire or charter. The distinction between “demurrage” and “compensation

or damages for detention” is that the one is liquidated damages and the other unliquidated. A claim under either head is a claim in respect of detention and is invariably in the nature of a claim of damages. Indeed, in mercantile world, demurrage is often used in a wider sense as including both demurrage strictly speaking and damages for detention. See *Moor Line Ltd. v. Distillers Co. Ltd.* (1912) S.C. 514 at p. 520 per Lord Salvesen. B I will now examine how the court below disposed of the question whether or not the appellants were entitled to the recovery of demurrage from the respondents in the present case.

In this regard, the court below reasoned thus:-

“... the cases cited by learned counsel in support of his contention C that demurrage was payable to the appellants by the respondents, in the circumstances of this appeal, are not applicable. There would have been some logic in the argument of counsel if Gilt Investment had notified the respondents that the appellants be paid demurrage direct and the respondents had agreed to do so, or the appellants had insisted from the begin- D ning that they be paid by the respondents. The appellants cannot be seen to accept Gilt Investment Limited as the rightful party to be paid the demurrage and then turn round to make demands on the respondents. Therefore, the principle that a third party can derive benefit from an offer made to the whole world, although he was not an actual party, can only avail E him if he does not compromise his position or by conduct waive his right to claim from the offeror.”

A little later in its judgment, the Court of Appeal went on:-

“There is evidence from PW.1 that the respondents paid a total of U.S. \$591,500.00 as demurrage. It therefore follows that the respondents paid F about U.S. \$366,500.00 for demurrage outside Nigeria. Since this amount was paid to Gilt Investment Limited to the knowledge of the appellants who raised no objection, it follows that the appellants still regarded themselves as acting for Gilt Investment, hence they did not insist that the amount be paid to them. It was Gilt Investment Limited that paid the appellants G the demurrage incurred by the respondents in Ghana. The appellants would probably have made out a case if demurrage payable in Takoradi or Tema port was not paid to Gilt Investment Limited.”

It also observed:-

“In the light of Exhibit U the Agreement of Discharge entered into between H Gilt Investment and the Central Bank of Nigeria, the agents of the respondents, it seems to me that the appellants are not competent to institute any action against the respondents in respect of the demurrage in Lagos. They can only claim against Equatorial Lines or Gilt Investment Limited.”

The Court of Appeal, next examined the question of the diversion of the appellants' vessel from Nigeria to Ghana and was of opinion that no contractual relationship between the appellants and the respondents resulted therefrom. It observed that the Federal Government diverted the vessel to Ghana, not as owners of the cargo but as the authority whose responsibility it was to see that the port was decongested. I think I ought to dispose of this last point first.

It is not in dispute and, this is clearly borne out by the charter-party, Exhibits A-A3 that the voyage, the subject matter of the original contract, was from Barcelona, Spain to Lagos, Nigeria. Without doubt, the appellants by the said Exhibits A-A3, neither contemplated nor were they bound to undertake the diversion to Takoradi and Tema, both in Ghana. ***It is therefore clear to me that the appellants' contract with Gilt by their agents, Equatorial Lines, the original charterers of MV Fotini terminated the moment the vessel arrived at the Lagos port on or about the 1st July, 1975 and gave notice of its readiness to discharge her cargo in accordance with the relevant Clauses of the cement contract, Exhibits P-P1, the Letter of Credit, Exhibit R and the charter-party, Exhibits A-A3.***

The appellants promptly gave notice of their readiness to discharge the said cargo on the 2nd July, 1975. Thereafter it was for Gilt, the charterers, to discharge the vessel within the lay days and once time started to run against a charterer under a voyage charter, it continued to do so, subject to any relevant exceptions unless the owners of the vessel removed it for their private purpose or to suit their own convenience. In the present case, there is no suggestion that the vessel was at any time removed by the appellants for their private purpose or to suit their own convenience.

It is common ground that in breach of the contracts, Exhibits A-A3 and P-P1, the respondents were unable to provide the MV Fotini with a berth and/or take delivery of their cargo of bags of cement due to massive ports congestion in Nigeria at the material time. The vessel having waited for some two and a half months at the Lagos waters was diverted by the respondents, acting through their agents, first to Takoradi and subsequently to Tema Ports, both in Ghana.

It is not disputed that the vessel was in demurrage both in Nigeria and Ghana due to the delay on the part of the respondents to off-load her for a total of 292 days from the 16th July, 1975 to the 4th May, 1976. It is also clear, as found by the trial court and affirmed by the court below, that the respondents paid some amount through Gilt to the appellants in respect of demurrage covering some period of time while the vessel was both

in Nigeria and Ghana. I will return to this aspect of the appeal later in this judgment. It suffices at this stage to consider an aspect of the main issue in the appeal which is whether there was a new enforceable contract outside Exhibits P-P1, or, indeed Exhibits A-A3, between the parties hereto in which there is an express or implied agreement for the payment of U.S. \$3000.00 per diem by the respondents to the appellants as demurrage following the diversion of MV Fotini to Ghana as aforesaid. B

The appellant's contention is that the voyage covered by Exhibits A-A3 and P-P1 having terminated at Lagos, a first diversion voyage arose in contract between the parties when the respondents ordered MV Fotini to Takoradi. They further argued that a second diversion voyage also arose in contract between the parties when pursuant to Exhibit B, the vessel was instructed by the respondents' agents to proceed from Takoradi to Tema. Relying on the decisions in *The "Tassos N": Ricargo Trading SA v. Splithoff's Bevrachtungskantor B. V.* (1983) 1 Lloyds 648 and *Lockhart v. Falk* (1875) L.R. 10 Ex. 132 at 135, the appellants submitted that the original contractual carrying voyage ended in Lagos and that a new continuation voyage having been offered by the respondents to the appellants without the intervention of Gilt, there was no basis for the respondents' argument that they had no contractual relationship with the appellants. D

For the respondents, it was argued that the facts of *The "Tassos N"* case are distinguishable from those of the present case. They pointed out that there was a tripartite written and duly executed agreement which created a contractual relationship between the parties in the former case. No such agreement between the parties exists in the present case. They submitted also that no offer was made to the appellants when the respondents ordered a diversion of the vessel, MV Fotini, to Ghana and that in the absence of any contract between the parties there was no contractual obligation on the part of the respondents to pay demurrage to the appellants. They stressed that since the cement supply contract was between Gilt and the 2nd respondent, any obligation arising therefrom must be enforceable against the respondents by Gilt only and by no one else. E F G

I think I ought to observe that the facts of the decision in *Carlill v. Carbolic Smoke Ball Co.* supra, under which the appellants strenuously urged the court to hold that the demurrage clause in Exhibits P-P1 was not addressed only to Gilt but constituted an offer to the whole shipping world are distinguishable from the facts of the present case. In *Carlill's* case, the defendant's offer was made to the world at large of which the plaintiff was a member. The plaintiff accepted the offer hence a contract in law which was sued upon matured. In the present case, the cement contract, Exhibits H

P-P1, which contained the demurrage clause was concluded between the respondents as buyers and Gilt as sellers and with no other person else. The offer therein was not made to the world at large but was exclusively made and accepted as between the named parties therein.

It is indisputable as a general rule that one who is not a party to a contract cannot make a claim in contract in respect thereof unless, of course, he is privy thereto or has acquired some legal interest, say by way of assignment of any rights thereunder. See Dunlop v. Selfridge (1915) A.C. 847 and Chuba Ikpeazu v. A.C.B. Ltd. (1965) NMLR 374. ***The doctrine of privity of contract, as a general rule, is that a contract cannot confer rights or impose obligations on strangers to it. The appellants being total strangers to Exhibits P-P1 may not establish a case in contract against the respondents.***

Similarly, in the case of The “Tassos N”, supra which the appellants heavily relied on, there was a tripartite agreement which created a contractual relationship between the plaintiff and the defendant in that case. In the present case, however, no such contractual relationship existed between the appellants and the respondents. Perhaps it is desirable for easy reference to set out briefly the facts of The “Tassos N” case.

On the 18th September, 1980, the plaintiffs, as owners of the “The Tassos N” entered into a charter whereby they let their vessel to Dan-Med for the period of one time charter trip from Sweden/Finland to the Red Sea with redelivery at Port Said. Dan-Med, on the 17th September, 1980 had entered into a sub-charter with the defendants for the carriage of cargo from Somas in Finland to Aqaba in Jordan. The vessel duly arrived at Aqaba on the 21st October, 1980 and gave notice of readiness the next day. Unfortunately Aqaba was very congested. After the expiration of lay time at the beginning of November but the vessel had not yet commenced discharge, it was agreed between the owners Dan-Med and the defendants on the 15th December, 1980 that the vessel would be diverted to Mersin, that Dan-Med would assign to the owners their rights to demurrage under the sub-charter and that the defendant would pay demurrage direct to the owners including any costs of diverting the vessel to Mersin. The agreement between the three parties was in writing and the contention of the parties revolved on the interpretation of this agreement. This is unlike in the present case where there does not exist any direct contractual agreement between the appellants and the respondents, particularly on the issue of demurrage and the interest claimed. It was held in the “The Tassos N” case, and quite rightly too, if I may say with respect, that although the carrying voyage was resumed when the vessel left Aqaba for Mersin, it was not the original “con-

tractual” carrying voyage which had come to an end at Aqaba, and, secondly, that it was up to the sub-charterers to discharge the vessel in time or pay demurrage in default so long as she was not taken away by the owners for their own purpose. It was further held that the right to demurrage having been assigned to the owners under the first agreement, they were in a position to maintain their claim on contract against the defendants. B

It is obvious, from the above facts, that the decision in The “Tassos N” cannot, with respect, be of much assistance in the determination of the present appeal as it turned on the interpretation of the language used in the tripartite written agreement between the parties unlike in the present case where no such agreement exists. C

There is next the case of Lockhart v. Falk, supra, relied upon by the appellants. I need only state that the charter-party in that case made express provision for a demurrage clause in these words, namely -
“demurrage at 2 pounds per 100 tons register per day.”

**As I have repeatedly observed, there is, in the present case, D
no contractual relationship between the parties in so far as demurrage as a contractual term or condition is concerned. Neither of the three documents involved in this case, namely, Exhibits P-P1, Exhibit R and Exhibits A-A3 created any contractual obligation or relationship whether directly or indirectly between the appellants and the respondents. And as a general rule, a contract affects only the parties E
to it, and cannot be forced by or against a person who is not a party thereto, even if the contract was made for his benefit and purports to give him the right to sue or to make him liable upon it. See Keighley, Maxsted and Co. v. Durant (1901) A.C. 240 H.L. The decision in Lockhart’s case F
cannot therefore be of much assistance in the determination of this appeal. I will now consider whether there is an otherwise concluded valid and enforceable contract between the parties in respect of which the appellants have contractual right to demurrage as between themselves and the respondents.**

**To constitute a binding contract, there must be an agreement G
in that the parties must be in consensus ad idem with regard to the essential terms and conditions thereof; the parties must intend to create legal relations and the promise of each party, in a simple contract, not under seal, must be supported by consideration. There must be a concluded bargain which has settled all essential conditions that H
are necessary to be settled and leaves no vital term or condition unsettled. See May and Butcher Ltd. v. R. (1934) 2 K.B. 17. It is a question of fact whether the parties have agreed on the essential elements of a contract. See Scammel and Nephew Ltd. v. Guston (1941) A.C. 251 and**

D'Silva v. Lister House Development (1971) Ch. 17. ***If the terms are unsettled, uncertain or vague that they cannot be ascertained with reasonable degree of certainty, there will be no valid contract enforceable at law unless the uncertain part of the contract is unsubstantial and can be separated from the vital parts thereof.*** See

B Harvey v. Pratt (1965) 1WLR 1025, Kingsley and Keith Ltd. v. Glynn Bros. (Chemicals) Ltd. (1953) 1 Lloyd's Rep. 211 and Bishop and Baxter Ltd. v. Anglo-Eastern Trading and Industrial Co. Ltd. (1944) K.B. 12 CA.

In the present case, it is not disputed that it was the respondents who, through their agents, diverted the appellants' vessel to Takoradi and subsequently to Tema, both in Ghana. According to PW1, the master of MV Fotini relayed the respondent's direct request for the diversion of their vessel to Ghana to the appellants by wireless message. This request was cross-checked and found established, as a result of which the diversion of MV Fotini was consented to. The vessel duly sailed to Takoradi and, thereafter, to Tema, again on the instruction of the respondents. In my view, the respondents' direct requests to the appellants for the diversion of their vessel to Takoradi and thence to Tema constituted fresh and independent offers in law on the part of the respondents for the carriage of their cargo from Nigeria to Ghana.

E ***An offer can be accepted in such manner as may be implied by the nature of the offer. Thus it may be accepted by the doing of the act which one is requested by the terms of the offer to do. Accordingly the performance of a condition is sufficient acceptance without the notification of it under circumstances where an offeror in his offer***
F ***impliedly indicates that he does not require notification of the acceptance of the offer. See Carlill v. Carbolic Smoke Ball Co., supra. I therefore entertain no doubt that the aforesaid respondents' offers were duly accepted by the appellants when they sailed out of Lagos and proceeded to Takoradi and later to Tema as requested but was***
G ***delayed there until the 4th May, 1976 on which date the discharge of her cargo was completed.***

Fresh and independent contract, therefore, came into existence by the respondents' engagement of the appellants' vessel to sail to Ghana. The respondents' offer was duly accepted by the appellants
H ***when their vessel sailed to Ghana. I think a contract thereby matured between the appellants and the respondents. It was however a contract with hardly any precise or essential terms and conditions. It was lacking in necessary details and conditions and I cannot conceive that it is the duty of the courts to make contracts for the parties by***

way of supplying the essential necessary details, terms or conditions thereof. See *Fakorede and others v. A.G. of Western State* (1972) 1 All NLR (Pt.1) 178 at 189. **I am therefore unable to hold that the said contract is either legally valid or enforceable at law.** See *Bishop and Baxter Ltd. v. Anglo-Eastern Trading Industrial Co. Ltd. and Kingsley and Keith Ltd. v. Glynn Bros. (Chemicals) Ltd.*, supra. The real question now is whether in the face of the above finding, the appellants must remain without a remedy. B

In this connection, the learned trial Chief Judge after a review of the evidence held that there was no privity of contract between the parties in connection with the payment of demurrage and he proceeded to dismiss the appellants' claims. The court below affirmed this decision of the trial court, holding that the respondents were not liable to pay demurrage or damages to the appellants. C

With profound respect to the court below, I am unable to accept that the respondents are not liable to pay demurrage or damages to the appellants. In this connection it must be borne in mind from a close study of the appellants' further amended Statement of Claim that their claim in demurrage was not only in contract, but also in quasi-contract for damages or loss for work done or services rendered as well as in tort. Those claims on the appellants' further amended Statement of Claim were in the alternative. Accordingly the appellants in paragraph 18 of their further amended Statement of Claim pleaded thus: D

"18. Further or alternatively, not being able to provide a berth at Apapa, the port originally designated for the discharge of the cargo of cement consigned to the 2nd defendant and carried by the vessel, and having diverted the vessel to Tema, Ghana to discharge its said cargo for receipt by the 2nd defendant and having received its said cargo at Tema, Ghana as aforesaid, the 2nd defendant became bound/liable to the plaintiff to pay demurrage/damages for detention for the delay/diversion of the vessel as aforesaid." E

Additionally, the appellants by paragraph 20 of their said amended Statement of Claim averred- G

".....The rate at which the said demurrage was payable was U.S. \$300.00 per day. A total of U.S. \$876,000.00 was thus due to the plaintiffs from the defendants." F

The appellants claimed per paragraph 22 of their said further amended Statement of Claim as follows: - H

".....By reason of the said forbearance, the plaintiffs have suffered loss and/or damage....."

They finally proceeded to give particulars of their alleged loss and damage.

I must state that the court below would appear to be very much

aware of these claims by the appellants in the alternative. In dismissing the appellants' appeal, that court had concluded -

"I am satisfied that, in the light of the pleadings and the totality of the evidence adduced by the parties and the relevant legal authorities applicable to this case, the respondents were not liable to pay demurrage or damages to the appellants either in contract or in tort. The appeal fails and the judgment of Anyaegbunam C.J. delivered on 2/7/86 is upheld. The appeal is dismissed with costs assessed at N300.00 in favour of the respondents."

The trial Court, for its own part, in concluding its judgment had stated -

"All these go to show that the only company that had contract in connection with demurrage is Gilt Investment Limited and that the contract had been fulfilled to the satisfaction of all the parties concerned hence Exhibit U.

With this I have no option except to dismiss the plaintiff's claim. It is hereby dismissed."

The trial Court did not regrettably advert its mind to the alternative nature of the appellant's claims but dismissed the same mainly on the basis that there was no privity of contract between the parties. I entertain no doubt that both courts below are, with respect, in gross error by giving no or adequate consideration to the alternative claims of the appellants.

I think a word should be said about the agreement of discharge, Exhibit U. The court below had held that it operated as a bar against the appellant's claims from the respondents. Exhibit U was executed between Gilt and the Central Bank of Nigeria, herein after referred to as C.B.N., relieving C.B.N. of further obligations and indemnifying the said C.B.N. of further proceedings on the Letters of Credit, Exhibit R. In the first place, the C.B.N. is not a party to the present action. In the second place, the appellants, whether directly or indirectly, are no parties to the said Exhibit U. In the third place, Exhibit U is only relevant to the original "contractual" carrying voyage and has no bearing whatever with the appellants' alternative claims in quasi-contract and/or in tort. In my view, the alternative claims are clearly entirely separate and independent from the original contractual carrying voyage which had terminated before the arrangements that gave rise to the alternative claims arose. I therefore entertain no doubt that Exhibit U is not only res inter alios act but is totally unconnected with the appellants' alternative claims. I will now consider the alternative claims in issue. I think I should deal with the issue of liability first.

It is common ground that as a result of massive ports congestion

in Lagos at all material times, the respondents, who are the purchasers and owners of the cargo of cement in issue, diverted the appellants' vessel, then in demurrage, to Ghana to be discharged. This diversion which the appellants accepted came at a time the appellants' vessel had hung around at the Lagos Port for over two months, waiting unsuccessfully to be discharged. The appellants subjected themselves to this diversion and accordingly executed their own side of the deal by leaving Nigeria and sailing to Ghana at the request of the respondents where it suffered more protracted delay due to no fault of their own.

The law is settled that where a plaintiff can prove the rendering of services under an unenforceable contract, the contract is admissible as evidence of the value of the services rendered and he may recover on a quantum meruit basis. Put differently, where work is done or services are rendered by the plaintiff at the request of the defendant and of which the defendant has had the benefit, the plaintiff can recover the value of the work done or services rendered on a quantum meruit. The law provides remedies for cases of unjust enrichment and thus to prevent one from retaining some benefit derived from another which it is unconscionable that he should keep. Such remedies, strictly speaking, are different from remedies in contract or tort and are recognised to fall within the common law remedy of quasi-contract. The term, quantum meruit, is at common law used in various senses inclusive of a claim for a reasonable price, remuneration or compensation implied in a contract where no remuneration or price was fixed for the work done or for a breach of contract for reasonable remuneration for work done. Claims for a quantum meruit in respect of work done under an unenforceable, void or illegal contract are properly regarded as quasi-contractual. Accordingly in a contract for work done or services rendered, where no scale of remuneration is fixed or agreed upon, the law imposes an obligation to pay a reasonable sum on the basis of quantum meruit. See *Way v. Latilla* (1937) 3 All E.R. 759 H.L. and *William G Lacey (Hounslow) Ltd. v. Davis* (1957) 1 WLR 932. The circumstances must however show that the work done or services rendered was not done gratuitously as the principle of quantum meruit is only an incident in assessing the amount due under an ordinary contract where the rate of remuneration was not expressly fixed. See too *Powell v. Braun* (1954) 1 All E.R. 484.

In the present case, the original "contractual" carrying voyage with accrued demurrage came to an end as soon as the offer in respect of the latter carrying voyage from Lagos to Ghana was made by the respondents and accepted by the appellants. As at that stage, the vessel, MV Fotini was

already in demurrage which commenced since the 16th July, 1975. The maxim is firmly settled that once on demurrage, always on demurrage until the vessel is fully discharged unless, of course, the owners of such vessel removed it for their own purpose or convenience. There is no suggestion in the present case that the appellants at any stage removed their vessel for
B their own purpose or convenience.

***It is not in dispute that the appellants fully executed their own part of the obligation and/or services requested of them by the respondents under what, in my view, is an unenforceable contract. It is also common place that the respondents had the benefit
C of the appellants' services and that no scale in respect of demurrage, remuneration or compensation was fixed or agreed upon with regard to the unforeseen and additional voyage to Ghana. It is further clear that the services rendered by the appellants to the respondents which entailed definite loss of earnings by way of de-
D murrage as a result of the subsequent voyage from Nigeria to Ghana and/or the delay suffered by the appellants before the respondents', cargo was fully discharged from their vessel were never intended to be gratuitous. It seems to me clear that the appellants would be entitled to a reasonable compensation for their loss on the basis of
E quantum meruit.*** The next question must be whether there is any reliable evidence as to what this reasonable remuneration or compensation ought to be.

***There is abundant evidence from the contracts, Exhibits A-A3, P-P1 and R and from the uncontroverted oral evidence before the trial court that the rate of demurrage agreed upon was US. \$3000.00 per diem.
F This rate of demurrage was payable to the appellants by the respondents through Gilt right from the 16th July, 1975 when MV Fotini entered into demurrage until the subsequent arrangement between the appellants and the respondents for the voyage from Nigeria to Ghana was struck. It therefore seems to me obvious that the reasonable rate
G of compensation or loss payable by the respondents, as demurrage in respect of the appellants' subsequent engagement from Nigeria to Ghana must be the same US. \$3000.00 per diem and I so find.***

As earlier observed, both parties are in agreement that MV Fotini was in demurrage for a total of 292 days. This demurrage, whether under
H the original "contractual" carrying voyage from Spain to Nigeria or under the subsequent carrying voyage from Nigeria to Ghana was payable by the respondents to the appellants. This demurrage, at the rate of US. \$3000.00 per diem for 292 days amounted to US. \$876,000.00 in all.

The appellants in paragraph 23 of their further amended State-

ment of Claim averred that the respondents paid the appellants through Gilt a total sum of US.\$591,483.00 as demurrage. Before the trial court, however, PW 1 testified that the appellants were paid a total of US. \$591,500.00 as the said demurrage. None of the appellants' witnesses testified on the break down of the said payment of US. \$591,500.00. Indeed before the court below learned counsel to the appellants at page 231 B of the record of proceedings addressed the court as follows -

"Defendants paid about US. \$591,483.00 and left an outstanding amount of US. \$84,500.00 which the plaintiff/appellant herein claimed at the lower court with interest....."

(Underlining supplied for emphasis)

C

Before this court, learned appellants' counsel in his brief of argument also stated thus -

"The respondents paid about US \$591,483.00 and left an outstanding amount of US \$284,500.00 which the appellant herein claimed at the lower court with interest from the due date till judgment, and continuing until final payment."

(Underlining supplied for emphasis)

As against the above claims, however, is the averment in the further amended Statement of Defence to the effect that the sum of US. \$730,030.00 was what the respondents paid to the appellants as demurrage and not US. E \$591,483.00 or US.\$591,500.00 as alleged by the appellants.

The D.W.2 gave a meticulous break down of this payment as follows-

"Apart from the amount in Exhibit 'S'..... we paid a total of \$730,030 US. to Gilt Investment Company as demurrage payment. The demurrage was paid in 7 instalments.

F

1st instalment was \$98,000 US. paid on 22/8/75; by our Correspondent Bank Dutch Bank.

2nd was \$49,000 US. paid on 29/8/75

3rd \$49,000 US. paid on 15/9/75

4th \$63,000 US. paid on 17/1/76.

G

5th \$143,500 US. paid on 10/3/76

6th \$147,000 US. paid on 26/7/76.

7th \$180,530 US. paid on 12/8/76.

All the above payments were authorised by C.B.N. I have proof of these payments. Proof of payments shown to Mr. Oduba.

H

Oduba: No objection.

Proof of payment tendered as Exhibits T to T6'. Exhibits T to T4 and T6 are Advices of payment and Exhibit T5 is a Statement of Account and our internal Memo of instruction to pay."

It ought to be noted from the record of proceedings that D.W.2 was never cross-examined on the proof of those payments, Exhibits T-T6. It cannot be overemphasized that where evidence given by a party to any proceedings was not challenged by the opposite party who had the opportunity to do so, it is always open to the court seized of the matter to act on such unchallenged evidence before it. See Isaac Omoregbee v. Daniel Lawani (1980) 3-4 S.C. 108 at 117, Nigerian Maritime Services Ltd. v. Alhaji Bello Afolabi (1978) 2 S.C. 79 at 81, Adel Boshali v. Allied Commercial Exporters Ltd. (1961) 1 All N.L.R. 917 etc. The learned trial Chief Judge was therefore correct when, in the course of his evaluation of the evidence of the said D.W.2, he said -

"The witness continued and testified that apart from the amount stated in Exhibit S the Central Bank also paid a total of ... 730,030 U.S. to Gilt Investment Company Limited as demurrage payment. The said demurrage was paid in seven instalments and he itemized them as follows -

D 1st \$98,000 US. paid on 22/8/75
 2nd \$49,000 US. paid on 29/8/75
 3rd \$49,000 US. paid on 15/9/75
 4th \$63,000 US. paid on 17/1/76
 5th \$143,000 US. paid on 10/3/76
 E 6th \$147,000 US. paid on 26/7/76
 7th \$180,530 US. paid on 12/8/76

He showed proof of these payments which were put in as Exhibits T to T6. Exhibits T to T4 and T6 are advices of payments and Exhibit 5 is Statement of Account and Central Bank internal memo of instruction to pay."

Dealing with the above findings of the trial court, learned counsel for the appellants at page 29 of his brief of argument before us commented as follows

"Alternatively, even if, which appellants deny, your Lordships was to be guided by the finding of lower court in their generosity that a total US \$730,030.00 was paid to Gilt Investment Ltd. as demurrage by the Respondents, since it is an agreed fact that the vessel left Tema, Ghana on 4/5/76 on completion of discharge and the demurrage charges started accruing on 13/7/75, then there is still an outstanding of US \$145,970.00 to be paid to the appellants by the respondents on demurrage. This much the lower court conceded in their judgment at page 305 of the records."

The above finding of fact that the respondents paid a total of US \$730,030.00 to the appellants through Gilt and not US \$591,483 or US \$591,500.00 as claimed by the appellants was

neither challenged in the court below nor before us. I am therefore prepared to accept that the respondents paid a total of US \$730,030.00 to the appellants through Gilt as demurrage thus leaving an outstanding balance of US \$145,970.00 unpaid as against the balance of US \$264,500.00 claimed by the appellants.

There is next the question whether the payments of demurrage B made by the respondents to Gilt amounted in law to a Waiver of the appellant's rights to collect the demurrage now claimed on their own. The court below had in its judgment observed as follows -

"The appellants cannot be seen to accept Gilt Investment Limited as the rightful party to be paid the demurrage and then turn round to make C demands on the respondents. Therefore, the principle that a third party can derive benefit from an offer made to the whole world, although he was not an actual party, can only avail him if he does not compromise his position or by conduct waive his right to claim from the offeror."

With profound respect, it ought to be borne in mind that pay- D ments of demurrage made to the appellants by the respondents through Gilt was strictly in accordance with the terms of the charter-party, Exhibits A-A3; Exhibits P-P1 and the Letter of Credit covering the price of the cargo with demurrage, Exhibit R. These contracts pertained to the original "contractual" carrying voyage and had nothing E to do with the appellant's right to collect demurrage they might be entitled to under a totally different and independent arrangement from Exhibits A-A3, P-P1 and R. In my view, the appellants' present claim has nothing to do with Gilt and no question of waiver therefore arises to operate against the appellants.

On the appellants' claim for U.S. \$233,996.00 being interest at F 11 1/2 % from 9th February, 1978 to 9th February, 1985, the general rule, at common law, is that interest is not payable on a debt or loan in the absence of express agreement or some course of dealing or custom to that effect. See London Chatham and Dover Rail- G way v. South Eastern Railway (1893) A.C. 429. Thus in the absence of express stipulation, interest was held not payable on money due on a contract for work done by the plaintiff, payment for which was in arrears. See Hill v. South Staffs Railway (1874) L.R. 18 Eq. 154. Interest will however be payable where H there is an express agreement to that effect and such agreement may be inferred from a course of dealing between the parties, See Re Duncan and Co. (1905) 1 Ch. 307, or where an obligation to pay interest arises from the custom or usage of a particular trade or business.

In the present case, there is no express stipulation or agree-

ment between the parties on the payment of interest. There is also no evidence that from the nature of the transaction, the course of dealing between the parties or by any custom whatever, interest is payable on the demurrage claimed. The appellant's claim for interest must therefore fail.

In the final result, this appeal succeeds and it is hereby allowed.

- B The judgments of both the trial court and the court below together with the order for costs therein made are hereby set aside and in substitution thereof, judgment is entered for the appellants against the respondents in the sum of US \$145,970.00 or its equivalent in local currency being outstanding balance of demurrage. The appellant's claim in respect of interest is hereby
- C dismissed. There will be costs to the appellants against the respondents which I assess and fix at N1,000.00 in this court, N700.00 in the court below and N600.00 in the trial court.
-

D

WALI JSC

I have had the advantage of a preview of the lead judgment of my learned brother Iguh, J.S.C. and I endorse his reasoning and conclusions on the issues raised as mine. I have nothing more useful to add to what was thoroughly and painstakingly discussed in the lead judgment. It is therefore

E for these same reasons that I also hereby allow this appeal, set aside the judgments and orders of the lower court and the court below; and in substitution thereof I enter judgment in the sum of US \$145,970.00 or its Naira equivalent for the appellant.

The appellant's claim for interest is hereby dismissed.

- F I abide by the order made as to costs contained in the lead judgment.
-

OGUNDARE JSC

- G I agree entirely with the judgment of my learned brother Iguh, J.S.C. just delivered, a preview of which I had before now. I adopt, as mine, the reasons given by him for the conclusion finally reached.

- I only need to add that I am unable to accept the submission of the learned Solicitor-General of the Federation that the request made by
- H the respondents in Exhibits B to the appellants was not an offer but an act of state and an executive action for which there was no judicial protection or remedy.

An "act of state" is defined by the learned authors of Halsbury's Laws of England (4th Ed) Vol.18 paragraph 1413 as "a prerogative act of

policy in the field of foreign affairs performed by a sovereign state in the course of its relationship with another state or its subjects". Examples are the making and performance of treaties, annexation of foreign territory, seizure of land or goods in right of conquest, declarations of war and of blockade, the detention of enemy alien in wartime or his deportation. Being an exercise of sovereign power, it is outside the jurisdictional control of the municipal courts. An individual cannot rely on it to found a cause of action. The Government or its agent in an action in tort against it by an alien may plead it as a defence. Although the court has no jurisdiction to question the validity of an act of State, it, however, has power to determine whether an act is an act of state. For example, where Government takes property belonging to a foreign state or to aliens the court has jurisdiction to decide whether the seizure is an exercise of political power, in which case it is an act of state and outside the court's jurisdiction, or whether it is the taking of possession under colour of a legal title, in which case it is not an act of state and falls within the jurisdiction of the court.

In the appeal on hand, the defendants did not plead act of state as a defence nor was it ever the basis of their case. They based their defence on there being no privity of contract between them and the plaintiff. The facts point more to a commercial transaction between the parties rather than exercise of political power by the Federal Military Government of Nigeria. There was no case of seizure of a ship by Government. Nor could the defendants, in exercise of act of state, order a foreign ship to proceed to a foreign country to discharge its (defendant's) cargo in that other country.

The argument of the learned Solicitor-General of the Federation, with respect, is not supported by Exhibit B nor the occasion; I have no hesitation in rejecting it."

It is for this reason and the other reasons given in the lead judgment of my learned brother Iguh, J.S.C. that I, too, allow this appeal and set aside the judgments of the two courts below. I subscribe to the judgment for plaintiff as contained in the lead judgment and the order for costs made therein.

MOHAMMED JSC

I have had the advantage of reading the judgment of my learned brother, Iguh, J.S.C., just read, and I agree with him that the appellants are entitled to the outstanding balance of demurrage which arose as a result of the failure of the respondents to provide a berth for the ship, M.V. Fotini, to discharge, the cargo of cement which the respondents ordered

from Barcelona, Spain, to Lagos.

I entirely agree that there is no privity of contract between the appellant and the respondents in respect of the charter party. In support of its claim the appellant submitted that Exhibit B which is a letter written by the respondents to Messrs Alfotrin directing its ship to divert from Takoradi B to Tema in Ghana could be construed as establishing a new contract between the appellant and the respondents. This assertion could not be correct because the letter still referred to the agreement with Gilt Investment on the supply of cement. The letter reads:

*"T1959/S8/CI/Vol. 1/9
3rd December, 1975*

C *"Messrs Alfotrin,
c/o Gilt Finance U.K. (Ltd.),
25 Curzon Street,
London, W.1*

D *Dear Sir,
Re-Gilt Investment Limited - Contract for Cement bought by Ministry of
Defence, Nigeria.*

E *I am directed to refer to your file reference EH/67 in respect of
10629 tons - SS. Fotini which is presently carrying cement bought by the
Nigerian Ministry of Defence, and to say that due to the slow rate of dis-
charge of the cement consignment at Takoradi port, we have therefore
instructed the Nigerian Ports Authority representatives at Takoradi to divert
the vessel - SS. Fotini - to the Port of Tema where the balance of the
cement cargo would be expeditiously discharged in view of the superior
F handling facilities at that port.*

*Yours Sincerely,
(Sgd.)
(Dr. P.E. Jakpa),
for: Permanent Secretary".*

G It is because the letter had been addressed to Messrs Alfotrin c/o
H Gilt Finance U.K. Ltd., that the appellant is saying that a new contract had
arisen between it and the respondents. Far from it. The subject matter of
the agreement has been clearly spelt out to be - Re-Gilt Investment Limited
contract for Cement bought by Ministry of Defence, Nigeria. The agree-
ment for the supply of cement bought by the respondents was between Gilt
and the Federal Ministry of Defence. Gilt went into a charter-party agree-
ment with the appellant to carry the cement to Lagos. The ship of the
appellant, M.V. Fotini, got caught up by what was popularly called "Ce-
ment Anmada" and the result was a big claim for demurrage. Demurrage is

defined as the sum agreed to be paid by the charterer to the ship owner as liquidated damages for delay beyond a stipulated or reasonable time for loading or unloading. There is therefore no privity of contract of payment of demurrage between the shipowner and the buyer. The following letter, Exhibit C, clearly shows that the agreement for payment of demurrage is between the respondents and Gilt Investment Ltd. The letter reads:- B

*Cement Contracts Negotiating Committee,
c/o N.P.A. Board Room,
26/28 Marina,
Lagos.
22nd December, 1975.*

*“Nigerian Ports Authority Secretariat
Atlantic Terminal
Apapa Quays.
Dear Sir,*

Demurrage Claim S/S Fotini Discharging at Takoradi Now at Tema D
Please be advised that the demurrage figure for the above-named vessel carrying cement under contract to the Ministry of Defence has been agreed at 35c per metric ton per day since the vessel entered into demurrage.

2. Provided that all supporting documentation is in order; we hereby E
authorize demurrage payment to be made on the pro rata basis as stated.

3. That payments shall continue until the vessel has completed its discharge at Tema.

(Sgd.) F
*“Fred Egbe,
Cement Contracts Negotiating Committee.*

*Re Gilt Investment Limited,
File Ref. Ell/67,
Letter of Credit No. CBN/BO/75/76”.* G

There is no dispute, as has been shown in the letter Exhibit C, over liability of the respondents to pay demurrage for the delay in off-loading the cargo of cement in the ship “M.V. Fotini”. Under the charter-party agreement however, it is Gilt and not the appellant, who could claim under the contract for the payment of the demurrage. H

I quite agree with my Lord Iguh, JSC, in his judgment, that the respondents, have not paid all the demurrage which had been assessed due for the delay in getting a berth for M.V. Fotini to off-load its cargo of cement. There is evidence showing that the respondents had paid \$730,030

U.S. Dollars to Gilt in settlement of the demurrage claim. However, it is quite clear that the ship was in demurrage for 292 days and since the parties agreed to pay \$3,000 US. Dollars, per day, the total amount the respondents should pay would be \$876,000 US. Dollars. Thus, \$145,970 US. Dollars is still outstanding against the respondents. Gilt should have claimed for this amount and thereafter
B pass it over to the appellant. But since Gilt who were the charterers, did not show any intention to claim the said sum, it is open to the appellant, who is the shipowner, and who suffered losses during the period of waiting to off-load its cargo, to request the respondents to pay the balance of the demurrage to it. The appellant has therefore a valid claim and its alterna-
C tive prayer in the writ could be granted accordingly.

For these reasons and the fuller reasons in the judgment of my learned brother Iguh, J.S.C. this appeal succeeds and it is allowed. I order the respondents to pay \$145,970 U.S. Dollars being outstanding balance of demurrage yet to be paid for the days M.V. Fotini waited at the harbours
D of Lagos, Takoradi and Tema before offloading its cargo of cement. I abide by all the consequential orders made in the lead judgment including that of costs.

ONU JSC

E I had the advantage to read before now the judgment of my learned brother Iguh, J.S.C. just delivered. He has so painstakingly and compre-
F hensively dealt with all the issues canvassed therein that I find nothing I can usefully add thereto. I adopt the same as mine.

G

H