

SUPREME COURT OF NIGERIA

28TH MAY, 1999. SC.131/1995

**CORAM:- A. G. KARIBI-WHYTE, E. O. OGWUEGBU,
S. U. ONU, A. I. KATSINA-ALU, A. O. EJIWUNMI, JJSC**

1. K. KOIKI

2. SILVERNORTH LIMITED PLAINTIFFS/APPELLANTS

3. SILVERNORTHE INTERNATIONAL LTD.

AND

B.V. MAGNUSSON DEFENDANT/RESPONDENT

(Carrying on business as United Producers)

CARRIAGE OF GOODS - Carriage by sea - Transshipment - Where there is evidence of the transshipment and delivery of the goods - The question as to which vessel carried the goods is irrelevant.

CONTRACTS - Repudiation - Fraudulent misrepresentation - Allegation of - Where both parties have freely entered into the agreement - None of them can thereafter withdraw from it - Since there is no proof of fraud or misrepresentation.

EVIDENCE - Crime - Standard of proof - Allegation of crime - Which is a fact directly in issue - Proof beyond reasonable doubt is required in law.

ESTOPPEL - Meaning and nature - Of estoppel.

PLEADINGS - Severance - Principle of - Where the allegation of crime cannot be severed from the body of the pleadings - The principle of severance is not applicable.

WORDS & PHRASES - "Facts in issue" - Definition - Precise meaning of the words.

FACTS

At the High Court of Lagos State holden at Lagos, the plaintiffs/appellants claimed against the defendant/respondent for the sum of US \$ 894,390.00 or its Naira equivalent being damages suffered as a result of the defendant's failure to ship and deliver 3, 948 bales of Icelandic Stockfish pursuant to a letter of credit dated 1st October, 1981; compound interest on the special damages; and general damages in the sum of N2,000,000.00. The plaintiffs entered into contract with the defendant and placed an order for the supply of 15,000 bales of stockfish from Iceland and the supply was to be delivered to the Nigerian National Supply Co. Ltd. It was the case of the plaintiffs that the defendant shipped and delivered only 11052 bales, that the balance of 3,948 bales were never delivered and that the documents alleged to have been used in shipping and delivering them were irregular and forged. The plaintiffs further maintained that the defendant was not entitled to the money paid to him on those documents through his bank in Iceland.

The defendant on the other hand contended that he shipped the total of 3,948 bales in two separate shipments of 2542 and 1406 bales and delivered them as requested. The parties have earlier in 1983 entered into an Agreement (Exhibit P.29) in settlement of the dispute. As a result, the defendant paid back to the plaintiffs a total sum of \$ 175,000 in full and final settlement of all claims by the plaintiffs on the consignment of 1406 bales of stockfish. The plaintiffs now sought to repudiate the agreement on grounds of fraud and misrepresentation. At the close of hearing, the learned trial judge gave judgment in favour of the plaintiffs. Being dissatisfied, the defendant appealed to the Court of Appeal, Lagos Division. The appeal was allowed and the plaintiffs' claim was dismissed. Aggrieved, the plaintiffs have appealed to the Supreme Court raising two issues while the defendants also raised two issues.

ISSUES FOR DETERMINATION

"(a) Whether the Court of Appeal was right in holding that the consignment of 2542 bales of stockfish was received by the Appellant (sic) or to the Appellant's (sic) order in Port Harcourt pursuant to the contract between the parties.

(b) Whether the Court of Appeal was right in holding that from the circumstances surrounding the shipment of 1406 bales of stockfish and the conduct of the Appellant (sic), the Appellant (sic) was (sic) estopped from denying the efficacy and applicability of Exhibit PX 29."

HELD (Unanimously dismissing the appeal per lead judgment of OGWUEGBU JSC)

Carriage of goods - Carriage by sea

1. I agree with Chief Uwechue, S.A.N. that the question as to which vessel carried the goods is irrelevant. The court below was therefore right in holding that the 2542 bales of stockfish were shipped by the defendant and received by the Nigerian National Supply Co. Ltd. All the exhibits involved in the transshipment of the 2542 of bales of stockfish have been closely examined and despite minor discrepancies, they support the oral evidence of the defendant on the transshipment and delivery of the goods. (p. 1472 B)

Words and phrases - "Fact in issue"

2. The Act has given a number of words and phrases special and precise meaning and in construing section 138(1) of the Evidence Act, it is essential to give affect to that meaning. Section 2 contains a definition of "fact in issue" thus:

"Fact in issue" includes any fact from which either by itself or in connection with other facts the existence, non-existence, nature or extent of any right, liability or disability asserted or denied in any suit or proceedings necessarily follows." (p. 1481 H)

Evidence - Crime

3. In my view the commission of crime by the defendant in this proceeding is a fact directly in issue and the plaintiffs are required in law to discharge the burden of proving the crime or offence of fraud and misrepresentation beyond reasonable doubt. The standard of proof required of the plaintiffs to succeed is not that of balance of probabilities. See Ikoku v. Oli (1962)1 All N.L.R.195, Nwakwere v. Adewunmi (1966)1

All N.L.R. 119, Nwobodo v. Onoh (1984)1 S.C.N.L. 1, Omorhirhi & Ors Enatevwere (1988)1 N.W.L.R. (Pt.73) 746 and Folami v. Cole (1990)2 N.W.L.R. (Pt.133) 445. (p. 1482 B)

B Pleadings - Severance

4. It is also my view that the principle of severance is not applicable having regard to the pleadings. The allegations of fraud and misrepresentation cannot be served from the body of the pleadings and the question of what remains after the severance which the plaintiffs can rely on to prove their case does not equally arise. (p. 1482 D)

Contract - Repudiation

5. I entirely agree with the court below that there was no iota of evidence to prove that the 1st plaintiff was induced into signing Exhibit P.29 by any misrepresentation. The court below further held:

"It is pertinent to observe that after the execution of Ex.P.29, the Respondents took no step or steps to claim against the Appellant on any shipment until 1987. The Appellant on the other hand relied on Exh. P.29, and had fully complied with the terms and conditions therein and the Respondents who benefited from the agreement did not raise any point for about 4 years. I therefore agree with the submissions of the learned counsel for the Appellant that having regard to all the circumstances surrounding the shipment of 1,046 bales of stock fish and the conduct of the respondents, they should be estopped from denying the efficacy and applicability of Exhibit P.29."

Both parties to the proceedings having chosen to regulate their legal position by Exhibit P.29, none of them can thereafter withdraw from it since there is no proof of fraud or misrepresentation. The Plaintiffs cannot approbate and reprobate. (p. 1482 E)

H Estoppel - Meaning and nature

6. Estoppel is an admission or something which the law views as equivalent to an admission. By its very nature, it is so important and conclusive that the party whom it affects, and in this case the plaintiffs, will not be

allowed to plead against it or adduce evidence to contradict it. See Basil & Or. v. Honger 14 W.A.C.A. 569 at 570. (p. 1483 A)

NOTABLE POINTS OF INTEREST

ONUJSC

B

1. Sellers obligation under a C and F contract

I therefore have no hesitation in agreeing with the submission of the learned defence counsel when he stated on behalf of the respondent as part of his oral submission thus:-

"We agree that the goods were delivered at Port Harcourt and in case they were not delivered, the respondents (as sellers) had done all that was in their power to do i.e handing over the goods to the ship and all the documents relating thereto." (parenthesis supplied)

C

See the learned Authors of Schmitthoff's Export Trade - Law and Practice of International Trade by Clive M.M. Schmitthoff, Eighth Edition at page 48 wherein the seller's obligation under a C.I.F. contract which in essence enures for C and F contract we are herein considering, have been clearly set out and dealt with in the case of Biddel Brothers v. E. Clemens Horst Company (1911) 1 K.B. 214 at 220. See also Andre et cie S.A. v. J.H Vantol Ltd. (1952) 2 Lloyds Law Report 282-291.(p. 1487 F)

D

2. Variation of a written agreement

F

The general rule is that where parties have embodied the terms of their agreement in a written document such as Exhibit PX.29 extrinsic evidence is not admitted to add, vary or subtract from or contradict the terms of the written instrument. See Olaoye v. Balogun (1990) 5 NWLR (Part 333) 385. Indeed, where the parties enter into a contract they are bound by the terms thereof and it is unfair to read into such a contract terms on which there is no agreement. See Baba v. Nigerian Civil Aviation Centre (1991)5 NWLR (Part 192) 388. (p. 1489 A)

G

H

REPRESENTATION

Bambo Adesanya for the Plaintiffs/Appellants

Chief G.N. Uwechue, S.A.N. with A.I. Idigbe Esq. for the Defendant/

Respondent.

CASES REFERRED TO

- Ikoku v. Oli (1962)1 All N.L.R. 195
- B Nwakwere v. Adewumi (1966)1 All N.L.R. 119
- Nwobodo v. Onoh (1984)1 S.C.N.L. 1
- Folami v. Cole (1990)2 N.W.L.R. (Pt.133) 445
- Basil v. Honger 14 W.A.C.A. 569 at 570
- Yoye v. Olubode (1974) All N.L.R. 657
- C Ukaegbu v. Ugoji (1991)6 N.W.L.R. (Pt.196) 127 At 146
- Omoboriowo v. Ajasin (1984) 1 SCNLR 108
- Anyia v. A.N.N. Ltd. (1992) 6 NWLR (Part 247) 319 at 333
- Biddel Brothers v. E. Clemens Horst Company (1911) 1 K.B. 214 at 220
- D Badejo v. Federal Ministry of Education (1996) 8 NWLR (Part 464) 15 at 50 E-F
- Baba v. Nigerian Civil Aviation Centre (1991)5 NWLR (Part 192) 388
- U.B.A. Ltd. v. Umeh & Sons Ltd. (1996) 3 NWLR (Part 426) 565
- E

STATUTE REFERRED TO

Evidence Act Cap. 112 Laws of the Federation of Nigeria, 1990; ss 2 and 138(1)

F

LEAD JUDGMENT BY OGWUEGBU JSC

At the High Court of Lagos State holden at Lagos, the appellants claimed:

- G *"(a) the sum of Us \$894,390.00 or its Naira equivalent being damages against the Defendant for the failure of the Defendant to ship and deliver 3,948 bales of Icelandic stockfish pursuant to a letter of credit dated 1st October, 1981;*
- (b) compound interest on the special damages at the rate of 15% per annum from 1st January, 1982, to 31st July, 1987, and at 20% per annum from 1st August, 1987 until the day of judgment;*
- H *(c) general damages in the sum of N2,000,000.00"*
- Pleadings were ordered, filed and exchanged. From the plead-

ings, the plaintiff entered into a contract with the defendant and placed an order for the supply of 15,000 bales of stockfish from Iceland and the supply was to be delivered to the Nigeria National Supply Co. Ltd. This contract was entered into in 1981.

It was the case of the plaintiffs that the defendant shipped and delivered only 11052 bales to the Nigerian National Supply Co. Ltd., that the balance of 3,948 bales were not delivered to the Nigerian National Supply Co. Ltd. or to any one else in Port Harcourt and that the documents alleged to have been used in shipping and delivering them were irregular and forged

The defendant maintained that he shipped the total of 3,948 bales in two separates shipments of 2542 and 1406 bales and delivered them as requested. The plaintiffs further maintained that the defendant was not entitled to the money paid to him on those documents through his bank in Iceland.

After hearing evidence Adeyinka, J, gave Judgment in favour of the plaintiffs in the following terms:

"Judgment is hereby entered for the plaintiffs against the defendant for the special damages of \$894,390 or its Naira equivalent with interest at 15% per annum from 1st day of January, 1981 to 31st day of July, 1987 and at 20% per annum from 1st August, 1987 until today and N1,000,000.00 (One Million Naira) being general damages."

Being dissatisfied, the defendant appealed to the Court of Appeal, Lagos Division. The appeal was allowed and the plaintiffs' claim was dismissed.

It is against the judgment of the Court of Appeal that the plaintiffs appealed to this court. The appeal to this Court is based on four grounds of appeal and counsel for both parties filed comprehensive briefs of argument. Mr. Adesanya, learned counsel for the plaintiffs/appellants in his brief identified two issues or questions for determination in this appeal. They are:

"(a) Whether the Court of Appeal was right in holding that the consignment of 2542 bales of stockfish was received by the Appellant (sic) or to the Appellant's (sic) order in Port Harcourt pursuant to the

contract between the parties.

(b) *Whether the Court of Appeal was right in holding that from the circumstances surrounding the shipment of 1406 bales of stockfish and the conduct of the Appellant (sic), the Appellant (sic) was (sic) es-*
B *topped from denying the efficacy and applicability of Exhibit PX 29."*

Chief Uwechue, S.A.N. for the defendant/respondent formulated two issues in the respondent's brief as proper issues arising from the grounds of appeal. They read:

C *"(1) Whether the Court of Appeal was right in holding that the Appellants (then the Respondents) were not entitled to judgment for non-delivery of 2542 bales of stockfish.*

D *(2) Whether the Court of Appeal was right in holding that the Respondent cannot be held liable to the Appellants for any amount in respect of the 1406 bales of stockfish having regard to the conduct of the 1st Appellant, the totality of the evidence and Exhibit p. 29."*

Even though the issues are variously couched in the two briefs, I am of the view that the answers to one set of issues will resolve the
E questions posed in the other set. I will therefore consider the appeal on the appellants' issues for determination.

Issues No.1 is concerned with what the learned counsel for the appellants referred to as "core findings" of the Court of Appeal which are
F contained at page 1078 from line 27 to page 1080 line 24 of the record of appeal. The said finding read:

G *"The letter Exhibit p. 28 dated 4th January 1982, was addressed to the Finance Manager of the NNSC containing details of all shipment, the date they were shipped, the grade of Stockfish, and the port of loading. Exhibit p. 28 also contained details of the various payments made on the shipments from the relevant letter of credit. The Respondents relied on their Reply and consequently the contents of Exhibit P.28 (See pg. 383 lines 30-384, line 5 of the Record)". In any case, the Respon-*
H *dents are bound by and cannot travel out of their pleadings and on pg. 388 lines 20-21 of the Records, the 1st Respondent testified as follows:- I see Exhibit p. 28 I rely on it. The contents of Exhibit p. 28 are correct" If the Respondents rely on the contents of Exhibit p. 28 which was made*

by their own staff Mr. Kunoth, they are admitting that all shipment shown in Exhibit p. 28(5) have actually been received by NNSC in Port Harcourt, Nigeria. In Exhibit p. 28(5), the name of the vessel shown against Order No. 67/003 for a total of 2542 bales of Stockfish received in Port Harcourt from Reykjavik, is ALVORADA. Therefore, from this, there is no doubt in my mind that the consignment of 2542 bales of Stockfish was received by the Respondents in Port Harcourt pursuant to the contract. What now appears to me in contention between the parties is whether it was Alvorada or Skafta or Golden Med that brought the consignment.

The Appellant has produced evidence in my view to prove that Alvorada did not convey the consignment to Nigeria because it was not available in Iceland at the material time. It is also evident on the face of the documents Exhibit D.17, 18, 19 & 21 that accompanied the transshipment in place of the Alvorada, that the date 12-11-1981 was common to all of them. And although Exhibits D17 and 18 bore the name Alvorada as the vessel that conveyed the consignments, Exhibit 19 showed Skafta as the conveying ship. It is also pertinent to observe that the quantity of bales of the stockfish in grades "A" and "B" as contained in Exhibits D17, 18 and 21 agree exactly with those in Exhibit p. 28. Also Exhibit D. 24, the telex from Islenska on 12-11-81 showed that M.V. Skafta was loaded on that day to travel to Hamburg with two grades of Stockfish as in Exhibit P.28 and that Alvorada was to take over from Hamburg to Nigeria with the same consignment of Stockfish. All this evidence, in my view seem to support the Appellant's (sic) testimony of transshipment. There is however, to my mind, no clear evidence of transshipment but the fact still remains that the consignment of 2542 bales of Stockfish as recorded in Exhibit P. 28(5) has actually been received by the Respondents or their Agents in Port Harcourt and I accordingly so find.

It was the contention of the learned appellants' counsel that the court below held that the consignment of 2542 bales of Stockfish was received by the appellants or their agents because of the construction it placed on Exhibit P.28(5) and thereby came to the conclusion that the appellants admitted receipt of the 2542 bales of stockfish when infact the

appellants made no such admission and could not have made the admission that the consignment of 2542 bales of Stockfish was received.

In his reply Chief Uwechue, S.A.N. for the respondent, referred the Court to Exhibits p. 28 and p. 28(5), the finding of the trial court and the court below on them, the averment of the appellants in paragraph 2(d) of their Reply to the Amended Statement of Defence and the evidence of the 1st appellant at page 382 lines 30-32 of the record. He submitted that these are statements of facts which are consistent with the overwhelming evidence of shipment of 2542 bales of stockfish.

It was further submitted in the respondents' brief that the main complaint of the appellants is the finding of the court below that the goods were received in Port Harcourt.

The court was referred to Exhibits P2, D. 13 and D. 14 and that Exhibit P2 is a photo copy of the bill of lading for 2542 bales of stockfish which the trial judge and the appellants regarded as fake because the named vessel ALVORADA did not eventually carry the cargo. We were urged to consider the link between Exhibits P.2, D.13 and D.14 as the court below did, that Exhibit P.2 was issued at the request of Mr. Kunoth, an employee of the plaintiffs to enable the plaintiffs claim their payments since the Letter of Credit between them and the Nigerian National Supply Co. Ltd. did not allow transshipment and they needed one through freight bill of lading to support their claim. It was further submitted by Chief Uwechue, S.A.N. that M.V. ALVORADA mentioned in Exhibit P.2 did not sail or convey the goods from Reykjavik in Iceland to Port Harcourt in Nigeria and that in its place, two ships were used to convey the goods and they produced two separate bills of lading - Exhibits D.13 and D.14.

We were also referred to Exhibit D.28 which was an Accomplished Bill of lading in respect of 2542 bales of stockfish showing the stamp of the Nigeria National Supply Co. Ltd. and a signature of their Finance Manager signifying receipt of the cargo on 8-2-82. On Issue 1, Chief Uwechue, S.A.N. concluded thus:

"..... the question as to which vessel carried goods is irrelevant where the goods were admitted to be shipped as per (sic) P.28 and there is UNCHALLENGED evidence (Exhibit D.28) that the goods were

received by NNSC. This Exhibit was neither challenged in the grounds of appeal nor in the Appellants' brief. Although ALVORADA was not specifically mentioned in the statement of defence, the Respondent specifically pleaded Exhibit D.14 (page 477 lines 25-26) and D.16 lines 27 which clearly stated that delivery of the goods could only be made upon production of the original through - freight bill of lading which is Exhibit D.28 or (Exhibit P.2) the bill of lading on ALVORADA. This was consistent with the evidence of the Respondent. The holder, NNSC did, in fact, collect the goods shown by Exhibits P.28 and D.28."

I will consider the pleadings of both parties in relation to the 2542 bales of stockfish, the evidence led and the exhibits tendered.

Paragraph 7 of the Further Amended Statement of Defence:

"7. The defendant shall show at the trial:-

(a) The entire 15,000 bales of stockfish were shipped to the 2nd Plaintiff's order in four consignments; the third consignment comprised 2542 bales and the fourth consignment was for 1406 bales.

(b) The third consignment was shipped to the Plaintiff's order on 12th November, 1981 from Iceland on M/V SKAFTA to Hamburg and M/V GOLDENMED from Hamburg to port Harcourt on 6th January, 1982. The defendant shall found upon all relevant shipping documents and in particular copies of the following:

(1)"

The plaintiffs filed a Reply to the Further Amended Statement of Defence and averred as follows:

"1. With reference to paragraphs 7(A) and (b) of the defence, the plaintiffs aver that it is an afterthought for the Plaintiffs were never at all material time informed by the Defendants that any shipment was made via M.V. Golden Med as contained in the said paragraph.

2. With reference to the same paragraph 7(a) and (b), the Plaintiffs shall, at the trial of this action rely on copies of the following documents:-

(a)

(b)

(c)

(d) *Copy of the recapitulation of Nigerian National Supply Company's Shipments showing shipments actually made by the Defendant in the transactions subject matter of this suit which never showed the said Golden Med as the Carrier but ALVORADA (Emphasis supplied).*"

The reply was filed on 26:6:89.

In his evidence-In-Chief on 17:12:89, the 1st plaintiff testified as follows:

" I filled a Reply to the Statement of Defence. I rely on the Reply in particular par: 7(a) and (b)."

In answer to cross-examination, the 1st plaintiff testified:

"I see Ex. P. 28. I rely on it. The contents of Ex. 28 are correct."

Exhibit P.28 is the recapitulation of shipments made. It was written by Mr. Kunoth, an employee of the 2nd plaintiff and addressed to the Nigerian National Supply Co. Ltd.

In the High Court the defendant relied on Exhibit P.28 as an admission by the plaintiffs that the 2542 bales of stockfish were actually shipped by him. He also relied on paragraph 2(d) of the plaintiffs' Reply to the Statement of Defence as an admission by the plaintiffs of the shipment of the 2542 bales of stockfish.

The learned trial judge said:

"I refer to paragraph 2(D) (sic) Reply. I agree with the submission of the defendant's learned counsel that there are two legs to the averment, the first leg being an admission by the Plaintiffs that 2542 bales were actually shipped by the defendant while the second leg is an averment that the ship was ALVORADA not GOLDEN-MED."

The court below when dealing with Exhibit P.28 and paragraph 2(d) of the plaintiffs' Reply held as follows:-

" The Respondents' Relied on their Reply and consequently the contents of Exhibit (sic) 28..... In any case, the Respondents are bound by and cannot travel out of their pleadings. If the Respondents rely on the contents of Exhibit P.28 which was made by their own staff Mr. Kunoth, they are admitting that all the shipments shown in

Exhibit P.28(5) have actually been received by NNSC in Port Harcourt, against Order No. 67/003 for a total of 2542 bales of stockfish received in port Harcourt, Nigeria."

The defendant relied on Exhibits P.2, D, 13 and D.14 among others in proof of the shipment and delivery of the consignment. Exhibit P.2 is a photocopy of the bill of lading for 2542 bales of stockfish and the named vessel was ALVORADA. On a review of the documents tendered, the court below found that there was a link between Exhibits P.2, D.13 and D.14 and observed that the respondent in his evidence conceded that the ship named ALVORADA did not sail or convey the goods in question from Reykjavik in Iceland to Port Harcourt in Nigeria and in the alternative, two ships which were used to convey the goods produced two separate Bills of Lading - Exhibits D.13 and D.14. This link was based on the evidence -in-chief of the defendant where he testified as D.W. 1. thus:

"Mr. Kunoth instructed the shipping Agent to make out through freight Bill of Lading because the L/C did not permit transshipment. This was permitted by the shipping line because the shipping lines was paying the freight from Reykjavik to Hamburg. The L.C is that issued by NNSC to Silvernorth the 2nd plaintiff. The L/C given to us by the 2nd plaintiff allowed Transshipment. I see Ex. p.2. The carrier in Ex. P. 2 is ALVORADA. It was not ALVORADA that carried the goods from Reykjavik in Iceland to Port Harcourt. The vessel that carried the goods was M. V. SKAFTA from Reykjavik to Hamburg and scheduled to go on ALVORADA from Hamburg to port Harcourt. The shipping company changed vessel from ALVORADA to GOLDEN MED which left Hamburg on 6th January, 1982 to Port Harcourt. I see the document now shown to me. It is the Bill of lading for SKAFTA from Reykjavik to Hamburg. The Bill of lading dated 12/11/81 is tendered, no objection and admitted in evidence as Exhibit D.13 I see this document shown to me. It is a Bill of lading showing SKAFTA loading in Reykjavik and Golden Med loading in Hamburg and discharged in Port Harcourt..... Court: The Bill of lading dated 6th January, 1982 is tendered no objection and admitted in evidence as Exhibit D.14.

..... I see Ex. P.2. It shows ALVORADA. Ex.D 13 and D.14 are also in respect of the same cargo. Since ALVORADA as per Ex. P.2 did not come to Iceland SKAFTA was used as Ex.D 13 as a collecting vessel for ALVORADA for shipment from Reykjavik to Hamburg. Golden Med was used as per Ex. D.14 instead of ALVORADA from Hamburg to Port Harcourt. Ex. P.2 was issued at the request of the Plaintiffs' staff Mr. Kunoth because the Plaintiffs have to have through Freight Bill of lading in order to be able to utilize the L/C which they had..... Ex D.13 is issued by Hafokip the owner of the ship SKAFTA. Ex. D.14 is issued by the Agent of MEDAFRICA in Hamburg."

It is true that M. V. ALVORADA was the vessel named in Exhibit P.2 which would have carried the consignment of 2542 bales of stockfish from Reykjavik, Iceland to Port Harcourt, Nigeria but due to bad weather it could not reach Iceland let alone sailing to Nigeria at the material time. There is also no doubt that it was on the instruction of Mr. Kunoth, the Agent/Employee of the 2nd Plaintiff that Exhibit P.2 - a Through Freight Bill of Lading was prepared by the shipping agent in order to satisfy the conditions of the Letter of credit between the plaintiffs and the Nigeria National Supply Co. Ltd. Which did not permit transshipment and also to enable the plaintiffs claim payment from the Nigeria National Supply Co. Ltd. The defendant had to fall back on Exhibit P.1 which was the letter of Credit between him and the plaintiffs and this permitted transshipment. That was how the vessels M. V. SKAFTA and M. V. GOLDEN MED were employed to convey the consignment from Reykjavik to Hamburg and from Hamburg to Port Harcourt, Nigeria. The two courts below did not reject the evidence of the defendant that Exhibit P.2 was issued at the request of Mr. Kunoth - the agent of the plaintiffs. It was also Mr. Kunoth who wrote Exhibit P.28 - the Recapitulation of shipments with all necessary details of Exhibits P.2 and P.28. He was in the centre of the shipment and transshipment of the 2542 bales of stockfish. His evidence was vital and why that evidence was not produced by the plaintiffs was not explained throughout the proceedings.

The court below was however satisfied with the documentary evidence produced by the defendant that there was transshipment and

that the 2542 bales of stockfish were infact received. It held as follows:

"The Appellant has produced sufficient evidence in my view to prove that ALVORADA did not convey the consignment to Nigeria because it was not available in Iceland at the material time. It is also evident on the face of the documents Exhibits D.17, 18, 19 and 21 that accompanied the transshipment in place of ALVORADA that the date 12/11/81 was common to all of them. And although Exhibits D.17 and 18 bore the name ALVORADA as the vessel that conveyed the consignment, Exhibit 19 showed SKAFTA as the conveying ship. It is also pertinent to observe that the quantity of bales of the stockfish in grades A and B as contained in Exhibit D.17, 18 and 21 agree exactly with these (sic) in P.28. Also Exhibit 24 the telex from Eslenska on 12-11-81 showed M. V. Skafta was loaded on the day to travel to Hamburg with the two consignments of stockfish as in Exhibit P.28 and that ALVORADA was to take over from Hamburg to Nigeria with the same consignments of stockfish. All these in my view seem to support the Appellant's testimony on the transshipment."

I have examined Exhibits P.1, P.2, P.28, D.13, D.14, D.17, D.18, D.19, D.21 and 28 and I am satisfied that 2542 bales of stockfish were transshipped by the defendant from Reykjavik Iceland to Hamburg on M. V. SKAFTA on 12-11-81 per Exhibit D.13 and from Hamburg to Port Harcourt on M. V. GOLDEN MED as per Exhibit D.14. The consignment was duly received and signed for by the Nigerian National Supply Co. Ltd. at Port Harcourt on 8-2-82 as per Exhibit D.28. While I agree that Exhibit D.14 showed that 2542 bales of stockfish instead of 2542 bales were carried in M. V. Golden med, this could be a typographical error which did not detract from the fact that Exhibit D.14 was issued by Medafrica Lines Agent in Hamburg and it referred to Exhibit D.13. On Exhibit D.14 was written boldly, "Delivery of goods to consignee may only be effected against collection of Original - through-Freight Bill of Lading No. 5 Reykjavik - Port Harcourt and if necessary payment of H through freight." The Through Freight Bill of Lading referred to in Exhibit D.14 is Exhibit P.2.

The Nigerian National Supply Co. Ltd. acknowledged the re-

cept of the consignment in Exhibit D.28 and if the consignment was not delivered, the plaintiffs should have tendered the original of exhibit P.2 which is the same as Exhibit D.28. Exhibit D.28 was tendered by consent and it was not challenged. It showed that the goods were received
B by the Nigerian National Supply Co. Ltd. and there was no evidence from the Nigerian National Supply Co. Ltd. denying Exhibit D.28.

**I agree with Chief Uwechue, S.A.N. that the question as to which vessel carried the goods is irrelevant. The court below was
C therefore right in holding that the 2542 bales of stockfish were shipped by the defendant and received by the Nigerian National Supply Co. Ltd. All the exhibits involved in the transshipment of the 2542 of bales of stockfish have been closely examined and despite minor discrepancies, they support the oral evidence of the
D defendant on the transshipment and delivery of the goods.**

I now come to Issue No. 2 which centered on the non-delivery of the consignment of 1406 bales of stockfish and Exhibit P.29. It is the contention of the plaintiffs that as a result of representations made to
E them, they were induced to execute Exhibit P.29 since the representations were later found to be false, they were entitled to consider themselves not bound by exhibit P.29. It was the further submission of the learned plaintiffs' counsel that from all the documents relied upon by the
F defendant as having been used in shipping the 1406 bales of stockfish and the evidence of the circumstances surrounding the said shipment, the consignment was neither shipped nor received by the plaintiffs or Ayaki & Co. Ltd. and that being so, they were entitled to resile from exhibit P.29 and claim the sum \$166,000 the cost of the stockfish pur-
G portedly delivered to Ayaki & Co. Ltd.

Exhibit P.29 was an agreement between Silvernorthe International Ltd., 3rd plaintiff and the defendant. It was dated 16th November, 1983. The 1st plaintiff signed exhibit P.29 on behalf of Silvernorthe
H International Ltd. (3rd plaintiff) and B. V. Magnusson signed on behalf of the united Producers (defendant). It is in respect of the shipment of 1406 bales of stockfish carried by M. V. Manthos of Medafrica Line which arrived port Harcourt, Nigeria on 1-3-82. From Exhibit P.29, out

of 1406 bales of stockfish, only 660 bales were delivered to Ayaki & Co. Ltd. at the request of silvernorth International Ltd. As a result of exhibit P.29, Silvernorth International Ltd. agreed to accept \$158,510 in full and final settlement of all claims against the defendant plus any interest on the amount of \$300,00 deposited in the bank for the purpose. B

From the evidence before the trial court, the sum of \$300,000 was paid to the defendant's bank in Iceland by the plaintiffs to cover the payment of the consignment of 1406 bales of stockfish to be delivered to the Nigerian National Supply Co. Ltd., Port Harcourt. As a result of the agreement (Exhibit P.29), the defendant paid back to the plaintiffs a total sum of \$175,000 in full and final settlement of all claims by the plaintiffs on the said consignment. This fact was admitted by the P.W.1 in his evidence. C

Owing to the maze of documents tendered at the trial and the oral evidence given, I should be excused for the frequent use of the excerpts from the pleadings and evidence. This is for a better appreciation of the facts. I will start with Exhibit p.29 and it reads: D

"The following agreement has been made between Silvernorth International Limited of 25, Euston Road, London, NW1, and United Producers Klapparstig, 29 101 Reykjavik of Iceland: E

1. Shipment was made to Silvernorth Limited, 25 Euston Road, London NW1, of 1,406 Bales of stockfish by m/v MANTHOS of Medafrica Line arrived at Port Harcourt, Nigeria, on 1st march, 1982. F

2. Out of this cargo only 660 Bales of stockfish; 50% grade 'A' and 50% grade 'B' were delivered to Ayaki & Co. Ltd., at Silvernorth International Limited's request, and were received in good condition.

3. The cost of the delivered consignment (660 Bales) amounts to USD 165,990 . - G

4. From the foregoing USD 134,010.- shall consequently be credited to Silvernorth International Limited from the USD 300,000. deposited for this purpose with the bank. H

5. It is further agreed that the sum of N14,000.00 equivalent of USD value as per 15th May, 1982, was paid as demurrage on behalf of united producers Limited as per agreement. This amount was also to be

credited in its USD equivalent to Silvernorthe International Limited. It is therefore agreed that in the final settlement Silvernorthe International Limited will accept about USD 158,510.- as final settlement, plus any interest on the whole and /or part of the USD 300,000.- that will be paid by the bank, shared proportionately.

6. This being the full and final settlement of silvernorthe International Limited claim against united producers, it is hereby confirmed by both parties with the signatures of their representatives.

C	<u>On behalf of United Producers</u> B. V. MAGNUSSEN (sgd)	<u>On behalf of Silvernorth</u> <u>International Ltd.</u> (sgd) K. O. A. KOIKI "
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On Exhibit P.29, the plaintiffs pleaded as follows in paragraph 6 of their amended statement of claim:

"6. On the 16th day of November, 1983 the Plaintiff and the Defendant entered into a written agreement wherefore the plaintiff was paid the sum of US\$ 134,000.00 as full and final settlement of the debt owed by the defendant to Messrs. Silvernorthe International Limited which agreement the plaintiff later on found to be based on fraudulent misrepresentation of the defendant to the plaintiff.

Particulars of Misrepresentation

(a) Plaintiff was deceived by the defendant by representing to the plaintiff that one Messrs. Ayaki & Co. Limited of Port Harcourt received a consignment of 660 bales of stockfish on behalf of the Plaintiff from the consignment of 31st December, 1981 which consignment was never shipped.

(b) The Plaintiff shall, in furtherance of proof of fraudulent misrepresentation of the defendant, rely on the sworn affidavit of the Solicitors to Messrs. Medafrica Line SPA of Genoa the shippers to the defendant in Iceland (the Unite Producers) sworn to in the London Court proceedings Suit No. 1033/84 revealing that all the shipping documents referred to by the Defendant to prove that they consigned the said stockfish to Nigeria are false."

In reply to paragraph 6 of the Amended Statement of Claim, the defendant in paragraph 13 of his Further Amended statement of defence

averred as follows:-

"13(a) With reference to paragraph 6 of the amended statement of claim the Defendant admits that on the 16th day of November 1983, the plaintiffs acting through the 1st and 3rd Plaintiffs on the one hand and United Producers represented by the Defendant on the other hand, finally settled a dispute which had arisen over alleged short delivery by the carriers which now forms the subject matter of this action. The Defendant admits that the sum of US \$134,000 was paid by United producers to the Plaintiffs on 16th November, 1983 in full and final settlement of any claims the plaintiffs had against United Producers or Its servants, agents or representative as averred in paragraph 6 of the amended statement of claim. The defendant avers (sic) the Plaintiffs are estopped from making any further claims against United Producers or its servants or agents.

(b) The Defendant categorically denies that he or any officers of United producers made any false or that the Plaintiffs were in dues or deceived by any false or fraudulent representation to agree to the settlement.

FURTHER PARTICULARS

(i) The agreement (sic) reached almost two years after the goods arrived or were expected to have arrived in Port Harcourt.

(ii) The meeting where at the settlement was reached took place in the office of NOLI INTERNATIONAL SHIPPING SERVICES (NIG) LIMITED, Port harcourt and the plaintiffs had full opportunity to ascertain all the facts and knew or ought to have know that both consignments had arrived.

(iii) The Plaintiffs thereafter made no claim against the United Producers or the Defendant from November, 1983 to March 1987. The Defendant shall rely on the doctrine that delay defeats equity.

(iv) United Producers had no liability even to settle the agreed sum but chose to do so in order to promote its business in Nigeria."

Both parties gave evidence on negotiations they had which led to the execution of Exhibit p. 29. The 1st plaintiff (P.W. 1) who took part in all the negotiations and was a signatory to Exhibit p.29. He testified thus:

"At the meeting the defendant and the Chairman of United Producers were present. Also present was a representative from Silver Eagle Shipping Agency, my lawyer from Iceland, and a co-director of the 2nd plaintiff. Medafrica Lines were the shipping company that were supposed to have carried the goods in question to Port Harcourt. The purpose of the meeting was to find out the shipping company (sic) actually delivered 1406 bales to Ayaki in Port Harcourt. The defendant wrote me Ex p6 at the meeting saying he needed time to go to Port Harcourt to investigate the delivery and the missing items. We both met in Port Harcourt at the premises of Noli International Shipping Agencies Ltd. We met in the Office of Silver Eagle not Noli. I don't know that Noli and Silver Eagle were in the same premises.

I see Ex p. 29, The Agreement Ex p. 29 was signed in the office of Noli. I see Ex D. 3, the first attachment thereto. The attachment is from Noli. The attachment was addressed to Ayaki & Co. Ltd. I see Ex p7. It is a letter to my Bank signed by me and my co-director. I see para. 2 of Ex p7. The document I referred therein as speaking for itself is the attachment to Ex D3. I read the Attachment to Ex D3. I am still saying that the goods were not even shipped. I signed Ex P29 in the office of Noli after calling in the police. It is not correct that at the time I signed Ex P29, I, in fact knew that the goods were delivered.

I see the 2nd Attachment to Ex D3. It is titled "Discharging Expenses paid by Ayaki & Co. Ltd.". I also see the 3rd Attachment to Ex D3. It is authority and Certificate of Release of Cargo written by Noli. The Cargo referred to there was 1,406 bales of stockfish. I settled the matter with the defendant on Ex p29 from what I was shown on papers. I see Ex D5, p.2, par 4. What my Solicitor was saying there was that the defendant has been earlier informed 660 bales of stockfish were actually received. Ex D5 is dated 7th November, 1983. I see Ex P5. p.10 of the attachment. The defendant paid the plaintiffs \$175,000.00 and the agreed amount in Ex P29"

Giving account of the circumstances leading to the execution of Exhibit P29, the defendant (D.W.1) testified thus:

"There was a claim made by them on short delivery and damage

and demurrage regarding the 1406 bales. When this claim was made, we had a meeting first in London with the 1st plaintiff. That agreement did not last more than few days and later on, the 1st plaintiff came to Iceland. He appointed a lawyer in Iceland to sue United Producers if an agreement was not possible. Then it was decided that the Chairman of B United Producers, myself and Silvernorth appointed lawyer as well as the 1st plaintiff should go to London. We have a meeting in London together with the representative of the Shipping Company and Mr. Guasopel representative of Silver Eagle in Port Harcourt to discuss problem. At C this meeting it was also agreed that I should go to Port Harcourt and investigate this matter personally there. There in Port Harcourt, I met the 1st plaintiff and having investigated the situation jointly, a settlement Agreement was signed on behalf of Silvernorthe Ltd, and United D Producers. The agreement is Ex P29. We made payment on 28/12/83 on the total amount \$175,000 covering demurrage, plus travelling expenses of the 1st plaintiff. It is not correct that I induced the plaintiff to enter into Ex p.29 on the fraudulent representation that Ayaki received 660 bales. Ayaki received 1060 bales which is shown by Delivery Tickets E from Silver Eagle Port Harcourt. Silver Eagle is Representative of Medafrica in Port Harcourt. Since all this quantity 1060 bales has been delivered and we have no possibility to investigate the claim of damage and other defects of the merchandise, if any agreed to settle on 660 bales. F I see Ex D3, it is a letter dated 16/9/82. It was written to me by the plaintiff before Ex p29. The plaintiff never made further claims against me in respect of 1406 bales or against United Producers. That settlement meeting took place in the office of Noli International Shipping Service G in Port Harcourt. Noli is a subsidiary of Medafrica Company servicing and unloading the vessels. Apart from me and the 1st plaintiff, there were other people present at the office of Noli in Port Harcourt . I remember there was the General Manager of Noli Mr. Macase. There was the other person that witnessed the agreement but I cannot read his H name."

From the evidence of P.W. 1 and D.W.1, all the representatives of both parties were present at the meeting in Port Harcourt which took

place in the premises of Noli International Shipping Agencies Ltd. A representative of Medafrica Lines, a representative from Eagle Shipping Agency and the solicitor for the plaintiffs were also present. The purpose of the meeting was to find out if the Shipping Company actually delivered 1406 bales of stockfish to Ayaki & Co. Ltd. in Port Harcourt. There was a joint investigation by both parties and a settlement was reached to the effect that Ayaki & Co. Ltd, received 660 bales of stockfish from the Company. The defendant agreed to pay for the balance out of 1406 bales including interest, demurrage and travelling expenses of P.W. 1. Details of the settlement are contained in Exhibit P.29 which was signed by the representatives of both parties and witnessed by a third party.

Exhibit P.29 shows that 1046 bales of stockfish arrived Port Harcourt on 1st March, 1982 through M.V. Manthos and 660 bales out of the 1406 bales were received in good condition by Ayaki & Co. Ltd. at the request of the plaintiffs. The 660 bales were valued at \$165,990 and since the total sum of \$300,000 was originally deposited for 1406 bales of stockfish, the balance of \$134,010 being the value of the bales of stockfish not delivered and/or damages was to be refunded to the plaintiffs.

By paragraph 5 of Exhibit P.29, the equivalent of N14,000.00 being demurrage paid by the plaintiffs on behalf of the defendant and accrued interest on the total amount deposited were also to be paid to the plaintiffs in full and final settlement of the plaintiff's claim on the consignment of 1406 bales of stockfish.

In compliance with the agreement, the defendant paid to the plaintiffs by cheque the total sum of \$175,000 being value of stockfish not delivered, interest on the amount deposited, demurrage incurred and travelling expenses of the 1st plaintiff. I have no reason to doubt the sincerity of the parties when they executed Exhibit P.29, accepted the terms and acted upon it.

It is pertinent to observe that after the execution of Exhibit P.29 the plaintiffs who were the beneficiaries took no steps to claim against the defendant on any shipment until 1987 - a period of four years. The defendant on the other hand relied on Exhibit P.29 and fully complied

with its terms and conditions.

The main contention of the plaintiffs was that after signing Exhibit P.29, they received telex messages particularly Exhibit P.12 from the Lloyd's of London which showed that M.V. Manthos which was to convey the consignment to Port Harcourt did not travel at the material time. B This also led the plaintiffs to the conclusion that Exhibit P. 26 (the bill of lading on M.V. Manthos) was a forgery.

A close examination of Exhibits P.5, P.7, P.8, P.25, P.26, P.27, D.3, D.4 and D.5 do not support the claim of the plaintiffs that the agreement Exhibit P. 29 was based on fraud and misrepresentation by the C defendant.

Exhibit P.7 is a letter dated 16/9/82 written to the Manager of Bergen Bank in Bergen, Norway (Plaintiffs' bank) by the 3rd plaintiff (Silvernorthe International Ltd). The letter was jointly signed by Mr. C. D Ntukidem and K. Koiki (1st plaintiff) as Director and Secretary respectively of the 3rd plaintiff. The letter reads:

"Dear Sir,

FINAL SETTLEMENT ON 1406 BALES OF STOCKFISH ON M. V. MANTHOS. E

We hereby confirm that we have only collected 860 Bales of stockfish out of the 1406, claimed shipped by United Stockfish Producers. Following documents with the copy of our own letter to suppliers F does (sic) not only speak for itself, (sic) but clearly shows (sic) the delay was not caused by our company or our own customer Ayaki & Co. Ltd. We now instruct you to pay the supplier \$183,499.23 representing the 860 collected out of the \$300,000 blocked for the transaction."

Exhibit P.5 contains the affidavit of the one Fergus Dingwall G Bateson to which was annexed the proof of evidence of the 1st plaintiff herein in Suit No. 1033 of 1984 in the Queen's Bench Division of the High Court of Justice in England between the 2nd plaintiff herein and Med Africa Ltd. Paragraphs 8-17 of the said statement confirm the H negotiations leading to Exhibit P.29. The statement is dated 19/1/84.

The Bill of Lading (Exhibit P.26) shows that the Managing Director of Ayaki & Co. Ltd took delivery of 1406 bales of stockfish on 12/

5/82 at Port Harcourt. In addition, Exhibits D.3 and D4 together with their annexures confirm the shipment of 1406 bales of stockfish and its receipt by Ayaki & Co. Ltd. Of special mention is Exhibit D.5, a letter dated 7-11-83 written by Wikborg, Rein & Co., a firm of Solicitors acting for the plaintiffs. It was addressed to the defendant. It reads in part:

"As you have been previously informed only 660 bales were actually received under the documents. Of these 200 were damaged. Accordingly, only USD \$168,300 should be paid. In addition demurrage incurred on the shipment was to be for your account. We have been informed that the demurrage amounted to USD \$29,000."

It is specific that Ayaki & Co. Ltd. received 660 bales of stockfish.

There is also the last annexure to Exhibit P.5 titled "AGREEMENT" and dated 28-12-82 entered into by the representatives of the plaintiffs and the United Producers (defendant). The plaintiffs' solicitor signed on their behalf and the defendant signed on behalf of the United Producers. It reads:

"In connection with a shipment of 1406 bales of stockfish sold by United Producers to Silvernorth International Limited and delivered ex-Monthos in Port Harcourt around March, 1st 1982, we the undersigned parties. The Silvernorth International Limited, London, on the one hand and on the other hand the United Producers, Klapparstig 29, Reykjavik, hereby make the following agreement:

1. United Producers shall pay the sum of USD 175,000.00 to Silvernorth Ltd upon the signing of this agreement. This amount covers the total claim, including short delivery, demurrage, interests, solicitors' fees and any other charges.

2. By receiving the above-mentioned sum, Silvernorth International Ltd. declares that no further claim will be lodged against United producers and/or Ulvegsbankl Island in connection with the above mentioned shipment.

3. It is acknowledge by both parties, that Silvernorth International Ltd has incurred travel expenses in connection with the above, and United Producers have advanced money both in Iceland and Nigeria, to Silvernorth International Ltd., i.e. to the representatives of the company.

It is agreed that travel expenses and advanced money are evened out by this agreement. United Producers undertake to provide Mr. Sigurjonsson, Silvernorth's solicitor, with receipts concerning the money advanced. With this agreement finalized both parties agree that neither has a claim on the other any longer in connection with the above.

B

Reykjavik, December 28th 1983

for Silvernorth

for United Producers

International Ltd.

by telex/telephone

C

authorization

(Sgd).

(Sgd).

Sigurour Sigurjossan,

Bjarni Magnusson,

Solicitor

Manager. "

This agreement was entered into on 28-12-83. The plaintiffs did not challenge it throughout the trial.

D

In paragraphs 3 and 6 of the Amended Statement of claim, the plaintiffs pleaded fraud and misrepresentation on the part of the defendant. The same fraud and misrepresentation led them to execute Exhibit P.29. As in the transshipment of 2542 bales of stockfish where the evidence of Mr. Kunoth was very material and that evidence was not produced, the same was the evidence of Ayaki & Co. Ltd. in the delivery of 1406 bales of stockfish which it received according to Exhibit D.14. Fraud and misrepresentation are criminal offences and the legal implication is that they have to be proved beyond reasonable doubt as they are directly in issue. Consequently, section 138(1) of the Evidence Act Cap.112 Laws of the Federation of Nigeria, 1990 applies. It stipulates:

F

"138 (i) If the commission of a crime by a party to any proceeding is directly in issue in any proceeding civil or criminal, it must be proved beyond reasonable doubt."

G

The issue of crime arose in paragraphs 3 and 6 the Amended Statement of Claim and it is the foundation of the plaintiffs' claim.

H

The Act has given a number of words and phrases special and precise meaning and in construing section 138(1) of the Evidence Act, it is essential to give affect to that meaning. Section 2

contains a definition of "fact in issue" thus:

"Fact in issue" includes any fact from which either by itself or in connection with other facts the existence, non-existence, nature or extent of any right, liability or disability asserted or denied in any suit or proceedings necessarily follows."

In my view the commission of crime by the defendant in this proceeding is a fact directly in issue and the plaintiffs are required in law to discharge the burden of proving the crime or offence of fraud and misrepresentation beyond reasonable doubt. The standard of proof required of the plaintiffs to succeed is not that of balance of probabilities. See Ikoku v. Oli (1962)1 All N.L.R.195, Nwakwere v. Adewumi (1966)1 All N.L.R. 119, Nwobodo v. Onoh (1984)1 S.C.N.L. 1, Omorhirhi & Ors Enatevwere (1988)1 N.W.L.R. (Pt.73) 746 and Folami v. Cole (1990)2 N.W.L.R. (Pt.133) 445

It is also my view that the principle of severance is not applicable having regard to the pleadings. The allegations of fraud and misrepresentation cannot be served from the body of the pleadings and the question of what remains after the severance which the plaintiffs can rely on to prove their case does not equally arise.

I entirely agree with the court below that there was no iota of evidence to prove that the 1st plaintiff was induced into signing Exhibit P.29 by any misrepresentation. The court below further held:

"It is pertinent to observe that after the execution of Ex.P.29, the Respondents took no step or steps to claim against the Appellant on any shipment until 1987. The Appellant on the other hand relied on Exh. P.29, and had fully complied with the terms and conditions therein and the Respondents who benefited from the agreement did not raise any point for about 4 years. I therefore agree with the submissions of the learned counsel for the Appellant that having regard to all the circumstances surrounding the shipment of 1,046 bales of stockfish and the conduct of the respondents, they should be estopped from denying the efficacy and applicability of Exhibit P.29."

Both parties to the proceedings having chosen to regulate

their legal position by Exhibit P.29, none of them can thereafter withdraw from it since there is no proof of fraud or misrepresentation. The Plaintiffs cannot approbate and reprobate. Estoppel is an admission or something which the law views as equivalent to an admission. By its very nature, it is so important and conclusive that the party whom it affects, and in this case the plaintiffs, will not be allowed to plead against it or adduce evidence to contradict it. See Basil & Or. v. Honger 14 W.A.C.A. 569 at 570, Yoye v. Olubode & Ors. (1974) All N.L.R. 657 and Ukaegbu & Ors. v. Ugoji & Ors. (1991)6 N.W.L.R. (Pt.196) 127 AT 146.

In the final result, this appeal must fail and it is hereby dismissed. The judgment of the court below is hereby affirmed. I assess costs against the plaintiffs at N10,000.00.

KARIBI-WHYTE JSC

I had the advantage of reading the judgment of my learned brother Ogundare, JSC in this appeal. I agree entirely with his reasoning and conclusion that this appeal fails and ought to be dismissed. I too will, and hereby dismiss the appeal. The judgment of the court below is hereby affirmed.

I assess costs against Appellants at N10,000.00.

ONU JSC

Although it may appear wooly and inextricable from the extracts set out below in the judgment of the Court of Appeal now on appeal, that in the penultimate paragraph the 2542 and 1406 bales of stock fish delivered by the respondents to the appellants what - with the maze of documents involved, I am satisfied that from the nature of the contract between the parties when the respondents being neither a shipping company nor carriers but purely sellers of goods, their duty ended when the goods were put on board the ship and the bills of lading passed on C and F. Put in another way, there was enough evidence that these goods were

delivered particularly the 1406 bales of stock fish that now constitute the bone of contention herein, to the Nigerian National Supply Company (NNSC for short) on 1st March, 1982 through Ayaki & Co. who happened to be the appellants' agents and that the appellants received the goods in Port Harcourt. The extracts referred to above as culled from 1st appellant's evidence-in-chief are as follows:-

"I see exhibit p.28. I rely on it. The contents of Exhibit P.28 are correct.

If the respondents rely on the contents of Exhibit P. 28 which was made by their own staff Mr. Kunnoth, they are admitting that all the shipment shown in Exhibit P.28(5) have actually been received by NNSC, Nigeria. In Exhibit P.29(5) the name of the vessel shown against order No. 67/003 for a total of 2542 bales of stock fish received in Port Harcourt from Reykjavik, is no doubt in my mind that the consignment of 2542 bales of Stock fish was received by the Respondents in Port Harcourt pursuant to the contract. What now appears to me in contention between the parties is whether it was Alvorada or Skafta or Golden Med that brought the consignment. The Appellant has produced sufficient evidence in my view to prove that alvorada did not convey the consignment to Nigeria because it was not available in Iceland at the material time. It is also evident on the face of the documents exhibits D17, 18, 19 and 21 that accompanied the transshipment in place of the Alvorada, that the date 12-11-1981 was common to all of them. And although Exhibits D17 and 18 bore the name Alvorada as the vessel that conveyed the consignments, Exhibit D.19 showed Skafta as the conveying ship. It is also pertinent to observe that the quantity of bales of the Stock fish in grades A and B as contained in Exhibits D17, 18 and 21 agree exactly with those in exhibit p.28. Also Exhibit D.24, the telex from Islenska on 12/11/81 showed that M.V. Skafta was loaded on that day to travel to hamburg with two grades of stockfish as in exhibit P.28 and that alvorada was to take over from Hamburg to Nigeria with the same consignment of stockfish. All this evidence, in my view, seem to support the Appellant's testimony of transshipment but the fact still remains that the consignment of 2542 bales of Stockfish as recorded in Exhibit P.28(5) has actually

been received by the respondents or their agents in Port Harcourt and I accordingly so find. (Underlining is mine for emphasis).

In as much as it was demonstrated beyond peradventure at the trial by the respondent through the production of such documentary evidence by the respondent as Exhibits P.1, P.28, D.13, D.14, D.17, D.18, D.19, D.21, and D.28 that the 2542 bales of stockfish were transshipped by the respondent from Reykjavik Iceland to Hamburg, Germany on M.V. SKAFTA on 12/11/81 per Exhibit D.13 and from Hamburg to Port Harcourt on M.V. GOLDEN MED as per Exhibit D.14 and being glaring that the consignment was duly received and signed for by the NNSC at Port Harcourt on 8/2/82 as per Exhibit D.28, I agree with learned senior advocate, chief Uwechue when he submitted most uncontrovertedly in the respondent's brief at page 7 thereof as follows:-

"At the close of the proceedings on 12/12/94 judgment was reserved (page 1046 line 5). The parties later appeared on invitation of the Court of Appeal to address the court on, inter alia, the liability of the seller who had handed over goods to a shipping company for delivery to the consignee. Both parties agreed, and it was settled as an issue that, in the words of the 1st appellant himself at page 1048 lines 28-30:-

"If the Appellant had actually delivered the good (sic) to the shippers and had sent proper Bill of Lading which is not false it has discharged its duties. But we are saying that he did not deliver the goods to the shippers and purported bill of lading Exhibit P. 2 is false."

This was a finding of the Court of Appeal recorded at page 1058 lines 17-20 of the record. The Appellants did not appeal against this finding. Thus the issue of receipt of goods by NNSC on which the Appellants appear to place much emphasis, cannot be a proper issue in this appeal."

Continuing at page 8, the learned Senior Advocate further submitted thus:-

"The Court of Appeal held unanimously that the Appellant (then the Respondent) was not entitled to judgment for non-delivery of the 2542 bales of Stockfish (pages 1080 lines 22-24) after a painstaking review of the pleadings and evidence. In respect of the 1406 bales the Court of Appeal found as a fact that the Appellants themselves pleaded

and tendered Exhibit P.29 but failed to call Ayaki & Co. Ltd. to testify as to what happened or deny receiving any consignment or any part thereof (page 1068). That court also found as a fact that the Appellants' Solicitor had confirmed that Ayaki & Co. Ltd. had received 660 bales and
 B that Exhibit P.7 a letter by the 1st Appellant himself also confirmed that 860 bales of Stock fish vide M.V. Manthos were received by Ayaki & Co. Ltd. They also found that there was no iota of evidence to prove that the 1st appellant was induced or intimidated into signing Exhibit P.29 (page
 C 1071). In the circumstances the court held that Exhibit P. 29 was binding and effective as an estoppel against the Appellants."

The NNSC acknowledge the receipt of the consignment in Exhibit D. 28 and had the consignment never been delivered at all, the appellants would have laid bare the respondent's defence or would have tendered the original of Exhibit P. 2 which is the same as Exhibit D. 28.
 D Besides, Exhibit D. 28 was tendered by consent and it was not in any way challenged. It was demonstrated in unequivocal terms that the goods were received by the NNSC with no countermanding denial or evidence
 E from the NNSC. Moreover, from Exhibit P. 29, it is manifest that 1446 bales of the Stock fish arrived Port Harcourt on 1st March, 1982 through M.V. Manthos and 660 bales of the 1406 bales were received in good condition by Ayaki & Co. Ltd. at the request of the appellants. The 660
 F bales which were valued at \$165,990 and the since the total sum of \$300,000 was originally deposited for the 1406 bales of stock fish, the balance or \$134,000 being the value of the value of the Stock fish not delivered and/or damaged which was to be refunded to the appellants but
 G this was not done. By paragraph 5 of Exhibit 29, the equivalent of \$14,000.00 being demurrage paid by the appellants on behalf of the respondent as well as accrued interest on the total amount deposited was also to be paid to the appellants in full and final settlement of the appellants' claim on the consignment of 1406 bales of Stock fish.

H In compliance with the free and voluntary agreement entered into by the appellants and the respondent, the respondent paid to the appellants by cheque the sum of 175,000 U.S. Dollars being value of the Stock fish not delivered, interest on the amount deposited, demurrage

incurred and the travelling expenses of the 1st appellant in full satisfaction thereof vide Exhibit P. 29. Be that as it may, despite the execution of Exhibit P. 29 of which the appellants were the beneficiaries, they took no steps to claim against the respondent on any shipment of the goods until 1987 - a period of four years. The respondent on the other hand relied on Exhibit P. 29 and fully and unconditionally complied with its terms and conditions. The contention tenaciously put forward by the appellants to the effect that after signing Exhibit P.29 they received telex messages, particularly Exhibit P.12 from the Lloyds of London, to the effect that M.V. Manthos which was to convey the consignment to Port Harcourt did not set sail after all i.e. at all times material to the genesis of this case, cannot be demonstrably right. The appellants have contended that Exhibit P.2 and P.26 (the bill of lading) for conveying the bales of Stock fish to Port Harcourt on M.V. Manthos was a forgery. A close scrutiny of Exhibit P.5, P.7, P.25, P.26, P.27, D. 3 and D.5 however, does not support the appellants' claim that the agreement - Exhibit P.29 - was based on fraud and misrepresentation by the respondent. To take allegations involving criminality such as these, one is by law required to prove one's case beyond reasonable doubt. See Omoboriowo v. Ajasin (1984) 1 SCNLR 108; Nwobodo v. Onoh (1984) 1 SCNLR 1; Ikokuwu v. Enoch Oli (1966) NMLR 47 and Anya v. A.N.N. Ltd. (1992) 6 NWLR (Part 247) 319 at 333. In the instant case, the appellants woefully failed to establish by leading evidence to show the criminal element in this civil matter.

I therefore have no hesitation in agreeing with the submission of the learned defence counsel when he stated on behalf of the respondent as part of his oral submission thus:-

"We agree that the goods were delivered at Port Harcourt and in case they were not delivered, the respondents (as sellers) had done all that was in their power to do i.e handing over the goods to the ship and all the documents relating thereto." (parenthesis supplied)

See the learned Authors of Schmitthoff's Export Trade - Law and Practice of International Trade by Clive M.M. Schmitthoff, Eighth Edition at page 48 wherein the seller's obligation under a C.I.F. contract which in

essence ensures for C and F contract we are herein considering, have been clearly set out and dealt with in the case of Biddel Brothers v. E. Clemens Horst Company (1911) 1 K.B. 214 at 220. See also Andre et cie S.A. v. J.H Vantol Ltd (1952) 2 Lloyds Law Report 282-291.

B It ought to be noted that while Exhibits P.9 and P.10 which are mere telexes do not refer to 2542 bales of Stock fish, the subject matter of this action they each refer to 2540 and 2540 bales of Stock fish, to wit: Exhibit P.9 to 2540 and Exhibit P.10 to 2540 respectively. Exhibit P.28 on the other hand was a fully stamped and authenticated document.
C The issue in contention between the parties herein being what became of the 1406 bales of stock fish and which, in my view, has been amply shown upon such documentary evidence as Exhibits P.28 and P.42, the former upon which the 1406 bales of stock fish were sold to Ayaki &
D Co. Ltd., the court below made unimpeachable findings thereon. The judgment arrived at thereon must, in my opinion, be affirmed. See Badejo v. Federal Ministry of Education (1996) 8 NWLR (Part 464) 15 at 50 E-F.

E On the issue whether Exhibit. PX.29 (Terms of Settlement signed by both parties) was binding the court below held among other things as follows:-

*"I therefore agree with the submission of the learned counsel for
F the Appellant that having regard to all the circumstances surrounding the shipment of 1406 bales of Stock fish and the conduct of the Respondents they should be estopped from denying the efficacy and applicability of Exhibit P.29. I respectfully hold and reject the 1st Respondent's contention that he was deceived or induced into signing it when he did. By the
G effect of the last paragraph of Exhibit P.29, once the terms of the agreement were complied with by the parties, that would be the end of any claim against the Appellant in respect of the shipment of 1406 bales of Stock fish. The Appellant has paid all the money he agreed to pay to the
H Respondents. Respondents admitted receiving the amount that makes the agreement binding and effective on the parties in respect thereof. The Appellant cannot therefore be liable to the Respondents in my judgment for any amount in respect of the 1406 bales of Stock fish. See Odu'a*

Investment Co. Ltd. v. Talabi (1991) 1 NWLR (Part 120) 776 at 782; Ukeagbu v. Ugorji (1991) 6 NWLR (Part 196) 127 at 146 and Odadhe v. Okujeni (1973) 11 SC. 43 at 353."

I cannot agree more. The general rule is that where parties have embodied the terms of their agreement in a written document such as Exhibit B PX.29 extrinsic evidence is not admitted to add, vary or subtract from or contradict the terms of the written instrument. See Olaoye v. Balogun (1990) 5 NWLR (Part 333) 385. Indeed, where the parties enter into a contract they are bound by the terms thereof and it is unfair to read into such a contract terms on which there is no agreement. See Baba v. Nigerian Civil Aviation Centre (1991) 5 NWLR (Part 192) 388. See also U.B.A. Ltd. v. Umeh & Sons Ltd. (1996) 3 NWLR (Part 426) 565 and S.C.O.A. Bourdex Ltd. (1990) 3 NWLR (Part 138) 380 at 389. C

The respondent having in their Brief quoted what the 1st Appellant D said in examination-in-Chief, to wit:

"I see Exhibit P.28. I rely on it. The contents of Exhibit 28 are correct."

cannot now, in my view, turn round and say otherwise. E

The respondents having pleaded Exhibits D.13 and D.14 and adduced them in evidence to show that they were indeed used in sending the goods, following the letter the terms and conditions of Exhibit P.29, have rebutted the onus of proof shifted on them by the Appellants. F

It is for the above reasons and the more detailed ones contained in the leading judgment of my learned brother Ogwuegbu, JSC with which I entirely agree, that I too find no merit in this appeal. I also accordingly dismiss the appellants' appeal and make the same consequential orders inclusive of those as to costs contained therein. G

KATSINA -ALU JSC

I have had the advantage of reading in draft the judgment of my H learned brother Ogwuegbu JSC, with which I am in entire agreement.

The appellants as plaintiffs at the trial court claimed against the defendant (respondent) as follows:

"(a) the sum of US \$894,390.00 or its Naira equivalent being damages against the Defendant for the failure of the Defendant to ship and deliver 3, 948 bales of Icelandic stockfish pursuant to a letter of credit dated 1st October, 1981;

B (b) Compound interest on the special damaged at the rate of 15% per annum from 1st January, 1982, to 31st July, 1987 and at 20% per annum from 1st August, 1987 until the day of judgment;

(c) general damages is the sum of N2,000.00."

C There was abundant evidence before the Court of trial that the consignment of 2542 bales of stockfish was transshipped by the defendant from Reykjavik Iceland to Hamburg on M.V. SKAFTA on 12-11-81 per Exhibit D.13 and from Hamburg to Port-Harcourt on M.V. GOLDEN MED as per Exhibit D.14. It has been shown conclusively that this
D consignment was received and signed for by the Nigeria National Supply Co. Ltd. at Port-Harcourt on 8-2-82 as per Exhibit D. 28. Exhibit D. 28 was tendered by consent. It showed that the goods were received by the Nigerian National Supply Co. Ltd. It must be stressed here that there
E was no evidence from the Nigerian National Supply Co. Ltd., denying Exhibit D. 28.

At the trial the plaintiffs busied themselves with the question of which vessel carried the goods. This was plainly irrelevant to the complaint that the defendant failed to deliver the consignment to the plaintiffs
F at Port-Harcourt.

I now turn to the issue of the non-delivery of the consignment of 1406 bales of stockfish. It was in evidence that out of 1406 bales of stockfish only 660 were delivered to Ayaki & Co. Ltd. in Port-Harcourt
G at the request of Silvernorthe International Ltd. (3rd plaintiff). After a series of meetings the parties reached an agreement vide Exhibit P.29 In compliance with this agreement the defendant paid the plaintiffs a total sum of \$175,000 being value of the stockfish not delivered, interest on
H the amount deposited, demurrage incurred and travelling expenses of the 1st plaintiff in full and final settlement of the plaintiffs' claim. At this stage I think it is necessary to reproduce Exhibit P.29. It reads:

"The following agreement has been made between Silvernorthe

International Limited of 25 Euston Road, London, NW1, and United Producers Klapperstig, 29 101 Reykjavik of Iceland:

1. *Shipment was made to Silvernorthe Limited, 25 Euston Road, London NW1, of 1,406 Bales of stockfish by M/V Manthos of Medafrica Line arrived at Port-Harcourt, Nigeria, on 1st March, 1982.*

2. *Out of this cargo only 660 Bales of stockfish, 50% Grade 'A' and 50% Grade 'B' were delivered to Ayaki & Co. Ltd., at Silvernorthe International Limited's request, and were received in good condition.*

3. *The cost of the delivered consignment (660 Bales) amounts to USD 165,990.*

4. *From the foregoing USD 134, 010, shall consequently be credited to Silvernorthe International Limited from the USD 300.000 deposited for this purpose with the bank.*

5. *It is further agreed that the sum of N14,000.00 equivalent to USD value as per 15th May, 1982, was paid as demurrage on behalf of United Producers Limited as per agreement. This amount was also to be credited in it USD equivalent to Silvernorthe International Limited. It is therefore agreed that in the final settlement Silvernorthe International Limited will accept about USD 158,510, as final settlement, plus any interest on the whole and/or part of the USD 300,000., that will be paid by the bank, shared proportionately.*

6. *This being the full and final settlement of Silvernorthe International Limited claim against United Producers, it is hereby confirmed by both parties with the signatures of their representatives.*

B.V. MAGNUSSEN (sgd)

K.O.A. KOIKI (sgd)

It will be seen that the defendant had done everything humanly possible to amicably settle this matter. I think the action by the plaintiffs is vexatious. It ought to have been dismissed.

In the light of the above and for the fuller reasons given by my learned brother Ogwuegbu, JSC I too dismiss this appeal by the plaintiffs. I affirm the judgment of the court below. I also award N10,000.00 costs in favour of the defendant.

EJIWUNMI JSC

I was privileged to have read in draft, the judgment of my learned brother Ogwuegbu, JSC. As he has thoroughly examined the facts and considered very carefully the issues raised thereon, I agree with his conclusion that the appeal lacks merit. I also dismiss the appeal for the reasons given in the said judgment of my brother Ogwuegbu, JSC. I also award costs in the sum of N10,000.00 against the plaintiffs.

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