

SUPREME COURT OF NIGERIA

30TH JUNE, 2000. SC. 133/1997

**CORAM:- A. B. WALI, M. E. OGUNDARE, A. I. IGUH, A. I.
KATSINA-ALU, S. O. UWAIFO, JJSC.**

BRAWAL SHIPPING (NIGERIA) LTD 1ST DEFENDANT/
APPELLANT

AND

1. F. I. ONWADIKE CO. LTD PLAINTIFF/
RESPONDENT

2. METROPOLITAN GENERAL INS. CO. LTD ... 2ND DEFENDANT/
RESPONDENT

APPEALS - Court of Appeal - Issues - Duty to make pronouncement on all issues placed before it.

APPEALS - Court of Appeal - Issues - When the court may not pronounce on all the issues placed before it.

APPEALS - Ground of appeal - Issues - Not based on any ground of appeal - The court would have acted in error if it has countenanced those issues

APPEALS - Issues - Abstract issues - Are of no use in an appeal

CARRIAGE OF GOODS - Bill of lading - Demurrer - Good defence - When a plaintiff can rely on a demurrer procedure as to whether a good defence has been disclosed

CARRIAGE OF GOODS - Bill of lading - Indorsement simpliciter - Implication of such an indorsement

CARRIAGE OF GOODS - Bill of lading - Locus standi - Demurrer - When it would be appropriate for a defendant to demur on the locus standi of the plaintiff

CARRIAGE OF GOODS - *Bill of lading - Property in the goods - Passes not by the mere assignment and delivery of the bill of lading - But by the contract between the assignor and the assignee*

CARRIAGE OF GOODS - *Bills of lading - Indorsement - Where the stamp of a third party appears on the bills but without the appropriate words to qualify it as an indorsement in full - It cannot be concluded that the third party is an indorsee of the bills*

CARRIAGE OF GOODS - *Carriage by sea - Contract - Privity - Bill of lading - Adesanya case - The principle in that case - Is that a person who is not a party to a contract of carriage of goods evidenced by a bill of lading - Cannot sue in reliance on that bill.*

DEMURRER - *Irregular procedure - Taking of evidence - Any procedure adopted which involved the taking or assessing of evidence - Would be irregular*

DEMURRER - *Pleading - Documents that are pleaded - If exhibited to make them part of the pleading for the purpose of demurrer proceeding - That approach would radically change the demurrer principle - Of relying on the statement of claim alone*

DEMURRER - *Principle of - A defendant is neither permitted to file a Statement of defence nor to tender evidence - He is taken to have accepted all the facts pleaded by the plaintiff - But rely on some point of law*

LOCUS STANDI - *Demurrer application - Carriage by sea - Bill of lading - Where the averment in the statement of claim shows that the plaintiff has a right to sue on the bill of lading - And that the defendants failed to meet the claims of the plaintiff - The plaintiff has locus standi to sue - And the demurrer proceeding ought to fail*

LOCUS STANDI - *Demurrer - Bill of lading - Property in the goods - Where the property in the goods has not passed to a third party - The plaintiff has locus standi*

PLEADINGS - *Document - Evidence - When a document is Pleaded it forms part of the pleading - And the document will be tendered as the evidence in proof of those facts.*

WORDS & PHRASES - *"Indorsement in blank" - And "Indorsement in full" - What they mean*

FACTS

In the Federal High Court, Port Harcourt, the plaintiff respondent filed a suit against the 1st defendant/appellant and 2nd defendant/respondent claiming the sum of N2,160, 820.00. In 1991 the plaintiff purchased some quantities of Icelandic fish heads from its customers in Iceland. Upon two bills of lading made in Iceland (NO. C. 116 of 24 April 1991 and NO. C.416 of 29 May 1991) the 1st defendant undertook the shipment of the said fish heads clear on board on behalf of the plaintiff to the port of delivery in Port Harcourt. The fish heads were covered by the Insurance Policy of the 2nd defendant against all risks, losses or damages. The fish heads were examined before shipment and a certificate of clearance in accordance with import requirements of the Federal Government of Nigeria was issued. When eventually the two ships carrying the fish heads landed at Port Harcourt, the fish heads were placed under Bad order list at the port. The plaintiffs and the defendants as well as the Ministry of Health Rivers State were aware of the losses and damages to the goods. The 1st defendant issued a discrepancy certificate to the plaintiff covering those losses for each bill of lading. The defendants have failed to meet the repeated claims of the plaintiff, hence the action.

The 2nd defendant filed a statement of defence in response to the statement of claim. The 1st defendant has not filed one. Instead the 1st defendant by way of demurrer made an application for an order to dismiss or strike out the suit as against it. The grounds for this are that

"the plaintiffs not having been named as either the consignee or endorsee of the relevant Bills of lading on which their claim herein is based, and (or if so named, having endorsed the same to another party, has no locus standi to institute and/or maintain this action as presently constituted". It went further to attach copies of the two bills of lading pleaded by the plaintiff to the motion on notice as exhibits FA1 and FA2. Exhibits FA1 and FA2 were endorsed to the plaintiff. On the front of the exhibits there is another endorsement by Ngo West Africa Ltd but without the appropriate words in order to qualify as an indorsement in full.

The learned trial judge in a considered ruling held that he was entitled to look at the bills of lading in a demurrer proceeding since they were pleaded in the statement of claim: that the said bills showed that Ngo West Africa Ltd. was the last indorsee; and that by such indorsement the plaintiff ceased to have the locus standi to sue on the bills of lading. He concluded that in the circumstances the proper order was that of dismissal and accordingly he dismissed the suit. The appeal against that ruling was allowed by the Court of Appeal with an order that the 1st defendant answer the statement of claim. The 1st defendant has now appealed to the Supreme Court raising six issues.

ISSUES FOR DETERMINATION

"1. Was it open to the Lower Court to abandon all the 1st Respondent's issues (who were the Appellants before them) as formulated and adopt the Appellant's issue or formulate its own issue for determination in the Appeal when such an issue did not arise from any of the grounds of Appeal filed before them and then to determine the appeal on that singular issue while abandoning all the other issues before it? (Ground 7).

2. Alternatively, was the 1st Respondent in these proceedings still entitled to sue on the Bills of Lading Contract under the provisions of Section 375(1) of Merchant shipping Act, Cap.224 when it was clear on the evidence before the Court that they had re-endorsed the Bills to 3rd parties thereby divesting them of title to the goods and the rights to sue? (Grounds 1 & 3) Etc., see p. 2430

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

Issues - Duty to make pronouncement on all issues

1. It is no longer in doubt that this court demands of, and admonishes, the lower courts to pronounce, as a general rule, on all issues properly placed before them for determination in order, apart from the issue of fair hearing, not to risk the possibility that the only issue or issues decided by them could be faulted on appeal. It has made this clear in its observations in several cases including Oyediran v. Anise (1970) 1 ALL NLR 313 at 317. (p. 2434 C)

Issues - When the court may not pronounce on all the issues

2. The obvious exceptions are when an order for a retrial is necessary or the judgment is considered a nullity, in which case there may be no need to pronounce on all the issues which could arise at the retrial or in a fresh action, as the case may be. The point was made in regard to a case for a retrial by Nnaemeka-Agu JSC in Sanusi v. Ameyogun (1992) 4 NWLR (pt. 237) 527 at 550-551. (p. 2434 F)

Ground of appeal - Issues

3. The lower court would have acted in error if it had countenanced those issues not based on any ground of appeal: see African Petroleum Ltd v. Owodunni (1991) 8 NWLR (pt. 210) 391. (p. 2435 F)

Issues - Abstract issues

4. These are abstract issues, the answers to which can only be general and will not necessarily lead to a definite resolution of the complaints against the decision in question. They are indeed, of no use in regard to the appeal: see Buraimoh v. Bamgbose (1989) 3 NWLR (pt. 109) 352 at 361. (p. 2434 H)

Carriage of goods - Carriage by sea

5. The case of Adesanya states the principle that a person who is not a party to a contract of carriage of goods evidenced by a bill of lading

cannot sue in reliance on that bill. The lower court did not decide this case contrary to that principle. Nor did that court hold contrary to Lawal v. G.B.O. and B.G.C.C. v. C.M.I.S. that a document pleaded does form part of the pleading. (p. 2438 G)

B

Pleadings - Document

6. I do not have any doubt that when a document is pleaded it forms part of the pleading. Certainly a document is pleaded in order that it may be used to support facts relied on by the pleader. The existence of such document is thereby pleaded as a fact. The contents thereof are facts and are pleaded as such. The document will then at the appropriate time in the proceedings be tendered as the evidence in proof of those facts. (p. 2439 D)

D

Demurrer - Pleading - Documents that are pleaded

7. Neither Adesanya nor B.G.C.C. v. C.M.I.S. nor Lawal v. G.B.O. in which evidence was taken at the trial went as far as to suggest that such documents that are pleaded could be attached to the pleading directly or by affidavit or that they may be exhibited by whatever means to make them part of the pleading. It seems to me that if that is done for the purpose of demurrer proceeding, that would be introducing evidence in order to decide it rather than basing it only on the facts pleaded in the statement of claim. The principle is that only those facts as pleaded should be considered at that stage on the assumption that they are accepted by the defendant as true but that in spite of those facts the plaintiff's case should be terminated in limine on some legal or equitable ground as not maintainable on those facts. Any other approach would, in my view, radically change the principle as to demurrer which is firmly laid down by this court. I think to that extent the procedure allowed in Seatrade v. Fiogret (supra) by the Court of Appeal cannot stand in the face of the decisions of this court. It seems to me erroneous. (p. 2439 G)

Demurrer - Principle of

8. In a demurrer proceeding, a defendant is neither permitted to file a

statement of defence nor to rely on it, neither is he to tender evidence. He is taken to have accepted all the facts pleaded by the plaintiff as established but rely on some point of law: see Fadare v. Attorney-General of Oyo State (1982) 4 S.C. 1; Federal Capital Development Authority v. Naibi (1990) 3 NWLR (pt. 138) 270 at 281. In essence, in a demurrer B proceeding, the rule enjoins a defendant to accept all the relevant averments of facts by a plaintiff for the purpose of the demurrer but gives him the right to contend that notwithstanding those facts, some legal or equitable issue or consequence denies the plaintiff a hearing or the reliefs C he seeks although no evidence to back that contention is permissible. This contention may be as to jurisdiction of the court, locus standi of the plaintiff or limitation of action as the case may be. (p. 2440 C)

Demurrer - Irregular procedure D

9. It seems to me, therefore, that any procedure adopted which involved the taking or assessing of evidence, whether documentary or oral, would be outside the procedure for demurrer and accordingly would be irregular. (p. 2441 B) E

Locus standi - Demurrer application

10. For the purposes of this appeal, the relevant averments of the statement of claim are in paras. 4, 8, 12, 13, 14, 15 and 15 and 16 F

The facts averred in these paragraphs would be deemed to have been accepted as true by the appellant in the demurrer proceeding. Those facts support the claim that the goods shipped as per the bills of lading belonged to the respondent; that the said bills were duly indorsed to the respondent under a contract which made it possible for the property in G the goods to pass to the respondent; that the goods landed at the port of delivery and were cleared; that the respondent and the appellant as well as the Ministry of Health Rivers State were aware of the losses and damages to the goods; that the appellant issued a Discrepancy Certificate to H the respondent covering those losses and damages for each bill of lading; that the defendants failed to meet the claims of the respondent. The simple questions would be, upon these facts, would the respondent have

locus standi to sue? and that the demurrer proceeding ought to fail? The obvious answers are in the affirmative. (p. 2441 C/2442 B)

Bill of lading - Locus standi - Demurrer

- B 11. It would be quite a different situation if in the statement of claim the facts contained in a bill of lading were sufficiently pleaded and those facts showed that a plaintiff effectively divested himself of the right to sue on the bill of lading or of the property in the goods consigned therein. It would then be legitimate and appropriate for a defendant to demur on C the locus standi of the plaintiff to sue for damages either in negligence or contract based on the bill of lading, or on whether he has a cause of action. (p. 2442 E)

D ***Demurrer - Good defence***

12. Where the procedure allows a plaintiff to demur upon a plea made by a defendant as to the contents and history of a bill of lading as to the indorsement, to whom and for what consideration etc, he can also rely E on demurrer procedure as to whether a good defence has been disclosed. The cases of Smurthwaite v. Wilkins (1862) 142 E.R. 1026; Lewis v. Mckee (1866) L.R. 2 Ex.37 and other like cases are good examples. (p. 2442 G)

F ***Words & Phrases - Indorsement in blank***

13. It is recognized that there are two known ways of indorsing a bill of lading. An indorsement is effected either by the shipper or consignee writing his name on the back of the bill of lading which is called an G "indorsement in blank", or by his writing on it "Deliver to 1 (or order) F" which is called an "Indorsement in full." In Adesanya v. Leigh Hoegh (Supra) at page 340 the following is recorded inter alia:

H *"Indorsement is effected either by the shipper or consignee writing his name on the back of the bill of lading, which is called an 'indorsement in blank', or by his writing 'deliver to 1 (or order), F', which is called an 'indorsement in full.' (p. 2443 F)*

Bills of lading - Indorsement - Stamp of a third party

14. When one looks at the bills of lading in this case (exhibits FA 1 and FA 2) it will be discovered that there is an indorsement in blank through the shipper merely writing its name on the back of the bills. That is one of the two ways of indorsing a bill of lading. It was a proper indorsement. B Then on the front of the said exhibits is indorsed by the consignee (i.e. First Bank of Nigeria Ltd.) in fully by saying "Deliver to the Order of E.I. Onwadike & Co. Ltd." (i.e. the respondent. That is the other known method of indorsing a bill. That was also a proper indorsement of the exhibits. Further, there is the stamp of Ngo West Africa Ltd. On the C front of the exhibits with the word "Received" simply written near it. Ngo West Africa Ltd. is not shown to be a shipper or consignee. Even if it was, the stamp is not on the back of the bills of lading to qualify as an indorsement in blank. Again, since the stamp is on the front of the bills, D it is not accompanied with the usual "Deliver to the order of" or words to that effect in order to qualify as an indorsement in full. Therefore, ex facie, it cannot be concluded or even assumed that Ngo West Africa Ltd. is an indorsee of the bills. (p. 2444 D) E

Bill of lading - Indorsement simpliciter

15. The obvious implication of the mere indorsement of a bill of lading is that a court should be slow to reach a decision in line as to what the result F or consequence of that indorsement is. Such an indorsement without more cannot lead inexorably to a conclusion that property in the goods has thereby passed to the indorsee or that the consignee or indorser has ceased to have a right to institute action upon the bill of lading. It may be G necessary to examine the pleadings to see what indeed might have transpired between the parties particularly if there are admissions that could clearly indicate that; or it may be expedient or even requisite that evidence be allowed to guide the course of event. The intention of the parties may be quite crucial. (p. 2445 D) H

Bill of lading - Property in the goods

16. The property in the goods passes not by the mere assignment and

delivery of the bill of lading but by the contract between the assignor and the assignee, or otherwise between the consignor and consignee, or indorser and indorsee by which it is intended that the property should pass. As to this, there can be no doubt, and this has been accepted by this court as a correct statement of principle: see Chacharos v. Ekimpex Ltd (1988) 1 NSCC (vol. 19, pt. 1) 65 at page 86. It is a principle that has stood for about two centuries: See Newsom v. Thornton (supra) (p. 2446 G)

Demurrer - Where property has not passed to a third party

C 17. I have no doubt therefore that the Court of Appeal was right when, after citing s. 375(1) provision, it took the same position in Nigerbras Shipping Line Ltd. v. Aluminium Extrusion Industries Ltd. (1994) 4 NWLR (pt. 341) 733 which would appear to be the latest authority on the matter.

D The lower court relied on that authority in the present case and I think it was certainly proper for it to do so. It then follows from all the principles of law enunciated above that the appellant's counsel in the present case could not possibly be right to argue, as he did at the stage of the proceedings in the trial court in reliance on the bills of lading, exhibits

E FA1 and FA2, upon a demurrer, that the plaintiff lacked locus standi. He would by that be urging a conclusion that property in the goods had passed to Ngo West Africa Ltd. even if it were to be conceded that the bills were indorsed by the plaintiff to that company. That cannot be a

F valid conclusion, not even an acceptable presumption upon the available facts. I therefore find no hesitation in holding that there is no merit in this appeal. (p. 2447 E)

G NOTABLE POINTS OF INTEREST

UWAIFO.JSC

1. Effect of failure to make pronouncement on all issues

Failure to do so may lead to a miscarriage of justice and certainly will

H have that result if the issues not pronounced upon are crucial. Consequently there could be avoidable delay since it may become necessary to send the case back to the lower court for those issues to be resolved.

(p. 2434 E)

2. English practice and procedure as to document referred to in a pleading

These matters are not entertained on inadequate pleading requiring evidence; certainly not under our procedure. But even under the English practice and procedure, if a document is referred to in a pleading and neither its effect is stated nor its precise words set out, it cannot be read without consent on a summons or motion for judgment or on a motion to strike out a statement of claim as not disclosing any reasonable cause of action. The cases of Howard v. Hill (1887) W.N. 193. (p. 2443 A)

REPRESENTATION

Femi Atoyebi Esq., for the appellant.
Respondents not represented.

CASES REFERRED TO

Smurthwaite v. Wilkins (1862) 142 E.R. 1026
Lewis v. McKee (1866) L.R. 2 Ex.37
Howard v. Hill (1887) W.N. 193
Williamson v. L. & N.W. Railway (1879) 12 Ch.D. 787
Smith v. Buchan (1888) 36 W.R. 631
Newsom v. Thornton (1805) 102 E.R. 1189
Chacharos v. Ekimpex Ltd (1988) 1 NSCC (vol. 19, pt. 1) 65 at page 86
Nigerbras Shipping Line Ltd. v. Aluminium Extrusion Industries Ltd. (1994) 4 NWLR (pt. 341) 733
F. I. Onwadike & Co. Ltd. v. Brawal Shipping (Nig) Ltd (1996) 1 NWLR (pt. 422) 65
Onifade v. Olayiwola (1990) 7 NWLR (pt. 161) 130

STATUTES REFERRED TO

Evidence Act, S. 131 (now S. 132).
Bill of lading Act 1855 of England; S I.
Merchant Shipping Act, Cap. 224,
Laws of the Federation, 1990; S. 375 (1)

LEAD JUDGMENT BY UWAIFO JSC

The appellant is the 1st defendant against whom, along with the 2nd defendant, a claim of N2,160,820.00 is made in this suit which was instituted in the Federal High Court, Port Harcourt. The statement of claim shows that in 1991, the plaintiff (now 1st respondent) purchased some quantities of Icelandic fish heads from its customers in Iceland. Upon two bills of lading made in Iceland [No. C. 116 of 24 April, 1991 and No. C 416 of 29 May, 1991] the 1st defendant undertook the shipment of the said fish heads clear on board on behalf of the plaintiff to the port of delivery in Port Harcourt. The fish heads were covered by the Insurance Policy of the 2nd defendant against all risks, losses or damages. The fish heads were examined before shipment and a certificate of clearance in accordance with import requirements of the Federal Government of Nigeria was issued.

When eventually the two ships carrying the fish heads landed at the port in Port Harcourt on 8 June, 1991 and 2 July, 1991 respectively, the fish heads were placed under Bad Order List at the port. The reason was that some of them were found to be wet, some rotten and some missing through pilferage as some of the containers landed without their seals. The losses and damages occurred while the goods were in the 1st defendant's custody. All these facts are as pleaded in the statement of claim filed on 15 October, 1992.

The 2nd defendant has since November 1, 1992 filed a statement of defence in response to the statement of claim. The 1st defendant has not filed one. Instead, on 14 January, 1993, the 1st defendant made an application for an order to dismiss or strike out the suit as against it. The grounds for this are that "the plaintiffs not having been named as either the consignee or endorsee of the relevant Bills of Lading on which their claim herein is based, and/or if so named, having endorsed the same to another party, has no locus standi to institute and/or maintain this action as presently constituted", and therefore by taking this course the 1st defendant came by way of demurrer. It went further to attach copies of the two bills of lading pleaded by the plaintiff to the motion on notice as exhibits FA 1 and FA 2.

At the hearing of the application, learned counsel for the 1st defendant relied on the bills of exchange and made copious analysis of them to argue that the plaintiff not being the last indorsee of the said bills, could not sue on them. I consider it helpful to recite the relevant portion of the submission by him as recorded by the learned trial judge (Ojutalayo, B J.) verbatim as follows:

"Learned counsel here took pains to analyses the two Bills of Lading in great details to show that the shippers or consignors are 'Norfish Ltd.' of Iceland; that the goods were consigned to the Order of 'Order' that is, not consigned to anybody in particular. He also showed the 'endorsement in blank' by the shippers at the back of the bills which also shows that the endorsement was to nobody in particular. He further directed the attention of the court to the endorsement on top of the Bills of Lading - 'NOT TO BE RELEASED UNLESS ENDORSED BY FIRST BANK OF NIGERIA' and the endorsement of the Bills of Lading by First Bank to the plaintiff who is also the 'Notify Party' in the two Bills But, plaintiff endorsed the Bills 'in blank', that is, also to nobody in particular. But under the endorsement there is another endorsement by Ngo West Africa Ltd. By this endorsement Ngo West Africa Ltd. became the holder and the last endorsee. It was therefore counsel's contention that by endorsing the Bills of Lading to Ngo West Africa Ltd., plaintiff has divested themselves of any right of action based on the Bills of Land- ing."

Learned counsel for the plaintiff submitted, among other things, that under the procedure adopted by the 1st defendant, he was deemed to have admitted the relevant paragraphs 4 and 8 of the statement of claim showing the plaintiff to be the purchaser and consignee of the goods in the bills of lading and also that it was the last indorsee of the said bills; that except in the case of 'indorsement in blank', the words 'deliver to' are necessary in all other kinds of indorsement to effect transfer of property in the goods; that the plaintiff having paid all the amount required to be paid on the bills to the First Bank whereupon the said bank indorsed the bills to it, acquired the right to sue on them; and that the mere stamping of the bills by Ngo West Africa Ltd. did not make it an indorsee.

On 15 April, 1993, the learned trial judge in a considered ruling held that he was entitled to look at the bills of lading in a demurrer proceeding since they were pleaded in the statement of claim; that the said bills showed that Ngo West Africa Ltd. was the last indorsee; and that by such indorsement the plaintiff ceased to have the locus standi to sue on the bills of lading. He concluded that in the circumstances the proper order was that of dismissal and accordingly he dismissed the suit. The appeal against that ruling was allowed by the Court of Appeal in a judgment given on 28 June, 1995 with an order that the 1st defendant answer the statement of claim. Against that judgment which is now reported as F. I. Onwadike & Co. Ltd. v. Brawal Shipping (Nig) Ltd (1996) 1 NWLR (pt. 422) 65, this appeal was made to this court.

The 1st defendant (hereinafter referred to as the appellant) in the present appeal filed seven grounds of appeal from which it raised the following issues for determination:

"1. Was it open to the Lower Court to abandon all the 1st Respondent's issues (who were the Appellants before them) as formulated and adopt the Appellant's issue or formulate its own issue for determination in the Appeal when such an issue did not arise from any of the grounds of Appeal filed before them and then to determine the appeal on that singular issue while abandoning all the other issues before it? (Ground 7).

2. Alternatively, was the 1st Respondent in these proceedings still entitled to sue on the Bills of Lading Contract under the provisions of Section 375(1) of Merchant shipping Act, Cap.224 when it was clear on the evidence before the Court that they had re-endorsed the Bills to 3rd parties thereby divesting them of title to the goods and the rights to sue? (Grounds 1 & 3)

3. Was it open to the Lower Court to refuse the Appellant's demurrer application and order trial when the said Appellant had a clear legal and/or equitable defence to the 1st Respondent's claim? (Ground 2).

4. Even after resolving the only issue it adopted in the 1st respondent's favour, was it not duty-bound to pronounce on all the other

issues properly raised before it? (Ground 4).

5. *Was it open to the Lower Court to refuse to follow the various decisions of this Honourable Court in the cases of:*

ADESANYA v LEIGH HOEGH (1968) ANLR, LAWAL v GBO (1972) ANLR 218, and BGSS v CMIS (1962) ANLR 565,

by reason of which there has been a miscarriage of justice resulting in an over-turning of the decision of the Court of first instance given in Appellant's favour; (Ground 5)

6. *Was it open to the Lower Court to refuse to follow its earlier decision in the Seatrade's case and to adopt their latter conflicting decision and thereby either expressly or by necessary implication over-rule itself? (Ground 6)."*

The plaintiff/respondent (to whom I shall refer as respondent) did not file a brief of argument nor was it represented at the hearing of the appeal. The appeal was heard on the appellant's brief of argument alone and the oral submissions of appellant's counsel.

The substance of the argument in support of issue 1 is that the lower court determined the respondent's appeal not on any of the five issues submitted to it by the respondent based on the five grounds of appeal filed but on only one of the six issues formulated by the present appellant. As there was no cross-appeal filed, those six issues must, to be valid, relate to the grounds of appeal before the lower court as decided in several cases including Nzekwu v. Nzekwu (1989) 2 NWLR (pt. 104) 373; Onifade v. Olayiwola (1990) 7 NWLR (pt. 161) 130; Momodu v. Momoh (1991) 1 NWLR (PT. 169) 608. It has been submitted that the only issue on which the judgment was based was not encompassed by any ground of appeal before that court. In other words, it was formulated in error by the present appellant as respondent as admitted and argued by appellant's counsel before us. It is therefore contended that the lower court should have discountenanced the issue and if that had been done the decision of the trial court would not have been overturned. This court is now urged to set aside the lower court's judgment on the basis that it was reached upon an invalid issue.

The issue in question upon which the judgment of the lower

court was reached was couched thus:

"Does a claimant who was shown as either the consignee or endorsee under a Bill of Lading contract still have locus standi to sue a carrier (shipowner) after it has further endorsed the said Bill of Lading to a 3rd party under the provisions of the Merchant Shipping Act Cap 224, Laws of the Federation of Nigeria 1990 which is a verbatim re-enactment of the English Bills of Lading Act, 1855?"

This issue presupposes that there has been an indorsement of the bills of lading in this case to a third party by the respondent and that such indorsment ipso facto deprived the respondent of the locus standi to sue on the bills.

It seems to me that the present appellant took into account grounds 1 and 2 of the grounds of appeal before the lower court when it decided to frame the issue in question. The said ground 1 which, admittedly, one may justifiably say is a bit clumsy reads as follows:

"The learned Federal High Court Judge erred in law when he held in his Ruling that no extrinsic evidence will therefore be allowed to alter, vary or modify the terms of the Bills of Lading.

PARTICULARS OF ERROR

(a) The learned Judge at the Court below held as stated above following the submission of the counsel for the 1st defendant/applicant relying on section 131 of the Evidence Act.

(b) However section 131(1) of the Evidence Act provides that any of the following matters may be proved by oral evidence even though the agreement or other relationship between the parties has been incorporated into a document as in this case the Bills of Lading. This section states as follows:

'Fraud, intimidation, illegality; want of due execution; the fact that it is wrongly dated; existence, or want or failure, of consideration; mistake in fact or law; want of capacity in any contracting party, or the capacity in which a contracting party, acted when it is not inconsistent with the terms of the contract; or any other matter which, if proved, would produce any effect upon the validity of any document, or of any part of it, or which would entitle any person to any judgment, decree, or

order relating thereto.'

Thus the capacity in which Ngo (W.A.) Limited acted when it impressed its stamp on the Bills of Lading could be proved if evidence were to be given during the hearing of the merits of the case.

Consequently when the learned trial Federal High Court judge was informed that Ngo (W.A.) Limited was the agent of the plaintiff and knowing that a Bill of Lading endorsed especially to an agent of the endorsee for some special assignment for the endorsee does not extinguish his rights and liabilities thereunder including his rights of action, the learned trial Judge ought to have ordered the 1st defendant to answer to the plaintiff's allegation when the issue of Ngo (W.A.) Limited would come out and plaintiff would have the opportunity to plead the capacity in which Ngo (W.A.) Limited acted under the Bills of Lading. Had this been done the plaintiff would not lose his rights to sue under the Bills of Lading as they stands. (sic)"

Ground 2 is similarly based on the relevant provision of section 131 (now section 132) of the Evidence Act and both that ground and ground 1 cover rather identical complaint.

I think the ground of appeal just reproduced seeks to contend that an indorsement of a bill of lading to a third party by a consignee or an indorsee does not automatically defeat the right of such consignee or indorsee to sue on it. It depends, for instance, on the capacity in which that third party receives the bills, and this would require extrinsic evidence contrary to what the learned trial judge held. In the same manner the issue framed from that ground by the present appellant requires an answer whether or not such mere indorsement passes property in the goods. I am satisfied that both grounds 1 and 2 of the grounds of appeal and the issue based on them are to the same end. Therefore I hold that the issue did arise from those grounds of appeal.

In fairness to learned counsel for the present appellant in this court, he probably saw the likely correlation between those grounds of appeal and the issue in question that he decided to frame issue 2 in the alternative to issue 1. Before I discuss issue 2 which I think could conveniently be taken along with issue 3, I shall first take issue 4, then issues

5 and 6. In respect of issue 4, the appellant argues in the brief of argument as follows:

"Assuming but without conceding that the lower court was right in deciding the appeal on a singular issue as they did, it is the appellants' humble submission that it was duty bound to pronounce on all the other issues properly raised before it so that if this court holds that it was wrong, it would have had the benefit of their opinions on the other issues. Regrettably, they did not do this. It is trite law that the Court of Appeal not being the final appellate court has a duty to pronounce on all issues properly raised before it."

It is no longer in doubt that this court demands of, and admonishes, the lower courts to pronounce, as a general rule, on all issues properly placed before them for determination in order, apart from the issue of fair hearing, not to risk the possibility that the only issue or issues decided by them could be faulted on appeal. It has made this clear in its observations in several cases including Oyediran v. Anise (1970) 1 ALL NLR 313 at 317; Ojobue v. Nnubia (1972) 6 SC 27; Atanda v. Ajani (1989) 3 NWLT (pt. 111) 511 at 539; Okonji v. Njakanma (1991) 7 NWLR (pt. 202) 131 at 150, 151, 152; Titiloye v. Olupo (1991) 7 NWLR (pt. 205) 519 at 529; Katto v. Central Bank of Nigeria (1991) 9 NWLR (pt. 214) 126 at 149.

Failure to do so may lead to a miscarriage of justice and certainly will have that result if the issues not pronounced upon are crucial. Consequently there could be avoidable delay since it may become necessary to send the case back to the lower court for those issues to be resolved. The obvious exceptions are when an order for a retrial is necessary or the judgment is considered a nullity, in which case there may be no need to pronounce on all the issues which could arise at the retrial or in a fresh action, as the case may be. The point was made in regard to a case for a retrial by Nnaemeka-Agu JSC in Sanusi v. Ameyogun (1992) 4 NWLR (pt. 237) 527 at 550-551. The rationale behind the duty to make a pronouncement on issues raised is similar to that where in cases in which damages are to be assessed, the trial court should always do so even if it considers the action fails, or even if its

decision in the action was against the party claiming damages. This will save the need to send the case back for assessment of damages in the event of the action succeeding on appeal: See Yakassai v. Messrs Incar Motors Ltd (1975) 5 S.C. 107 at 115-116; International Textile Industries (Nig.) Ltd. v. Aderemi (1999) 8 NWLR (pt. 614) 268 at 301. If, of course, the action fails also on appeal the failure of the lower court to make an assessment of damages though amounting to a breach of the laid down principle will not attract a serious complaint of an error of a reversible nature.

In the present case, the complaint of the appellant against the failure of the lower court to consider all the issues placed before it, as I understand it, is in two arms, namely (1) failure to consider the issues placed before it by the 1st respondent who was the appellant in that court and (2) failure to consider the remaining issues raised by the present appellant who was the 1st respondent in that court. As to the first arm, the appellant cannot be heard to complain; it would have been the appellant in that court who could have done that if it had lost the appeal. That is obvious. As regards the second arm, the appellant framed six issues. It has argued that the first issue did not arise from any of the grounds of appeal before the lower court. I have found that that issue is related to grounds 1 and 2 of the grounds of appeal. I think the fourth issue is an adjunct to the first issue, both of which being covered by grounds 1 and 2. But the second, third, fifth and sixth issues do not relate to any ground of appeal. **The lower court would have acted in error if it had countenanced those issues not based on any ground of appeal: see African Petroleum Ltd v. Owodunni (1991) 8 NWLR (pt. 210) 391; Ogunlade v. Adeleye (1992) 8 NWLR (pt. 260) 409.**

Besides, it seems to me that those issues were framed in the abstract without being related to the facts and circumstances of this case. For instance, the second issue asks: "What is an 'endorsement' for the purposes of the said enactment (i.e. the Bill of Lading Act)?" while the sixth issue is: "Does compliance with the rules of court on demurrer particularly relating to a party's locus standi amount to technicalities?" **These are abstract issues, the answers to which can only be general**

and will not necessarily lead to a definite resolution of the complaints against the decision in question. They are indeed, of no use in regard to the appeal: see Buraimoh v. Bamgbose (1989) 3 NWLR (pt. 109) 352 at 361. Therefore, my view is that in all the circumstances, issue 4 raised in this appeal is completely without merit.

I shall take issues 5 and 6 together and from which I shall go on to the discussion of issue 2. These two issues call for an examination of B.G.S.S. v. C.M.I.S. (1962) 1 ALL NLR 565; Adesanya v. Leigh Hoegh (1968) 1 ALL NLR 333 and Lawal v. G.B.O. (1972) 1 ALL NLR (pt. 1) 207; (1972) 3 S.C. 124, to ascertain what principles they lay down as may be relevant to the present case. Learned counsel has argued that this court decided in Adesanya case that a party not named as either the consignee or indorsee of a bill of lading has no locus standi to sue thereon. As regards B.G.S.S v. CMIS and Lawal v. G.B.O. also decided by this court, his contention is that they establish that where a party refers to a document in his pleading, the document is deemed to have become part of the pleading and it is open to the court to examine the document and determine the rights of the parties irrespective of the words used to indicate such effect in the pleading. Based on that submission, learned counsel referred to Seatrade v. Fiogret (1987 -90) 3 NSC 453, a decision of the Court of Appeal which he said followed B.G.S.S. v. C.M.I.S. and Lawal v. G. B. O., and argued that the lower court in the present case was bound by its earlier decision in the Seatrade case.

In Seatrade v. Fiogret (supra), the plaintiff instituted an action against four defendants in reliance on a bill of lading. Thereafter the statement of claim was filed in which the bill of lading was pleaded. The bill of lading was said to be in pursuance of a contract the plaintiff entered into with the defendants in which they undertook to transport from Norway by ship to the plaintiff in Nigeria frozen fish and to ensure the safe arrival of the same in good condition. The larger bulk of the fish arrived in Nigeria in a damaged and decomposed condition, and was thoroughly unfit for human consumption. The defendants filed no statement of defence but proceeded by demurrer upon a motion on notice for an order to strike out or dismiss the action on the grounds that the plain-

tiff had no locus standi, not being a party to the contract evidenced by the bill of lading on which he based his suit, and also "striking out the 2nd-4th defendants' names from the suit on the grounds that the said defendants are not proper parties to this action and/or that the statement of claim discloses no cause of action against the said defendants." The B defendants attached a copy of the bill of lading pleaded by the plaintiff to their motion on notice. The bill of lading showed the plaintiff as a mere "notify party."

The Court of Appeal cited Day v. Williams Hill (Park Lane) Ltd. C (1949) 1 ALL ER 219 where Singleton L.J. said at page 221 that, "It should be clear that, if documents are referred to in a pleading, they become part of the pleading, and it is open to the court to look at them without the need of an affidavit exhibiting them." It also cited B.G.C.C. v. C.M.I.S. (supra) and Lawal v. G.B.O. (supra). In S.G.C.C v. C.M.I.S., D reported also as B.G.C.C. v. Spetsai (No.2) (1962) 2 SCNLR 310, what Brett FJ. at pages 315-316 said was: "As the agreement of the 26th October, 1961, was in writing the reference to it makes it part of the pleading: Day v. Williams Hill (Park Lane), (1949) 1 K.B. 632, and it was E produced in evidence." (Emphasis mine). Lawal v. G.B.O. at page 213 cited B.G.C.C. v. CMIS (Spetsai) (1962) 1 ALL NLR 570 and said:

"there is a statement of principle in the headnote with which we respectfully agree that:

'if an agreement in writing is referred to in a pleading it becomes F part of the pleading, and it is open to the court to give the agreement its true legal effect irrespective of the terms used in the pleading to indicate such effect.'

The emphasis here, it must be noted, is that the agreement in writing must G be referred to in the pleadings, not in any other document pleaded."

The case of Adesanya v. Leigh Hoegh & Co. (1968) 1 ALL NLR 333 which the appellant's counsel contends the court below failed to follow is on the question that a party who is not named in a bill of lading H and the bill is not indorsed to him cannot base an action on such bill of lading as he will lack the locus standi to sue upon it. The case was cited at page 463 of Seatrade v. Fiogret and the observation of this court at

pages 340-341 was quoted thus:

"The important thing was that the name of the plaintiff never appeared in the bill of lading save in regard to notification which in this respect is irrelevant and The question therefore of who had the property is not relevant to the plaintiff's suit based upon the bill of lading. The plaintiff was in no way a party to the contract of carriage of goods, but he was a party, if at all, to a separate contract with the sellers, and argument of his counsel has confused the two. In so far as the bill of lading was concerned, therefore, the plaintiff has no locus standi to sue upon it."

The appellant's counsel has argued that the lower court was bound by B.G.C.C. v. C.M.I.C., Adesanya v. Leigh Hoegh, Lawal v. G.B.O. and Seatrade v. Fiogret but failed to follow them. There is no doubt that the lower court was bound by the Supreme Court cases referred to and its own earlier decision in Seatrade. But there is nothing to show from the judgment of the lower court that it did not feel bound by those decisions. The decision in Seatrade upon the facts is that the plaintiff being not named in the bill of lading and was not an indorsee of it could not sue upon it. In the present case the court below held that there was nothing to show that property in the goods did pass from the respondent to Ngo West Africa Limited and therefore the respondent could sue upon the bill of lading in respect of those goods, relying as its own decision in Nigerbras Shipping Line Ltd. v. Aluminium Extrusion Industries Ltd (1994) 4 NWLR (pt. 341) 733 which is not in conflict with Seatrade on the facts because the plaintiff there was a mere "notify party" whereas in Nigerbras the issue was whether indorsement Simpliciter of a bill of lading passed property in the goods from the indorser who was the plaintiff. The question that can arise is whether the principle stated in that case it relied on was correct. I shall come back to that. **The case of Adesanya states the principle that a person who is not a party to a contract of carriage of goods evidenced by a bill of lading cannot sue in reliance on that bill. The lower court did not decide this case contrary to that principle. Nor did that court hold contrary to Lawal v. G.B.O. and B.G.C.C. v. C.M.I.S. that a document pleaded does form part of the**

pleading. I therefore find no merit in issues 5 and 6.

It is now left for me to consider issues 2 and 3. I shall set them out here again and discuss them together. They read:

"2. was the 1st respondent in these proceedings still entitled to sue on the Bills of Lading Contract under the provisions of section 375(1) of Merchant Shipping Act, Cap. 224 when it was clear on the evidence before the court that they had re-endorsed the said Bills to 3rd parties thereby divesting them of title to the goods and the right to sue?"

3. Was it open to the lower court to refuse the appellant's demurrer application and order trial when the said appellant had a clear legal and/or equitable defence to the 1st respondent's claim?"

I find it convenient to start with issue 3. That immediately leads inquiry into whether a demurrer was appropriate in the circumstances of this case.

I do not have any doubt that when a document is pleaded it forms part of the pleading. Certainly a document is pleaded in order that it may be used to support facts relied on by the pleader. The existence of such document is thereby pleaded as a fact. The contents thereof are facts and are pleaded as such. The document will then at the appropriate time in the proceedings be tendered as the evidence in proof of those facts. Indeed, Brett FJ in B.G.C.C. v. Spetsai (No. 2) (supra) at pages 315-316 in citing Day v. Williams Hill to the effect that the agreement in writing pleaded in that case made it part of the pleading added "and it was produced in evidence." It is not part of our procedure as it is in England to attach documents pleaded to the statement of claim so as to make them possible to be read at once along with the pleading as was certainly the case in Day v. Williams Hill. **Neither Adesanya nor B.G.C.C. v. C.M.I.S nor Lawal v. G.B.O. in which evidence was taken at the trial went as far as to suggest that such documents that are pleaded could be attached to the pleading directly or by affidavit or that they may be exhibited by whatever means to make them part of the pleading.**

It seems to me that if that is done for the purpose of de-

murrer proceeding, that would be introducing evidence in order to decide it rather than basing it only on the facts pleaded in the statement of claim. The principle is that only those facts as pleaded should be considered at that stage on the assumption that they are accepted by the defendant as true but that in spite of those facts the plaintiff's case should be terminated in limine on some legal or equitable ground as not maintainable on those facts. Any other approach would, in my view, radically change the principle as to demurrer which is firmly laid down by this court. I think to that extent the procedure allowed in Seatrade v. Fiogret (supra) by the Court of Appeal cannot stand in the face of the decisions of this court. It seems to me erroneous.

In a demurrer proceeding, a defendant is neither permitted to file a statement of defence nor to rely on it, neither is he to tender evidence. He is taken to have accepted all the facts pleaded by the plaintiff as established but rely on some point of law: see Fadare v. Attorney-General of Oyo State (1982) 4 S.C. 1; Federal Capital Development Authority v. Naibi (1990) 3 NWLR (pt. 138) 270 at 281. In essence, in a demurrer proceeding, the rule enjoins a defendant to accept all the relevant averments of facts by a plaintiff for the purpose of the demurrer but gives him the right to contend that notwithstanding those facts, some legal or equitable issue or consequence denies the plaintiff a hearing or the reliefs he seeks although no evidence to back that contention is permissible. This contention may be as to jurisdiction of the court, locus standi of the plaintiff or limitation of action as the case may be. Recently, in Williams v. Williams (1995) 2 NWLR (pt. 375) 1 at 17, a clear statement on the principle of demurrer was made per Iguh JSC as follows:

"It is trite law that whenever a demurrer is raised before trial, a defendant shall be taken as having admitted all the allegations of fact contained in the plaintiff's claim, and accordingly, no evidence respecting matters of fact shall be allowed. Where a plaintiff's statement of claim or, indeed a petition does not ex facie disclose a cause of action so that even if all the allegations of fact therein averred are established,

such a plaintiff or petitioner would still not be entitled to the relief sought, the defendant will be perfectly entitled to move the court to have the case dismissed without any answer on questions of fact from the defendant or respondent. This procedure, it must be emphasized, is only available where from the facts (averred in the statement of claim) before the court, there is a good legal or equitable defence to the action." (Emphasis and parenthesis mine)

It seems to me, therefore, that any procedure adopted which involved the taking or assessing of evidence, whether documentary or oral, would be outside the procedure for demurrer and accordingly would be irregular. For the purposes of this appeal, the relevant averments of the statement of claim are in paras. 4, 8, 12, 13, 14, 15 and 15 and 16 as follows:

"4. The plaintiff in 1991 purchased some quantities of Icelandic fish heads from its customers in iceland as contained in the proforma invoice of 15th January, 1991. Under this Bills of Lading made in Iceland No. C 116 of 24th April, 1991 and No. C 416 of 29th May, 1991 the 1st defendant undertook the shipment of the plaintiff's fish heads clear on board to the port of delivery in Port Harcourt of the Rivers State.

8. The shipped Bills of Lading were indorsed to the plaintiff and accordingly the property in the fish heads passed to the plaintiff for delivery to it.

12. The plaintiff informed the defendants of the loss and damage to the fish heads promptly within time on the delivery of the goods to the plaintiff at Onne Port.

13. The plaintiff and the defendants jointly engaged the services of Lloyds Agents who conducted the survey of the loss and damage to the fish heads in the two vessels and issued separate survey Reports No. LPH/C/91/c of 26th June, 1991 for Voy. 95 and No/LPH/C/91/089 of 26th July, 1991 for Voy. 92. The plaintiff will rely on these Reports at the trial.

14. The Ministry of Health, Rivers State condemned the damaged fish heads and ordered their Certificate of Condemnation/Burial. Some Photographs of the wet and damaged fish heads were taken at the

scene and the plaintiff will found on those photographs.

15. The 1st defendant issued to the plaintiff a Discrepancy Certificate covering these discrepancies for each of the two shippings.

16. Despite all that, the defendants have failed, refused or neglected to settle the plaintiff's repeated claims made to them in writing."

The facts averred in these paragraphs would be deemed to have been accepted as true by the appellant in the demurrer proceeding. Those facts support the claim that the goods shipped as per the bills of lading belonged to the respondent; that the said bills were duly indorsed to the respondent under a contract which made it possible for the property in the goods to pass to the respondent; that the goods landed at the port of delivery and were cleared; that the respondent and the appellant as well as the Ministry of Health Rivers State were aware of the losses and damages to the goods; that the appellant issued a Discrepancy Certificate to the respondent covering those losses and damages for each bill of lading; that the defendants failed to meet the claims of the respondent. The simple questions would be, upon these facts, would the respondent have locus standi to sue? and that the demurrer proceeding ought to fail? The obvious answers are in the affirmative.

It would be quite a different situation if in the statement of claim the facts contained in a bill of lading were sufficiently pleaded and those facts showed that a plaintiff effectively divested himself of the right to sue on the bill of lading or of the property in the goods consigned therein. It would then be legitimate and appropriate for a defendant to demur on the locus standi of the plaintiff to sue for damages either in negligence or contract based on the bill of lading, or on whether he has a cause of action. In the same manner, where the procedure allows a plaintiff to demur upon a plea made by a defendant as to the contents and history of a bill of lading as to the indorsement, to whom and for what consideration etc, he can also rely on demurrer procedure as to whether a good defence has been disclosed. The cases of Smurthwaite v. Wilkins (1862) 142 E.R. 1026; Lewis v. Mckee (1866) L.R. 2 Ex.37 and other

like cases are good examples. These matters are not entertained on inadequate pleading requiring evidence; certainly not under our procedure. But even under the English practice and procedure, if a document is referred to in a pleading and neither its effect is stated nor its precise words set out, it cannot be read without consent on a summons or motion for judgment or on a motion to strike out a statement of claim as not disclosing any reasonable cause of action. The cases of Howard v. Hill (1887) W.N. 193; Williamson v. L. & N.W. Railway (1879) 12 Ch.D. 787; and Smith v. Buchan (1888) 36 W.R. 631 support this. See The Supreme Court Practice 1999 vol. 1, Ord. 18/7/919, page 316. B C

However, assuming that the demurrer proceeding could be entertained so as to permit the use of, and reliance on, the bills of lading ex facie, did the appellant make out a case that the respondent lacked locus standi to sue for the loss it suffered on the basis that it no longer had any property in the goods? This lead to the further questions: was there really an indorsement on the bills of lading by the respondent to a company known as Ngo West Africa Limited whose stamp was on the said bills? If there was such an indorsement, what was the purpose or intention, and what was the effect? D E

In order to answer these questions I have to turn to the decided cases. It is pertinent to say that the relevant provision of section 1 of the Bills of Lading Act 1855 of England is the same as section 375(1) of our Merchant Shipping Act, Cap. 224, Laws of the Federation, 1990. It is therefore useful to consider some of the English cases decided as a forerunner to that Act of 1855 and those decided thereafter based on it. To begin with, **it is recognized that there are two known ways of indorsing a bill of lading. An indorsement is effected either by the shipper or consignee writing his name on the back of the bill of lading which is called an "indorsement in blank", or by his writing on it "Deliver to 1 (or order) F" which is called an "Indorsement in full."** In Adesanya v. Leigh Hoegh (Supra) at page 340 the following is recorded inter alia: F G

"Indorsement is effected either by the shipper or consignee writing his name on the back of the bill of lading, which is called an

'indorsement in blank', or by his writing 'deliver to 1 (or order), F', which is called an 'indorsement in full.'

Semble - A bill of lading which does not contain some such words as 'to order', or 'to order or assigns', or which is endorsed in full, but without such words, is a negotiable instrument."

See also Scrutton on Charterparties, 18th edn., page 181. In this regard this court in Adesanya case observed at page 339:

"The primary meaning of 'to endorse' is 'to write at the back' and whilst the requirement may sometimes have been tempered so far as it being on the reverse side is concerned we were shown no authority for a person being an endorsee without writing, unless the endorsement be in blank."

I have already shown who can indorse a bill of lading in blank.

When one looks at the bills of lading in this case (exhibits FA 1 and FA 2) it will be discovered that there is an indorsement in blank through the shipper merely writing its name on the back of the bills. That is one of the two ways of indorsing a bill of lading. It was a proper indorsement. Then on the front of the said exhibits is indorsed by the consignee (i.e. First Bank of Nigeria Ltd.) in fully by saying "Deliver to the Order of E.I. Onwadike & Co. Ltd." (i.e. the respondent. That is the other known method of indorsing a bill. That was also a proper indorsement of the exhibits. Further, there is the stamp of Ngo West Africa Ltd. On the front of the exhibits with the word "Received" simply written near it. Ngo West Africa Ltd. is not shown to be a shipper or consignee. Even if it was, the stamp is not on the back of the bills of lading to qualify as an indorsement in blank. Again, since the stamp is on the front of the bills, it is not accompanied with the usual "Deliver to the order of" or words to that effect in order to qualify as an indorsement in full. Therefore, ex facie, it cannot be concluded or even assumed that Ngo West Africa Ltd. is an indorsee of the bills.

The matter does not end there. There is a further difficulty as to the real effect of an indorsement simpliciter on a bill of lading. In Waring v. Cox (1808) 170 E. R. 989, Lord Ellenborough C. J. observed inter alia

at pages 989-900:

"No case has gone so far as to decide, that a bill of lading is transferable like a bill of exchange, and that the mere signature of the person entitled to the delivery of the goods prima facie passes the property in them to the indorsee. Much confusion has arisen from similitudinary reasoning upon this subject. There must be value upon the indorsement of a bill of lading, or no property in the goods is thereby transferred If no property passed to the indorsee, he could have no right to complain of the non-delivery or of the conversion of the goods as an injury to himself."

It was there held that the indorsement of a bill of lading, without consideration, does not transfer any property in the goods; and therefore the mere indorsement of a bill of lading by the consignee to an agent, to authorize him to stop the goods in transitu on account of his principal, will not enable such agent to maintain assumpsit or trover for the goods in his own name.

The obvious implication of the mere indorsement of a bill of lading is that a court should be slow to reach a decision in line as to what the result or consequence of that indorsement is. Such an indorsement without more cannot lead inexorably to a conclusion that property in the goods has thereby passed to the indorsee or that the consignee or indorser has ceased to have a right to institute action upon the bill of lading. It may be necessary to examine the pleadings to see what indeed might have transpired between the parties particularly if there are admissions that could clearly indicate that; or it may be expedient or even requisite that evidence be allowed to guide the course of event. The intention of the parties may be quite crucial.

In Sewell v. Burdick (1884) 10 App. Cas. 74, Earl of Selborne, L.C., said of the Bills of Lading Act, 1855:

"The statute contemplates the passing of 'the property in the goods' by the indorsement of the bill of lading, as a thing which may, or may not, happen, according to the nature and intent of the contract or dealing, for the purpose of which that indorsement is made; and it seems

to provide for those cases only in which the property so passes, as to make it just and convenient that all rights of suit under the contract contained in the bill of lading should be 'transferred to' the indorsee, and should not any longer 'continue in the original shipper or owner.'"

B In Newsom v. Thornton (1805) 102 E.R. 1189, Lord Ellenborough C. J. again observed at page 1202:

"A bill of lading indeed shall pass the property upon a bona fide indorsement and delivery, where it is intended so to operate, in the same manner as a direct delivery of the goods themselves would do, if so intended."

This observation was referred to with approval by Lord Blackburn in Sewell v. Burdick (supra) at page 101. In that same case Lord Bramwell said at page 105 after adverting to the preamble of the Bills of Lading Act which he quoted:

"I take this opportunity of saying that I think there is some inaccuracy of expression in the statute. It recites that, 'by the custom of merchants a bill of lading being transferable by indorsement the property in the goods may thereby pass to the indorsee.' Now the truth is that the property does not pass by the indorsement, but by the contract in pursuance of which the indorsement is made. If a cargo afloat is sold, the property would pass to the vendee, even though the bill of lading was not indorsed. I do not say that the vendor might not retain a lien, nor that the non-indorsement and non-handing over of the bill of lading would not have certain other consequences. My concern is to shew that the property passes by the contract. So if the contract was one of security - what would be a pledge if the property was handed over - a contract of hypothecation, the property would be bound by the contract, at least as to all who had notice of it, though the bill of lading was not handed over."

Hence **the property in the goods passes not by the mere assignment and delivery of the bill of lading but by the contract between the assignor and the assignee, or otherwise between the consignor and consignee, or indorser and indorsee by which it is intended that the property should pass. As to this, there can be no doubt, and this has been accepted by this court as a correct state-**

ment of principle: see Chacharos v. Ekimpex Ltd (1988) 1 NSCC (vol. 19, pt. 1) 65 at page 86. It is a principle that has stood for about two centuries: See Newsom v. Thornton (supra) and Waring v. Cox (supra). See also Sewell v. Burdick (supra) at page 105.

The statement also derives from a proper interpretation of s. B 375(1) of our Merchant Shipping Act which provides that:

"Every consignee of goods in a Bill of Lading and every endorsee of a bill to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment or endorsement shall have transferred to and vested in him all right of such, and subject to the same liabilities in respect of such goods as if the contract contained in the Bill of Lading had been made with himself." C

Relying on Sewell v. Burdick (supra), Kerwin J. in the Canadian case of Insurance Co. of North America v. Colonel S. S. Limited (1942) SCR D 357 when dealing with a provision similar to s. 375(1) said:

"It is not every endorsee who by reason of this section is vested with the right of action in respect of the goods mentioned as if the contract contained in the Bill of Lading had been made with himself. It is only an endorsee to whom the property in the goods passed upon or by reason of the endorsement." E

I have no doubt therefore that the Court of Appeal was right when, after citing s. 375(1) provision, it took the same position in Nigerbras Shipping Line Ltd. v. Aluminium Extrusion Industries Ltd. (1994) 4 NWLR (pt. 341) 733 which would appear to be the latest authority on the matter. The lower court relied on that authority in the present case and I think it was certainly proper for it to do so. F

It then follows from all the principles of law enunciated above that the appellant's counsel in the present case could not possibly be right to argue, as he did at the stage of the proceedings in the trial court in reliance on the bills of lading, exhibits FA1 and FA2, upon a demurrer, that the plaintiff lacked locus standi. He would by that be urging a conclusion that property in the goods had passed to Ngo West Africa Ltd. even if it were to be conceded that the bills were indorsed by the plaintiff to that company. That can- G H

not be a valid conclusion, not even an acceptable presumption upon the available facts. I therefore find no hesitation in holding that there is no merit in this appeal. I accordingly dismiss it but with no order for costs as the plaintiff/respondent did not participate in the appeal.

WALI JSC

I am privileged to have read before now the lead judgment of my learned brother Uwaifo JSC and I subscribe to the reasoning and conclusion for dismissing this appeal. Since the plaintiff/respondent did not file any respondent's brief, I make no order as to costs.

OGUNDARE JSC

I agree entirely with the judgment of my learned brother Uwaifo JSC just delivered. He has covered all the issues canvassed in this appeal. I have nothing more useful to add to his reasonings which I hereby adopt as mine too.

This appeal fails and it is dismissed by me. The respondent did not participate in the appeal. Hence, I make no order as to costs in its favour.

IGUH JSC

I have had the privilege of reading in draft the judgment just delivered by my learned brother, Uwaifo, J.S.C. and I agree entirely with the reasoning and conclusions therein. I have nothing to add.

Accordingly I, too, hold that this appeal is without substance and the same is dismissed with no order as to costs.

KATSINA-ALU JSC

I have had the advantage of reading in draft the judgment delivered by my learned brother Uwaifo, JSC. I entirely agree with it and for the reasons which he has given. I too would dismiss the appeal with N10,000.00 costs to the Respondents.