

SUPREME COURT OF NIGERIA
16TH DECEMBER, 2005. SC. 103/2001
CORAM:- S. U. ONU, A. I. KATSINA-ALU, N. TOBI,
G.A. OGUNTADE, M. MOHAMMED, JJSC

NIGERIAN PORTS AUTHORITY PLC APPELLANT
AND

1. LOTUS PLASTICS LIMITED

2. ELDER DEMPSTER AGENCIES LTD. RESPONDENTS

STATUTES - Provisions of NPA Decree 1993 - Courts - Interpretation of - Where words of a statute are clear and unambiguous - Court is to give such words - Their natural, literal and ordinary meaning (H1)

ACTIONS - NPA Decree 1993 - Limitation of action - As a defence - Is not available to appellant - Where the transaction between the parties - Is related to specific contract of bailment (H2)

ACTIONS - Limitation - Statutory privilege - Reliance on limitation clause - As a defence in a breach of contract claim - Would depend on the facts - On which an individual case turns (H3)

ACTIONS - Limitation - NPA Decree 1993 - Filing action after 12 months limitation period - In a Contract of Bailment - Makes it statute barred (H4)

ACTIONS - Statute bar - Effect of - Where an action is brought outside the prescribed statutory period - It becomes statute barred - And does not give rise to a cause of action (H5)

PRACTICE & PROCEDURE - Actions - Dismissal of - Statute bar - Where raised as a defence - And the defence is sustained - Court is to make an order of dismissal of plaintiff's action (H6)

FACTS

Before the Federal High Court sitting in Lagos, the plaintiff/1st respondent instituted an action against the defendant/appellant and the defendant/2nd respondent, Elder Dempster Agencies Limited. The plaintiff claimed the following reliefs : (1) The sum of US\$49,300.00 cost of the bus and freight or its Naira equivalent at date of judgment on commercial exchange rate (2) The sum of N300,000.00 cost of survey (3) The sum of N1,000,000.00 general damages.

The 1st defendant, the Nigeria Ports Authority Plc, without filing its statement of defence decided to challenge the competence of the plaintiff's claim by filing a motion on notice and sought for an order dismissing the suit against it for failure of the plaintiff to comply with provisions of the 1993 NPA Decree. The trial court upheld the objection of the 1st defendant and dismissed the plaintiff's claim. The plaintiff appealed to the Court of Appeal where his appeal was allowed. The 1st defendant aggrieved by the decision of the Court of Appeal has now appealed to the Supreme Court.

ISSUES FOR DETERMINATION

"1. Whether the relationship between the Appellant and the Respondent comes within the statutory duties of the Appellant as laid out by the provisions of section 3(1)(a) of the Nigerian Ports Authority Decree No. 74 of 1993 having regard to the averments in the first respondents statement of claim.

2. Whether the Court of Appeal was right not to have proceeded under its powers as provided for by section 16 of the Court of Appeal Act to consider and rule on the first respondent's failure to issue a pre-action notice."

HELD (Unanimously allowing the appeal per **MOHAMMED JSC**)

STATUTES - Provisions of NPA Decree 1993

1. Starting with sub-section (1) of section 72 of the Nigerian Ports Decree quoted above, it is quite clear that the provision provides protection to the appellant against any action that may be instituted against it for any act done in pursuance or execution of any enactment or public duty including any

act of alleged neglect or default in the execution of the enactment or duty if such action or suit is not instituted within 12 months from the time when the cause of action accrued. The provision of the sub-section is quite clear and unambiguous. Where words of a statute are clear and unambiguous, the rule of interpretation of statutes enjoined courts to give such words their natural, literal and ordinary meaning. (p. 2944 D)

NPA Decree 1993 - Limitation of action

2. All the 1st respondent is saying in its argument in this appeal is that having regard to the decision of this court in *Nigeria Ports Authority v. Construzioni Generati* (supra), the defence of the limitation of action was not available to the appellant in the transaction between the parties relating to a specific contract of bailment. The provisions of the limitation of action that came for consideration by this court in that case are contained in section 97(1) of the Ports Act CAP 115 of the Laws of the Federation 1958, then in force. The provisions are virtually the same as those of section 72(1) of the Nigerian Ports Decree now under consideration in this appeal. Section 97(1) of the Ports Act states:-

“97(1) When any suit is commenced against the Authority or any servant of the Authority for any act done in pursuance or execution or intended execution of any ordinance or law, or of any public duties or authority, or in respect of any alleged neglect or default in the execution of such Ordinance or Law, duty or authority such suit shall not lie or be instituted in any court unless it is commenced within 12 months next after the act, neglect or default complained of”

This court in that case, that is, *Nigerian Ports Authority v. Construzioni* (supra) in considering whether or not the defence of limitation of action claimed by the appellant was available, had this to say at page 630 -

“We shall now deal with the other point which to our mind does not seem to be well settled namely whether the kind of statutory privilege which we have been considering is applicable to an action founded upon a contract. In other words, whether section 97 of the Ports Act applies to cases of contract. We think the answer to this question must be in the

negative. We agree that the section applies to everything done or omitted or neglected to be done under the powers granted by the Act. But we are not prepared to give the section the stress which it does not possess. We take the view that the section does not apply to cases of contract.” (p. 2945 B)

B

ACTIONS - Limitation - Statutory privilege

3. Although it was the decision of this court that the statutory privilege granted to the appellant under section 97(1) of the Ports Act does not apply to cases of contract, the court however had agreed that the section applies to everything done or omitted or neglected to be done under powers granted by the Act. However, the court did not proceed to examine the applicability of the section vis-a-vis the powers of the “Nigerian Ports Authority under the Act as the issue was not raised by the parties for determination by the court in that case.

However, in the present case the sole issue for determination as to whether or not having regard to the statutory duties or functions of the appellant under section 3 of the 1993 Nigerian Ports Decree, the statutory privilege given to it under section 72(1) of the Decree was available to it, did not arise for determination in the *Construzioni*’s case. In the task of resolving these issues relating to limitation of actions under the English Limitation Act the learned authors of *Preston and Newmans Limitation of Actions*, 3rd edition at page 202 (1953) under the heading -’Proceedings For Breach of Contract’ have this to say:-

“The general considerations as to when the section applies are particularly important where the proceedings are not for tort as in most of the cases so far referred to but for breach of contract. ... In Clarke v. Lewisham Borough Council where the action was for wrongful dismissal (that is a claim against an employer for breach of a service contract) Bingham J. went so far as to say that ‘Good Sense’ as well as the authorities showed that the Act was not intended to apply to actions for damages for breach of contract at all. This statement however seems to be too wide. It does seem to me after consideration of all the authorities set out in 38 English And Empire Digest at 119-121 para .824-831 that the question as to whether the protection of a Limitation Act could be relied

upon as a defence in any case especially cases arising from breach of contract would depend on the facts on which an Individual case turns”

I entirely agree with this observation. (p. 2946 B)

Filing action after 12 months limitation period

4. The appellant could not deliver this cargo of the bus to the 1st respondent through its agents because the bus had been vandalized and it became a total loss. This transaction between the appellant and the 1st respondent which may rightly be termed as a contract of bailment as found by the court below, is also entirely within the statutory duties of the appellant as prescribed under section 3(1)(a), 2(b) and (c) of the Nigeria Ports Decree No.74 of 1993, which specifically empowered the appellant to provide and operate in the ports under its control, such port facilities as appear to it best calculated to serve the public interest. Such port facilities which the appellant was expected to provide and operate in the ports under the enabling statutory provision of section 3 of the Decree, include provisions for warehousing and handling of goods. In this respect, I am of the firm view that the duty performed by the appellant in the transaction between it and the 1st respondent in relation to the Tata bus imported by the 1st respondent, was carried out in the course of execution or in pursuance or execution or intended execution of an enactment or public duty or authority of the appellant. The transaction therefore comes squarely within the provisions of section 72(1) of the Nigerian Ports Decree No.74 of 1993. To this end, the appellant's objection to the 1st respondent/ plaintiffs claim rooted in the limitation of action prescribed under the section, is clearly well founded. The lower court was therefore wrong after finding plainly in its judgment that the action of the 1st respondent was filed outside the 12 month's limitation period prescribed by the section, that the action was still not statute barred. The action of the 1st respondent having been filed nearly 3 years after the accrual of the right of action and nearly 2 years outside the 12 months limitation period prescribed by section 72(1) of the Nigeria Ports Decree No. 74(1) of 1993, was definitely caught up in the web of this section of the Decree and therefore statute barred. (p. 2948 H)

Statute bar - Effect of

5. The question now is what is the effect of the finding that the action is statute barred? The general principle of law is that where the law provides for the bringing of action within a prescribed period in respect of a cause of action accruing to a plaintiff, proceedings shall not be brought after the time prescribed by the statute had expired. See *Obiofuna v. Okoye* (1961) 1 All NLR 357. This means an action brought outside the prescribed period offends against the provision the statute and does not give rise to a cause of action. (p. 2949 G)

Actions - Dismissal of - Statute bar

6. In this respect, the action of the 1st respondent against the appellant which was statute barred could not have been properly and validly instituted. The action was therefore not maintainable. To this end, the position of the law is trite. Where a defendant raises a defence that the plaintiffs action is statute barred and the defence is sustained by the trial court, the proper order for the trial court to make is an order of dismissal of the plaintiffs action and not to merely strike it out. This should have been the fate of the 1st respondent's case both at the trial Federal High Court and the Court of Appeal.

In line with my findings in the present appeal that the action of the 1st respondent against the appellant was statute barred, quite contrary to the findings of the Court below, this appeal has merit. Accordingly the appeal shall be and is hereby allowed. The judgment of the Court below of 29-11-2000 now on appeal is hereby set aside. In place of that judgment set aside, I hereby substitute a judgment dismissing the 1st respondents/ plaintiffs action. (p. 2950 E)

NOTABLE POINTS OF INTEREST

H TOBI JSC

1. Limitation of actions - Common law & Statutory duties

Usually, there is a clear line between statutory duties conferred on a statutory body and contractual duties based on the common law. In such

situation, the court finds it not difficult to interpret the applicable law, vide the facts of the case. There could however be borderline situations of a hybrid nature where the enabling statute, in addition to statutory duties, also provide for contractual duties of the common law tradition. In such situations, the court will be enjoined to construct the enabling provisions B in the light of the clear intention of the lawmaker. Again in such situations, I think the court will be right in constructing the apparent contractual duties of the common law tradition in the statute, with a statutory flavour as the duties are contained in the statute. This is because by finding itself C in the body of a statute, the contractual duty of the common law has lost its tinge in the common law tradition. The apparent contractual duty in the statute cannot, in the circumstance, be heard to cry for autonomy in the statute, as the strong and ossified hands of the statute have consumed the flexible and versatile hands of the common law. (p. 2959 F) D

2. Construction of a statute by court - How done

And what is more, in the construction of a statute, the court must take into consideration the totality of the statute and not pockets of it and E arrive at the intention of the lawmaker. This court will be going outside the canon of statutory interpretation if it picks and chooses at its whims and caprices sub-paragraphs of section 3 in favour of the common law principle of bailment and ignore the meat of the whole section which F provides for the statutory duties of the appellant. That is the temptation I will not like to fall into by the submission of learned counsel for the 1st respondent. (p. 2960 H)

3. Reliefs claimed are to be scrutinized by court

A plaintiff has the liberty to compose or construct a cause of action or relief in the way he likes and to the best of his ability, with the aim of obtaining judgment. He is free to use words that will earn him judgment. But that is only as the matter goes for the plaintiff, in law, that is not the final matter. H The finality of the relief in terms of giving the plaintiff judgment can only be determined by the court.

I do not think I sound clear. The point I am struggling to make is

2934 Nigeria Ports Author. Plc. v. Lotus Plastics Ltd (2005) 12 KLR

this. The mere fact that the 1st respondent used the words, "*breach of contract, bailment, negligence, and res- ipsa loquitur*," a defence in tort, do not change an action founded on the statutory duties of the appellant, into breach of contractual duties. While it is the right of a plaintiff to present relief to the court, it is the duty of the court to determine it in the light of the law and the facts of the case.

It is my view that the case is founded on the statutory duties of the appellant and not on breach of contract in common law. Accordingly, it is caught by section 72 (1) of the Ports Decree No.74 of 1993.
(p. 2963 D)

REPRESENTATION

Ayo A. Olawoyin with Wole Omisade Esq. for the appellant.
N. I. Quarkers Esq. for the 1st respondent
2nd respondent served but absent and not represented.

CASES REFERRED TO

Toriola v. Williams (1982) 7 SC 27 at 47-48
Eboigbe v. N.N.P.C. (1994) 5 NWLR (pt.347) 649 at 659
Obiefuna v. Okoye (1961) 1 All NLR 357
Bolaji v. Bamgbose (1986) 4 NWLR (Part 37) 632 at 644
Umokoro v. Nigerian Ports authority (1997) 4 NWLR (Ft. 502) 656
Trading Company Limited v. Nigerian Ports Authority (1980-1986) 2 NSC 247
Bello v. A-G of Oyo State (1986) 1 NWLR (Part 45) 828 at 876
Thomas v. Olufosoye (1986) 1 NWLR (Part 18) 689
Sosan & Ors. v. Ademuyiwa (1986) 3 NWLR (pt.27) 241
Odubeko v. Fowler (1993) 7 NWLR (pt.308) 637 at 661-662
Okafor v. A-G Anambra State (2005) 14 NWLR (pt.945) 210 at 222-223
Eboigbe v. Nigeria National Petroleum Corporation (1994) 5 NWLR (pt.347) 649 at 659
Afolayan v. Ogunrinde (1990) 1 NWLR (pt.127) 369 at 373
Akilu v. Fawehinmi (No.2) (1989) 2 NWLR (pt.102) 122
Sodipo v. Lemminkainen OY (1992) 8 NWLR (pt.258) 229

P. N. Udo Trading Co. Ltd. v. Abere (2001) 11 NWLR (pt.723) 114 at 135
Nosiru Bello & Ors v. Attorney-General of Oyo State (1986) 5 NWLR
(pt.45) 828 at 876

STATUTES & RULES REFERRED TO

Nigerian Ports Decree No. 74 of 1993 ss. 3(1) & (2), 72(1) and 97(1)
Court of Appeal Act s. 16
Federal High Court Civil Procedure Rules 1976 O. 27 rr. (1) & (3)

LEAD JUDGMENT BY MOHAMMED JSC

By a Writ of Summons dated 10-4-96, the plaintiff, Lotus Plastics Limited, instituted an action at the Federal High Court sitting at Lagos against the Nigerian Ports Authority Plc and Elder Dempster Agencies Limited as 1st and 2nd defendants respectively and claimed the following reliefs -

1. The sum of US\$49,300.00 cost of the bus and freight or its Naira equivalent at a date of judgment on commercial exchange rate.
2. The sum of N300,000.00 cost of survey.
3. The sum of N1,000,000.00 general damages.

Pleadings were ordered by the trial Federal High Court on 04-7-96. The plaintiff duly complied with this order by filing its statement of claim on 23-7-96. However, the 1st defendant, the Nigerian Ports Authority Plc, without filing its statement of defence decided to challenge the competence of the plaintiffs claim against it by filing a motion of notice dated 16-8-96 pursuant to Order 27 Rules 1 and 3 of the Federal High Court Civil Procedure Rules 1976 and sought for an order:

"dismissing this suit against the 1st defendant/applicant for failure of the plaintiff/respondent to comply with the provisions of section 72 (1) of the Ports Decree No.74 of 1993 and for such further or other orders as this Honourable Court may deem fit to make in the circumstances."

In the affidavit in support of this application, it was averred in paragraphs 3 and 4 thereof as follows-

"3. That I am informed by counsel handling this matter, Mrs. O. I. Laoye and I verily believe her that the plaintiff/respondent did not

commence this action within 12 months next after the act neglect or default complained of.

4. That I am further informed by the said counsel and I verily believe her that the plaintiff/respondent did not comply with the provision of section 72(1) of the Ports Decree No.74 of 1993 and this action should be dismissed with costs.”

The motion which came up for hearing before Bioshugun J. on 31-7-97, was duly argued and in his ruling delivered on 22-9-97, the learned judge of the trial court upheld the objection of the 1st Defendant and dismissed the plaintiffs claim mainly on the ground that the claim was incompetent for the failure of the plaintiff to bring the action within the 12 months period prescribed under section 72(1) of the Nigerian Ports Decree No.74 of 1993.

The plaintiff was aggrieved by this ruling of the trial court and therefore appealed against it to the Court of Appeal Lagos Division where the appeal was heard on 10-10-2000. In its judgment delivered on 29-11-2000, the Court of Appeal allowed the plaintiffs appeal and held that the trial court was wrong in dismissing the plaintiffs action. Part of this judgment at pages 113-114 of the record of this appeal reads -

“In this case the cause of action accrued on 26th May, 1993. Time begins to run from that day till the period of limitation required depending on the type of action. See the case of *Adimora v. Ajufu* (1998) 3 NWLR (pt.80) 1.

In the instant case the cause of action arose on 26th May 1993 upon discovery of damage to the Bus. The suit was filed on 10th April, 1996 almost 3 years after the cause of (sic) accrued. The action in my view is still in order and not caught by the 12 months bar. I therefore hold that the learned trial judge was wrong in dismissing the plaintiffs action as statute barred under section 72(1) of Decree No.74 of 1993.”

Before arriving at this decision, the lower court examined the nature of the claims of the plaintiff in the statement of claim in relation to the statutory duties and functions of the 1st defendant under the provisions of the statute that created it and came to the conclusion that the defence of the plaintiffs action being statute barred under section 72(1) of the Nigerian

Ports Decree No.74 of 1993, was not available to the 1st defendant in private contractual relations with other parties to justify the trial court's dismissal of the action. The Court below also faulted the decision of the trial court for raising suo motu, the issue of the alleged failure of the plaintiff to issue a pre-action notice, without affording the parties a B hearing.

The 1st defendant which was not happy with this decision of the Court of Appeal then decided to appeal to this court against it. The 1st defendant, now the appellant had filed its brief of argument in which two issues for the determination of the appeal were formulated from the three C grounds of appeal filed by the appellant. These issues are -

“1. Whether the relationship between the Appellant and the Respondent comes within the statutory duties of the Appellant as laid out by the provisions of section 3(1)(a) of the Nigerian Ports Authority Decree No.74 D of 1993 having regard to the averments in the first respondents statement of claim.

2. Whether the Court of Appeal was right not to have proceeded under its powers as provided for by section 16 of the Court of Appeal Act E to consider and rule on the first respondent's failure to issue a pre-action notice.”

The plaintiff, which is now the first respondent in this Court in its respondent's brief of argument, had identified three issues arising from the grounds of appeal filed by the appellant for the determination of the F appeal. The issues read -

“(a) Whether the relationship between the appellant and the 1st respondent was a private contract or tort or statutory to enable the appellant claim the immunity provision otherwise known as the time bar G provisions of the Ports Act.

(b) Whether the issue of pre-action notice was relevant or applicable to the case and if so whether the Court of Appeal could have applied section 16 of the Court of Appeal Act to consider and rule on the issue of H pre-action notice.

(c) Whether an issue not raised at the Court of First instance and the Court of Appeal would not require leave of this Honourable Court to

be raised.”

Taking into consideration the three grounds of appeal filed by the appellant to challenge the decision of the Court of Appeal in this court, it is my view that the two issues as distilled in the appellant’s brief of argument are the issues arising for determination in this appeal.

However, at the hearing of the appeal in this court on 19-9-2005, learned counsel to the appellant upon realizing from the record of this appeal that the 1st respondent had in fact complied with the requirement of the law by issuing a pre-action notice to the appellant before commencing its action at the trial court, quite rightly abandoned the second issue for determination in the appellant brief of argument which issue was consequently struck out by this court together with all the arguments in its support in the appellant’s brief. Following this development, the only remaining issue for determination in this appeal is whether the relationship between the parties in this appeal comes within the statutory duties of the appellant as laid out by the provisions of section 3(1)(a) of the Nigerian Ports Decree No.74 of 1993 having regard to the averments in the first respondent’s statement of claim. The circumstances that gave rise to the claims of the 1st respondent against the appellant at the trial court some of which were closely examined by the court below in arriving at its judgment now on appeal, are clearly spelled out in paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 of the plaintiffs statement of claim below:-

“2. The 1st defendant is a company set up by statute as a Port.

3. The 2nd defendant is the shipping agent of the Vessel ‘M.V. California Highway’.

4. The plaintiff imported a brand new Tata Bus from Bombay, Ex. M.V. California Highway’ by a bill of lading No. NSH/LAS/001 dated 19th March, 1993.

5. The bus was put on board ‘M.V. California Highway’ intact.

6. The vessel ‘M.V. California Highway’ arrived Tin Can Island Port Apapa, Lagos on the 17th of April, 1993.

7. Immediately after arrival, the plaintiff instructed its clearing agents Mess. Anwa Commercial Company Limited to clear and take delivery of the bus on its behalf.

8. *The 2nd defendant confirmed the arrival of the consignment on board the vessel M.V. California Highway to the plaintiffs agent but the bus could not be traced until after a long search lasting for three weeks. The bus was eventually found at the back of shed one at Roro Port Car Park owned and managed by the 1st defendant.*

B

9. *The bus was totally vandalized as all necessary parts had completely disappeared. Particularly the gear box, tyres, engine, electrical, mechanical and panel parts.*

10. *The plaintiffs agent wrote a letter to the 1st defendant dated 20th May, 1993 notifying them of the damage to the bus and requesting to know why the bus was not discharged at the Roro Car Park which is the usual parking lot.*

C

11. *The plaintiffs insurers, United Nigeria Insurance Company Plc (UNIC) appointed a Cargo Survey Company, FASCO Agencies Limited to inspect the said bus at the 1st Defendants premises and same was carried out on 26 May, 1993 and a report was issued in respect thereof dated 10 June, 1993. Further, the plaintiffs' insurers also instructed Joe AMS International (West Africa) Limited, Marine Cargo superintendents/ surveyors to inspect the subject matter of this suit and a supplementary survey report was issued dated 18 July, 1994.*

D

12. *The plaintiff paid the freight and the ware housing fees to the defendants whereof the defendants are in breach of contract for failure to deliver the said bus in good condition or at all. The value of the car is US\$49,300.00."*

F

Thus, for the failure of the appellant to deliver the bus to the plaintiff now 1st respondent in good condition or at all, the 1st respondent in its action filed on 10-4-96 claimed the sum of \$49,300.00 cost of the Bus and freight or its Naira equivalent at the date of judgment on commercial exchange rate; N300,000.00 cost of survey and N1,000,000.00 general damages.

G

In support of the lone issue remaining for determination in this H appeal, learned counsel to the appellant in the appellant's brief of argument and his oral submission, referred to the statutory duties of the appellant outlined under section 3(1) of the Nigerian Ports Decree No.74 of 1993

and the averments in the 1st respondent's statement of claim particularly in paragraph 12 thereof and argued that the role the appellant was to perform in taking custody of the plaintiff's bus into its warehouse was within the appellant's statutory duties as provided by section 3(1)(2)(b) and (c) of the Nigerian Ports Decree No.74 of 1993. Learned counsel emphasized that the appellant being a creature of statute, cannot enter into a separate contract with all the ports users outside its statutory functions and the averments in the 1st respondent's statement of claim underscores the appellant's role for which the 1st respondent gave consideration. Learned counsel after conceding that the appellant as 1st defendant, not having filed its statement of defence before challenging the competence of the action, was deemed to have admitted the 1st respondent/plaintiffs statement of claim, maintained that the 1st respondent was obliged under the law to have commenced its action within the period laid down under section 72(1) of the Ports Decree No.74 of 1993. Not having done so, the respondent's action was statute barred and that reliance on the case of Nigerian Ports of Authority v. Construzioni Generati FCS & An (1974) vol. 9 NSCC 622, which is distinguishable with the present case, could not have saved the respondent's claim concluded the learned counsel who urged this court to allow the appeal.

For the 1st respondent however, its learned counsel observed that the appellant by proceeding under Order 27 of the Federal High Court Civil Procedure Rules, was deemed to have admitted the facts contained in the 1st respondent's Writ of Summons and the statement of claim. He therefore submitted that the time bar provision contained in section 72(1) of the Ports Decree No.74 of 1993, does not apply to the present case in which the claim was based on a simple contract, relying on the case of Nigeria Ports Authority v. Construzioni (Supra). Learned counsel pointed out that the present case is distinguishable with the case of Umukoro v. Nigerian Ports Authority (1997) 4 NWLR (pt.502) 652, in which the action was related to the statutory duties of the appellant and therefore urged this court to dismiss the appeal.

In the resolution of the only issue remaining for determination in this appeal as to whether or not the action of the 1st respondent against the

appellant was statute barred having regard to the provisions of sections 3 and 72 of the Nigerian Ports Decree No.74 of 1993, it is necessary to examine very closely the undisputed facts averred in the statement of claim and the relevant provisions of the Decree. In other words in deciding whether or not the action was statute barred, I must be satisfied that there was cause of action and when the cause of action arose. B

The term cause of 'action' is defined by Jowitt's Dictionary of English Law as -

"The facts or combination of facts which give rise to a right to sue. The phrase is of importance chiefly with reference to the limitations Act 1939 and the jurisdiction of certain courts. Thus time begins to run when the cause of action arises (unless postponed or revived by reason of fraud, mistake, acknowledgment etc.) ..." C

In *Egbe v. Adefarasin (No.2) (1987) 1 NWLR (pt.47) 1* at page 20 Oputa JSC in relation to the definition of this term 'cause of action' said -

"Now let us examine the meaning of cause of action. It is admittedly an expression that defies precise definition. But it can safely be defined as the fact or facts, which establish or give rise to a right of action. It is the factual situation which gives a person a right to judicial relief." E

Other decisions of this court where the term was defined include *Nosiru Bello & Ors v. Attorney-General of Oyo State (1986) 5 NWLR (pt.45) 828* at 876; *Afolayan v. Ogunrinde (1990) 1 NWLR (pt.127) 369* at 373; *Akilu v. Fawehinmi (No.2) (1989) 2 NWLR (pt.102) 122*; *Sodipo v. Lemminkainen OY (1992) 8 NWLR (pt.258) 229* and *P. N. Udo Trading Co. Ltd. v. Abere (2001) 11 NWLR (pt.723) 114* at 135. F

In the instant case, it is not at all in dispute from the paragraphs of the 1st respondent's statement of claim earlier quoted in this judgment, that the 1st respondent had a cause of action being the claim for the cost of its bus delivered to the warehouse of the appellant for custody for which appropriate fees had been paid. As to the question when the cause of action arose, both the trial court and the court below relied on paragraphs 10, 11 and 12 of the statement of claim which revealed that the 1st respondent was notified of the damage to the bus by a letter dated 20-5-93. The extent G H

of the vandalization of the bus was confirmed to the 1st respondent by a Cargo Survey Company appointed by its insurers which examined the bus at the premises of the appellant on 26-5-93. Thus the facts or combination of facts which gave rise to the right to sue, accrued to the 1st respondent on 26-5-93 when it became fully aware of the extent of the damage to the bus in terms of cost through the expert cargo surveyor.

On the question of when does time begin to run for the purpose of a statute of limitation, this court had answered the question in the case of *Eboigbe v. Nigeria National Petroleum Corporation* (1994) 5 NWLR (pt.347) 649 at 659 as follows -

“The next question is when does time begin to run for the purpose of a statute of limitation? Time begins to run from the date on which the cause of action accrues. The cause of action generally accrues on the date on which the incident giving rise to the cause of action accrues. Proceedings must begin, normally by the issue of a Writ of Summons within a period prescribed by the relevant statute.”

See also *Sosan & Ors. v. Ademuyiwa* (1986) 3 NWLR (pt.27) 241; *Odubeko v. Fowler* (1993) 7 NWLR (pt.308) 637 at 661-662 and the recent decision of this court in *Okafor v. A-G Anambra State* (2005) 14 NWLR (pt.945) 210 at 222-223.

In the present case, although the 1st respondent’s cause of action arose on 26-5-1993, it did not file its action in the Federal High Court seeking reliefs against the appellant until 10-4-96 when the Writ of Summons was filed. The question is whether the claim of the appellant that the action of the 1st respondent against it was statute barred as held by the trial Federal High Court while on appeal the Court of Appeal held otherwise, can be sustained by this court on further appeal. The general principle of law is that where the law provides for the bringing of an action within a prescribed period, in respect of a cause of action accruing to the plaintiff, proceeding shall not be brought after the time prescribed by the statute. This was the decision in *Obiofuna v. Okoye* (1961) 1 All NLR 357. Therefore an action brought outside the prescribed period is contrary to the provision of the law and does not give rise to a cause of action. A cause of action as earlier defined in this judgment means the factual situation

stated by the plaintiff, if substantiated, entitles him to a relief or remedy against the defendant. See *Egbe v. Adefarasin* (supra).

Coming back to the instant case, the provisions of the statute of limitation relied upon by the appellant are contained in section 72(1) of (he Nigerian Ports Decree No. 74 of 1993 which states -

"72(1) When a suit is commenced against the company or an employee of the company -

(a) for an act done in pursuance or execution or intended execution of any enactment or of any public duty or authority

(b) in respect of any alleged neglect or default in the execution of the enactment, duty or authority,

the suit shall not lie or be instituted in any court unless it is commenced within 12 months next after the act, neglect or default complained of, or, in the case of a continuance of injury or damage within twelve months next after the ceasing thereof"

In line with the requirement of the well known rule of construction of statute which enjoined courts not to interpret a section of a statute in isolation with other sections but to look at the entire statute, I shall be guided by the decision of this court on the subject in the case of *Lamina v. Ikeja Local Government* (1993) 8 NWLR (pt.314) 758 at 767. It is for this reason that in resolving the lone issue for determination in this appeal, I shall not confine myself to the provision of section 72(1) of the Nigerian Ports Decree containing the limitation of action provision. I shall also examine very closely the provision of section 3(1) and (2) of the same Decree in order to determine whether the transaction between the appellant and the 1st respondent comes within or was done in pursuance or execution or intended execution of any enactment or any public duty or authority. The section reads -

"3(1) The company shall -

(a) provide and operate in the ports, such port facilities as appear to it best calculated to serve the public interest;

(b) maintain, improve and regulate the use of the ports;

(c) provide for the ports, the approaches to the ports and the territorial waters of Nigeria, such pilotage services and lights, marks and

other navigational services and aids as appear to it best calculated to serve the public interest; and

(d) provide such other services as the Minister may, from time to time, require.

B (2) *In this section -*

‘navigational services’ includes the cleaning deepening and improving of any waterway; “port facilities’ means facilities -

(a) for berthing, towing, mooring or dry-docking of ships in entering or leaving a port or its approach;

C *(b) for the loading and unloading of goods or embarking or disembarking of passengers in or from a ship;*

(c) for the lighterage or the sorting, weighing, warehousing or handling of goods; and

D *(d) for the carriage of passengers or goods in connection with any of the facilities.”*

Starting with sub-section (1) of section 72 of the Nigerian Ports Decree quoted above, it is quite clear that the provision provides protection to the appellant against any action that may be instituted against it for any act done in pursuance or execution of any enactment or public duty including any act of alleged neglect or default in the execution of the enactment or duty if such action or suit is not instituted within 12 months from the time when the cause of action accrued. The provision of the sub-section is quite clear and unambiguous. Where words of a statute are clear and unambiguous, the rule of interpretation of statutes enjoined courts to give such words their natural, literal and ordinary meaning. In *Toriola v. Williams* (1982) 7 SC 27 at 47-48 Obaseki JSC had this to say -

“The wording of the section seems to me clear and unambiguous and one does not have to search hard or strain one’s imaginative and intellectual powers to get at the meaning and intention of the section. I must therefore construe the words of the section according to the ordinary cannon of construction that is to say by giving them their ordinary meaning in the English Language as applied to such a subject-matter in Nigeria unless some gross and manifest absurdity would be thereby produced.”

In any case in the present appeal, in addition to the words of section 72(1) of the Nigerian Ports Decree being clear and unambiguous, it was common ground between the parties that the 1st respondent's course of action accrued on 26-5-93 but it did not file its action against the appellant until 10-4-96, a period of nearly three years after the accrual of the right of action. In other words the 1st respondent does not dispute that its action was filed outside the period of 12 months period prescribed by the Decree. The need for necessary interpretation of the limitation of action provision in the section therefore hardly arises in the instant case because **all the 1st respondent is saying in its argument in this appeal is that having regard to the decision of this court in Nigeria Ports Authority v. Construzioni Generati (supra), the defence of the limitation of action was not available to the appellant in the transaction between the parties relating to a specific contract of bailment. The provisions of the limitation of action that came for consideration by this court in that case are contained in section 97(1) of the Ports Act CAP 115 of the Laws of the Federation 1958, then in force. The provisions are virtually the same as those of section 72(1) of the Nigerian Ports Decree now under consideration in this appeal. Section 97(1) of the Ports Act states:-**

"97(1) When any suit is commenced against the Authority or any servant of the Authority for any act done in pursuance or execution or intended execution of any ordinance or law, or of any public duties or authority, or in respect of any alleged neglect or default in the execution of such Ordinance or Law, duty or authority such suit shall not lie or be instituted in any court unless it is commenced within 12 months next after the act, neglect or default complained of"

This court in that case, that is, Nigerian Ports Authority v. Construzioni (supra) in considering whether or not the defence of limitation of action claimed by the appellant was available, had this to say at page 630 -

"We shall now deal with the other point which to our mind does not seem to be well settled namely whether the kind of statutory privilege which we have been considering is applicable to an action founded upon

a contract. In other words, whether section 97 of the Ports Act applies to cases of contract. We think the answer to this question must be in the negative. We agree that the section applies to everything done or omitted or neglected to be done under the powers granted by the Act. But we are not prepared to give the section the stress which it does not possess. We take the view that the section does not apply to cases of contract.”

Although it was the decision of this court that the statutory privilege granted to the appellant under section 97(1) of the Ports Act does not apply to cases of contract, the court however had agreed that the section applies to everything done or omitted or neglected to be done under powers granted by the Act. However, the court did not proceed to examine the applicability of the section vis-a-vis the powers of the “Nigerian Ports Authority under the Act as the issue was not raised by the parties for determination by the court in that case.

However, in the present case the sole issue for determination as to whether or not having regard to the statutory duties or functions of the appellant under section 3 of the 1993 Nigerian Ports Decree, the statutory privilege given to it under section 72(1) of the Decree was available to it, did not arise for determination in the Construzioni’s case. In the task of resolving these issues relating to limitation of actions under the English Limitation Act the learned authors of Preston and Newmans Limitation of Actions, 3rd edition at page 202 (1953) under the heading -’Proceedings For Breach of Contract’ have this to say:-

“The general considerations as to when the section applies are particularly important where the proceedings are not for tort as in most of the cases so far referred to but for breach of contract. ... In Clarke v. Lewisham Borough Council where the action was for wrongful dismissal (that is a claim against an employer for breach of a service contract) Bingham J. went so far as to say that ‘Good Sense’ as well as the authorities showed that the Act was not intended to apply to actions for damages for breach of contract at all. This statement however seems to be too wide. It does seem to me after consideration of all the authorities

set out in 38 English And Empire Digest at 119-121 para .824-831 that the question as to whether the protection of a Limitation Act could be relied upon as a defence in any case especially cases arising from breach of contract would depend on the facts on which an Individual case turns”

B

I entirely agree with this observation.

In the case of Umukoro v. Nigerian Ports Authority (1997) 4 NWLR (pt.502) 656 at 667 relied upon by the appellant, Kutigi JSC had this to say on the limitation of action defence relied upon by the Nigerian Ports Authority which was the respondent in that case which is now the appellant under section 97(1) of the Ports Act -

C

“I think section 97(1) of the Ports Act (supra) is quite clear and unambiguous. The imperative nature of the provision is also not in doubt. On these facts, I am in complete agreement with the decisions of both the two lower courts (and as rightly conceded by Mr. Eduvie) that the plaintiffs suit is statute barred and therefore rightly dismissed.”

D

The claim of the plaintiff in that case arose from the act of the Nigerian Ports Authority in the alleged destruction of the plaintiffs Raffia E Palms and other economic trees at Umunu Island in the course of construction in the expansion of Sapele Port being an act done in pursuance or execution of a public duty under the Act.

The provisions of section 3(1) and (2) of the Nigerian Ports Decree F No.74 of 1993 have clearly outlined the duties and functions of the appellant, the Nigerian Ports Plc which was duly registered as a public limited liability company under the Companies and Allied Matters Act 1990. The main duty of the appellant under this section of the Decree is to provide and operate in the ports, such ports facilities as appear to it best calculated to serve the public interest. These port facilities which the appellant was empowered by the Decree to provide in the act of serving public interest, have been specifically defined under sub-section (2) of section 3 of the Decree which states -

G

H

“(2) In this section -

xxxxxxxxxxxx

‘port facilities’ means facilities -

(a) - xxx

(b) *for the loading and unloading of goods or embarking or disembarking of passengers in or from a ship.*

(c) *for the lighterage or sorting, weighing, warehousing or handling of goods; and*

(d) *xxxxxxx*

The above statutory provisions which are quite plain and unambiguous, have clearly empowered the appellant to provide in the ports operated by it, facilities for the loading and unloading of goods being exported or imported into the country through the ports. Other facilities the appellant was empowered to provide in the ports include facilities for warehousing and handling of goods being imported or exported through the ports being operated by it.

Close examination of the action of the 1st respondent as plaintiff against the appellant from the writ of summons and the statement of claim, particularly the facts averred in paragraphs 10, 11 and 12 thereof, reveals that the action was based on the handling of the 1st respondent's imported goods, namely, the Tata bus which was unloaded into the warehouse of the appellant for which services the 1st respondent paid the warehousing fees to the appellant. It is therefore hardly in doubt that the nature of the public duties performed by the appellant in its contractual relationship with the 1st respondent, were related to the rendering of warehousing and handling of imported goods and services which the appellant was empowered to perform under section 3(1) and (2) of the Nigerian Ports Decree No.74 of 1993. In other words having regard to the claim of the 1st respondent in the paragraphs of the statement of claim I have earlier quoted in this judgment, it is quite clear that the loss suffered by the 1st respondent which gave rise to the cause of action arose From the use of the appellant's warehouse. This is because the 1st respondent's Tata bus which it imported from India into this country was a cargo on board of a ship, the M.V. California Highway. The Cargo was duly discharged into the appellant's warehouse at the Tin Can Island Port, Apapa, Lagos and the appropriate fees duly paid. **The appellant could not deliver this cargo of the bus to the 1st respondent through its agents because the**

bus had been vandalized and it became a total loss. This transaction between the appellant and the 1st respondent which may rightly be termed as a contract of bailment as found by the court below, is also entirely within the statutory duties of the appellant as prescribed under section 3(1)(a), 2(b) and (c) of the Nigeria Ports Decree No.74 of 1993, which specifically empowered the appellant to provide and operate in the ports under its control, such port facilities as appear to it best calculated to serve the public interest. Such port facilities which the appellant was expected to provide and operate in the ports under the enabling statutory provision of section 3 of the Decree, include provisions for warehousing and handling of goods. In this respect, I am of the firm view that the duty performed by the appellant in the transaction between it and the 1st respondent in relation to the Tata bus imported by the 1st respondent, was carried out in the course of execution or in pursuance or execution or intended execution of an enactment or public duty or authority of the appellant. The transaction therefore comes squarely within the provisions of section 72(1) of the Nigerian Ports Decree No.74 of 1993. To this end, the appellant's objection to the 1st respondent/plaintiffs claim rooted in the limitation of action prescribed under the section, is clearly well founded. The lower court was therefore wrong after finding plainly in its judgment that the action of the 1st respondent was filed outside the 12 month's limitation period prescribed by the section, that the action was still not statute barred. The action of the 1st respondent having been filed nearly 3 years after the accrual of the right of action and nearly 2 years outside the 12 months limitation period prescribed by section 72(1) of the Nigeria Ports Decree No. 74(1) of 1993, was definitely caught up in the web of this section of the Decree and therefore statute barred.

The question now is what is the effect of the finding that the action is statute barred? The general principle of law is that where the law provides for the bringing of action within a prescribed period in respect of a cause of action accruing to a plaintiff, proceedings shall not be brought after the time prescribed by the statute had

expired. See Obiefuna v. Okoye (1961) 1 All NLR 357. This means an action brought outside the prescribed period offends against the provision the statute and does not give rise to a cause of action. This was also the decision of this court in Eboigbe v. N.N.P.C. (1994) 5 NWLR (pt.347) 649 at 659 where Adio JSC said -

“Where an action is statute-barred a plaintiff who might have had a cause of action loses the right to enforce the cause of action by judicial process because the period of limitation laid down by the limitation law for instituting such an action has elapsed. See Odubeko v. Fowler (1993) 7 NWLR (pt.308) 637. An action commenced after the expiration of the period within which an action must be brought as stipulated in the statute of limitation is not maintainable. See Ekeogu v. Ahiri (1991) 3 NWLR (pt.179) 258. In short when the statute of limitation in question prescribes a period within which an action must be brought, legal proceedings cannot be properly or validly instituted after the expiration of the prescribed period. See Sanda v. Kukawa Local Government (1991) 2 NWLR (pt.174) 379.”

I am indeed bound by the decision of this court in that case and the various decisions of this court referred to and relied upon therein on the position of the law relating to actions which are statute barred. **In this respect, the action of the 1st respondent against the appellant which was statute barred could not have been properly and validly instituted. The action was therefore not maintainable. To this end, the position of the law is trite. Where a defendant raises a defence that the plaintiffs action is statute barred and the defence is sustained by the trial court, the proper order for the trial court to make is an order of dismissal of the plaintiffs action and not to merely strike it out.** See Egbe v. Adefarasin (1987) 1 NWLR (pt.47) 1 at 15 and Eboigbe v. N.N.P.C (1994) 5 NWLR (pt.347) 649 at 666. **This should have been the fate of the 1st respondent’s case both at the trial Federal High Court and the Court of Appeal.**

In line with my findings in the present appeal that the action of the 1st respondent against the appellant was statute barred, quite contrary to the findings of the Court below, this appeal has merit.

Accordingly the appeal shall be and is hereby allowed. The judgment of the Court below of 29-11-2000 now on appeal is hereby set aside. In place of that judgment set aside, I hereby substitute a judgment dismissing the 1st respondents/plaintiffs action.

There shall be N2,000.00 costs in the court below and N10,000.00 costs in this court in favour of the appellant against the 1st respondent.

ONU JSC

Having been privileged to read before now the judgment of my learned brother Mohammed, JSC just read, I am in entire agreement that the appeal be allowed.

The relevant facts of this case which revolve around the provisions of the Ports Act giving the Appellant immunity against law suits not commenced within twelve months of accrual and the requirement of service of pre - action notice before instituting legal proceedings (which were held inapplicable to private contractual relations) are:

The 1st Respondent had sued the Appellant and the 2nd Respondent jointly and severally for breach of contract of bailment and negligence wherein the 1st Respondent claimed as follows: -

“(i) US49,3000 of the bus and freight or its Naira equivalent at the date of judgment on commercial exchange rate.

(i) N300,000 cost of survey.

(ii) N1,000.000.00 general damages”

The Appellant filed a preliminary objection in the nature of a demurrer that the suit be dismissed because it was filed outside the 12 months allowed by Section 72(1) of the Ports Act, 1993.

The 1st Respondent filed a Counter- Affidavit while the Appellant in turn filed a reply, the relevant portions in which it deposed as follows:

“4. That I am informed by the counsel handling this matter, Mrs. O. I. Laoye and I verily believe her that paragraph 7 of the counter affidavit is false to the extent that the provisions of Section 374 of the Merchant Shipping Act Cap.224 Laws of the Federation of Nigeria 1990 relates to the time limit of two years within which actions are maintainable

between ships or ship owners and other ships.

5. *That in the suit herein brought against the Nigeria Ports PLC as 1st Defendant, neither the Plaintiff nor the 1st Defendant is a ship or a ship owner.*

B 6. *That Section 72(1) of the Ports Decree relates to actions brought against the N. P PLC and it is therefore the statutory provision relevant to this case.*

C 7. *That I am further informed by the said same counsel and I verily believe her that this action was not brought within a period of 12 months after the act, default or neglect complained of by the Plaintiff and therefore offends against the provisions of Section 72(1) Ports Decree, 1993 and should be dismissed with costs....."*

D The Appellant formulated two issues for our determination out of which issue 2 was withdrawn and accordingly struck out. The 1st respondent on the other hand, submitted three issues as arising for determination, which overlap Appellant's lone issue to the following effect and which are enough to dispose of the appeal thus:

E *"(a) Whether the relationship between the Appellant and the 1st Respondent was a private contract or tort or statutory to enable the Appellant the immunity provision otherwise known as the time bar provisions of the Port Act.*

F *(b) Whether the issue of pro - action notice was relevant or applicable to the case and if so whether the Court of Appeal could have applied Section 16 of the Court of Appeal Act to consider and rule on the issue of pre -action notice."*

G The statutory duties of the Appellant, it is submitted, are as provided in Section 3(1) of the Nigerian Ports Decree No.74 of 1993. The Section provides that the company shall -

"(a) provide and operate in the ports, such port facilities as appear to it best calculated to serve the public interest.

H *(b) maintain, improve and regulate the use of the ports;*

(c) provide for the ports, the approach to the ports and the territorial waters of Nigeria, such pilotage services and lights, marks and other navigational services and aids as appear to it best calculated to serve

the public interest;

(d) provide such other services as the Minister may, from time to time, require

(2) In this Section

“Navigational services” includes the clearing, deepening or dry docking of ships in entering or leaving a port of its approach; port facilities means facilities -

(a) for berthing, towing, mooring or dry docking of ships in entering or leaving a port or its approach;

(b) for the loading and unloading of goods or embarking or disembarking of passengers in or from a ship;

(c) for the lighterage or the sorting, weighing, warehousing or handling of goods; and

(d) for the carriage of passengers or goods in connection with any of the facilities.”

In paragraph 12 of the 1st Respondent’s statement of claim it is particularly averred as follows:

“The Plaintiff paid the freight and the warehousing fees to the defendants whereof the defendants are in breach of contract for failure to deliver the said bus in good condition or at all. The value of the car is US\$49,300.00.”

From the foregoing, it is clear that the role which the Appellant was paid to perform by the 1st Respondent was “warehousing” which is coterminus with Appellants statutory duties as provided by Section 3(1)(2)(b) & (c) of Decree No.74 of 1993 (ibid). Be it noted that Appellant, a creature of statute, cannot enter into separate contracts with all the ports users outside its statutory functions and the averments in the 1st Respondent’s Statement of Claim which underscores the Appellant’s role for which the Respondent gave consideration. The Appellant concedes that the nature of its application was such that the averments in the statement of claim should be deemed to have been admitted, they as bailee to all importers through Nigerian Ports, can only, be in breach of its statutory duties subject to the provisions of statute which spells out its functions. I therefore respectfully agree that the nature of Appellant’s

application was such that the averment in the statement of claim should be deemed to have been admitted, it being clear that the Appellant as bailee to all importers through Nigerian Ports, can only be in breach of its statutory duties subject to the provisions of the statute which spells out its functions.

B It is for the above reasons that I agree with the 1st Respondent that the cause of action, if any, arose while the Appellant was performing its statutory functions to it (1st Respondent). Furthermore, I agree that 1st Respondent was obliged under the law to commence its action within the period laid down by the provisions of section 72(1) of Decree No.74 of 1993. It is also for that reason that the case of Nigeria Ports Authority v. Construzioni Generali FCS Anor (1974) Vol.9 NSCC is not apposite to the present case. In fact, contrary to what the Court of Appeal decided in its judgment, the Construzioni case was commenced by the Nigerian Ports Authority outside the limitation period vide Section 97 of the Nigerian Ports Authority Act which is in pan materia with Section 72(1) of Decree No.74 (ibid).

E For purposes of clarity, in the case of Construzioni, (supra), a Defendant filed a defence and counterclaimed. Counsel to the Nigerian Ports Authority then raised a preliminary objection to the competence of the counterclaim on the ground that the Defendant did not give a pro - action notice in a suit which they, as Plaintiff forced on the Defendant. The Supreme Court held that Section 97 of the Ports Act does not apply to the filling of a counterclaim where the suit itself is commenced by the very authority for whose protection the section was enacted. In such circumstances, the statutory body concerned should be deemed, to a certain extent, have waived the privilege or protection conferred upon it by statute. G In recognizing the efficacy of the provisions of Section 97 (supra) it went on to say in the Construzioni case at page 630E paragraph 30 that:

H *“We think that it is good law to say that where a person is being sued in respect of a transaction, it is monstrous and unjust that he should be prevented from setting up a counterclaim in respect of the transaction, even if in the original action there would be jurisdiction to sue the Plaintiff.”*

I am in full agreement with the Appellant that the statutory privilege

given to it by virtue of the provisions of Section 72 (1) could not have extended to the case of *Construzioni* (supra). This is because it was a specific contract which certainly does not come within the statutory duties of the Appellant as provided for in Section 3 (1) of decree No. 74 of 1993.

The above cannot be said of the present case where the averments B in the statement of claim should be deemed to have been admitted by the Appellant. See *Bolaji v. Bamgbose* (1986) 4 NWLR (Part 37) 632 at 644 C-D; E-F.

In this wise, I agree that the Respondents having paid warehousing C fees to the Appellant, that act constituted Appellant's duties under the statute, the Appellant can only be in breach of its statutory duties under the statute. In other words, the Appellant can only be in breach of its statutory duties as provided by the enabling statute. Assuming there was a contract of bailment as held by the court below on page 113 of the Record, the 1st D respondent could not claim to be a bailor as the statement of claim did not disclose this. It was also not pleaded that the 1st Respondent was the carrier of the vehicle in question, in which case, he could sue as a bailor. In any case, there can only be a contract of bailment within the provisions E of Section 3(1)(2) of Decree No.74 of 1993.

The Court below having held at page 114 of the Records that the suit was filed almost three years after 'the cause of action accrued, I am of the view that it was wrong of the court below to have gone on to F conclude that "*The action in my view is still in order and not caught by the 12 months bar.*"

The term '*cause of action*' underlined above was judicially defined by the Supreme Court, applying *Read v. Brown* 1 QM/192 QBD 128 at 131, per Lord Esher M.R in *Lasisi Fadare & ors v. Attorney-General of G Oyo State* (1982) 4 S.C 1 at 7 per Aniagolu, JSC as

"denoting every fact (though not every piece of evidence) which it would be necessary for the plaintiff to prove, if traversed to support his right to the judgment of the court." H

See also *Egbe v. Adefarasin* (1985) 1 NWLR (Part 3) 54; *Thomas v. Olufosoye* (1986) 1 NWLR (Part 18) 689. It is also defined as any act on the part of the defendant which gives the plaintiff a cause of complaint.

See *Bello v. A-G of Oyo State* (1986) 1 NWLR (Part 45) 828 at 876.

The common law principle expressed in the maxim *actio personalis moritur cum persona* presupposed the cause of action arising when both the plaintiff and the defendant are alive, and does not apply where the
B ‘cause of action’ arose after the death of the plaintiff or the defendant. See *Nzom v. Jinadu* (1987) 1 NWLR (Part 51) 533.

In *Umokoro v. Nigerian Ports Authority* (1997) 4 NWLR (Part 502; 656, the statutory time bar provision was held applicable, as the claim was
C a fall out of the statutory duties of the Authority. In *Nigerian Ports Authority v. Construzioni Generali FCS & Anor* (supra) the Supreme Court held that section 97 of the Ports Act and similar enactments are not intended to apply to specific contracts. The rationale for this conclusion
D or reasoning of (the Umukoro Case (Supra) was not stated and one can only assume the court below is still relying on the *Construzioni* case (supra), which I have elsewhere in this judgment held, is not apposite to the present case. In sum, I hold the view that if the Court below recognized the efficacy of Section 72(1) of Decree No.74 of 1993, which gives a
E limitation of 12 months within which to bring an action, it certainly has come to a wrong decision by holding that an action commenced almost three years later was not caught by that law.

It is for the above reasons, but more particularly those contained in
F the overwhelming ones proffered in the judgment of my learned brother Mohammed JSC, that I too, allow the appeal. I make similar consequential orders as to costs in the court below as well as in this court.

G **KATSINA-ALU JSC**

I have had the advantage of reading in draft the judgment of my learned brother Mohammed JSC. I entirely agree with it.

The issue to be resolved in this case is whether the breach
H complained of is in relation to the appellant’s statutory duty or one based on contract. The statutory duties of the appellant are as provided in section 3(1) of the Nigerian Ports Authority Decree No. 74 of 1993. The section provides that the company shall

“(a) provide and operate in the ports, such port facilities as appear to it best calculated to serve the public interest;

(b) maintain, improve and regulate the use of the ports;

(c) provide for the ports, the approaches to the ports and the territorial waters of Nigeria, such pilotage services and lights, marks and other navigational services and aide as appear to it best calculated to serve the public interest;

(d) provide such other services as the Minister may, from time to time, require.”

Sub-section 2 is the definition clause. It reads:

“Navigational Services” includes the cleaning, deepening and improving of any waterway;

“port facilities” means facilities -

“(a) for berthing, towing, mooring, moving or dry decking of ships in entering or leaving a port of its approach;

(b) for the loading an unloading of goods or embarking or disembarking of passengers in or from a ship.

(c) For the lighterage or the sorting, weighing, warehousing or handling of goods; and

(d) for the carriage of passengers or goods in connection with any of the facilities.”

Paragraph 12 of the 1 respondent’s statement of claim reads thus:

“The plaintiff paid the freight and the warehousing fees to the defendants whereof the defendants are in breach of contract for failure to deliver the said bus in good condition or at all. The value of the car is US\$49,300.00.”

One important statutory duty of the appellant is warehousing. It is provided for in section 3(2)(c) of Decree No. 74 of 1993 which I have earlier on read. I find it, therefore, particularly plain that the present case is founded on the statutory duties of the appellant and not in breach of contract in common law. That being so, the 1st respondent was caught by section 72(1) of the Ports Decree No. 74 of 1993. What this means is that for the 1st respondent’s action to be maintainable it had to be brought within the period laid down by section 72(1) of the said Decree. The subsection

provides that:

“When a suit is commenced against the company in respect of any alleged neglect or default in the execution of the enactment, duty or authority the suit shall not lie or be instituted in any court unless it is commenced within 12 months next after the act, neglect or default complained of or in the case of a continuance of injury or damage within 12 months next after the ceasing thereof.”

It is not in dispute that this action was commenced almost three (3) years after the cause of action accrued. In spite of this the court below held that “the action in my view is still in order and not caught by the 12 months bar.” The Court of Appeal relied on the case of Nigerian Ports Authority v. Construzioni Generati FCS & Anor (1974) Vol. 9 NSCC 622. But on a careful reading it would be seen that the case of Nigerian Ports Authority v. Construzioni General FCS is not apposite to the present case. In that case the Nigerian Ports Authority sued Construzioni, a firm of building contractors engaged for the building of the 2nd Apapa Wharf. That case was simply one of contract. In that case the Supreme Court held that:

“Whether S.97 of the Ports Act applies to cases of contract. We think that the answer to this question must be in the negative. We agree that the section applies to everything done or omitted or neglected to be done under the powers granted by the Act. But we are not prepared to give to the section the stress which it does not possess. We take the view that the section does not apply to cases of contract.”

In the result, I too allow this appeal and set aside the judgment of the Court of Appeal. I restore the ruling of the court of trial. I abide by the order for costs made by my learned brother Mohammed, JSC.

TOBI JSC

I have read in draft the judgment of my learned brother, Mohammed, JSC and I agree with him. The area of dispute in this appeal is narrow but pungent. It is the construction of section 72 (1) of the Ports Decree No.74 of 1993 vis-a-vis the reliefs as they relate to limitation of the action.

By a writ of summons dated 10th April, 1996, and statement of claim

dated 14th July, 1996, the 1st respondent as plaintiff claimed against the appellant three reliefs. The appellant filed a motion to terminate the action on the ground that the 1st respondent failed to comply with section 72 (I) of Decree No.74 of 1993. The learned trial Judge saw merit in the motion and he accordingly dismissed the case on the ground that it was statute B barred. The 1st respondent filed an appeal in the Court of Appeal. That court gave it judgment. The court held that the action was not statute barred under section 72 (1) of Decree No. 74 of 1993. There is an appeal to this court.

It is the argument of learned counsel for the appellant that the action, C based on the statutory duties of the appellant, is statute barred. He cited section 3 (1) of Decree No. 74 of 1993. He submitted that the case of Nigerian Ports authority v. Construzioni Generati FCS (1974)9 NSCC 622 did not apply. Learned counsel cited Bolaji v. Bamgbose (1986) 4 NWLR D (Pt.37) 632. Counsel urged the court to allow the appeal. The above is briefly his augment on Issue No. 1. He withdrew Issue No. 2 on 19th September, 2005 when the appeal was argued. The issue was accordingly struck out. E

It is the argument of learned counsel for the 1st respondent that section 72 (1) of Decree No. 74 of 1993 cannot be invoked in the case as the action was based on breach of contract and not on the statutory duties of the appellant. He relied heavily on the case of Nigerian Ports Authority F v. Construzioni Generati FSC (supra). Counsel urged the court to dismiss the appeal.

Usually, there is a clear line between statutory duties conferred on a statutory body and contractual duties based on the common law. In such G situation, the court finds it not difficult to interpret the applicable law, vide the facts of the case. There could however be borderline situations of a hybrid nature where the enabling statute, in addition to statutory duties, also provide for contractual duties of the common law tradition. In such situations, the court will be enjoined to construct the enabling provisions H in the light of the clear intention of the lawmaker. Again in such situations, I think the court will be right in constructing the apparent contractual duties of the common law tradition in the statute, with a statutory flavour

as the duties are contained in the statute. This is because by finding itself in the body of a statute, the contractual duty of the common law has lost its tinge in the common law tradition. The apparent contractual duty in the statute cannot, in the circumstance, be heard to cry for autonomy in the statute, as the strong and ossified hands of the statute have consumed the flexible and versatile hands of the common law.

And that takes me to the statutory duties of the appellant as provided in section 3(1) of Decree No. 74 of 1993, the applicable law.

It provides as follows:

“The company shall (a) provide and operate in ports, such port facilities as appear to it best calculated to serve the public interest; (b) maintain, improve and regulate the use of the ports; (c) provide for the ports, the approaches to the ports and the territorial waters of Nigeria, such pilotage services and lights, marks and other navigational services and aids as appear to it best calculated to serve the public interest; (d) provide such other services as the Ministry may from time to time, require”

Section 3 (2), the definition clause, provides as follows:

“Navigational services” includes the cleaning, deepening and improving of any waterways; “port facilities” means facilities:

(a) for berthing, towing, moving or dry-docking of ships entering or leaving a port or its approach.

(b) for the loading and unloading of goods or embarking or disembarking of passengers in or from a ship;

(c) for the lighterage or the sorting, weighing, warehousing or handling of goods; and

(d) for the carriage of passengers or goods in connection with any of the facilities.”

Learned counsel for the 1st respondent has made frantic efforts to work into section 3 of Decree No. 74 of 1993, the common law principles of bailment. I do not think he has succeeded in his efforts. Even if he did, the provision cannot be of any help to the 1st respondent. In so far as the principle finds itself in the statute, it invariably conveys a statutory flavour and must be so construed. I had earlier made the point.

And what is more, in the construction of a statute, the court must

take into consideration the totality of the statute and not pockets of it and arrive at the intention of the lawmaker. This court will be going outside the canon of statutory interpretation if it picks and chooses at its whims and caprices sub-paragraphs of section 3 in favour of the common law principle of bailment and ignore the meat of the whole section which provides for the statutory duties of the appellant. That is the temptation I will not like to fall into by the submission of learned counsel for the 1st respondent.

Learned counsel for the 1st respondent submits that by the provision of section 3 of the Decree, the duties imposed on the appellant are of a public nature, in the common and territorial interest and service of Nigeria in general. This sounds not only big but quite a mouthful. With respect, it has not said anything in assistance of the 1st respondent. Is learned counsel saying that because section 3 imposes a public duty “in the common and territorial interest and service of Nigeria,” a statute cannot place a limitation on when action can be filed against the appellant? That should be new to me and it is likely to be new to the jurisprudence of this country.

Learned counsel submits that as a statutory corporation, the appellant can contract and enter into agreement independent of her statutory obligation. This is a solid one and I entirely agree with him. No legislature worth its name of lawmaker can legislate out a statutory corporation or body from entering into the free world of contractual relationship with any body or person. But is that the situation in this appeal? We are called upon to interpret the statutory duties of the appellant in the light of section 72 (1) of Decree No.74 of 1993, and we cannot go outside that issue.

Let me take paragraph 12 of the 1st respondent statement of claim. It reads:

“The plaintiff paid the freight and the warehousing fees to the defendants whereof the defendants are in breach of contract for failure to deliver the said bus in good condition or at all. The value of the car is US\$49,300.00”

The most central and telling word in the context of the statutory duties of the appellant is “warehousing.” All other contractual embellish-

ments, if I may so call them, are meant to give life and credence to the case of the 1st respondent as seen by it. The word “warehousing” grows from the noun warehouse. A warehouse is a large building for storing things, especially things that are to be sold.

B One important statutory duty of the appellant is warehousing. It is provided for in section 3 (2) (c) of Decree No. 74 of 1993. Let me reproduce it even at the expense of prolixity:

“port facilities” means facilities...

C *(c) for the lighterage, or the sorting, weighing, warehousing or handling of goods...”*

Is learned counsel for the 1st respondent saying that section 72 (1) of Decree No. 74 of 1993 does not apply in this case in the light of the averment as it relates to warehousing and section 3(2) (c) of the Decree?

D Let me take the cases cited by learned counsel. He relied mostly on the case of Nigerian Ports Authority v. Construzioni Generati FCS. (Supra) The facts of that case are quite different from those of this case. That case had to do with building contract entered between the parties for
E the building of the 2nd Apapa Wharf. There is no such building contract or any building contract in this case. I therefore agree with learned counsel for the appellant that the case is not relevant.

Another case cited by counsel for the 1st respondent is Allied
F Trading Company Limited v. Nigerian Ports Authority (1980-1986) 2 NSC 247. Again, the facts of Allied Trading Company are quite different from the facts of this case. Like the facts of Construzioni Generati, Allied Trading Company Limited dealt with clear contractual relationship between the parties. That is not the situation here.

G Another case which learned counsel cited is Umokoro v. Nigerian
Ports authority (1997) 4 NWLR (Ft. 502) 656. The case, like the present case, had to do with limitation law where this court held that by virtue of section 97 (1) of the Ports Authority Act, whoever wishes to sue the
H Nigerian Ports Authority for any public duty undertaken by the Authority or its servants must do so within 12 calendar months next after the act complained of.

Learned counsel for the 1st respondent also submits that by virtue

of the appellant's demurrer application, this court has to decide the appeal on the admitted facts as contained in the writ of summons and the statement of claim. This submission is correct and valid. That is the adjectival essence of demurrer. But how does that help the 1st respondent? In paragraph 12 of the statement of claim, the 1st respondent as plaintiff B averred.

"The plaintiff paid the freight and the warehousing fees to the defendants whereof the defendants are in breach of contract for failure to deliver the said bus in good condition or at all. The value of the car is US C \$49,300.00."

The operative word, from the point of view or standpoint of the statutory duties of the appellant is "warehousing." That word sums it all. By the demurrer proceedings the appellant will be right in law to lean on that word, particularly as the word is provided for in section 3 (2) of D Decree No. 74 of 1993.

A plaintiff has the liberty to compose or construct a cause of action or relief in the way he likes and to the best of his ability, with the aim of obtaining judgment. He is free to use words that will earn him judgment. E But that is only as the matter goes for the plaintiff, in law, that is not the final matter. The finality of the relief in terms of giving the plaintiff judgment can only be determined by the court.

I do not think I sound clear. The point I am struggling to make is F this. The mere fact that the 1st respondent used the words, "*breach of contract, bailment, negligence, and res- ipsa loquitur,*" a defence in tort, do not change an action founded on the statutory duties of the appellant into breach of contractual duties. While it is the right of a plaintiff to present relief to the court, it is the duty of the court to determine it in the light of G the law and the facts of the case.

It is my view that the case is founded on the statutory duties of the appellant and not on breach of contract in common law. Accordingly, it is caught by section 72 (1) of the Ports Decree No. 74 of 1993. The H subsection provides:

"When a suit is commenced against the company or an employee of the company in respect of any alleged neglect or default in the execution

of the enactment, duty or authority the suit shall not lie or be instituted in any court unless it is commenced within 12 months next after the act, neglect or default complained of or in the case of a continuance of injury or damage within 12 months next after the ceasing thereof.”

B In view of the fact that the totality of the action against the appellant is in respect of “alleged neglect or default in the execution of enactment, duty or authority” of the appellant, the 1st respondent was under a statutory duty to comply with section 72 (1) of Decree No. 74 of 1993. As it failed to comply with the provision, the Court of Appeal was clearly C in error in upholding the appeal of the 1st respondent. That court ought to have dismissed the appeal.

In sum, I too allow the appeal of the appellant. I restore the ruling of the trial court. I abide by the costs awarded in the judgment of my D learned brother, Mohammed, JSC.

OGUNTADEJSC

E I have had the advantage of reading in draft a copy of the lead judgment by my learned brother Mohammed JSC. I agree with the reasons advanced by him in the said judgment as to why this appeal ought to be allowed. He has ably set out the facts leading to the dispute out of which F this appeal arose. I do not intend repeating the said facts save to the extent necessary for the purpose of making my opinion easy to follow.

The issues formulated by the appellant for determination in the appeal read:

G “ 1. *Whether the relationship between the Appellant and the Respondent comes within the statutory duties of the Appellant as laid out by the provisions of section 3(1)(a) of the Nigerian Ports Authority Decree No. 74 of 1993 having regard to the averments in the first Respondent’s statement of claim.*

H 2. *Whether the Court of Appeal was right not to have proceeded under its powers as provided for by section 16 of the Court of Appeal Act to consider and rule on the first Respondent’s failure to issue a pre-action notice.”*

The appellant was the 1st defendant before the Federal High Court Lagos where the 1st Respondent as Plaintiff claimed against it the following reliefs:

“1. *The sum of US\$49,300.00 cost of the bus and freight or its Naira equivalent at a date of judgment on commercial exchange rate.* B

2. *The sum of N300,000.00 cost of survey.*

3. *The sum of N1,000,000.00 general damages.”*

The Plaintiff filed its Statement of Claim and paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 thereof read:

“2. *The 1st defendant is a company set up by statute as a Port.* C

3. *The 2nd defendant is the shipping agent of the Vessel M V. California Highway’.*

4. *The plaintiff imported a brand new Tata Bus from Bombay, Ex. ‘M.V. California Highway’ by a bill of lading No. NSH/LA/001 dated 19th D March, 1993.*

5. *The bus was put on board ‘M.V. California Highway’ intact..*

6. *The vessel ‘M.V. California Highway’ arrived Tin 3 an 1 993. Can Island Port Apapa, Lagos on the 17th of April* E

7. *Immediately after arrival, the plaintiff instructed its clearing agents Messrs. Anwa Commercial Company Limited to clear and take delivery of the bus on its behalf.*

8. *The 2nd defendant confirmed the arrival of the consignment on board the vessel M.V. California Highway to the plaintiffs agent but the bus could not be traced until after a long search lasting for three weeks. The bus was eventually found at the back of shed one at Roro Port Car Park owned and managed by the 1st defendant.* F

9. *The bus was totally vandalized as all necessary parts had completely disappeared. Particularly the gear box, tyres, engine, electrical, mechanical and panel parts.* G

10. *The plaintiffs agent wrote a letter to the 1st defendant dated 20th May, 1993 notifying them of the damage to the bus and requesting to know H why the bus was not discharged at the Roro Car Park which is the usual parking lot.*

11. *The plaintiffs insurers, United Nigeria Insurance Company Plc.*

(UNIC) appointed a Cargo Survey Company, FASCO Agencies Limited to inspect the said bus at the 1st Defendant's premises and same was carried out on 26 May 1993 and a report was issued in respect thereof dated 10 June 1993. Further, the plaintiffs' insurers also instructed Joe
B AMS International (West Africa) Limited, Marine Cargo superintendents/surveyors to inspect the subject matter of this suit and a supplementary survey report was issued dated 18 July, 1994.

12. The plaintiff paid the freight and the ware housing fees to the
C defendants whereof the defendants are in breach of contract for failure to deliver the said bus in good, condition or at all. The value of the car is US\$49,300.00"

From the above paragraphs of the Statement of Claim, it is made plain that the plaintiffs claim was founded on 1st defendant's failure to
D deliver to it (the plaintiff) a Tata Bus covered by bill of lading No. NSH/LAS/001 dated 19-3-93. It is also clear that the 1st defendant was sued in connection with the performance of its duties under the Statute. Section 3(1) and (2) of that statute -Nigerian Ports Act No. 74 of 1993 provides:

E "3(1) The company shall -

(a) provide and operate in the ports, such port facilities as appear to it best calculated to serve the public interest;

(b) maintain, improve and regulate the use of the ports;

F (c) provide for the ports, the approaches to the ports and the territorial waters of Nigeria, such pilotage services and lights, marks and other navigational services and aids as appear to it best calculated to serve the public interest; and

G (d) provide such other services as the Minister may, from time to time, require.

(2) In this section -

'navigational services' include the cleaning, deepening and improving of any waterway; 'port facilities' means facilities -

H (a) for berthing, towing, mooring or dry-docking of ships in entering or leaving a port or its approach;

(b) for the loading and unloading of goods or embarking or disembarking of passengers in or from a ship;

(c) for the lighterage or the sorting, weighing, warehousing or handling of goods; and

(d) for the carriage of passengers or goods in connection with any of the facilities;”

Section 72(1) of the same Act gives cover or protection to the 1st B defendant by way of limiting the period for bringing an action against 1st defendant by anybody dandified by an act done in the performance of the duties assigned to 1st defendant in section 3(1) and (2) reproduced above. Section 72(1) of Act No. 74 of 1993 provides

“72(1) When a suit is commenced against the company or an C employee of the company -

(a) for an act done in pursuance or execution or intended execution of any enactment or of any public duty or authority;

(b) in respect of any alleged neglect or default in the execution of D the enactment, duty or authority, the suit shall not lie or be instituted in any court unless it is commenced within 12 months next after the act, neglect or default complained of, or, in the case of a continuance of injury or damage within twelve months next after the ceasing thereof.” E

The 1st defendant (now appellant), on being served with the Statement of Claim brought an application before the trial court praying that plaintiffs suit be dismissed on the ground that the plaintiff failed to bring it within the period of 12 months as prescribed under section 72(1) F of Act No. 74 of 1993 above. The trial judge Bioshogun J. upheld the objection and dismissed plaintiffs suit. Dissatisfied the Plaintiff brought an appeal before the Court of Appeal, Lagos Division (hereinafter referred to as the ‘court below’). The court below on 10-10-2000 allowed the appeal. G It stated that the suit although filed almost 3 years after the cause of action accrued was not statute barred. It is against the judgment of the court below that the 1st defendant (at the trial court) has brought this appeal.

The trial court in dismissing the plaintiffs suit held that the plaintiff H ought to have commenced its suit within 12 months from the date of accrual of the cause of action. The court below in reversing the trial court said at page 113 of the record:

“In the Construzioni’s case (supra) the Construction Company filed

a suit for a claim for money, which was due under a Construction Contract entered into by the parties. The Company filed the suit well after 12 months had lapsed when the money became due. The Nigerian Ports Authority sought to avoid liability by virtue of the provisions of section 97 of the Ports Act which is in pan' materia with section 72(1.) of the Decree No. 74. In that case the Supreme Court held *infer alia* as follows:-

'Section 97 of the Ports Act and similar enactments are not intended by the Legislature to apply to specific contract. Also, when goods have been sold, and the price is to be paid upon a quantum meruit the section will not apply to an action for the price, because the refusal or omission to pay would be a failure to comply with the terms of the contract and not with the provisions of the statute.'

On the facts pleaded there was no doubt that plaintiffs cause of action accrued on 26-5-93. There was also no doubt that the Plaintiff commenced its suit on 10-4-96. The nature of plaintiffs suit would appear to be one in the contract of bailment or the tort of negligence. In *Nigeria Ports Authority v. Construzioni General's FSC & Anor.* {1974} Vol. 9 NSCC 622 at 630, this Court per Ibekwe JSC said:

"We shall now deal with the other point which to my mind, does not seem to be well-settled, namely whether the kind of statutory privilege which we have been considering is applicable to an action founded upon a contract. In other words, whether S.97 of the Ports Act applies to cases of contract. We think that the answer to this question must be in the negative. We agree that the section applies to everything done or omitted or neglected to be done under the powers granted by the Act. But we are not prepared to give to the section the stress which it does not possess. We take the view that the section does not apply to a case of contract. The learned Chief Justice, in deciding this point, made reference to the case of *Salako v. L.E.D.B. and Anor.*, 20 N.L.R. 169 where *de Commarmond S.P.J.* as he then was, construed the provision of S.2 of the Public Officers Protection Ordinance which is almost identical with S.97 of the Ports Act, and thereafter stated the law as follows:

'I am of opinion that section 2 of the Public Officers Protection Ordinance does not apply in cases of recovery of land, breaches of

contract, claims for work and labour done, etc.’

We too are of the opinion that de Commarmond S.P.J., has quite rightly stated the law in the passage of his judgment cited above. It seems to us that an enactment of this kind i.e. S.97 of the Ports Act is not intended by the legislature to apply to specific contracts. B

It is pertinent to point out that the view which we have just expressed seems to be in consonance with the trend of the judgments pronounced in English cases dealing with similar provisions in certain English Statutes. We shall refer only to one case as an example. In The Midland Railway Company v. The Local Board for the District of Withington (1882-3) 11 Q.B.D. 788, the Court of Appeal construed S.264 of the Public Health Act, 1875 (38 & 39 Vict. C.55) which, more, or less falls in line with S.97 of the Ports Act, the subject-matter of this appeal. We think that it is desirable that we should here set out the provision of S.264 of the Public Health Act, 1875, as follows: C D

‘Sec.264. A writ or process shall not be sued out against or served on any local authority, or any member thereof, or any officer of a local authority, or persons acting in his aid, for anything done or intended to be done or omitted to be done under the provisions of this act, until the expiration of one month after notice in writing has been served on such local authority member, officer, or person....’ E

Delivering the judgment of the court at page. 794, Brett, M.R., made the following illuminating observation: F

‘It has been contended that this is an action in contract, and that whenever an action is brought upon a contract, the section does not apply. I think that where an action has been brought for something done or omitted to be done under an express contract, the section does not apply; according to the cases cited an enactment of this kind does not apply to specific contracts. Again, when goods have been sold, and the price is to be paid upon a quantum meruit, the section will not apply to the action for the price, because the refusal or omission to pay would be a failure to comply with the terms of the contract and not with the provisions of the statute.’ G H

We agree with their Lordships’ exposition of the law on this point.

Clearly, the appellants' claim and the 1st respondents' counter-claim in the present case are founded in contract. The counterclaim, in brief, is for the payment of the balance of money due from the appellants to the respondents as a result of the contract they both entered into for the construction of the second Apapa Wharf Extension." (Underlining mine)

I observe that Section 97(1) of the Ports Act Cap 115, 1958 Laws of the Federation which was considered by this Court in the Construzioni case above is in ipsissima verba with Section 72(1) of the Act No. 74 of 1993 reproduced above. It was the view of this Court per Ibekwe J.S.C. above that the protection afforded under Section 97(1) would not cover cases of specific contracts. However this Court in Umukoro v. Nigerian Paris Authority [1997] 4 N.W.L.R. (Pt. 502) 656 at 667 per Kutigi JSC said:

"I think section 97(1) of the Ports Act (supra) is quite clear and unambiguous. The imperative nature of the provisions is also not in doubt. On these facts, I am in complete agreement with the decisions of both the two lower courts (and as rightly conceded by Mr. Eduvie that the Plaintiffs suit is statute barred and therefore rightly dismissed.)"

It is remarkable that the decision of this Court in construzioni case (supra) was never brought to the attention of this Court in v. N.P.A (supra). The court did not therefore have the opportunity to consider the reasoning advanced in support of the decision.

The learned authors of Preston and Newmans Limitation of Actions, 3rd edition at page 202 (1953) write:

"The general considerations as to when the section applies are particularly important where the proceedings are not for tort as in most of the cases so far referred to but for breach of contract. In Clarke v. Lewisham Borough council where the action was for wrongful dismissal (that is acclain against an employer for breach of a service contract) Bingham J. went so far as to say that 'Good Sense' as well as the Authorities showed that the Act was not intended to apply to actions for damages for breach of contract at all. This statement however seems to be too wide. It does seem to me after consideration of all the authorities set out in 38 English And Empire Digest at 119-121 Para. 824-831 that the question as to whether the protection of a Limitation Act could be relied

upon as a defence in any case especially cases arising from breach of contract would depend on the facts on which an individual case turns.”

I think, with respect, that it would be unjust to clothe the Nigerian Ports Authority with special protection in all cases of contract as that would negate the general principles upon which the Law of Contract is based.

In a contract, parties are free to negotiate the terms of their relationship. It is therefore sound to say that in a specific contract, section 72(1) of Act No. 74 of 1993 may not be invocable unless the Nigeria Ports and the party with which it is contracting have specifically made it a part of the terms of the contract. In the *Construzioni* case, the N.P.A, was involved in a specific contract for the construction of Apapa Wharf extension.

In the case on hand, there was no averment that the plaintiff entered into a specific contract with the 1st defendant. There was no averment that the plaintiff handed its bus to the 1st defendant for safe keeping. If the plaintiff was relying on a contract in bailment, the foundation for such contract could only have been based on the general duties placed on the 1st defendant under section 3(1) and (2) of Act No. 74 of 1993. The plaintiff's vehicle could not otherwise have found its way into 1st defendant's custody save only in the performance of the 1st defendant's duties under section 3(1)(a) to “provide and operate in the ports, such port facilities as appear to it best calculated to serve public interest.” This view draws support from the averment in paragraph 12 of the Statement of Claim where the plaintiff pleaded:

“ 12. *The plaintiff paid, the freight and the warehousing fees to the defendants whereof the defendants are in breach of ‘contract for failure to deliver the said bus in good condition or at all. The value of the car is US\$49,300.00’.*”

It is obvious that the plaintiff was not relying on a specific contract with the 1st defendant but rather on the fact that it paid warehousing fees. This is a fee, which all importers generally pay for the services of the 1st defendant.

The only conclusion to be drawn is that Plaintiffs suit arose from

the normal day to day operations of the 1st defendant under the Ports Act and not under any specific contract. It seems to me that the language of Section 72(1) is very clear. It is to protect the Nigeria Ports Authority in its day-to-day operations and as provided under the Act. A conclusion that B the 1st defendant/appellant could not derive protection under the Act would amount in my view to a subversion of the clear language of the law.

There may be valid reasons why specific contracts should not be covered or protected by section 72(1). But I think that the general day-to-day operations of the Nigerian Ports Authority ought to be protected under C the Act. I therefore agree with the lead judgment by my learned brother Mohammed J.S.C. I would also allow this appeal with costs as in the lead judgment.

D

E

F

G

H