

SUPREME COURT OF NIGERIA
15TH JUNE, 2007. SC. 121/2002
CORAM:-S. U. ONU, D. MUSDAPHER, S. A. AKINTAN,
M. MOHAMMED, I. F. OGBUAGU, JJSC

OWNERS OF M/V GONGOLA HOPE	APPELLANTS/
NIGER BRASS SHIPPING LINE LTD.	CROSS-RESPONDENT
AND	
SMURFIT CASES NIG. LTD.	RESPONDENTS/
CARLDOM INT. AGENCIES LTD.	CROSS-APPELLANTS

APPEALS - Issues - Grounds of appeal - Issues for determination - Should be distilled from the grounds of appeal - And be in consonance with it (H1)

APPEALS - Issues - Fresh issue - Carriage of goods by sea - Issue of limitation of liability and defence open to appellants - Not being raised before lower court - Is a fresh issue that requires leave of court (H2)

PLEADINGS - Jurisdiction - Issues - Appeals - Where appellants led no evidence - In proof of pleaded defence - The pleadings remain dead - Court has no jurisdiction - To go outside the issues before it (H3)

APPEALS - New issue - Evidence - Supreme Court will not allow a new issue - Save substantial points of law are involved - And there is evidence in support of that issue - Without need for further evidence (H4)

CONTRACTS - Admission - Carriage of goods - Limitation of liability - Admission of loss of goods - Without offering explanation to proved fraud or negligence - Makes the Hague Rules and the per package limitation inapplicable (H5)

APPEALS - Issues - Grounds of appeal - Issues for determination - Must relate to the grounds of cross appeal - And flow from the judgment - In

order to be competent (H6)

JUDGMENTS - Appeals - Cross appeal - Where Court of Appeal held that respondents proved all their claims - It ought to award the claims as pleaded and proved (H7)

FACTS

Before the Federal High Court Lagos, plaintiffs/respondents filed an action against the defendants/appellants. Respondents' claims against appellants were in respect of losses and damages caused as a result of appellants failure to deliver the 41 reels of Kraftliner board which they carried for reward by sea for and on behalf of 1st respondent from Paranagua. Appellants failed to deliver the goods and gave no explanation why the goods were not delivered nor traced. The claims which were in detinue, conversion, negligence and or fraudulent misrepresentation for non delivery of the goods, included claims for loss of profits, and interest. Respondents led evidence in proof of their pleadings. Appellants led no evidence but merely rested their defences on respondents' evidence.

The trial Judge refused respondents' claims on the ground that 1st respondent had no locus standi to file the action and that the suit is statute barred. He struck out the case. Respondents' appeal to the Court of Appeal was allowed but the Court failed to grant all the respondents' claims though it held they were proved. Dissatisfied, appellants have now appealed to the Supreme Court, whilst respondents cross appealed.

ISSUES FOR DETERMINATION

"1. What in the circumstances of the facts of the case should have been the orders/award of the Court of Appeal having held that the case of the respondents was wrongly struck out?"

2. On a true construction of the contract between the parties as evidenced by Exhibit A, the Bill of lading, what is the measure of the limit of the appellants' liabilities?"

Cross Appeal

"Whether the respondent/cross-appellants are entitled to interests on their claims also whether they are entitled to loss of profits, which was

proved in evidence at the trial and not contradicted, as well as general damages.”

HELD (Unanimously dismissing the appeal, but allowing the cross appeal per **MUSDAPHER JSC**)

Issues - Grounds of appeal

1. In my view, having regard to the two grounds of appeal, the complaint of the appellant is based on the issue whether the limitation of liability clause as provided by the Hague Rules as incorporated into the contract of carriage by the Bill of Lading avails the appellants to limit their liability to 100 in Gold per package or unit. The issues formulated by the appellants do not really appear to be in consonance with the grounds of appeal especially issue No. 1.

Issues for determination should be distilled from the grounds or ground of appeal and must naturally flow from the essential complaint in the ground or grounds of appeal. (p. 2620 D)

Fresh issue - Carriage of goods by sea

2. There is no doubt that the Court of Appeal did not consider the limitation of liability as provided for under Hague Rules which is indisputably incorporated in the instant contract by the Bill of Lading. It can be seen plainly that the issue as to the limitation of liability to 100 gold per package or unit was not an issue for the determination of the matters placed before the Court of Appeal. The issues of defence open to the appellants were not raised in the Court of Appeal and were not accordingly decided upon.

Thus the issue of the defence of the limitation of liability was not raised in the Court of Appeal. It is now a fresh issue. A matter not raised at and decided by the Court of Appeal may not ordinarily be raised in the Supreme Court for the first time without leave unless it is such matter of fundamental importance such as the issue of jurisdiction. Thus jurisdictional issue because of the nature of its fundamental importance to the competence of adjudication is one of the very few exceptions where fresh issues may be raised without leave. Issue of jurisdiction may be

raised at any stage of the proceedings even at the Supreme Court and even by the court suo motu, leave may not be necessary because without the judicial competence to adjudicate everything done is a nullity. The general rule is that fresh issues can only be raised with leave.

B (p. 2620 H)

PLEADINGS - Jurisdiction - Issues

3. In my view the parties are bound by the issues they formulated in their briefs of argument. So too, the Court of Appeal. The Court of Appeal had no jurisdiction to go out side the issues legitimately submitted to it for the determination of the appeal See OJOH VS. KAMALU [2005] 24 NSCQR (Vol. 24) page 256.

D There is no doubt that the appellants in the court of trial raised the issue of limitation of liability as provided for under the Hague Rules as an alternative defence. But it is good law, that pleadings, as stated by TOBI JSC in OJO VS. KAMALU supra:-

E “xxxxxxx *not being human beings, have no mouth to speak in Court. And so they speak through witnesses. If witnesses do not narrate them in court, they remain moribund, if not dead at all times and for all times, to the procedural disadvantage of the owner, in this context the appellant.*”

F In the instant case, the appellants, led no shred of evidence in support of their, entire pleadings and I am of the view that under the circumstances the Court of Appeal had no duty or authority to resurrect the pleadings and to find a defence for the appellants to limit their liability, significantly when such a defence was even never referred to the court.

G (p. 2622 C)

APPEALS - New issue - Evidence

4. In any event, this court will not generally allow a party on appeal to raise a question or an issue not raised in the Court of Appeal or to grant leave to argue fresh grounds not canvassed in the Court of Appeal except where the new grounds involve substantial points of law substantive or procedural which need to be allowed in order to prevent an obvious mis-carriage of justice. Even in such a case, there must be the evidence ad-

duced by the party relying on the new issue. Invariably the court, will only allow a fresh issue to be argued on appeal where the issue is relevant and no further evidence is necessary. In any event, it is patently clear that no leave was sought and obtained to canvas this issue on appeal and the appellants led no evidence to support the defence. (p. 2622 H)

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CONTRACTS - Admission - Carriage of goods

5. As mentioned above, the Court of Appeal considered the issues submitted to it for the determination of the appeal. It considered all the evidence led before the trial court before it reached its decision to enter judgment. I am also of the view that the appellants having admitted the loss of the goods without any explanation and without disproving that they were negligent or fraudulent cannot avail themselves on the defence of the limitation of liability. From the facts, the appellants were guilty of a fundamental breach. From the facts, the appellants were guilty of a fundamental breach of the contract and they could not therefore rely on their own wrong doing to limit their liability. In any event they led no evidence whatsoever to support their entitlement to the defence.

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When a contract of carriage is breached in such a manner and when no explanation is offered as to how the loss occurred and where the shipper pleads and proves fraud, misrepresentation and negligence the Hague Rules and the per package limitation will not apply. I accordingly discountenance the two issues formulated by the appellants and consequently strike out the appeal as incompetent. (p. 2623 C)

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Issues for determination - Must relate to the grounds

6. The issues formulated by the cross-respondents as recited above do not flow from the grounds of the cross-appeal. It is settled law that issues for determination must relate or tie to the grounds of appeal and where such issues do not tally with the grounds of appeal, they, become incompetent and are deemed non-issues and should be ignored and struck out. It must be emphasized that even a respondent to an appeal is not permitted to formulate any issues not arising from or related to the grounds of the cross-appeal and therefore a respondent to an appeal such as in

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this case must be careful in formulating issues for the determination of the cross-appeal to formulate issues that are in consonance with the grounds of the cross-appeal, otherwise, the issues not covered by grounds of appeal will be incompetent and struck out. It is also the law that issues for determination failing to flow from the judgment appealed against cannot be competent. Issues for determination in any appeal must not only be related to or arise not only from the grounds of appeal filed by the appellant or Cross-appellant but must be traced to the judgment or decision being appealed against.

In the present case as none of the issues formulated by the cross-respondents addressed the real issue, in this appeal to wit whether the Court of Appeal was right in omitting to enter judgment in all the matters proved as found by the court and which was contained in the Amended Statement of Claim. The issues even appear to me to be in the nature of preliminary objection to the competence of the cross-appeal. It is not permitted to file a Notice of Preliminary Objection in this manner. I discountenance the issues, filed by the cross-respondents. (p. 2624 F)

JUDGMENTS - Appeals - Cross appeal

7. Now in its judgment, the Court of Appeal stated as pointed out before, that the respondents as plaintiffs called evidence in proof of all the averments contained in the Amended Statement of Claim and the appellants failed or refused to call any evidence in the defence of the claims or proof or support of the Statement of Defence, judgment should be entered in favour of the respondents. In their Notice of Appeal the respondents as the appellants prayed the court to enter judgment as per the Amended Statement of Claim. But instead of doing that the Court of Appeal merely entered judgment on two items only without mentioning the other claims and without assigning any reasons for failure to make the award. In the present appeal, the cross-respondents have no dispute with the evidence adduced by the cross-appellants.

In my view, the Court of Appeal having held that the respondents had proved all their claims, the Court ought to have awarded the claims as pleaded and proved. I accordingly allow the cross-appeal and vary

the judgment of the Court of Appeal to include the interest as claimed and the anticipated profit as contained in paragraph 15 of the Amended Statement of Claim. (p. 2625 F)

NOTABLE POINT OF INTEREST

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OGBUAGU JSC

1. Defendant's failure to give evidence - Implications

Also firmly settled, is that where the evidence of a Plaintiff is unchallenged and uncontroverted and particularly, where the opposite party or side, had the opportunity to do so, it is always open to the trial court seized of the matter, to accept and act on such unchallenged and/or uncontroverted evidence before it. There are too many decided authorities in respect thereof. As in the instant case leading to this appeal where the Appellants, offered no evidence, it is also settled, that in such circumstances, the evidence before the court, obviously, goes one Way with no other set of facts or evidence weighing against it. In other words, there is nothing in such a situation, to put on the other side of the proverbial or imaginary scale of balance as against the evidence given by or on behalf of the Plaintiff. Also settled, is that in such a case or circumstances, the onus of proof, is naturally discharged, on a minimal of proof. (p. 2632 E)

REPRESENTATION

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O. G. Oyeleke, Esq. for the Appellants/Cross Respondents.

Chief E. O. A. Idowu, (SAN), for the Respondents/Cross-Appellants with him, Mrs. Olufunke Agbor; T. A. Alakoso, Esq. and Abdulazz Garba, Esq.

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CASES REFERRED TO

CAPTAIN AMADI VS. NNPC [2000] 10 NWLR (Pt 674) 76

AROWOLO VS. AKAPO [2003] 8 NWLR (Pt.823) 451 382

ARCHIBISHOP JATAU VS. ALHAJI AHMED & 4 OTHERS [2003] 1 H SCNJ 382

FACOLA VS. UNION BANK [2005] 2 SC (Pt.11) 62

DADA VS. DOSUNMU [2006] VOL. 12 MJSC 115

- OJOH VS. KAMALU [2005] 24 NSCQR (Vol. 24) page 256
EZE VS. A.G. RIVERS STATE [2001] 8 NSCQR 537
OJEGBE VS. OMETSONE [1999] 6 NWLR (Pt 608) 59
WESTERN STEEL WORKS LTD VS. IRON AND STEEL WORKERS
B UNION OF NIGERIA [1987] 1 NWLR (Pt. 49) 284 at 304
ONYESOH VS. NNEBED M [1992] 3 NWLR (Pt 229) 315
OLOWOSAGO VS. ADEBANJO [1988] 4 NWLR (Pt. 88) 275
THE M.V. “CAROLINE MAERSK” SISTER VESSEL TO M.V. “CHRIS-
TIAN MAERSK” & 2 ORS. V. NOKOY INVESTMENT LTD. (2002) 12
C NWLR (PT 782)
PHOTO PRODUCTION LTD. V. SECURICOR TRANSPORT LTD.
(1980) 1 ALL E.R. 556
GEORGE MITCHELL (CHESTERHALL) LTD. V. FINNEY LOCK
D SEEDS LTD. (1983) 2 ALL E.R. 737
THE GOLD COASTED ASHANTI ELECTRIC POWER DEVELOPMENT
CORPORATION LTD. V. THE ATTORNEY-GENERAL OF THE GOLD
COAST 3 WACA 219
E IMANA V. ROBINSON (1979) 3 & 4 S.C. 1

RULES REFERRED TO

Hague Rules Articles 3-6 Clause 8 (2)

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LEAD JUDGMENT BY MUSDAPHER JSC

In the Federal High Court holden at Lagos and in suit No. FHC/
121/90, by an Amended Statement of Claim the plaintiffs’ claim against
G the defendants were as follows:-

- “1. Delivery of all 41 Reels of Kraftliner Board 150 GSM 2050
mm directly to the plaintiffs’ factory with all other consequential direc-
tions AND/OR Either.*
- H *2. Damages for fraud or fraudulent misrepresentation and/or neg-
ligence. AND/OR.*
- 3. Payment of the sum of USD 71,446.94 plus interest at the rate
of 8% from the 22nd of August 1990 to the date of judgment and there-*

after interest at the rate of 10% until date of payment.

4. *The sum of N697,066.81 being the amount specified items 3, 4, 5, 6, 7 and 8 of the particulars listed in paragraph 14 supra .*

5. *Anticipated loss of profit on use of goods N2,000,000.00 [Two Million Naira] if they had arrived and been processed.* B

6. *Further and or other reliefs as the Court may deem fit.”*

Pleadings were ordered, delivered and amended. Five witnesses testified for the plaintiffs and a number of documentary evidence were tendered. The defendants offered no evidence but rested their case on the evidence led by the plaintiffs. After the addresses of counsel, in his judgment delivered the 12th day of February, 1997, the learned trial judge refused the plaintiffs’ claims on the ground that the 1st plaintiff had no locus standi to file the suit because it had lost its right of suit to the 2nd plaintiff by appointing the 2nd plaintiff as its clearing agent for clearing the lost goods. The learned trial judge also found that the 2nd plaintiffs claims had become statute barred. He struck out the plaintiffs’ case. The plaintiffs felt unhappy with the situation and appealed to the Court of Appeal on 16 grounds of appeal. The Court of Appeal in its consideration of the appeal before it, in its Judgment delivered on the 21st of January, 2002, held per Aderemi JCA as he then was, which was concurred by Oguntade JCA as he then was and Chukwuma-Eneh JCA also as he then was:- C D E F

“In the final result and for all the reasons that I have given above, this appeal must be allowed and it is accordingly allowed. The ruling of the court below striking out the entire suit is hereby set aside. In its place is an order entering judgment in favour of the appellants in the following terms- G

(a) US Dollar 60,087.07 [sixty thousand eighty seven dollars and seven cents]

(b) N212,973.46 [Two hundred and Twelve Thousand nine hundred and seventy - three naira forty six kobo only] H

The judgment was entered in favour of the 1st plaintiff only against the defendants.

The defendants also felt unhappy with the decision of the Court of

Appeal and have now appealed to this court on two grounds of appeal. In his brief for the defendants the learned counsel stated that the appeal is only against the consequential orders and not against the decision allowing the appeal “per se, but on what appropriate orders should have been made having come to the decision that the case was wrongly struck out.”

The plaintiffs on 1/2/2002 filed an application before the Court of Appeal praying for the variation of the judgment entered on the 21/1/2002 in that the judgment sum should include interest on the amount adjudged as proved at the rate of 8% from 22/8/1990 until date of judgment on the 21/1/2002 and thereafter interest at the rate of 10% until date of payment to 1st plaintiff,” and for also loss of profits. The defendants filed a Counter Affidavit in opposition to the motion. In its consideration of the motion, the court below agreed that it made a mistake in not awarding the interest and the loss of profits as claimed and proved, but declined to vary its judgment since at the time of the ruling on the application the appeal had already been entered in the Supreme Court. That was why the plaintiffs also filed a Notice of Cross-appeal on the omission of the Court of Appeal to enter the full judgment in accordance with the amended statement of claim. Now in this judgment, the defendants are hereinafter referred to as the appellants or the cross-respondents as the case may be while the plaintiffs are referred to as the respondents or the cross-appellants. I shall first deal with the appeal as filed by the appellants.

Appellants’ Appeal

In their Notice of Appeal, the appellants filed the following two grounds of appeal:-

“(1) *The Court of Appeal erred in Law in awarding damages in excess of the limitation imposed by the Bill of Lading.*

Particulars

(i) *The Bill of Lading Exhibit A specifically incorporates the Hague Rules, which placed a limit on owners/appellants liability for cargo claims.*

(ii) *The Court of Appeal relied on the terms of the same Bill of Lading to come to its decision allowing the respondents appeal.*

(iii) *The Court failed to take adequate advantage of the powers*

allowed it by virtue of section 16 of the Court of Appeal Act, 1976.

(1) The Court of Appeal erred in law and a miscarriage of justice was occasioned when it failed to adequately consider the defence of the appellants.

Particulars

(i) The failure of the appellants to lead evidence should not prejudice the defences available to it by law.

(ii) The Court of Appeal should have in the circumstances of the decision reached assumed the role of the trial Court to consider the legal defences in the pleadings along with the totality of the evidence provided.

(iii) The appellants pleaded and raised legal, defences in counsel's address at the trial court and which should have been considered."

Before the examination of the issues distilled from the two grounds of appeal by both parties, it is convenient at this stage to set out the relevant facts for the determination of the appeal. The respondents claims against the appellants were in respect of losses and damages caused through the failure of the appellants to deliver the 41 reels of Kraftliner board 95m 2050 mm which the 1st appellant carried for reward, by sea for and on behalf of the 1st respondent from the sea Port of Paranagua for delivery to the 1st respondent in Lagos, Nigeria. The appellants failed to deliver the goods and gave no explanation why the goods were not delivered nor traced. The claims of the respondents against the appellants were in detinue and or/conversion and/or negligence and/or fraud or fraudulent misrepresentation for non delivery of the goods. As mentioned above the claim was for losses, damages, including loss of profits and interest. As mentioned above, the respondents called evidence in proof of their pleadings. The appellants however did not lead any evidence in proof or support of their pleadings, but merely rested their defences on the evidence led by the respondents. The Court of Appeal commented on the consequence of a party who fails to adduce evidence to substantiate its pleadings. As a matter of fact in paragraph 2 of the Statement of Defence, the appellants admitted paragraphs 5, 9, and 10 of the Amended Statement of Claim. The consequence was that there were no issues

joined on the liability of the appellants to the respondents. Also as mentioned above, the appeal herein is not “challenging any aspect of the facts and evidence as admitted before the trial court but seeks a review of the decision of the. Court of Appeal when the court failed to be guided by the defences of limitation of liability available to the appellants.” (see page 5 of the appellants’ brief)

Now, in his brief for the appellants the learned counsel has identified formulated and submitted two issues for the determination of the appeal thus:-

“1. *What in the circumstances of the facts of the case should have been the orders/award of the Court of Appeal having held that the case of the respondents was wrongly struck out?*

2. *On a true construction of the contract between the parties as evidenced by Exhibit A, the Bill of lading, what is the measure of the limit of the appellants’ liabilities?”*

In my view, having regard to the two grounds of appeal, the complaint of the appellant is based on the issue whether the limitation of liability clause as provided by the Hague Rules as incorporated into the contract of carriage by the Bill of Lading avails the appellants to limit their liability to 100 in Gold per package or unit. The issues formulated by the appellants do not really appear to be in consonance with the grounds of appeal especially issue No. 1. See CAPTAIN AMADI VS. NNPC [2000] 10 NWLR (Pt 674) 76. AROWOLO VS. AKAPO [2003] 8 NWLR (Pt.823) 451 382, ARCHIBISHOP JATAU VS. ALHAJI AHMED & 4 OTHERS [2003] 1 SCNJ 382, FACOLA VS. UNION BANK [2005] 2 SC (Pt.11) 62, DADA VS. DOSUNMU [2006] VOL. 12 MJSC 115.

Issues for determination should be distilled from the grounds or ground of appeal and must naturally flow from the essential complaint in the ground or grounds of appeal. As mentioned above the fundamental complaint of the appellants in this appeal is the failure of the court below to apply the limitation of liability under the Hague Rules which will reduce the claims of the respondents.

There is no doubt that the Court of Appeal did not consider

the limitation of liability as provided for under Hague Rules which is indisputably incorporated in the instant contract by the Bill of Lading. The only issues presented to the Court of Appeal for the determination of the appeal by the then appellants [respondents herein] were:-

“(i) Whether on the facts and the circumstances of this case, the 1st appellant could rightly be held to have lost its right of suit to 2nd appellant.

(ii) Whether the appellants’ case received fair and/or adequate consideration of the learned trial judge.

(iii) Whether the trial judge is justified in deciding the case only on technicality without making any findings on the merits.

(iv) Whether the learned trial judge is right in finding that the 2nd plaintiff/appellant’s action is statute barred.”

For their part, the respondents to the aforesaid appeal, the appellants herein, raised two issues for the determination of the appeal:-

“(i) Whether either of the appellants as plaintiffs had proved within the relevant period for the purposes of the time limitation restrictions that they were endorsees and party entitled to property covered by the Bill of Lading.

(ii) Whether the trial court was right to determine the case solely on a legal point on a consideration of the terms of the applicable law.”

It can be seen plainly that the issue as to the limitation of liability to 100 gold per package or unit was not an issue for the determination of the matters placed before the Court of Appeal. The issues of defence open to the appellants were not raised in the Court of Appeal and were not accordingly decided upon. The issue in the main was whether the trial judge, having regard to the uncontradicted evidence adduced by the respondents, was not in error to have struck out their claims and if the decision was found to be erroneous, the Court of Appeal should enter judgment for the respondents in accordance with their claims as contained in the Amended Statement of Claim.

Thus the issue of the defence of the limitation of liability was not raised in the Court of Appeal. It is now a fresh issue. A matter not raised at and decided by the Court of Appeal may not ordinarily

be raised in the Supreme Court for the first time without leave unless it is such matter of fundamental importance such as the issue of jurisdiction. Thus jurisdictional issue because of the nature of its fundamental importance to the competence of adjudication is one of the very few exceptions where fresh issues may be raised without leave. Issue of jurisdiction may be raised at any stage of the proceedings even at the Supreme Court and even by the court suo motu, leave may not be necessary because without the judicial competence to adjudicate everything done is a nullity. The general rule is that fresh issues can only be raised with leave. I have above in this judgment recited the issues submitted to the Court of Appeal for the determination of the appeal before it together with the prayer to enter judgment as per the Amended Statement of Claim. **In my view** the parties are bound by the issues they formulated in their briefs of argument. So too, the Court of Appeal. The Court of Appeal had no jurisdiction to go out side the issues legitimately submitted to it for the determination of the appeal See OJOH VS. KAMALU [2005] 24 NSCQR (Vol. 24) page 256.

There is no doubt that the appellants in the court of trial raised the issue of limitation of liability as provided for under the Hague Rules as an alternative defence. But it is good law, that pleadings, as stated by TOBI JSC in OJO VS. KAMALU supra:-

“xxxxxxx not being human beings, have no mouth to speak in Court. And so they speak through witnesses. If witnesses do not narrate them in court, they remain moribund, if not dead at all times and for all times, to the procedural disadvantage of the owner, in this context the appellant.”

In the instant case, the appellants, led no shred of evidence in support of their, entire pleadings and I am of the view that under the circumstances the Court of Appeal had no duty or authority to resurrect the pleadings and to find a defence for the appellants to limit their liability, significantly when such a defence was even never referred to the court.

In any event, this court will not generally allow a party on

appeal to raise a question or an issue not raised in the Court of Appeal or to grant leave to argue fresh grounds not canvassed in the Court of Appeal except where the new grounds involve substantial points of law substantive or procedural which need to be allowed in order to prevent an obvious miscarriage of justice. Even in such a case, there must be the evidence adduced by the party relying on the new issue. See *EZE VS. A.G. RIVERS STATE* [2001] 8 NSCQR 537. Invariably the court, will only allow a fresh issue to be argued on appeal where the issue is relevant and no further evidence is necessary. In any event, it is patently clear that no leave was sought and obtained to canvas this issue on appeal and the appellants led no evidence to support the defence.

As mentioned above, the Court of Appeal considered the issues submitted to it for the determination of the appeal. It considered all the evidence led before the trial court before it reached its decision to enter judgment. I am also of the view that the appellants having admitted the loss of the goods without any explanation and without disproving that they were negligent or fraudulent cannot avail themselves on the defence of the limitation of liability. From the facts, the appellants were guilty of a fundamental breach of the contract and they could not therefore rely on their own wrong doing to limit their liability. In any event they led no evidence whatsoever to support their entitlement to the defence.

When a contract of carriage is breached in such a manner and when no explanation is offered as to how the loss occurred and where the shipper pleads and proves fraud, misrepresentation and negligence the Hague Rules and the per package limitation will not apply. See the *PEMBROKE* [1993] LLOYDS REP 230, *THE CHANDA* [1989] 2 LLOYDS REP. 494.

I accordingly discountenance the two issues formulated by the appellants and consequently strike out the appeal as incompetent.

The Cross-appeal

The cross-appeal is concerned with the claim for damages for

loss of profits and interest. As mentioned at the beginning of the judgment, the Court of Appeal, admitted that they were wrong in refusing to grant the claims, but declined to vary the judgment because the appeal was already entered at this court. The cross-appellants submit one issue

B for the determination of the cross-appeal which reads:-

“Whether the respondent/cross-appellants are entitled to interests on their claims also whether they are entitled to loss of profits, which was proved in evidence at the trial and not contradicted, as well as general damages.”

C The learned counsel for the cross-respondents on the other hand, has submitted the following issues for the determination of the cross-appeal.

D *“1. Whether the reliefs sought by the cross-appellants in this appeal is available under the “sliprule,” or by a “variation” of the judgment of the Court of Appeal as stated on the Notice of appeal, [sic]*

2. Whether the grounds and particulars supporting the cross-appellants’ Notice of Appeal should not be dismissed for relying on the
E *decision not appealed, the ruling, to support the complaints against the decision appealed, the judgment.*

3. Whether the Appeal Court did not take full account and/or was not fully mindful of the totality of the cross-appellants claims as plain-
F *tiffs in the trial court in the eventual decision that it reached on the appeal.”*

The issues formulated by the cross-respondents as recited above do not flow from the grounds of the cross-appeal. It is settled law that issues for determination must relate or tie to the grounds
G **of appeal and where such issues do not tally with the grounds of appeal, they, become incompetent and are deemed non-issues and should be ignored and struck out. It must be emphasized that even**
H **a respondent to an appeal is not permitted to formulate any issues not arising from or related to the grounds of the cross-appeal and therefore a respondent to an appeal such as in this case must be careful in formulating issues for the determination of the cross-appeal to formulate issues that are in consonance with the grounds**

of the cross-appeal, otherwise, the issues not covered by grounds of appeal will be incompetent and struck out. See OJEGBE VS. OMETSONE [1999] 6 NWLR (Pt 608) 59.

It is also the law that issues for determination failing to flow from the judgment appealed against cannot be competent See WEST-ERN STEEL WORKS LTD VS. IRON AND STEEL WORKERS UNION OF NIGERIA [1987] 1 NWLR (Pt. 49) 284 at 304; ONYESOH VS. NNEBEDU M [1992] 3 NWLR (Pt 229) 315, OLOWOSAGO VS. ADEBANJO [1988] 4 NWLR (Pt. 88) 275. Issues for determination in any appeal must not only be related to or arise not only from the grounds of appeal filed by the appellant or Cross-appellant but must be traced to the judgment or decision being appealed against.

In the present case as none of the issues formulated by the cross-respondents addressed the real issue, in this appeal to wit whether the Court of Appeal was right in omitting to enter judgment in all the matters proved as found by the court and which was contained in the Amended Statement of Claim. The issues even appear to me to be in the nature of preliminary objection to the competence of the cross-appeal. It is not permitted to file a Notice of Preliminary Objection in this manner. I discountenance the issues, filed by the cross-respondents.

Now in its judgment, the Court of Appeal stated as pointed out before, that the respondents as plaintiffs called evidence in proof of all the averments contained in the Amended Statement of Claim and the appellants failed or refused to call any evidence in the defence of the claims or proof or support of the Statement of Defence, judgment should be entered in favour of the respondents. In their Notice of Appeal the respondents as the appellants prayed the court to enter judgment as per the Amended Statement of Claim. But instead of doing that the Court of Appeal merely entered judgment on two items only without mentioning the other claims and without assigning any reasons for failure to make the award. In the present appeal, the cross-respondents have no dispute with the evidence adduced by the cross-appellants.

In my view, the Court of Appeal having held that the respondents had proved all their claims, the Court ought to have awarded the claims as pleaded and proved. I accordingly allow the cross-appeal and vary the judgment of the Court of Appeal to include the interest as claimed and the anticipated profit as contained in paragraph 15 of the Amended Statement of Claim. In the result the appeal is struck out and the cross-appeal is allowed. The respondents/cross-appellants are entitled to costs assessed at N10,000.00.

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ONU JSC

Having been privileged to read before now the judgment of my learned brother Dahiru Musdapher, JSC, I am in entire agreement with his reasoning and conclusions to strike out the main appeal and allow the Cross-Appeal. I abide by the consequential orders contained in the leading judgment inclusive of costs awarded therein.

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AKINTAN JSC

The dispute that led to the respondent/cross appellants to commence this action arose over the performance of a contract of carriage of goods by sea between the parties. The appellants were the carriers while the respondents/cross-appellants were the owners of the goods carried. The allegation was that the goods sent through the appellants for delivery to the respondents/cross-appellants in Lagos port were never delivered. The action was tried at the Federal High Court, Lagos for the recovery of the cost of the goods lost and interest therein. Pleadings were filed and exchanged. At the trial, the plaintiffs led evidence in support of their pleadings. The defendants, on the other hand, did not call any witness. At the conclusion of the hearing and address of counsel, the trial court refused the claim on the ground, inter alia, that the 1st plaintiff had no locus standi to file the suit and that the 2nd plaintiff's claim had become statute barred. An appeal to the court below was allowed and judgment was entered in favour of the plaintiffs based on the merit of

their claim. The Court below however failed to award interest on the awards made even though claimed by the plaintiffs. The present appeal is against the judgment of the court below.

I had the privilege of reading the draft of the lead judgment written by my learned brother, Musdapher, JSC. The facts of the case are fully set out in the said lead judgment and all the issues raised in both the appeal and the cross-appeal are well set out and extensively discussed. I agree with his reasoning and conclusions as set out therein and I hereby adopt them. For the detailed reasons given in the lead judgment, I also dismiss the appeal and allow the cross-appeal with costs as assessed in the lead judgment.

MOHAMMED JSC

This appeal arose from the performance of a contract of carriage of goods by sea between the parties. The Appellants who were the carriers, carried goods for reward by sea for and on behalf of the Respondents from the seaport of Paranagua for delivery in Lagos what really happened to the goods. The Respondents action at the trial Federal High Court, after going through full trial in which the Appellants as Defendants virtually conceded liability for the breach of their obligation under the contract, was all the same struck out by the learned trial judge. The Court below however on hearing the Respondents' appeal, set aside the decision of the trial Court and entered judgment for the Plaintiffs/Respondents for part of their claims. Both parties were not happy with the judgment of the Court below hence the Appellants' appeal and the Respondents' cross-appeal to this Court now for consideration.

I have had the opportunity before today of reading the judgment of my learned brother Musdapher JSC, in which he ably dealt with the issues arising for determination in the appeal and the cross-appeal. I entirely agree that the Appellants, not having obtained the leave of the Court below or this Court in raising the fresh issues-canvassed in their grounds of appeal, their appeal is incompetent and ought to be struck out. As for

the cross-appeal, the Appellants as Defendants having admitted liability to the Plaintiffs/Respondents' claims, the Court below in entering judgment for the Respondents, ought to have granted all the reliefs claimed by them including the reliefs for loss of profit in the goods which the Appellants refused to deliver and appropriate interest. The Court below was therefore in error for not entering judgment for all the reliefs claimed by the Plaintiffs/Respondents.

Accordingly, the Appellants' appeal for being incompetent is hereby struck out while the cross-appeal is allowed. I abide by the orders made in the leading judgment including the order on costs.

OGBUAGU JSC

This is an appeal against the decision of the Court of Appeal, Lagos Division (hereinafter called "the court below") delivered on 21st January, 2002, allowing the appeal of the Respondents against the decision of the Federal High Court sitting in Lagos, striking out the Respondents' case, and setting same aside.

Dissatisfied with the said decision, the Appellants, have appealed to this Court in respect of the Consequential Orders of the court below on two (2) grounds of appeal. Without their particulars, they read as follows:

"(a) The Court of Appeal erred in law in awarding damages in excess of the limitations imposed by the Bill of Lading.

(b) The Court of Appeal erred in law and a miscarriage of justice was occasioned when it failed to adequately consider the defences of the Appellants".

In other words, the appeal, is not against the decision allowing the appeal against the decision of the trial court.

I note that the claim of the Respondents over various heads, was for breach of contract and/or negligence in respect of a contract of affreightment for the Carriage of goods by Sea. The trial court, struck out the suit. In respect of the 1st plaintiff, it held that it had no locus standi to sue and could not obtain leave, to join the 2nd Plaintiff. In respect of the

2nd Plaintiff, it held that the action failed as it was statute-barred and relied on Articles 3-6 of the Hague Rules - Clause 8(2) of Exhibit A - Bill of Lading. The court below, awarded special damages, but failed to award interest as claimed.

The Appellants have formulated two (2) issues for determination, namely,

“1. What in the circumstances of the facts of the case should have been the orders/award of the Court of Appeal having held that the case of the Respondents, was wrongly struck out?”

2. On a true construction of a contract between the parties as evidenced by Exhibit A, the Bill of Lading, what is the measure of the limit of the Appellants liabilities?”

On its part, the Respondents formulated one (1) issue for determination, namely,

“3.03B (1) Whether the Respondents are entitled to interest on their claims and also whether they are entitled to loss of profit, which was proved in evidence at the trial and not contradicted, as well as general damages”.

The Respondents, Cross-appealed and they also filed one ground of appeal which without its particulars, reads as follows:

“The Lower Court erred in law when it delivered its judgment on the 21st day of January 2001 and failed to award interest, loss of profit and other ancillary reliefs on the adjudged sum in favour of the Respondents/Applicants “.

At the hearing of the appeal on 19th March, 2007, learned counsel for the Appellants - Oyeleke, Esq. told the Court that they are not denying liability, but are challenging the consequential order of the court below after allowing the Respondents' appeal. That the order it should have made, was to award damages in terms of the contract of the parties. He referred to their case No. 1 in their Additional List of Authorities (which is not quite properly/correctly cited) it is. See The M.V. “Caroline Maersk” Sister Vessel to M.V. “Christian Maersk” & 2 ors. v. Nokoy Investment Ltd. (2002) 12 NWLR (Pt 782) - (the page was/is not supplied, but it is at page 472 and it is also reported in (2002) 6 SCNJ. 208).

Chief Idowu (SAN), leading counsel for the Respondents told the Court that the limitation law, does not apply under the Hague Rules. That where the Carrier is guilty of fraud or negligence, he cannot avail himself of the limitation liability as contained in the Rules. He said that he cited decided authorities on the Book Laws. That he proved both fraud and negligence and that the Appellants, admit liability. That the case of M. V. Caroline etc., is inapplicable as the facts according to him, are not the same. He urged the court to dismiss the appeal and allow the Cross-Appeal.

Replying on point of law, Oyeleke Esq. referred to their cases Nos. 1, 3 and 4 in their said Additional List of Authorities. - i.e. Photo Production Ltd. v. Securicor Transport Ltd. (1980) 1 All E.R. 556; George Mitchell Ltd. v. Finney Lock Seeds (not properly cited - it is George Mitchell (Chesterhall) Ltd. v. Finney Lock Seeds Ltd. (1983) 2 All E.R. 737 and The New York Star (1980) 3 All E.R. 257. (Again not properly cited - it is Port Jackson Stevedoring Pty Ltd. v. Salmond & Sprasson (Australia) Pty Ltd. The New York Star.

He then submitted that the Appellants, are covered by Hague Rules even if the Appellants are negligent. He further submitted that the Cross-Appeal, is no appeal.

I note that the court below - per Aderemi, JCA (as he then was), at page 344 of the Records, recorded that the learned counsel for the Defendants/Respondents, announced at the trial court, that he was not calling evidence. That in consequence and by consent of both learned counsel for the parties, written addresses, were submitted and exchanged by them. That the consequence in law when a Plaintiff calls evidence in proof of the pleadings/averments in his Statement of Claim and the defendant fails to give evidence in support of the pleading/averments in his/its statement of defence, is that once pleadings have been settled and issues joined, the duty of the trial court, is to proceed to the trial of those issues. That if one of the parties, refuses or fails to call evidence in support of the pleadings, the trial judge, is duty bound, to resolve the issues identified at the close of pleadings, against the defaulting side unless, there are legal reasons dictating to the contrary. His Lordship cited

and relied on the cases of The Gold Coasted Ashanti Electric Power Development Corporation Ltd. v. The Attorney-General of the Gold Coast 3 WACA 219 and Imana v. Robinson (1979) 3 & 4 S.C. 1.

At page 345, His Lordship, stated inter alia, as follows:

“in the amended Statement of Claim, the appellant claimed damages against the defendants for breach of duty as carriers, and/or as agents, and/or as bailees for reward and/or in breach of contract. The particulars of damage are embodied in their pleadings. It is the law that the governing purpose of damages is to put the party whose rights have been violated in the same position, so far as monetary compensation can be, as if his rights have not been violated. See OMONUWA V. WAHABI (1976) 4 S.C. 3.7. I have had a careful look at the items of damages claimed, on the pleadings. They are, in the main, in the nature of special damages. They consist of items of loss which have to be particularized in the pleadings and strictly proved by admissible and believable evidence. See OSUJI vs. ISIOCHA (1989) 3 NWLR (Pt. III) 623. The claim for damages as could be gathered from the pleadings referred to is beset with air of uncertainty as there is an alternative claim for damages in detinue”.

His Lordship, continued thus: -

“..... A Plaintiff who succeeds in his case rooted in detinue is entitled to an order of specific restitution of the chattel which is adjudged to have been unlawfully detained or in default of that, its value and also damages for its detention up to the date of judgments See (1) OLUWA GLASS CO. LTD. Vs. EHINLANWO (1990) 7 NWLR (Pt.160) 4 and ORDIA Vs. PIEDMONT NIG. (1995) 2 NWLR (Pt.379) 516. Again this specie of damages which are special in nature must be strictly proved”.

All the above, are firmly established law. His Lordship, then proceeded to examine the evidence led particularly, that of PW1 - Julius Oduala Ogunrinde - The Chief Accountant of the 1st Plaintiff/Appellant who tendered Exhibit C - a letter of undertaking on which the release of the vessel was predicated. His Lordship, also considered the exhibits tendered. From the evidence reviewed, he held that the following sums had been proved as due:

“(1) US\$60,087.03 - *Covering the value of the goods sea freight and commission - Exhibit B.*

(2) N199,040.62 - *Duty Paid - Exhibit E2*

(3) N13,932.84 - *Clearing Agent Fees - Exhibit F”.*

B After setting aside the order of striking out of the entire suit made by the trial court, judgment was entered in favour of the Plaintiffs/ Appellants as follows:-

“(a) US \$60,087.07 - *(Sixty Thousand Eighty-seven Dollars and three Cents).*

C (b) N212,973.46 - *(Two Hundred and Twelve Thousand Nine Hundred and Seventy-Three Naira, Forty-six kobo only)”.*

So, these two sets of sums of money, were awarded in favour of the 1st Plaintiff/Respondent. Costs were also awarded in favour of the D two Appellants.

It need be stressed and this is settled that pleadings do not constitute evidence. See the cases of Mrs. Bala & ors v. Mrs. Bankole (1986) 3 NWLR (Pt.37) 141; Magnusson v. Koiki & 2 ors. (1993) 12 SCNJ, 114 E @ 124; Broadline Enterprises Ltd. v. Monterey Maritime Corporation & anor. (1995) 10 SCNJ, 1 @ 25; Madam Helen Obulor & anor. v. Oboro (2001) 4 SCNJ, 22 and recently, Neka B.R.B. Manufacturing Co. Ltd. v. A.C.B. Ltd. (2004) 1 SCNJ, 193 @ 205 just to mention but a few.

F Also firmly settled, is that where the evidence of a Plaintiff is unchallenged and uncontroverted and particularly, where the opposite party or side, had the opportunity to do so, it is always open to the trial court seised of the matter, to accept and act on such unchallenged and/or uncontroverted evidence before it. There are too many decided authorities in respect thereof. See Odulaja v. Haddad (1973) 11 S.C 557; Isaac Omoregbe v. Lawani (1980) 3-4 S.C, 108 @ 117 and recently, Chief Durosare v. Ayorinde (2005) 3 SCNJ, 8 @ 18; (2005) 5 - 4 S.C. 14 and Newbreed Organisation Ltd. v. Eromosele (2006) S.C. (Pt.1) 136 @ H 150; (2006) 2 SCNJ, 198; (2006) 5 NWLR (Pt.974) 499; (2006) 1 JNSC. (Pt.1) 1 and (2006) Vol. 140 LRCN 2064 (the last case, also cited in paragraph 4.25 page 17 of the Respondents’/Cross-Appellants’ Brief and referred only to (2006) S.C. (Pt.1) 136 @ 150).

As in the instant case leading to this appeal where the Appellants, offered no evidence, it is also settled, that in such circumstances, the evidence before the court, obviously, goes one Way with no other set of facts or evidence weighing against it. In other words, there is nothing in such a situation, to put on the other side of the proverbial or imaginary B scale of balance as against the evidence given by or on behalf of the Plaintiff. Also settled, is that in such a case or circumstances, the onus of proof, is naturally discharged, on a minimal of proof. Again, there are too many decided authorities in this regard. See *Nwaboku v. Ottih* (1961) 1 C NWLR. 487 @ 490; *Balogun v. U.B.A. Ltd.* (1992) 6 ANLR (Pt.247) 336 @ 354; (1992) 7 SCNJ. 61 and *Odunsi v. Bamgbala & 3 ors.* (1995) 1 NWLR (Pt.374) 641; (1995) 1 SCNJ. 275 and many others.

On the authorities, I hold that the court below, was right in allowing the appeal of the Respondents and setting aside the said orders of the D trial court.

It seems to me and I so hold, that from the evidence and exhibits before the trial court, the court below, made the said award only on special damages and there was no award by it on general damages as to E loss of profits etc. and interest as claimed by the Respondents in the Amended Statement of Claim and proved in evidence. It therefore, with respect, erred in not making the said awards in respect thereof. In the circumstance, while I hold that the Appellants' appeal, lack substance F and in fact incompetent, the Cross-Appeal, is meritorious and succeeds. I allow it.

In conclusion, I had the advantage and privilege to read before now, the lead Judgment of my learned brother, Musdapher, JSC and I agree with his reasoning and conclusion. I too, strike out the main appeal G and allow the Cross-Appeal.

I abide by all the consequential orders in the lead Judgment including costs.