

SUPREME COURT OF NIGERIA
14TH DECEMBER, 2012. SC. 206/2005
CORAM:- C. M. CHUKWUMA-ENEH, J. A. FABIYI,
B. RHODES-VIVOUR, N. S. NGWUTA,
M. U. PETER-ODILI, JJSC

NIGERIAN PORTS PLC APPELLANT
AND
1. BEECHAM PHARMACEUTICAL
PTE LTD
2. SMITHKLINE BEECHAM
NIG. PLC RESPONDENTS

WORDS & PHRASES - Actions - “Cause of action” - Meaning - The words connote totality of all material facts - Necessary to establish legal right in a case (H1)

ACTIONS - Commencement - Correctness of - Since Exhibit E was obtained on 16/9/94 - Action initiated on 24/3/95 was commenced within 12 months - Prescribed under s.72(1) Nigeria Ports Act (H2)

TORTS - Res ipsa loquitur - Meaning - Res speaks where inference from facts shows that - What happened is reasonably attributed to some act of negligence - On the part of defendant (H3)

CONTRACTS - Bailment - Liability - Appellant has no protection under s.72(1) Nigeria Ports Act - Since contract of bailment for reward - Is not a duty imposed by statute on appellant (H4)

BILL OF LADING - Definition - Bill of lading is writing signed on behalf of ship owner - Acknowledging receipt of goods - And undertaking to deliver same - Subject to conditions stated therein (H5)

DOCUMENTS - Rejection - Effect - Document rejected in evidence - Cannot be of any relevance in a matter - And its contents cannot fare better (H6)

FACTS

Plaintiffs/respondents imported five containers carrying pharmaceutical products for which appellant/defendant was a bailee for reward. One of the containers (the subject matter of the suit) was allegedly broached sometime in January 1994 whilst still in the custody of appellant. Respondents on 19/01/1994 wrote a letter to appellant alleging broaching of their container. The matter was thus reported to the police. After police investigation report issued on 16/01/94, respondents instituted this action on 24/03/95 against appellant at the Federal High Court Lagos. Respondents claimed various sums of money as damages and interest for the broaching of the container.

In its judgment, the court held in favour of respondents but rejected their claim for special damages and interest. Aggrieved, appellant filed appeal at the Court of Appeal, Lagos. Appellant contended that the trial court lacked jurisdiction to determine the issues in the matter, since the action had become statute barred by virtue of Section 72 (1) of the Nigerian Ports Act. This was argued on the ground that the suit was commenced after the expiration of twelve months next after the accrual of the cause of action. The court dismissed the issue on the limitation of action on the ground that the cause of action of respondents accrued after the investigation of appellant was completed. The court thus held that the suit was properly commenced within the 12 months provided by the Act. In dissatisfaction, appellant appealed to Supreme Court.

ISSUES FOR DETERMINATION

“1. Whether the Court of Appeal properly appreciated the evidence adduced at the trial Court while relying on the decision in Nigerian National Shipping Line v. Gilbert Emenike (1987) 4 NWLR (pt.63) at 77 in coming to the conclusion as to the precise date of the accrual of the respondents’ cause of action.

2. Whether the Court of Appeal properly considered the doctrine of res ipsa loquitur vis-a-vis the provisions of Section 66 (2) of the Nigeria Ports Decree No. 74 of 1993, thereof which clause is in respect of limitation of liability, wherein no liability in the circumstances of this Suit can be ascribed to the Appellant.

3. Was the Court of Appeal right in affirming the learned trial Court’s reliance on the Bills of Lading as “evidence against the Ap-

pellant of the quantity of goods received into Appellant's custody?

4. Was the Court of Appeal right in affirming the refusal of the learned trial Judge to admit in evidence the clean report of findings. If yes, can the clean report of findings properly be considered in determining the quantity of goods delivered into Appellant's custody?"

HELD (Unanimously dismissing the appeal per
NGWUTA JSC)

"Cause of action" - Meaning

1. Both learned counsel examined the meaning of cause of action as defined by various decided cases. The phrase "cause of action", connotes the totality of all material facts necessary to establish a legal right in a particular case. (p. 4494 G)

ACTIONS - Commencement - Correctness of

2. On the issue of accrual of cause of action, this case cannot be distinguished from Emenike's case (Supra) in which it was held that where the loss of goods giving rise to the cause of action is being investigated, as is the case herein, the cause of action would only accrue for the purpose of limitation statute after the conclusion of the investigation and the result is known. It does appear to me from the record that the appellant was deliberately tardy in its correspondences with the respondents in the hope that by so doing the statute of limitation (s.72(1) of the Act No. 74 of 1993) would run to the detriment of the Respondents. On the facts of this case, I hold the considered view that the last of the totality of the material facts which the Respondents need to establish to entitle them to the judgment of the trial Court occurred on 16/9/94 in the form of the Police Investigation Report, Exhibit E. Consequently, the action initiated by the Respondents on 24/3/95 was commenced within the 12 months prescribed in the limitation provision in s.72 (1) of the Nigeria Ports Decree (now Act) No.74 of 1993. I resolve issue 1 in favour of the Respondents and against the appellant. (p. 4496 B)

TORTS - Res ipsa loquitur - Meaning

3. Issue 2 revolves on the construction of the doctrine of res ipsa loquitur in the light of section 66 (2) (6) of the Nigeria Ports Decree (Act) No. 74 of 1993. Res ipsa loquitur, a Latin Phrase means “the thing itself speaks, or the thing done or the transaction speaks for itself.”

The res speaks in circumstances where the relevant facts stand unexplained and the natural and reasonable, as opposed to conjectural, inference from the facts shows that what happened is reasonably to be attributed to some act of negligence on the part of the defendant, or some want or reasonable care in the circumstances. I agree with learned Counsel for the appellant that res ipsa loquitur is a rebuttable presumption which arises upon proof that the instrumentality causing the injury complained of was at the material time in the defendant’s exclusive control. (p. 4496 G)

CONTRACTS - Bailment - Liability

4. The obligation assumed by the appellant is based on the contract of bailment it voluntarily entered with the respondents. The above limitation provision, as the one in s.(1) of the Act will be construed strictly against the appellant who seeks to ‘benefit therefrom. Section 71 (1) or s.66 (2) or both sections cannot exonerate a public authority that engages in contract outside its duty assigned to it by the Statute that created it.

The Power of the appellant to act as bailee for reward under S. 3 (1) (2) (c) of the Act does not impose a duty on the appellant to engage in a contract of bailment for reward. It is a power it can exercise or refuse to exercise without liability under the law that created it. Since the contract of bailment for reward is not a duty imposed by statute on the appellant, but a power it can exercise if it so desires, it has no protection under s.72 (1) or s.66 (2) (e) of the Act if it chooses to exercise the power so donated to it by the Act. I resolve issue 2 against the appellant. (p. 4499 D)

BILL OF LADING - Definition

5. A bill of lading is defined as a writing signed on behalf of the owner of the ship in which goods are embarked, acknowledging the receipt of the goods and undertaking to deliver them at the end of the voyage, subject to such conditions as may be mentioned therein. A bill of lading may be considered under these three aspects:

(1) as a receipt given by the master of a ship acknowledging that the goods specified in the bill have been put on board:

(2) as a document containing the items of the contract for the carriage of the goods agreed upon between the shipper of the goods and the ship-owner (whose agent the Master of the ship is); and

(3) a document of title to the goods of which it is the symbol.

“It is by means of this document of title that the goods themselves may be dealt with by the owner of them while they are still on board ship and upon the high seas.” (p. 4500 C)

DOCUMENTS - Rejection - Effect

6. Issue 4 is on the propriety vel non of the affirmation by the Court below of the trial Court’s rejection of the clean report of findings. The clean report of findings was rejected by the trial Court when it was offered as exhibit. This was affirmed by the Court below. A document that is rejected when it is offered in evidence cannot be of any relevance in the matter. Also contents of a rejected document cannot fare better than the document itself. (p. 4500 H)

REPRESENTATION

Funke Agbor (Mrs.) with A. A. Abdulhameed, for the Appellant
E. A. Adegbonmire, for the Respondents

CASES REFERRED TO

Nigerian Ports Authority v. Ajobi (2000) 13 NWLR 192

Sanda v. Kukawa Local Government (1991) 2 NWLR (pt. 174) 379

Jallco Ltd v. Owoniboy Technical Services Ltd (1995) 4 NWLR (pt.

391) 534

Nigerian National Shipping Line v. Gilbert Emenike (1981) 4 NWLR (pt. 63) 77

Sneade v. Wortherton (1904) 1 QB 207

Agbahomovo v. Eduyegbe (1999) 3 NWLR (pt. 594) 17

B Ijade v. Ogunyemi (1986) 9 NWLR (pt. 470) 17

Olumesan v. Ogundepo (1996) 2 NWLR (pt. 433) 628

Ekwealor v. Obasi (1990) 2 NWLR (pt. 131) 231

Board of Trade v. Layzer, Irvine & Co Ltd (1927) AC 610

C Jallco Ltd v. Owoniboy Technical Services Ltd (1995) 4 NWLR (pt. 391) 534

Ike v. Mangrove Engineering (Nig) Ltd (1985) 5 NWLR (pt. 41) 350

Ibekandu v. Ike (1993) 6 NWLR (pt. 299) 287

UBN v. Ozigi (1994) 3 NWLR (pt. 333) 385

D ACB Ltd v. Gwagwada (1994) 5 NWLR (pt. 342) 25

STATUTES REFERRED TO

Nigeria Ports Decree No. 74 1993, ss. 66(2)(e), 72(1)

Evidence Act CAP 112 LFN 1990, s. 149(d)

E

BOOKS REFERRED TO

Black's Law Dictionary 5th Ed p.1173

Chitty on Contracts 27th Ed

Halsbury's Statutes of England 2nd Ed p.1182

F

Trayner's Latin Maxims 4th Ed. p.298

Advanced Law Lexicon 3rd Ed (Reprint 2009) p.4089

Blackburn One Sales 3rd Edition, p.421

William R. Anson - Principles of the Law of Contract p.380

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LEAD JUDGMENT BY NGWUTA JSC

This appeal is brought against the judgment of the Lagos Division of the Court of Appeal in which the lower Court affirmed the judgment of the Federal High Court, Lagos presided over by H Jinadu, J. About November, 1993 the 1st Respondent, a Pharmaceutical Company, incorporated in Singapore with an address within jurisdiction at Km 16 Ikorodu Road, Ojota, Lagos, shipped a consignment of five containers of pharmaceutical products from Singapore to the 2nd Respondent, also a Pharmaceutical Company incorpo-

rated in Nigeria with offices also at Km 16, Ikorodu Road, Ojota, Lagos. The appellant, a statutory body, was a bailee for reward in respect of the five containers. Four of the five containers were duly cleared and delivered to the 2nd Respondent. However, the container with the number KNLU 318007-8 was alleged to have been broached while in the custody of the appellant in January 1994. B There were correspondences between the parties on the loss of the contents of the container No. KNLU 31800-8 and after the conclusion of Police investigation in the matter, the Respondents sued the appellant claiming as follows:

“(a) The sum of N4,785,905.45 (Four million seven hundred and eighty-five thousand nine hundred and five naira forty-seven (sic) kobo) being the value of 87 cartons of pharmaceutical products belonging to the plaintiffs lost in the custody of the defendant. C

(b) N500,000.00 being general damages for the loss of the plaintiffs goods which loss was occasioned by the negligence of the defendant. D

(c) Interest on the composite sum at the rate of 21% per annum from November 28, 1993 until judgment and thereafter at the rate of 12% per annum until the sum is paid. E

(d) Costs.” (see page 15 of the record).

In his judgment the learned Judge, Jinadu, J. after a review of the entire case, concluded as follows:

“I therefore find and hold that the plaintiffs have been able F to prove their case on the balance of probabilities and that they are therefore entitled to judgment. Accordingly judgment is hereby entered for the plaintiffs in the sum of N4,785,905.45. The plaintiffs have been unable to prove any special damage and the interest G claimed and the two heads of claim are hereby rejected.” (See page 116-117 of the record).

Appellant appealed to the Court of Appeal, Lagos Division. The lower Court, in its judgment, concluded thus:

“Appeal dismissed while judgment of learned trial Judge affirmed with N10,000 costs to the respondents.” (See page 277 of the record). H

Against the said judgment, Appellant appealed to the Court on six grounds hereunder, reproduced shorn of their particulars:

“1. The learned Justices of the Court of Appeal erred in law when they dismissed the appeal of the Appellant in favour of the Respondents without taking cognizance of the lack of jurisdiction of the Court to hear the matter, which rendered the whole proceedings and judgment a nullity.

B *2. The learned Justices of the Court of Appeal erred in law when they came to the conclusion that the doctrine of res ipsa loquitur applies to the Respondent’s claim before the trial Court.*

C *3. The learned Justices of the Court of Appeal erred in law in affirming the Judgment of the trial Court in favour of the Respondents as per its claim for the sum of N4,785,905.45 without a proper consideration of paragraph 6 of the appellant’s amended statement of defence.*

D *4. The learned Justices of the Court of Appeal erred in law when they affirmed the trial conclusion that the Bill of Lading in its role as a receipt was evidence of the truth of the statement contained in it and therefore held that the plaintiffs were entitled to judgment against the Defendant.*

E *5. The learned Justices of the Court of Appeal misdirected their-selves on the law when they affirmed the wrongful ejection of the clear report of findings which evidence if it had been received would have substantially affected the case of the Appellant but which rejection has occasioned substantial injustice to the Appellant.*

F *6. The judgment is against the weight of evidence.” (See pages 282-284 of the record).*

G In compliance with the rules and practice of the Court, learned Counsel for the parties filed and exchanged briefs of argument. In the Appellant’s brief, its learned Counsel distilled the following two issues from the six grounds of appeal:

H *“(i.) Whether the Court of Appeal properly appreciated the evidence adduced at the trial Court while relying on the decision in Nigerian National Shipping Line v. Gilbert Emenike (1987) 4 NWLR (Pt.63) at 77 in coming to the conclusion as to the precise date of the accrual of the Respondents’ cause of action.*

(iii) Whether the Court of Appeal properly considered the doctrine of res ipsa loquitur vis-a-vis the provisions of Section 66 (2) (e) of the Nigeria Ports Decree No. 74 1993, thereof which clause is in respect of limitation of liability, wherein no liability in the circum-

stances of this suit can be ascribed to the Appellant.”

Learned Counsel for the Respondents framed the following four issues from the Appellant’s six grounds of appeal:

“(1) Does the provision of Section 72(1) of the Nigeria Ports Act No. 74 of 1993 bar the Respondents from instituting and maintaining the suit. B

(2) Was the Court of Appeal right in holding that the learned trial judge was correct in holding that the Appellant was negligent and liable for the loss of the Respondents goods delivered into its custody.

(3) Was the Court of Appeal right in affirming the Learned Trial court’s reliance on the Bills of Lading as evidence against the Appellant of the quantity of goods received into Appellant’s custody? C

4. Was the Court of Appeal right in affirming the refusal of the Learned Trial Judge to admit in evidence the clean report of D findings? If yes, can the clean report of findings properly be considered in determining the quantity of goods delivered into Appellants’ custody?”

I have considered the substance of the two issues in the Appellant’s brief and the four issues formulated by learned Counsel for the Respondents. In my humble view, Respondents’ issues 1 and 2 can be incorporated into the appellant’s issue 2, leaving appellant’s issues 1 and 2 and Respondent’s issues 3 and 4. The four issues from the two briefs are re-numbered thus: E

“1. Whether the Court of Appeal properly appreciated the evidence adduced at the trial Court while relying on the decision in Nigerian National Shipping Line v. Gilbert Emenike (1987) 4 NWLR (pt.63) at 77 in coming to the conclusion as to the precise date of the accrual of the respondents’ cause of action. F

2. Whether the Court of Appeal properly considered the doctrine of res ipsa loquitur vis-a-vis the provisions of Section 66 (2) of the Nigeria Ports Decree No. 74 of 1993, thereof which clause is in respect of limitation of liability, wherein no liability in the circumstances of this Suit can be ascribed to the Appellant. (This incorporates Respondents’ issues 1 and 2). G H

3. Was the Court of Appeal right in affirming the learned trial Court’s reliance on the Bills of Lading as “evidence against the Appellant of the quantity of goods received into Appellant’s custody?”

4. *Was the Court of Appeal right in affirming the refusal of the learned trial Judge to admit in evidence the clean report of findings. If yes, can the clean report of findings properly be considered in determining the quantity of goods delivered into Appellant's custody?"* (Issues 3 and 4 herein are issues 3 and 4 in the Respondents' brief).

B I will determine the appeal on the four issues above. In issue one derived from ground one of the grounds of appeal in his brief, learned Counsel for the Appellant dealt at length with the date of accrual of the Respondents' cause of action. He reviewed the following cases relied on by the lower Court: Nigerian Ports Authority v. C Ajobi (2000) 13 NWLR 192 at 200-201; Sanda v. Kukawa Local Government (1991) 2 NWLR (Pt.174) 379 at 388; Jallco Ltd v. Owoniboys Technical Services Ltd (1995) 4 NWLR (Pt.391) 534 at 547 and Nigerian National Shipping Line v. Gilbert Emenike (1981) D 4 NWLR (Pt. 63) 77 at 86. From his review of the authorities, learned counsel concluded that in determining the accrual of the cause of action it has to be ascertained that:

- (i) there is in existence a person who can sue;
- (ii) there is another who can be sued;
- E (iii) all the facts had happened which are material to be proved to entitle the plaintiff to succeed.

Learned Counsel then concluded that the cause of action in this case accrued on the 19th January 2004, the date on which the appellant was served with a letter informing it of the broaching of the Respondents' container. He contended that the fact of broaching the container means that the contents thereof were either stolen or pilfered but not lost as in Emenike's case (supra) relied on by the Court below. Learned Counsel cited and relied on s.72 (1) of the Nigerian G Ports Decree No. 74 of 1993 and contended that the suit commenced on 24th March 1995 was filed about two months after the 12 months prescribed in the said section. He urged the Court to resolve and allow the appeal on issue one.

H In issue 2, culled from grounds 2, 3 and 4 of the grounds of appeal, learned Counsel for the Appellant submitted that the appellant at the trial Court and at the Court below was able to discharge the onus placed on it, as statutory bailee for reward to establish that there was no negligence or default on its part. Learned Counsel referred to page 252 of the record wherein the Court below reviewed

the concept of *res ipsa loquitur* as defined in the Black's Law Dictionary, 5th Edition at page 1173. He said that the Court below agreed with learned Counsel for the parties on the issue of bailment and the proposition of law as stated in Chitty on Contracts, 27th Edition to the effect that the bailee is normally under an obligation to return the bailed chattel to the bailor at the end of the period of bailment, unless he can show good cause for not returning the chattel. He remarked on the fact that the Court below agreed with learned Counsel for the appellant that the learned trial Judge erred on the effect of amendment of the pleadings. He referred to *Sneade v. Wortherton etc & Co* (1904) 1 QB 207; *Agbahomovo v. Eduyegbe* (1999) 3 NWLR (Pt.594) 17 at 186-187 and *Ijade v. Ogunyemi* (1986) 9 NWLR (Pt.470) at 17 at 31 para. E. Learned Counsel submitted that contrary to the authorities above and the agreement of the Court below with the learned counsel for the appellant on the effect of amended pleadings on the determination of the case, the Court below held that the trial Judge was right in his decision that the doctrine of *res ipsa loquitur* operated against the appellant. Counsel referred to page 245 lines 13-17 of the record and complained that the lower Court accepted that the appellant's liability is by statute, but failed to consider the statute in its judgment. He contended that the application of *res ipsa loquitur* to the facts of this case and the evidence of the parties will demonstrate that the appellant discharged the onus placed on it by the said doctrine. He argued that even though the containers were put into the custody of the appellant, the respondents at their request were allowed to hire their own private security to keep vigil on the container allegedly breached. He bemoaned the rejection of the evidence on the private security made by the parties adding that the Court did not exercise its discretion in accordance with common sense and justice. He relied on *Olumesan v. Ogundepo* (1996) 2 NWLR (Pt.433) 628 at 647-648. He argued that the subsequent security arrangement by the parties varied their contract and that in any case section 66 (2) (e) of Decree No. 74 of 1993 protects the appellant from the Respondent's claim. He urged the Court to examine the conclusions and inferences drawn by the Courts below as the inadequacies in the two Courts below rendered the judgment perverse. He relied on *Ekwealor v. Obasi* (1990) 2 NWLR (Pt.131) 231 at 269 paras. A-B. He referred to the evidence of DW1 at page

50 of the record which he said was not challenged and paragraph 11 of the amended statement of defence and submitted that only two items- Amoxil and Augmentin were submitted for pre-shipment inspection and eventually shipped contrary to what was contained in the bill of lading which documented three items - Amoxil, Augmentin and Ampicillin. He invoked the provision of S.149 (d) of the Evidence Act Chp.112 LFN 1990 in respect of the clean report of findings which he said was withheld by the Respondents. He urged the Court to allow the appeal on issue 2. He urged the Court to allow the appeal and set aside the judgment appealed against.

As I indicated earlier in the judgment, Respondents' issues 1 and 2 are subsumed in Appellant's issue 2. In his reply, learned counsel for the Respondents, in issue one on S. 72 (1) of the Nigerian Ports Act No. 4 of 1993 argued that reference to 19th January 1994 as evidence of when the cause of action accrued is not tenable as the evidence was not led for the purpose of limitation of action. Learned Counsel contended that s.72 (1) of the Act does not apply as the claim is based on contract of bailment and that even if the Act is applicable the action was filed within the prescribed 12 months of the accrual of the cause of action. He referred to 13 Halsbury's Statutes of England 2nd Edn. at page 1182 and 26 Halsbury's Laws of England 2nd Edn. page 294, paragraph 612 and submitted that the performance or breach of a contract which a public authority has the power, but not the duty to make, is not within the protection of the Act. He relied on Board of Trade v. Layzer, Irvine & Co Ltd (1927) AC 610 applied by the Supreme Court in Jallco Ltd v. Owoniboy Technical Services Ltd (1995) 4 NWLR (Pt.391) 534 at 5547 E-G and argued that the cause of action accrued for the purpose of limitation of action on the date it was deemed the goods were in fact lost.

On the evidence with particular reference to Exhibits G-G6; Exhibit H and Exhibit E, he argued, it could be said that the cause of action accrued on 7th July 1994 on the Respondent's receipt of Exhibit G6 or on 16th September, 1994 when the Police Investigation Report (Exhibit E) was made. He contended that the Suit commenced on 24/3/95 was commenced within the 12 months prescribed in s.22 (1) of the Act.

In issue 2 on the finding by the trial Court, affirmed by the Court below, that the appellant was negligent and so liable for the

loss of the respondents' goods, learned Counsel said that the clean report of finding was rejected because it was not pleaded as shown at page 57 of the record. Based on the rejection of the clean report of finding, learned Counsel argued that the issue of the number of items submitted for inspection was not properly raised and could not have been received in evidence. B

On Exhibit J, the Terminal Delivery Order, he argued that the trial Court considered and rejected the evidence. He referred to page 114 of the record and contended that the finding of the trial court on Exhibit J is a matter of evaluation of evidence and not a consideration of an issue. Learned Counsel argued that in bailment the mere fact of failure to deliver the goods to the Respondents was prima facie evidence of negligence and the onus is on the appellant to satisfy the Court that the loss of goods was not due to negligence, default or misconduct on the part of the appellant. He relied on *Kate Ike v. Mangrove Engineering (Nig) Ltd* (1985) 5 NWLR (Pt.41) 350 at 359 D-H; *Replying on Ibekandu v. Ike* (1993) 6 NWLR (Pt.299) 287 at 297 B-D and contended that having pleaded *res ipsa loquitur* no proof of appellant's negligence is required of respondents beyond the loss of the goods. C D E

On the issue of private security arrangement, he said the matter was pleaded midway into the testimony of the evidence of DW1 and that the respondent did not have the opportunity of meeting the allegation. He urged the Court to invoke S. 149 (d) of the Evidence Act for failure of the appellant to provide evidence of application and approval in respect of the private security. Even if there was private security as contended by the appellant, learned Counsel argued, there was no evidence that the appellant was relieved of its duty of providing security for the respondents' goods. He referred to the evidence of DW1 at page 50 and page 62 of the record and concluded that the appellant abdicated its responsibility as bailee to secure the respondents goods under its custody. He argued that s.66 (2) (e) of the Nigerian Ports Act does not absolve the appellant from liability for the loss of the goods in its care. F G H

In issue 3 on the bill of lading as evidence of the quantity of goods in the custody of the appellant, learned Counsel submitted that nothing in the record suggests that the trial Court construed the bills of lading as conclusive against the appellant. He referred to page

114 of the records. He referred to *Broadline Enterprises Ltd v. Montorey Maritime Corporation* (1995) 19 NWLR (Pt. 417) 1 and argued that in a bailment, a bill of lading is prima facie evidence of the goods delivered to a bailee. He urged the Court to hold that the bill of lading was prima facie evidence against the appellant of the receipt of goods stated thereon and the onus is on the appellant to adduce credible evidence to rebut the presumption in Exhibits A-A1.

In issue 4 on the rejection by the trial Court, and affirmation of the rejection by the lower Court, of the clean report of findings, Counsel said that the document was not pleaded and when the statement of defence was subsequently amended the clean report findings was not tendered, hence the trial Court did not give probative value to the evidence of DW1 relating to the clean report findings. He argued that the Court cannot rely on the contents of a document it had rejected. He relied on *UBN v. Ozigi* (1994) 3 NWLR (Pt.333) 385 at page 399 E; *ACB Ltd v. Gwagwada* (1994) 5 NWLR (Pt.342) 25 at p.31. He urged the Court to dismiss the appeal with costs.

I have summarized the submission of learned counsel for the parties in issues 1 and 2 and that of learned Counsel for the Respondents on issues 3 and 4 in the Respondents' brief, on which learned Counsel for the appellant did not reply by way of reply brief. I pause here to add that issues 3 and 4 in the Respondents' brief related to Grounds 4 and 5, respectively, of the appellant's grounds of appeal. May be I should re-emphasize the need for learned Counsel to indicate the ground or grounds of appeal from which an issue for determination is derived. I will resolve the four issues seriatim.

Issue 1 centres on the lower Court's application of the decision in *Nigerian Shipping Line v. Gilbert Emenike* (1987) 4 NWLR (Pt. 63) at page 77 in the determination of the precise date of the accrual of the Respondents' cause of action. ***Both learned counsel examined the meaning of cause of action as defined by various decided cases. The phrase "cause of action", connotes the totality of all material facts necessary to establish a legal right in a particular case.*** See *Rosenthan v. Alderton & Sons* (1946) KB 374. The term "cause of action" as has been stated in *Read v. Brown* (1888) 22 QBD 128 at 131, per Lord Esher M.R. denotes 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,” See *Lasisi Fadare & ors v. Attorney-General of Oyo State* (1982) 4 SC 1 at 6-7 per Aniagolu, JSC (May the Good Lord rest his soul). See also *Trower & Sons Ltd v. Ripstein* (1944) AC 254 at 263 per Lord Wright. Section 72 (1) of Nigeria Ports Decree (now Act) No. 74 of 1993, relied on by learned Counsel for both parties provides:

“When a suit is commenced against the company or an employee of the Company ... 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”

Now the question is at what point in time, in the words of Lord Esher M. R. in *Read v. Brown* (supra) adopted by Aniagolu, JSC, in *Lasisi Fadare & ors v. A-G Oyo State* (supra) did every fact or the last of the acts (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 occur.

From the facts of the case and as agreed upon by the parties, a formal complaint of the broaching of the container was made in writing by the 2nd Respondent on 13th January, 1994. This complaint of the 2nd Respondent sparked off a series of correspondences involving the parties herein as well as third parties, culminating to Exhibit E on the letter head of Nigerian Ports Police. It is captioned “Police Investigation Report Re: Case of Broaching and Stealing from Containers No. KNLU 318007-8. In paragraph 4 of the Report Exhibit E it was stated inter alia:

“4. From the foregoing report there is no doubt that the container was broached and the aforementioned items stolen ...”

This report Exhibit E was made on 16th September, 1994. The matter was under investigation by the appellant who made several requests on the Respondents for documents to aid their investigation. The essence of the investigation embarked upon by the appellant and the police was to ascertain whether in fact the act complained of by the 2nd Respondent occurred. If at the end of the investigation it was discovered that the container was actually returned intact to the Respondents, or that it was misplaced or stolen and recovered and returned to the Respondents, would the Respondents have a cause of action as defined by the various authorities to insti-

tute the action claiming the value of the contents of the container? I am constrained to answer the question in the negative. Since the matter was investigated by the appellant and the Police, the result of the investigation is one of the totality of the facts the Respondent would have to prove to be entitled to the judgment of the Court. It is
 B my view that based on the peculiar facts and circumstances of this case, the cause of action occurred on 16/9/94, the date of the Police Report Exhibit 5 which proved the veracity of the Respondent's complaint.

C ***On the issue of accrual of cause of action, this case cannot be distinguished from Emenike's case (Supra) in which it was held that where the loss of goods giving rise to the cause of action is being investigated, as is the case herein, the cause of action would only accrue for the purpose of limitation statute after the conclusion of the investigation and the result is known. It does appear to me from the record that the appellant was deliberately tardy in its correspondences with the respondents in the hope that by so doing the statute of limitation (s.72(1) of the Act No. 74 of 1993) would run to the detriment of the Respondents. On the facts of this case, I hold the considered view that the last of the totality of the material facts which the Respondents need to establish to entitle them to the judgment of the trial Court occurred on 16/9/94 in the form of the Police Investigation Report, Exhibit E. Consequently, the action initiated by the Respondents on 24/3/95 was commenced within the 12 months prescribed in the limitation provision in s.72 (1) of the Nigeria Ports Decree (now Act) No.74 of 1993. I resolve issue 1 in favour of the Respondents and against the appellant.***
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Issue 2 revolves on the construction of the doctrine of res ipsa loquitur in the light of section 66 (2) (6) of the Nigeria Ports Decree (Act) No. 74 of 1993. Res ipsa loquitur, a Latin Phrase means "the thing itself speaks, or the thing done or the transaction speaks for itself." See Trayner's Latin Maxims Fourth Edition page 298. *"This maxim is applicable in action for injury by negligence where no proof of negligence is required beyond the document itself, which is such as necessarily to involve negligence... It ought not to be applied unless the facts proved are more consistent*
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with negligence in the defendant than with a mere accident; nor ought it to be applied to evidence of an unexplained accident, if the evidence is as consistent with the cause of the accident having been the victim's own negligence, as with its having been that of the defendant." (See Advanced Law Lexicon, 3rd Edition Reprint 2009, page 4089). See also Onwuka v. Omogui (1992) 3 NWLR (Pt.236) 393 at B 415 where the phrase was defined to mean:

"...that an accident may, by its nature be more consistent with its being caused by negligence for which the defendant is responsible than other causes, and that in such a case the mere fact of the accident is prima facie evidence of such negligence. In such a case, the burden of proof is on the defendant to explain and show that it occurred without fault on his part." C

The res speaks in circumstances where the relevant facts stand unexplained and the natural and reasonable, as opposed to conjectural, inference from the facts shows that what happened is reasonably to be attributed to some act of negligence on the part of the defendant, or some want or reasonable care in the circumstances. I agree with learned Counsel for the appellant that res ipsa loquitur is a rebuttable presumption which arises upon proof that the instrumentality causing the injury complained of was at the material time in the defendant's exclusive control. Learned Counsel argued that in view of the private security arrangement the respondents made with the consent and approval of the appellant, the doctrine is inapplicable to this case. What is the effect of the alleged private security on the contractual obligations of the parties to the contract of bailment? There is no evidence in the proceedings of a review of the financial obligation of the respondents as bailers to the appellant as bailee for reward. If the container was at the material time not in exclusive control of the appellant as a result of the private security provided by the respondents, there would have been no economic sense for the respondents to fulfill in full their obligation to the bailee under the contract of bailment. At page 46 of the record, the PW1 H under cross-examination:

"...agree that the plaintiff has its security representative at the location where these consignment was placed in the custody of the defendant. Re-examined the witness said:

“The plaintiff’s security men were there just to monitor the position of the consignment but not for the purpose of providing security for the consignment. By monitoring the position I mean just to see how things go at the port.”

In his own evidence under cross-examination, the DW1
B stated, inter alia:

“I agree that from the time the container landed and until delivery the container was under our custody but not in our care as it was under the watchful eyes of the plaintiff’s security men... I agree that neither the Police Report nor our correspondences with the plaintiff show the existence of any special security arrangement.” (See page 62 of the record.)

Evidence of the special security arrangement heavily relied on by the appellant is less than satisfactory. If there was in fact such
D arrangement upon which the liability vel non of the appellant could be determined, why was it not mentioned and the particulars thereof stated in the Police Report and the appellant’s correspondences with the respondents? The said particular, if tendered, would have been useful in determining if, and to what extent and at what point in time,
E the Respondents assumed the responsibility for which they engaged the services of the appellant as a bailee for reward. Perhaps, the evidence, if produced, would have been unfavourable to the appellant who withheld it. See s.149 (d) of the Evidence Act. Appellant who
F relied on the private security arrangement was duty bound to produce the terms of the private security arrangement it relied on.

DW1 claimed that: *“... the container was under the custody but not in our care..”* What is the difference between the meanings, purports and connotations of the common words “custody” and “care”
G In my view, the two words are synonymous. The Black’s Law Dictionary, 9th Edition at page 240 explains the meaning of the word “custody” as:

“The care and control of a thing or person for inspection, preservation or security.” It defines the word “care” as “serious attention, heed. Under the law of negligence or of obligation, the conduct demanded of a person in a given situation. Typically, this involves a person’s giving attention both to possible dangers, mistakes and pitfalls and to ways of minimizing those risks.” See page 240 (supra).

The play on words and semantics will not avail the appellant

as the two words mean the same thing - the performance of the duty for which the respondents hired the services of the appellant as a bailee for reward. There is nothing in the evidence to suggest that the respondents having hired the services of the appellant as a bailee for reward, assumed, at any time, the whole or part of the responsibility for which they hired the appellant either with or without a corresponding alteration in the terms of the bailment. There is no evidence of any variation in the terms of the contract between the parties.

Now I will deal with s.66 (2) (e) of the Act under which the appellant claims no liability can be ascribed to it. It is hereunder reproduced:

“S.66 (2): The company shall in no case be liable under subsection (1) of this Section for a loss, misdelivery, detention or damage arising from:

(e) an act or omission of the consignor, consignee or depositor or of the servant or agent of any such person.”

The obligation assumed by the appellant is based on the contract of bailment it voluntarily entered with the respondents. The above limitation provision, as the one in s.(1) of the Act will be construed strictly against the appellant who seeks to ‘benefit therefrom. Section 71 (1) or s.66 (2) or both sections cannot exonerate a public authority that engages in contract outside its duty assigned to it by the Statute that created it. See *Compton v. West Hom CBC* (1939) 1 Ch 7711 at 778; 1939 LL ER at page 199 cited by learned Counsel for the Respondents. **The Power of the appellant to act as bailee for reward under S. 3 (1) (2) (c) of the Act does not impose a duty on the appellant to engage in a contract of bailment for reward. It is a power it can exercise or refuse to exercise without liability under the law that created it. Since the contract of bailment for reward is not a duty imposed by statute on the appellant, but a power it can exercise if it so desires, it has no protection under s.72 (1) or s.66 (2) (e) of the Act if it chooses to exercise the power so donated to it by the Act. I resolve issue 2 against the appellant.**

As I indicated earlier in the judgment, Respondents’ issues 3 and 4 were culled from grounds 4 and 5, respectively, of the

Appellant's grounds of appeal. In his reply brief, learned Counsel for the appellant concentrated exclusively on Respondents' response to issue 1 in the appellant's brief. Learned Counsel for the appellant had an opportunity to reply to the Respondents' argument on issues 3 and 4 but he chose not to do so. I will therefore resolve the issues on the respondents' submission alone, even though the appellant is deemed to have conceded the argument thereon. Issue 3 is on the bills of lading. The trial Court accepted, and the lower Court affirmed, that the bills of lading constitute evidence against the appellant of the quantity of goods received by the appellant into its custody.

A bill of lading is defined as a writing signed on behalf of the owner of the ship in which goods are embarked, acknowledging the receipt of the goods and undertaking to deliver them at the end of the voyage, subject to such conditions as may be mentioned therein. See Blackburn One Sales, 3rd Edition, page 421. A bill of lading may be considered under these three aspects:

(1) as a receipt given by the master of a ship acknowledging that the goods specified in the bill have been put on board:

(2) as a document containing the items of the contract for the carriage of the goods agreed upon between the shipper of the goods and the ship-owner (whose agent the Master of the ship is); and

(3) a document of title to the goods of which it is the symbol.

"It is by means of this document of title that the goods themselves may be dealt with by the owner of them while they are still on board ship and upon the high seas." See William R. Anson, Principles of the Law of Contract, p.380 (Arthur L. Carbin Ed.) for the definition above.

The bill of lading is prima facie evidence of the Respondents' goods delivered to the appellant as the Respondents' bailee for reward at the end of the voyage. The Court below was right to have affirmed the finding of the trial Court in that regard.

Issue 4 is on the propriety vel non of the affirmation by the Court below of the trial Court's rejection of the clean report of findings. The clean report of findings was rejected by

the trial Court when it was offered as exhibit. This was affirmed by the Court below. A document that is rejected when it is offered in evidence cannot be of any relevance in the matter. Also contents of a rejected document cannot fare better than the document itself.

In the end, both Courts below were left with the bills of lading, Exhibits A-A1 as the evidence against the appellant of the quantity of the Respondents' goods delivered into the custody of the appellant as a bailee for reward. The concurrent findings of the two Courts below remain undisturbed in view of the fact that the appellant has not shown that the findings are either perverse, or there is substantial error either in substantive or procedural law which if not corrected, will lead to miscarriage of justice or that there is no sufficient evidence to support the findings. See Lokoyi & Anor v. Olojo (1983) 8 SC 61 at 68; Bankole v. Pelu (1991) 8 NWLR (Pt.211) 23; Njoku ors v. Eme & ors (1973) 5 SC 293 at 306 and Kale v. Coker (1982) 12 SC 252 at 271.

The two issues (3 and 4) which the learned counsel for the appellant is deemed to have conceded for failure to respond to them in his reply brief - see Joseph Ira & 3 ors v. Echenwenchi & ors (1996) 8 NWLR (Pt.468) 629 - are resolved against the appellant.

The four issues having been resolved against the appellant in favour of the Respondents, the appeal is bereft of merit and accordingly it is hereby dismissed. Appellant is to pay costs fixed at N100,000.00 to the Respondents.

FABIYI JSC

I have read before now the judgment just delivered by my learned brother Ngwuta, JSC. I agree completely with the reasons therein ably advanced to arrive at the conclusion that the appeal is devoid of merit and should be dismissed.

The appellant, a statutory body was a bailee for reward of five (5) No. containers carrying pharmaceutical products imported from Singapore by the respondents about November, 1993. Four of the five containers were cleared and delivered to the 2nd respondent. The container with No. KNLU 318007-8 was allegedly broached while in the appellant's custody in January, 1994. After exchange of

correspondences by the parties, investigation was conducted by the police. The respondents initiated their suit at the trial High Court to claim for the sum of N4,785,909.45 being value of the lost items of pharmaceutical products; N500,000.00 as general damages with interest at the rate of 21% per annum from November 28, 1993 until judgment and thereafter at the rate of 12% per annum until judgment sum is paid. The learned trial judge found in favour of the respondents and entered judgment for them in the sum of N4,785,905.45. The claims in respect of general damages and interest were refused. The appellant appealed to the Court of Appeal, Lagos Division which dismissed the appeal with N10,000.00 costs to the respondents. Still not contented with the stance of the court below, the appellant decided to further appeal to this court. On 16th October, 2010 when the appeal was heard, learned counsel on each side of the divide adopted and relied on the briefs of argument filed on behalf of the parties.

The first issue which was seriously contested is whether the provision of section 72 (1) of the Nigerian Ports Act, No. 74 of 1993 bar the respondents from instituting and maintaining the suit. I need to say it right away that the appellant was a contractual bailee. In the case of *Nigerian Ports Authority v. Construzioni General FSC & Anr* (1974) 9 NSCC 622 this court held that the provision of section 72 (1) of the Nigeria Ports Act, 1993 is not intended by the Legislature to apply to specific contracts like bailment and limitation period is six years and not 12 months as strenuously contested by the appellant. As such, it does not appear that the suit commenced on 24th March, 1995 is statute barred. It should be stressed further that even if 12 months limitation period is applicable, since the claim is for loss of goods, cause of action accrued for the purpose of limitation of action on the date when it is deemed that the goods were in fact lost. If the loss was being investigated the cause of action does not accrue until the investigation is completed. This is as decided by the Court of Appeal in the case of *Nigerian National Shipping Line v. Gilbert Emenike* (1987) 5 NWLR (Pt. 63) 77 at 86.

There is a considerable degree of logic in the above pronouncement. Often times, law and logic cannot be separated. I endorse it without any hesitation. In this matter on appeal, the evidence shows that the Nigerian Ports Police investigated and confirmed the

loss of goods in its report made on the 16th September, 1994 which is Exhibit E. This is the date the cause of action would be deemed to have arisen when all material facts which if proved would entitle the respondents to succeed in their claim against the appellant are complete. See: *Jallco Ltd. v. Owoniboy Technical Services Ltd.* (1995) 4 NWLR (Pt.391) 534. It is clear that the action commenced on 24th March, 1995 is within 12 months suit time prescribed by section 72 (1) of the Nigerian Ports Act, 1993. As such, this action is not statute barred. The trial court was imbued with jurisdiction to hear and determine the suit as it did. The 2nd issue relates to the duty of care which rests on the appellant, a bailee for reward. In bailment, the duty to keep safe custody of the goods is on the bailee and not on the bailor. Such duty on the bailee is independent of any miniature arrangement by the bailor. The bailee cannot abdicate his responsibility and try to take umbrage under blame game canopy. The evidence discernible from the record points directly to the fact that the appellant neglected its duty of care and tried to shift same to the respondent. This, clearly, is evidence of negligence on the part of the appellant.

The 3rd serious issue canvassed relates to the document in respect of clean report of findings which was rejected by the trial court. The document was rightly rejected since it was not pleaded by the appellant. As such, the trial court could not make any inference from the clean report of findings or give any judgment based on it. A trial or appellate court must not rely on a document not tendered as an exhibit before it. See: *Oladele v. Aromoraran II* (1996) 6 NWLR (pt.453) 180 at 226. As well, the court must not rely on parole evidence in respect of a document it had rejected or excluded as an exhibit. The document is irrelevant and goes to no issue. See *UBN v. Ozigi* (1994) 3 NWLR (Pt.333) 385 at 399 and *ACB Ltd. v. Gwagwada* (1994) 5 NWLR (pt.342) 25 at 31 both cited by respondent's counsel. This court cannot look at the document. Oral evidence on same by D.W.1 is of no value. The two courts below made concurrent findings in respect of all the issues raised which are not perverse in any manner. I cannot see how I can interfere with same. See: *Oduntan v. Akibu* (2000) 7 SC (Pt. 2) 106.

My learned brother carefully 'covered the field'. The above which is just like the tip of the ice-berg is merely for emphasis to show

my support. I, too, hereby dismiss the appeal, affirm the judgment of the court below delivered on 14th April, 2005 and endorse the order relating to costs in the lead judgment.

B

RHODES-VIVIOUR JSC

I had the advantage of reading in draft the leading judgment prepared by my learned brother Ngwuta JSC. I am in full agreement with the judgment. I propose to add only a few observations on:

C

- (a) Whether the suit is statute barred; and
- (b) Duty of Care.

Section 72 (1) of the Nigerian Ports Act, No.14 of 1993 states that:

D *“When a suit is commenced against the company or an employee of the company the suit shall not lie or be instituted in any court unless it is commenced with 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

ON HOW TO DETERMINE PERIOD OF LIMITATION UNDER SECTION 72(1) OF THE NIGERIAN PORTS ACT WHEN THE POLICE CONDUCTED INVESTIGATION.

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By examining the plaintiffs pleadings to see when the Police completed their investigation and the plaintiff informed, and comparing that date with the date the originating process was filed. The action would be statute barred if the time that the originating process was filed is beyond 12 month from the accrual of cause of action i.e. The date Police investigation was concluded.

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The respondents had a cause of action on the 16th of September 1994 - Exhibits E (When they were informed that police investigation was concluded). The action would be statute barred if it was filed after 16th of September, 1995. The action is not statute barred since it was filed on the 23rd of March 1995. See Nigerian National Shipping Line v. G. Emenike 1987 5 NWLR pt.63 p.77.

H

One of the many kinds of bailment is the delivery of goods by one person to another to keep for the use of the bailor. The goods were kept in the custody of the bailee (the appellant) for the use of the bailor (the respondents and owner of the goods). Under a bailor and bailee relationship liability can arise in contract or tort. In this case

liability arises in contract since it is for loss of property. The onus is on the bailee to show that he exercised reasonable and proper care to ensure the safety and proper custody of the goods and that the loss was not due to his negligence. *C.S.A. Ltd v. Intercotra* 1969 1 ALL N.L.R. p.112 is instructive on what the law expects from the Bailee. Where as in this case it is established that the loss was due to the bailee's negligence, the bailee would be liable for breach of a bailment. It would then be the duty of the court to compensate the bailor, and this entails restoring the bailor to the position as if the goods were never lost or damaged. That is to say judgment would be for the actual loss suffered.

The appellant failed to discharge the onus expected of a bailee, and that explains why concurrent findings of the courts below cannot be disturbed by this court. I dismiss the appeal with costs of N100,000 to the respondents.

PETER-ODILI JSC

I agree with the judgment just delivered by my learned brother, Nwali Sylvester Ngwuta, JSC.

The Plaintiffs (Respondents to the present appeal) took out a particulars of claim dated 24th March 1995 and subsequently filed before the Federal High Court, Lagos their Statement of Claim dated 16th February 1996 in respect of the sum of N4,785,905.47 (Four Million, Seven Hundred and Eighty Five Naira, Forty Seven Kobo), being the value of goods alleged to be missing from a container whilst in the custody of the Defendant (the Appellant herein).

FACTS:

The Respondents imported five (5) No. Containers carrying certain Pharmaceutical Products for which the Appellant was a bailee for reward. One of the containers (with NO. KNLU 318007 - 8), the subject matter of the suit at the trial court was allegedly broached sometime in January 1994 whilst still in the custody of the Appellant, after the other containers had been cleared and delivered. There was no dispute on the facts that the Respondents caused a letter dated 19th January 1994 to be written to the Appellant alleging a broaching of the container NO.KNLU 318007 - 8 while same was in the custody of the Appellant. The case of the Respondent at the trial

B court was to the effect that the alleged broaching which formed their
 cause of action took place sometime in January 1994 when it in-
 formed the Appellant herein (Defendant in the court of trial) of this
 fact. The main plank of the appeal in the Court of Appeal is that the
 trial Court lacked jurisdiction to examine and determine all the issues
C relating thereto as being issues that had become statute barred by
 virtue of Section 72 (1) of the Nigerian Ports Decree NO; 74 of 1993
 having commenced the suit after the expiration of twelve months
 next after the accrual of the cause of action. Appellant at the Court of
 Appeal urged that Court to set aside the judgment of the trial Court
 awarded to the present Respondents. The Court of Appeal dismissed
 the issue on the limitation of action on the ground that the cause of
 action of the Respondents accrued only when it was deemed that the
 goods subject of the suit were in fact lost. The Court of Appeal held
D that the cause of action occurred after the investigation of the Appel-
 lant was completed or the goods were deemed to be in fact lost which
 date was not easily ascertainable. The Court below held further that
 the dates of 7th July 1994 and 16th September 1994 were instruc-
 tive and relevant for the purpose of determining the date of accrual
E of the Respondents cause of action and in that light the date of 24th
 March 1995 when the suit at the trial court was commenced by the
 Respondents herein was within the 12 months limitation period pre-
 scribed by Section 72 (1) of the Nigeria Ports Act 1993.

F In dissatisfaction the Appellant has appealed to this court by
 a Notice of Appeal of 15th April 2005 and on the 28th June 2006 an
 order of this Court was granted to the Appellant and an Amended
 Notice of Appeal was filed. On the 16th October, 2012 date of hear-
 ing, the Appellant through counsel adopted their Brief of argument
G settled by Funke Agbor (Mrs.) and filed on 16/8/06. Also adopted
 was Appellant's Reply Brief filed on 7/6/06. In the Appellant's Brief
 were distilled two issues for determination which are as follows:-

H 1. Whether the court of Appeal properly appreciated the
 evidence adduced at the trial court while relying on the decision in
 Nigerian National Shipping Line v Gilbert Emenike (1997) 4 NWLR
 (Pt.53) 53 at 77 in coming to the conclusion as to the precise date of
 the accrual of the Respondent's cause of action.

2. Whether the Court of Appeal properly considered the
 doctrine of *res ipsa Loquitur* vis-a-vis the provisions of section 66 (2)

(e) of the Nigerian Ports Decree No. 74, 1993, thereof which clause is in respect of limitation of liability, wherein no liability in the circumstances of this suit can be ascribed to the Appellant.

Learned counsel for the Respondents adopted their Brief settled by Norrison I. Quakers and filed on 24/4/07 and in it were formulated four issues for determination, viz:-

1. Does the provision of Section 72(1) of the Nigeria Ports Act No. 74 of 1993 bar the Respondents from instituting and maintaining the suit.

2. Was the court of Appeal right in holding that the learned trial judge was correct in holding that the Appellant was negligent and liable for the loss of the Respondents goods delivered into its custody.

3. Was the court of Appeal right in affirming the Learned trial court's reliance on the bills of lading as evidence against the Appellant of the quantity of goods received into Appellant's custody?

4. Was the court of Appeal right in affirming the refusal of the Learned Trial Judge to admit in evidence the clean report of findings? If yes, can the clean report of findings properly be considered in determining the quantity of goods delivered into Appellants' custody?

The issue as drafted by the Appellant seem more convenient to utilise in the determination of this appeal and so I shall use them as crafted.

ISSUE ONE:

Whether the court of Appeal properly appreciated the evidence adduced at the trial court while relying on the decision in Nigerian National Shipping Line v. Gilbert Emenike (1997) 4 NWLR (pt.63) 63 at 77 in coming to the conclusion as to the precise date of the accrual of the Respondents, cause of action.

Learned counsel for the Appellant said that in the determination of whether or not a suit is statute barred it is the statement of claim as filed by the Plaintiff that should be looked at and nothing else. That a perusal of the statement of claim would show that the matter of the limitation statute was not immediately obvious in that statement of claim as it was not clearly pleaded and that same was overlooked by the initial counsel handling the defence in the suit before the trial Court. That the law affords the Appellants the opportunity of raising the issue of jurisdiction upon the taking of evidence

on the basis of the action of the Respondent where as in the case of A.G. Kwara State v Olawale (1993) 1 NWLR (Pt.272) 645 at 663 - 665, where an issue of jurisdiction is raised and evidence called, the Court cannot completely close its eyes to the evidence called. That this appeal should be allowed on the ground that the suit as constituted was statute barred at the time of its commencement. He cited A.G. Kwara State (supra); Bright Motors Limited v. Honda Motor Co. Ltd (1994) 12 NWLR (Pt.577) 230 at 247.

That a cause of action matures or arises on the date or from the time when a breach of any duty or act occurs which warrants the person thereby injured or the victim who is adversely affected by such breach to take a court action in assertion or the protection of his legal right that has been breached. He referred to the case of Eboigbe v NNPC (1994) 5 NWLR (pt.347) 347 at 649; Woherem v. Emereuwa (2004) 13 NWLR (Pt.890) 398 at 415. Mrs. Agbor, learned counsel for the Appellant further contended that certain events ought to be ascertainable to find that a cause of action has accrued which events are that:

- i. there is in existence a person who can sue;
- ii. there is another who can be sued;
- iii. and all facts have happened which are material to be proved to entitle the plaintiff to succeed.

That the requisite events have happened in respect of the case in hand to determine that the Respondent's action had accrued as at 19th January 2004. That the particulars of claim were filed on 24th March 1995 whilst the totality of the evidence from the trial reveals that the alleged wrong happened on or about 19th January 1994.

For the Appellant it was further contended that the Respondents had discovered through their own security operatives the fact of the broaching of the container and reported same. That it was the Respondents that invited the independent surveyor Messrs Yinka Omilani & Associates to conduct the survey of the breached container and that survey produced Exhibit 'C'. He said from Exhibit 'C' it is seen that the independent surveyor was engaged to conduct the survey as at 18th January 1994. She stated on that the facts of the instant appeal do not appear to be on all fours with that of Emenike's case (supra) as there was nothing on the facts and evidence to sup-

port the facts that the goods did not arrive in the country rather there was abundant evidence that the goods ostensibly arrived in the port of Nigeria. That by the fact of the broaching, the contents of the container were stolen or pilfered as against being lost as was in Emenike's case and so there was no doubt as to what had happened to the goods of the Respondents. That the accrual of the cause of action was ascertainable. He cited *Egbe v. Adefarasin* (1987) 1 NWLR (pt.47) 1 at 20 per Oputa JSC. B

Mrs. Agbor of counsel submitted that this new issue cannot be raised here since it was not a part of the issues raised and considered at the Court of trial, is a general rule which would not apply. That it is so as the instant issue falls amongst the exception that where the issue involves substantial points of law, substantive or procedural and it is plain that no further evidence would have to be adduced which would affect the decision of the case, the court will allow the question to be raised and the points taken and to prevent an obvious miscarriage of justice. He cited *Shonekan v. Smith* (1964) All NLR 168 at 173; *Apene v. Barclays Bank of Nigeria & Anor* (1977) NSCC 29. That the Limitation Statute is an issue which goes to the jurisdiction of the court and the authorities are trite that issues pertaining to the exercise of jurisdiction are such that can be taken at any stage even on appeal. That the rule as to raising any special defence vide the pleadings is maintained to avoid any party springing surprises against the opponent at trial. She said in the circumstances of this suit the fact that the action was limited by statute only became glaring during the course of trial and the fact that the issue was not raised in the pleading of the Defendant (Appellant) ought to be excused. C D E F

In response, Mr. Adegbonmire of counsel for the Respondents said the Appellant's arguments were untenable as the issue here involves construing a statute of limitation that was not pleaded and no evidence was led on the point. That under Order 25 Rule 6 (1) of the Federal High Court (civil procedure) Rules of 1995 applicable to this case it is mandatory to plead specifically any statute of limitation which, if not pleaded, might take the opposite party by surprise. That the time the cause of action arose cannot be determined from the statement of claim alone without recourse to evidence. That the Respondents have lost the opportunity to lead evidence on the point considering the stage the issue was raised as such G H

they have been taken by surprise. He said reference by the Appellant to 19th January 1994 as the evidence of when the cause of action arose is not tenable because the evidence was not led for the purpose of limitation of action.

B For the Respondents it was contended that the cause of action did not arise on 19th of January 1994. That for the purpose of limitation of action the cause of action would be deemed to have arisen or accrued when all material facts which if proved would entitle the Respondents to succeed in their claim against the Appellant are complete. He cited *Board of Trade v. Cayzer, Irrine & Co Ltd* (1927) AC 510; *Jallco Ltd v Owoniboy Technical service Ltd* (1995) 4 NWLR (Pt.391) 534 at 554; *NPA v Ajobi* (2000) 13 NWLR (Pt.683) 193 at 200. Mr. Adegbonmire said with regard to actions for breach of contract this Court had held that the cause of action accrues from D the time the breach of the contract is committed and not when the danger is suffered. He cited *Olaogun Enterprises Ltd v S. J. & M.* (1992) 4 NWLR (Pt.235) 361 at 388. Learned counsel for the Respondents referred to the correspondences between 2nd Respondent and Appellant tendered through PW1 as Exhibits 'G' to 'G6', E letters between 19th January, 1994 and 16th May 1994 before the Police Investigation Report was made on the 16th September 1994 tendered as Exhibit 'E'. He went on to submit for the Respondents that the case of the Respondents was based on contract and tort of F bailment. That Respondents particularly pleaded *res ipsa loquitor* in paragraph 11 of the statement of claim to the effect that the fact that the goods were lost while in the Appellant's custody is sufficient evidence of negligence. He stated that the facts as pleaded and the evidence led in support established a case of bailment not only in G contract and torts but also as an action on its own *sui generis*, arising out of the possession had by the Appellant as bailee of the goods. He referred to *Kate Ike v. Enterprises Mangrove Eng. (Nig.) Ltd.* (1986) 5 NWLR (Pt.41) 350, *Ibekendu v. Ike* (1993) 6 NWLR (Pt.299) 287 AT 297; *Broadline Enterprises Ltd v Monterey Maritime Corporation* H (1995) 9 NWLR (Pt.417) 1 at 24.

On the matter of the private security provided by the Respondents which fact the Appellant made a lot of fuss of, Mr. Adegbonmire said the arrangement was a causal one just to monitor the consignment and not to provide security which was in the control

of the Appellant totally. That the suggestion by the Appellant that the private security was more than that as Appellant said Respondent's letter of application that would have shown the exact nature of the security the Respondent offered to provide (sic). That the Appellant failed to produce the crucial evidence when they knew that it would be needed thus bringing the presumption under Section 149 (d) of the Evidence Act to the extent that it can be presumed that if the letter was produced would have gone against the Appellant. That no oral evidence of the contents of the document can be given. He relied on Uzuegbu v Progress Bank (Nig.) Ltd (1998) 4 NWLR (Pt.87) 236; Section 132 (1) of the Evidence Act: Prospect Textile Mills Ltd v. I.C.I. Plc (England) (1996) 6 NWLR (Pt.457). B
C

In answering the question posed in this issue, the clear divide between the parties is narrow but deep rooted and that is that while the Appellant is of the view that the action of the Respondent was statute barred, the Respondent says they were within time, the 12 months provided under Section 72 of the Ports Act to bring the action not having been exhausted. The effect of whichever side takes the prize in the answer is to determine whether the action was alive at the time of the institution process in the trial Court of the action or was already dead at that point. The term "cause of action" was looked into by Oputa JSC in Egbe v Adefarasin (1987) 1 NWLR (pt.47) 1 at 20 thus:- D
E

"Now let us examine the meaning of cause of action. It is admitted as 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." F

This Court had in Jalco Ltd v Owoniboy Technical Services Ltd (1995) 4 NWLR (Pt.391) 534 at page 554 applying the principle as enunciated in the English case of Board of Trade v Cavzer. Irrine & Co. Ltd (1927) A C 610 held as follows:-

"Time begins to run when there is in existence a person who can sue and another who can be sued and all facts have happened which are material to be proved to entitle the plaintiff to succeed." H

The crucial legislation at the root of this action and even the appeal is the Nigeria Ports Decree No. 74 of 1993, Section 72(1) precisely and it provides as follows:-

“When a suit is commenced against the company or an employee of the company... the suit should 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.”

B A rehash of the facts or circumstances of the matter would be needful here as a reminder and to be taken in context and that being the following:-

C The 2nd Respondent imported from Singapore a consignment of pharmaceutical products which were shipped into Nigeria on board the vessel MV “Van Linschoten” in several containers. The relevant container in this appeal was discharged along others and in apparent good order into the custody of the appellant on or about the 28th November 1993 pending collection by the 2nd Respondent. There is no dispute on the fact that the container was broached or tampered with while in the Appellant’s custody. The seal was broken and replaced by a padlock without the knowledge of the Respondent. When the padlock was broken in the presence of the representatives of all parties, it was observed that some cartons in the container were distorted, torn open and in some cases emptied. The incident was reported to the Appellant by 2nd respondent’s by letter dated 19th January 1994. By letter dated 18th February 1994 and 17th May 1994 the Appellant informed the 2nd Respondent that investigation into the incident had commenced. The Appellant further requested for certain documents from 2nd Respondent to facilitate their investigation and 2nd Respondent forwarded the documents requested by a covering letter dated 8th March 1994. On the 3rd May, 1994, 2nd Respondent sent a reminder and Appellant wrote on 16 May 1994 requesting for the same documents earlier asked for. All these correspondences were tendered and admitted as Exhibits at the Court of trial.

H There is evidence to show that the Nigeria Ports Police investigated the matter and the Police Investigation Report was made on the 16th September 1994, Exhibit ‘E’. The stand of the Appellant is that the cause of action accrued on the 19th January 1994 when the incident of tampering of the container was made by the 2nd Respondent in which case by the 24th March 1995 when the action was commenced, that would be outside the 12 months period prescribed

by Section 72 (1) of the Nigerian Ports Act 1993. That stance was rejected by the Respondents who contend that the cause of action could not have been in effect while those correspondences between the parties were on with the Police report made on September 1994 or 7th July 1994 when the Respondents received Exhibit 'G6', the second request from Appellant to Respondents for the documents which Respondents had earlier sent. Respondents contend that which of these two dates is taken as the date the cause of action accrued the action commenced on 24th March 1995 was within the 12 months provided for.

Taking the above including the definition of cause of action and situating it with the full circumstances of this case there is no gainsaying that the cause of action has to be taken to reflect when Respondents came to terms not only that their goods were lost, also the quantity. This position is all the more strengthened by the police investigation initiated by the Appellant which report confirmed the misgivings of the Respondents. This in my view would be 16th September 1994, date of the Police Report. This is so because going to court earlier than that date of the Police Report would mean heading into court with speculative materials and without definitiveness of the grievance of the Respondent, a situation that could be taken to mean that the action as commenced had died "in utero" since proof would be difficult to establish, the injury or damage being unascertainable. Therefore the case of *Jalco Ltd v. Owoniboy Technical Services Ltd* (1995) 4 NWLR (Pt.391) 534 at 554 is apt here in that for the purpose of limitation of action the cause of action would be deemed to have arisen or accrued when all the material facts which if proved would entitle the Respondents to succeed in their claim against the Appellant are complete.

For a fact this case seems on all fours with that of *Nigerian National Shipping Line v Gilbert Emenike* (1987) 4 NWLR (pt.63) 77. In that case, the Plaintiff had ordered from a supplier in Holland two cases of Motor Car spare parts which were to be carried to Port Harcourt Nigeria by the Defendant's vessel. Despite the arrival of the Appellant's ship in Port Harcourt, Nigeria on the 3/1/78 notice of the fact that the goods never arrived was only issued by the Appellant to the Respondent (Plaintiff) on 5/9/78. When the Appellant who was earlier the Defendant defaulted in paying, the Plaintiff then ap-

proached the court by the institution of a suit on 2/3/79 claiming the sum of N15,000.00 (Fifteen Thousand Naira) being the value of 2 cases of Motor Car spare parts, together with incidental expenses and loss of profit thereon, which goods were short landed by the defendants sometime in 1978 from their vessel, the SS/MV “Santa B Ines” at the Port of Port Harcourt.

In response, the defendant pleaded that the claim of the plaintiff was time barred in that the ship arrived Port Harcourt on 3/1/75 whilst the suit was instituted on 2/3/79. Judgment was given in favour of the Plaintiff and the Defendants appealed on the main ground of the action being statute barred action having been instituted beyond one year after delivery of the goods should have been made pursuant to the Carriage of Goods by Sea Act (Cap 29) Laws of the Federation and Lagos 1958, Article 3 Rule 3 of the Rules Relating to Bills D of Lading. The Court of Appeal in construing the date of the accrual of the cause of action were of the opinion that the evidence at the trial showed that although the respondent instructed his clearing agent in January, 1978 to clear the goods after the arrival of the ship, neither the appellant nor the respondent seemed to know the whereabouts of the goods or to be certain that the goods were not on board the ship until several months later when by their letter dated 5th September 1978, the appellant issued to Respondent a short landing certificate to wit that the ship arrived without the goods. In conclusion the Court of Appeal in that case held that the cause of F action did not accrue on the 3rd January 1978 when the ship arrived and therefore the limitation period could not start to run from that day. That the cause of action accrued on the 5th September 1978 when the certificate of short landing was issued.

Indeed the facts of this case are identical with that of Nigerian G National Shipping Line v Gilbert Emenike (supra) and the answer herein is that there need be certainty of the state of affairs before the cause of action could rightly be said to be in position and time would begin to run. The issue is resolved against the Appellant and in favour H of the Respondents.

ISSUE TWO:

Whether the Court of Appeal properly considered the doctrine of *res ipsa Loquitur* vis-a-vis the provisions of Section 65 (21 of the Nigerian Ports Decree No. 74, 1993, thereof which clause is in

respect of limitation of liability, wherein no liability in the circumstances of this suit can be ascribed to the Appellant.

Mrs. Agbor on behalf of the Appellant submitted that when the definition of the doctrine of *res ipsa Loquitur* is strictly applied to the evidence adduced before the trial court by the respective parties vis-a-vis the facts of the present case, that it becomes obvious that the onus placed on Appellant by the doctrine was completely discharged. That the onus on the Appellants herein to disprove the negligence imputed to it was properly discharged when it led evidence from PW1 and DW1 to the effect that the Respondent had taken upon itself the duty of keeping vigil on the container, which was subsequently alleged to have been breached. She stated on that a thorough appraisal of the facts of this case by this court based on the materials placed before the trial court, will lead to the irresistible conclusion that the rejection of the proper evidence before the Lower court to the effect that the approval granted the Respondents to provide their own private security personnel served to discharge the statutory obligation placed upon the Appellants as bailees for reward to return the bailed chattel (container) to the bailers. That the trial Court shut its eyes to the obvious in refusing to take into account the fact of the subsequent arrangement of the parties which served to vary the contract of bailment. That Section 66 (2) (e) of the Nigerian Ports Decree No. 74 of 1993 which protects the Appellant from the nature of such claims as made against the Appellant. He said the trial Court exercised its discretion wrongly which calls for the interference of this Court since the Court of Appeal failed to. He relied on *Hart v. Igbi* (1994) 10 NWLR (Pt.568) 28 at 39; *Olumesan v Ogundepo* (1995) 6 NWLR (Pt.433) 628 at 647 - 648; *Ekwealor v. Obasi* (1990) 2 NWLR (pt.131) 231 at 269.

Learned counsel for the Appellant submitted that when admissible evidence has been adduced which remains uncontroverted, it becomes part of what will lead to a decision in the case and when the evidence is palpably incredible, the Court is not only entitled to, but has no reason not to accept it. That where evidence as in the instant matter subject of the appeal, is not cross-examined upon, or challenged by the opposite party who had the opportunity to do so, it is always open to the court to act on the evidence. He cited *Ifeanyi Chukwu Osondu Co Ltd v Akhigbe* (1999) 11 NWLR (Pt.625) 1 at

19; Adejuwon v Ayantegbe (1989) 3 NWLR (pt.110) 417; Alaki v. Shaaho (1999) 3 NWLR (Pt.595) 387 at 395.

Mrs. Agbor went further to say that the unchallenged and uncontradicted evidence of DW1 in this regard is not only credible but also amounts to an admissible evidence against the plaintiff. He referred to the case of Bello v Fayose (1994) 2 NWLR (Pt. 327) 404 at 427. She said it is trite that the court does not punish the litigant for the inadvertence of the counsel so that where the counsel omitted to do an act it was open to the court in the interest of justice and in order not to facilitate a miscarriage of justice to allow or give room for amendment to be made. That an amendment to a party's pleadings could be made any time before the judgment of the court and this also where the evidence before the court are not in line with the pleadings filed before the said court and if that is not done would go to no issue. Mr. Adegbonmire for the Respondent submitted that the long tested and accepted rule of pleading is that both the court and the parties are bound by pleaded facts and un-pleaded facts go to no issue. That for a document to be admitted in evidence, it must satisfy this rule on pleadings, thus a document not pleaded is not admissible. That the appellant having failed to plead the clean report of findings, the trial court was right to have declined admitting in evidence and so Appellant cannot be heard to argue that the document is relevant. He cited Chiebu v Tonimas (Nig.) Ltd (1993) 3 NWLR (Pt.593) 11 at 144; UBN v. Ozigi (1994) 3 NWLR (Pt.333) 385; Udeze v Chidebe (1990) 1 NWLR (Pt.125) 141.

Mr. Adegbonmire said the trial court could not make any inference from a document it had rejected such as the clean report of findings. He referred to Oladele v Aromolaran II (1990) 6 NWLR (Pt.453) 180 at A.C.B. Ltd. v. Gwagwada (1994) 5 NWLR (Pt.345) 25 at 31; Prospect Textile Mills (Nig.) Ltd. (1996) 6 NWLR (Pt.457) 668; Koko v. Koku (1999) 8 NWLR (Pt.616) 672 at 683; Nzekwu v. Nzekwu (1989) 2 NWLR (Pt.104) 373 at 423.

On the applicability of the doctrine of *res ipsa Loquitur*, learned counsel for the Appellant stated that whether or not the Appellant at the Court of Appeal or as defendants at the trial court had or were able to discharge the onus placed upon them as statutory bailees for reward, and to establish that there was no negligence nor default on their part. That on their side the answer is affirmative. This view is

coming from the stand point that the Respondents had their security also in place for 24 hour security surveillance over the containers which were ostensibly in the custody of the Appellant.

That position of the Appellant was forcefully resisted by the respondents who through learned counsel on their behalf submitted that from the pleadings and evidence led in support a case of bailment had been established apart from the issue of the contract between the parties and the law of torts embedded therein. That main plank is that the Appellants were in possession of the goods as bailee of the goods. That in bailment as in this instance the appellant failing to deliver to the Respondents custody shows prima facie evidence of negligence and there resided in the appellant the duty to discharge the onus that the loss was not due to their neglect, default or misconduct. That what inevitably has been thrown up is that the fact speaks for itself, *res ipsa Loquitur* and nothing the appellant would posit would change the operation of that legal maxim. I place reliance on the cases, *Broadline Enterprises Ltd v Monterey Maritime Corporation* (1995) 9 NWLR (Pt.417) 1 at 24; *Kate Ike v Mangrove Engineering (Nig) Ltd* (1985) 5 NWLR (Pt.41) 350 at 359.

The Appellant had made a lot of heavy stuff of the Respondent's private security outfit in the Port premises. Respondent in the evidence of PW1 had said the security men were there just to monitor the position of the consignment but not for the purpose of providing security for the consignment. That is to see how things go at the Port. The description of the nature of what the Respondent's security outfit were doing at the port is not different substantially with the version put across by the appellant whose witness, DW1 said:

"The Plaintiff applied for its own private security and the application was granted... I agree that neither the police report nor our correspondences with the Plaintiff show the existence of any special security arrangement."

My understanding though may be simplistic, is that the matter of the private security supplied by the Respondent was not crucial to the custody of the goods or the responsibility of the Appellant to ensure the safety of the goods in their custody and in their premises, the Ports. The bottom line is that the bailee being Appellant had lost the goods, no viable excuse rendered for that so as to exculpate them from liability. Therefore harping on the private security of the

Respondent remains no more than the raising of dust which had not shaken the solid point that what transpired was due to the negligence of appellant who had neglected to effect the duty of care squarely expected of them. I rely on Chittty on Contract 27th Edition pp 101 - 102; Panalpina World Transport (Nig.) Limited v Wariboko (1975) B 2 SC 29; Odinaka v. Moghalu (1992) 4 NWLR (Pt.233) 1 at 15; Halliburton (Nig.) Ltd v Chapele (1996) 8 NWLR (Pt.455) 554.

I am satisfied that the concurrent findings of the trial court and affirmed by the Court of Appeal cannot be dislodged since there is nothing upon which this court can upset those findings based on proper evaluation of evidence before the trial court. From the foregoing and the well articulated reasonings in the lead judgment of my learned brother, N. S. Ngwuta JSC, I too dismiss this appeal and affirm the decision of the Court below.

D I abide by the consequential orders in the lead judgment.

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