NIGERIAN BANKING LAW REPORTS

[2000 – 2001]

VOLUME 10 (PART I)

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THE NIGERIAN BANKING SYSTEM

1. The Development of Banking in Nigeria

The historical development of the financial system in Nigeria dates back to 1892 when modern banking business commenced and a formal and institutional channel of saving mobilization was introduced into the economy with the establishment of the African Banking Corporation (ABC). The operation of ABC was later taken over in 1894 by the British Bank of West Africa (which later became Standard Bank) and subsequently, First Bank of Nigeria. Owing to the colonial heritage, the pioneer commercial banks in Nigeria were of foreign origin and their operations favoured finance of foreign trade and commerce.

Thereafter, several other foreign and a host of indigenous banks were established. The establishment of indigenous banks was initially propelled largely by nationalistic consciousness rather than the existence of relevant resources, including basic skilled manpower, for running such institutions. Consequently most of the early indigenous banks collapsed in rapid succession. Banks that failed during the early stage of the evolution of the Nigerian financial system were largely those with problems of inadequate capital, poor management, and fraudulent practices, among other factors.

An important feature of the Nigerian financial system, especially before the establishment of the Central Bank of Nigeria (CBN), was small scope of operations of participating foreign institutions and the complete absence of any form of institutional regulatory framework which would provide the necessary guide for both the operations and orderly development of the system. These were some of the reasons behind the slow development of the financial system during the pre-CBN era.

The situation however changed from 1958 when the CBN was established. Since then, series of efforts have been made by the CBN and other relevant authorities to promote the
growth and development of the Nigerian financial system. For example, the need to develop the system and create an avenue for investment of short term funds informed the issue by the CBN in 1960 of Treasury Bills as a supplement to Commercial Papers that were already in the market. Other money market instruments after the establishment of the CBN but prior to the introduction of the Structural Adjustment Programme (SAP) in 1986 included Treasury Certificates in 1968, Certificates of Deposit in 1975 and the Bankers’ Unit Fund as well as Stabilization Securities in 1976. The establishment of the CBN also aided the development of the capital market. This was achieved by ensuring the emergence of the securities markets and instruments (primary and secondary) and by promoting the establishment of development banks.

Following the adoption of the SAP in 1986, and the subsequent deregulation of the financial system, the banking system witnessed radical changes. Apart from the introduction of measures and instruments to deregulate the financial services industry, the techniques and the range of products offered by the industry changed significantly. The major objective of the deregulation was to enhance economic efficiency and effective resource allocation through service-driven competition and improvement in quality and spread of financial services delivery.

On July 6th, 2004 the Governor of CBN announced a banking reform programme aimed at strengthening and consolidating the banking system. The reform is expected to address the safety of depositor’s funds, enable the banking sector play an active developmental role in the economy and transform Nigerian banks into competitive players in the African and Global financial system.

2. **The Nigeria Deposit Insurance Corporation**

One of the key measures introduced during the era of deregulation of the banking sector was the establishment of the Nigeria Deposit Insurance Corporation (NDIC), with the promulgation of Decree No. 22 of 1988 now Cap 301 Laws
of the Federation 1990, (as amended). The NDIC was established to insure all the deposit liabilities of licenced banks, promote banking stability and a sound financial system. Although the NDIC enabling Act was promulgated in 1988, the Corporation only commenced operations in March, 1989. The Nigeria Deposit Insurance Corporation scheme was introduced to provide a further layer of protection to depositors and complement the role of prudent bank management as well as the Central Bank of Nigeria’s (CBN) supervisory activities in ensuring a safe and sound banking system. It was also considered as an additional framework to serve as a vehicle for addressing some of the challenges that followed the deregulation of the financial system under the SAP. Prior to the establishment of the NDIC, the Government had played the role of what in industry parlance is referred to as an implicit insurer, by bailing out troubled banks in its bid to protect depositors. With deregulation, an explicit Deposit Insurance Scheme (DIS) became imperative. The establishment of NDIC was also informed by the change in government bank-support policy, the bitter experiences of prior bank failures in Nigeria and the lessons of other countries with bank deposit insurance schemes. The scheme aims at increasing the competitive efficiency of the banking system as well as reducing the system’s vulnerability to destructive runs, panic-induced shocks by reinforcing depositors’ confidence in the nation’s financial system.

The mission of the Corporation is to protect depositors through effective supervision of insured institutions, provision of financial and technical assistance to eligible insured institutions, prompt payment of guaranteed sums and the orderly resolution of failed financial institutions.

The Corporation currently acts as the Liquidator of thirty four (34) banks out of a total of thirty six (36) banks whose operating licenses were revoked by the Governor of the CBN. All depositors of the banks in liquidation who have come forward to file their claims have been paid their insured deposits while liquidation dividends making up
100% of total uninsured deposits have been declared and paid to depositors of ten (10) banks in Liquidation.

In September 1997, the Corporation commenced publication of the Failed Banks Tribunals Law Reports (F.B.T.L.R.) which contained only reported decisions of the Tribunal established under the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Act, 1994 and decisions of the Special Appeal Tribunal established under the Recovery of Public Property (Special Military Tribunal) Decree, 1984. In 1999, with the return to civil rule, the Corporation restructured the publication into a compendium of decisions of all banking matters given by our superior courts of record from 1933 to date. This gave rise to the birth of the Nigerian Banking Law Reports (N.B.L.R.).

Nigeria Deposit Insurance Corporation
November, 2005
Banking is the most important sub-sector of the economy of any nation. Banks facilitate economic transactions between various national and international economic units and by so doing encourage trade, commerce and industry. It is widely acknowledged that a sound and efficient finance industry, of which banks constitute the major segment, would promote growth of the real sector while the opposite is the case if the financial sector is repressed and inefficient. Therefore the Law of Banking assumes a position of pre-eminence in economic development and this underscores the importance of a Law Report on the subject.

The efforts of the Nigeria Deposit Insurance Corporation in the development of the Law of Banking through the publication of a banking law report started over 8 years ago. It would be recalled that in September, 1997, the Corporation launched the Failed Banks Tribunal Law Reports (F.B.T.L.R.) at the International Conference Centre, Abuja. Although the Failed Banks Law Reports were short-lived following the advent of civil rule in 1999, they nonetheless served as a veritable reference material for Judges, Legal Practitioners, Jurists, Bankers, Students and the general public.

It is for the foregoing reason that when the Corporation decided to expand the scope of the publication by including the decisions of the Supreme Court and the Court of Appeal on banking matters and re-named it the Nigerian Banking Law Reports (N.B.L.R.), I did not hesitate in giving my consent.

The NBLR is a compendium of case law on Nigerian banking from 1933 to date. The first batch of the compendium contains cases decided between 1933–2002 which I understand would continue to 2004. Thereafter, the reports would be published regularly. This initiative will prove invaluable to users who would not have to wade through
different law reports when conducting research on Nigerian banking case law.

The publication of the N.B.L.R. is one reliable means of disseminating information and knowledge of banking law and practices to depositors and other members of the public as part of the Corporation’s contribution to safe and sound banking practices. Hence, it is well known that the Corporation did not embark upon publication of the N.B.L.R. in order to make profit.

Specialized law reports are very rare mainly because of the tedium, great expenses, time and labour required to produce them. However, when available, such reports generate considerable public interest. I am therefore pleased that the presentation of the Nigerian Banking Law Reports has become a reality. The laudable decision of the Management of the NDIC to shoulder this onerous burden for the Nigerian Banking industry is a practical example of the social as well as corporate responsibilities expected of modern Corporations.

I have no doubt in my mind that the publication will endure and I am therefore pleased to recommend the Nigerian Banking Law Reports, which is a worthy and befitting legacy for posterity, especially the world of learning, to all and sundry.

Hon. Justice Mohammed Lawal Uwais, GCON
Chief Justice of Nigeria
November, 2005
PREFACE TO THE
NIGERIAN BANKING LAW REPORTS

The decision of the Nigeria Deposit Insurance Corporation to publish the Nigerian Banking Law Report has its origin from its involvement in the implementation of the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Act, 1994. The Law was promulgated by the then Military Government with the combined objectives of recovering the debts owed to failed banks and prosecuting directors, officers and customers of banks who were suspected to have committed banking malpractices, which led to the collapse of most of the failed banks.

Furthermore, in 1994, when the Corporation was appointed as the Liquidator to carry out the liquidation of some failed banks, it was observed that there were hardly any records relating to the winding up of banks that had failed in the past. There was also no sufficient data on the causes of the past bank failures. The Corporation therefore took the initiative, in September, 1997 to report and publish decisions of the Failed Banks Tribunal established under the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Act, 1994. This effort culminated into the publication of the Failed Banks Tribunal Law Reports (F.B.T.L.R.). Thus, the Corporation was motivated by the need to place on permanent record the lessons from the new wave of bank failures/distress, particularly with regard to the causes of such failures/distress and efforts made to resolve such failures.

Hitherto, the absence of proper documentation relating to the bank failures experiences in the early fifties had made it exceedingly difficult for practitioners and researchers to make references to such failures. The decision to publish the F.B.T.L.R. was to ensure that the mistakes of the past were not repeated, through elaborate documentation of the recent failures, the essence of which were captured in the decisions of the Failed Banks Tribunal.
However, with the return to democratic rule in May, 1999, the Failed Banks Act was amended by the Tribunals (Certain Consequential Amendment, etc) No. 62 of 1999, which abrogated the Tribunal. The civil and criminal jurisdictions of the Tribunal were accordingly transferred to the Federal High Court. Consequently, the title of the Publication was changed to Nigerian Banking Law Reports.

Furthermore, in response to the new democratic dispensation, the Corporation decided to expand the scope of the publication into a compendium containing decisions of the Supreme Court, Court of Appeal as well as Federal and State High Courts on banking matters from 1933 to date in order to provide a comprehensive data base for all banking related cases decided by the superior courts of record. Also in order not to miss the tremendous achievements recorded by the Failed Banks Tribunal during their relatively short tenure, their decisions have been included in the compendium thereby making the N.B.L.R. very comprehensive. In addition, there is an index for the compendium up to 2002, which would soon be updated to 2004 and thereafter, it would be published on regular basis.

It is therefore my hope that legal practitioners, my Lords the honourable justices and judges, distinguished scholars and law professors, bankers, students and the general public would find this initiative useful.

I would like to express my profound appreciation to the Editorial Board of the Nigerian Banking Law Reports under the distinguished chairmanship of Prof. Anifalaje, an erudite professor of law and the Dean of the Faculty of Law, University of Ibadan ably assisted by seasoned Legal Practitioners and staff of the Legal Department of the Corporation, for their patriotic commitment, diligence and ingenuity for details, that went into the production of the NBLR. They left no stone unturned in bringing the Corporation’s dream of making this worthy contribution to legal knowledge and
research a reality. Their commitment in ensuring the completion of the project is highly commendable.

Management will on its part do everything possible to ensure that publication of the Nigerian Banking Law Reports (N.B.L.R.) is sustained.

G.A. Ogunleye, OFR
Managing Director/Chief Executive
November, 2005
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Sheldon and Filders Practice and Law of Banking (11ed)

The Export Trade, C.H. Schmitthoff (6ed)

The Laws of International Trade by Han Van Huntee

Webster Comprehensive Dictionary (International Edition)
Thor Limited v First City Merchant Bank Limited

COURT OF APPEAL, LAGOS DIVISION
NZEAKO, ADEREMI, OGUNTADE JJCA
Date of Judgment: 11 JANUARY, 2000
Suit No.: CA/L/62/95

Banking – Loan – Collateral – Whether forecloses lender’s right to sue for the loan in case of default – Purpose of collateral

Banking – Loan – Proof of repayment – On whom lies – How discharged

Facts

Before the Lagos State High Court, the respondent on 15 March, 1994 commenced legal action against the appellants by specially indorsed writ pursuant to Order 3 Rule 4 of the Lagos State High Court (Civil Procedure) Rules, 1972. The respondent subsequently brought an application for judgment pursuant to Order 10 of the Lagos State High Court Rules on the 8 April, 1994. Meanwhile on 5 April, 1994, the appellant on its part had entered an appearance and filed a statement of defence and counter-claim to the action. With respect to the summons for judgment, the appellant filed an affidavit of merit of 38 paragraphs on 4 May, 1994 as required by the Rules. In effect, the appellant sought leave to defend the suit.

On 9 December, 1994 the learned trial Judge determined the summons for judgment as prayed by the respondent as by the respondent against the appellant. He made an order empowering the respondent to enter judgment in the sum of ₦12,203,145.19 and interest at the rate of 15% per annum from 1 January, 1994, until the date of judgment, 9 December, 1994, and thereafter at 10% per annum until final liquidation of the judgment debt.

Aggrieved, the appellant appealed to the Court of Appeal.

Held –

1. The purpose of a collateral for bank loans is to provide something to fall back on if the borrower defaults in the
payment of the loan. Therefore, the lender may decide to sue for the amount owing or against the security provided by the borrower. The provision of security is no bar to the lender’s right to sue for the loan.

2. The burden of showing that a loan has been repaid lies on the party who asserts it. A party cannot even at the trial lead evidence of repayment without pleading the facts to be relied upon. In the instant case, the appellant failed to plead or depose to these facts. The learned trial Judge was therefore right in deciding not to let in the defendant to defend.

Appeal dismissed.

Cases referred in the judgment

Nigerian

Agwuneme v Eze (1990) 3 NWLR (Part 137) 242
Akpeno v Barclays Bank of Nigeria (1977) 1 SC 47
Aromolaran v Kupoluyi (1994) 2 NWLR (Part 325) 221
Douglas v Peterside (1994) 3 NWLR (Part 330) 37
Jipreze v Okonkwo (1987) 3 NWLR (Part 62) 737
Macaulay v NAL Merchant Bank Ltd (1990) 4 NWLR (Part 144) 283
Nishizawa Ltd v Jethwani (1984) 12 SC 234

Foreign

McLardy v Slateum (1890) 24 Q.B.D. 504

Nigerian rules of court referred to in the judgment

High Court of Lagos State (Civil Procedure) Rules, 1972, Order 10 rules 1–4

Counsel

For the appellant: Johnson (with him Moronfola (Mrs)
For the respondent: Adesanya (with him Aure)
Judgment

NZEAKO JCA: *(Delivering the lead judgment)* The complaint of the appellant in this appeal arose out of the summary judgment procedure applied by Alabi J of the High Court of Justice, Lagos, pursuant to the Order 10 provisions of the High Court of Lagos State (Civil Procedure) Rules, 1972 (the same as Order 11 of Rules made pursuant to the 1994 Civil Procedure Law). At the time of this suit, the 1972 Rules were in operation.

The relevant provisions of Order 10 state as follows:

1. *(a)* Where the defendant appears to a writ of summons specially indorsed with or accompanied by a statement of claim under Order 4 Rule 4, the plaintiff may on affidavit made by himself or by any other person who can swear positively to the facts, verifying the cause of action and the amount claimed (if any liquidated sum is claimed), and stating that in his belief there is no defence to the action except as to the amount of damages claimed, if any, apply to a Judge in Chambers for liberty to enter judgment for such remedy or relief as upon the statement of claim the plaintiff may be entitled to. The Judge thereupon, unless the defendant shall satisfy him that he has a good defence to the action on the merit or shall disclose such facts as may be deemed sufficient to entitle him to defend the action generally, may make an order empowering the plaintiff to enter such judgment as may be just, having regard to the nature of the remedy or relief claimed.

2. The application by the plaintiff for leave to enter final judgment under Rule 1, of this Order shall be made by summons, returnable in Chambers not less than four clear days after service, accompanied by a copy of the affidavit and exhibits referred to therein.

3. *(a)* The defendant may show cause against such application by affidavit, or the Judge may allow the defendant to be examined upon oath.

*(b)* The affidavit shall state whether the defence alleged goes to the whole or to part only and (if so) to what part of the plaintiff’s claim.
(c) The Judge may, if he thinks fit, order the defendant, or in 
\(a\) the case of corporation, any officer thereof, to attend 
and be examined upon oath, or to produce any leases, 
deeds, books or documents, or copies of or extracts there-
from.

4. If it appears that the defence set up by the defendant 
applies only to a part of the plaintiff’s claim, or that any 
part of his claim is admitted, the plaintiff shall have 
Judgment forthwith for such part of his claim as the de-
fence does not apply to or as is admitted, subject to such 
terms, if any, as to suspending execution, or the payment 
of the amount levied or any part thereof into Court, the 
taxation of costs, or otherwise, as the Judge may think fit. 
The defendants may be allowed to defend as to the resi-
due of the plaintiff’s claim.”

The plaintiffs/respondents who for purposes of this appeal 
will be referred to as plaintiffs had on 15 March, 1994 
commenced legal proceedings against the defendants (the 
appellants herein) by specially indorsed writ pursuant to 
Order 3 Rule 4 of the said 1972 Rules.

As required by the Rules the writ was accompanied by the 
statement of claim.

By a summons for judgment pursuant to the said Order 10 
of the High Court of Lagos (Civil Procedure) Rules, sup-
ported by a 38-paragraph affidavit with 22 documentary 
exhibits, filed on 8 April, 1994, the plaintiffs prayed for an 
order of the High Court to enter final judgment against the 
defendants as claimed in the writ.

The affidavit verified the claim of the plaintiff.

The defendants on their part, had entered an appearance 
and filed a statement of defence and counter-claim on 
5 April, 1994.

Reacting to the summons for judgment of 8 April, 1994, 
the defendant filed an affidavit of merits of 38 paragraphs, 
on 4 May, 1994. It verified the facts averred in the statement 
of defence. All this was as required by the Rules.

By a Ruling delivered on 9 December, 1994, Ade-Alabi J 
determined the summons for judgment as prayed by the
plaintiffs against the defendants. He refused to grant the defendants leave to defend the suit.

He made an order, “empowering the plaintiff to enter judgment in the sum of ₦12,303,145.19” and interest at 15% per annum from 1 January, 1994 until the date of judgment being 9 December, 1994, and thereafter at 10% per annum until the judgment debt is finally liquidated.

Dissatisfied, the defendants now appealed to this Court.

They filed 2 grounds of appeal by their notice of appeal filed on 17 January, 1995.

The grounds of appeal:–

"Ground 1: The Honourable Judge misdirected himself when he held that the appellant was not entitled to be given unconditional leave to defend the action.

Particulars

(i) Each credit arrangement provided for repayment out of proceeds of cash collateral beyond the value of each relevant credit, held and controlled exclusive by the plaintiff who did not give any evidence of whether, how and when it had dealt with the said cash collateral.

(ii) The onus of proving repayment was in the circumstances on the plaintiff entirely.

(iii) The calculation of interest, the relevant and proper rate and the period of interest were crucial to establishing the balance claimed and there was a genuine dispute concerning this which the plaintiff did not attempt to explain.

(iv) The defendants counter-claim was indivisible from the claim and was a substantial defence thereto.

(v) There were substantial issues of fact arising from the defendants affidavit and the plaintiffs own affidavit, irresolvable without oral evidence and which were crucial to a proper appraisal and conclusion concerning the disputed balance as follows:–

a. whether the US$150,000 ‘red clause’ element of the letters of credit were not retained and recovered by the plaintiff.
b. whether the plaintiff accounted for US$60,000 received from Decacia International Limited who guaranteed the credits in order to finance exports to themselves through the plaintiff.

c. whether the guarantee by Decacia Limited was not a condition of the credits upon which the defendant relied and whether therefore the secret arrangement of the plaintiff to release Decacia International Limited was not prejudicial, unlawful, illegal and of a vitiating effect on the credit contracts.

d. whether the defendants allegation of manipulations on his account were not justified by the fact that a purported loan of ₦21 Million produced debits of ₦92 Million and credits of ₦86 Million.

Ground 2: The Honourable Judge erred in law when he cast a harsh and unjustified onus of proof on the appellant to establish a right to defend and he therefore acted contrary to principle and in contravention of the appellants constitutional rights.

Particulars

(i) Order 10 summary procedure creates a limited exception to the constitutional right of a defendant to full plenary trial or his ‘day in court’.

(ii) Unless the principle is limited then the defendant will be denied the full opportunity to be heard in his own defence and will be denied fair hearing.

(iii) The principle is that a defendant must be given leave to defend unless the case is too plain for argument that the defence is a sham.

(iv) Order 10 does not warrant trial of the merits of a complicated claim or defence on affidavit.

(v) Order 10 does not oblige the defendant to file a copious affidavit bringing forth all the oral and documentary evidence available for his defence but only to show that there are serious questions of law and or fact in issue which may avail him a defence to part or all of the claim.

(vi) The learned trial Judge expected the defendant to prove its defence on affidavit even when the plaintiff has a demonstrably deficient case.

(vii) The unjustified onus led to a denial of the right to defend and an infringement of the applicant/defendants constitutional rights.”
Each party, in its brief of argument, set out what it considered as the issues for determination.

The defendant’s issues were put thus:–

“(i) What is the principle upon which the Court is entitled to deny the defendant to liquidated claim the right to defend himself in a plenary trial?

(ii) Whether the respondent was entitled to summary judgment either on its own or on the case made by the appellant?”

The plaintiff’s issues were:–

“Whether the defendant was entitled to be let in to defend the claim of the plaintiff on the basis of the ‘affidavit of merit’ and the statement of defence before the court.”

In my view, the plaintiff’s issues seem to me to be more to the point. It also encompasses elements in the defendant’s issues which will suffice to determine the controversy as can be gathered from the grounds of appeal and argument of both parties.

The plaintiff has raised objections to the defendant’s issues as couched and asked us to discountenance them. He calls the first issue hypothetical.

I do not think so. I would agree that the language in which the issue is couched did not hit the mark clearly as well as the plaintiff’s single issue. But I have no doubt as to the import and what the defendant sought to convey, when the issue is examined against Ground 1, with its particulars and the Order 10 Rules applicable to liquidated demands.

The defendant is asking the Court to define the application of the rule which denies the defendant to the claim for the liquidated sum, the right to defend the suit.

The issue for determination formulated by the appellant in Douglas v Peterside (1994) 3 NWLR (Part 330) 36 at 47 cited by the learned Counsel for the plaintiff which was disapproved by Edozie JCA was clearly abstract, virtually academic, as it did not address any specific complaint in the appeal. It was in the following terms: “Whether the Court of
Appeal can interfere with the award of damages made by the trial Judge, when such an award is either ridiculously low or excessive.” The same cannot be said of the issue in this appeal which addresses the complaint but is vaguely couched.

Learned Counsel for the plaintiff also submitted that issue No. 2 of the defendants does not arise from Ground 2 of the appeal.

Read with the particulars, Ground 2 complains of misapplication of the summary judgment procedure in the case, placing the onus on the defence and giving judgment to the plaintiff and denying defendant its constitutional right of fair hearing. Then its issue No. 2 questions the entitlement of the plaintiff to that summary judgment in such circumstances.

The issue clearly arises from that ground of appeal. It is, however, a totally different matter what the answer to the issue is.

I will now deal with the merits of the appeal. I see elements of the two grounds of appeal in the issues formulated by both parties. I have however decided to address the appeal based on the more succinct single issue as couched by the plaintiff.

The principles which guide the courts in their application of the provisions of Order 10 of the High Court of Lagos (Civil Procedure) Rules, 1972 have been well settled.

In the case of *Nishizawa Ltd v Stichand N Jethwani* (1984) 12 SC 234; these principles were well examined and determined. In that case, one of the issues relevant to this appeal which the Supreme Court had to determine was:–

“Whether the courts below were right in holding that the defendant had duly established that he had a good defence to the action on the merits or that he had disclosed such facts as may be deemed sufficient to entitle him to defend the action.”

One principle relevant to this appeal and which came out loud and clear is that what the trial Judge will be looking for at that stage of the proceedings before him when considering
A summons for summary judgment under Order 10, is whether the defendant has disclosed by his affidavit such facts as may be deemed sufficient to entitle him to defend the action.

What are deemed facts sufficient to entitle him to defend the action depend on the circumstances of the case.

If, for example, the defendant pleads facts which are grounds in law, and the issue of law is substantial, the Judge hearing the summons for judgment will not readily grant leave to the plaintiff to enter judgment. He will let in the defendant to defend the suit.

If, on the other hand, the facts seem to ground a defence which is frivolous, or worthless or, as the courts sometimes describe it, “a sham” the court will surely grant the plaintiff leave to enter judgment and refuse to let in the defendant.

To pin the principles further down, what a trial Judge looks out for under the Order 10 procedure are facts which raise triable issues (see Nishizawa Ltd case (supra)).

A defendant said to be owing money and in its effort to “show cause”, denies owing, a bare denial does not suffice. He must back it up with facts, otherwise it can hardly amount to a good defence or give rise to a triable issue. See Obaseki JSC in Nishizawa v Jethwani (supra) at 234 where he said:–

“...alleges that the defendant owes him a sum of money and the defendant denies it... If in the application for summary judgment, the plaintiff deposed to affidavit verifying the facts, and proceeded to Exhibit the agreement for the loan and receipt given by the defendant as evidence of the loan, it is idle to think that a bare statement of denying the loan will amount to a good defence under Order 10.”

To allow a defendant under Order 10 to defend where the plaintiff has prima facie put up an unassailable case, he must
show that he has a *bona fide* defence. See *Macaulay v NAL Merchant Bank Ltd* (*infra*) where it was also held that the effect of the Order 10 procedure is that upon the allegation of one side or the other, a party is not to be permitted to defend himself in court, that his rights are not to be litigated at all.

Also, in the *Nishizawa Ltd* case at 290, Oputa JSC further stated that the trial Court will not then be looking “for proof of those facts or evidence on oath verifying those facts”.

This is the result of closely examining Order 10 rule 1(a) which requires the defendant either to “show cause”:

(i) to satisfy the court that he has a good defence on the merits; or

(ii) to disclose such facts as may be deemed sufficient to entitle him to defend the action generally.

In the case of *Macaulay v NAL Merchant Bank Ltd* (1990) 4 NWLR (Part 144) 283, it was so held by the Supreme Court.

Our attention was drawn to the *dictum* of Aniagolu JSC in the *Nishizawa Ltd v Jethwani* case (*supra*) where at 278 he stated thus:

“In interpreting Order 10 Rule 3 of the High Court of Lagos (Civil Procedure) Rules Cap 52 Vol. 3 two broad guiding principles are to be borne in mind, namely:

(i) that a defendant who has no real defence to the action should not be allowed to dribble and frustrate the plaintiff and cheat him out of the judgment he is legitimately entitled to by delay tactics aimed, not at offering any real defence to the action but at gaining time within which he may continue to postpone meeting his obligation and indebtedness; and

(ii) that, on the other hand, a plaintiff should not be permitted to shut out real (not a sham) defence to an action by his clinging to the assertion that once the defendant has failed to:—

‘show cause against such (plaintiff’s) application by affidavit’

as required by *Order 10 Rule 3 of Lagos High Court Rules*, he is out of court and must have a judgment signed against...
him no matter how genuine a defence he had disclosed by means other than by an affidavit under that rule of the Order.”

Both parties have relied on this case and used it extensively.

The learned Justice of the Supreme Court also made the important point that, in coming to a decision whether to grant the defendant leave to defend, the trial court, “must be guided by the overall interest of justice, bearing in mind always that, while appreciating the need for procedural requirements to be obeyed, the ultimate dictates of justice must override niggling technicalities”.

The same principles were reiterated by Oputa JSC in the same case when he said that the summary trial procedure established to prevent injustice to a deserving plaintiff may not be allowed to become a vehicle for injustice against a deserving defendant.

There can be no doubt that this is all well said. It also boils down to the well-known principle that justice is not a one-sided affair, it is justice for all, for the plaintiff and for the defendant.

It must be ascertained therefore that both parties complied with the Rules and that justice is meted out to all concerned. After ascertaining that the plaintiffs have complied with Order 10 Rules 1 and 2 by examining their claim and affidavit, it must also be ascertained that the defendants met Order 10 Rules 1 and 3, scrutinising to see if any triable issues are raised by the affidavit of merit and the statement of defence.

I would like to note at this stage that there is no doubt that the plaintiff’s application had been properly constituted having satisfied the requirements in the Order 10 Rules and fully verifying the cause of action, the amount claimed and stating that in their belief there is no defence to the action. The trial Judge had rightly noted this. Once the plaintiff has had its application properly constituted in accordance with the Rules, the ball, then goes unto the defendant’s court under rule 3(a) to show cause why judgment should not be
signed, by satisfying one or the other of the conditions in rule 1(a):–

(i) that he had a good defence to the plaintiff’s action on the merit; or

(ii) he discloses such facts as might be deemed sufficient to entitle him to defend the action generally.

The submission for the defendant that its complaint raises the question whether the plaintiff has not been obliged to prove *prima facie* entitlement to judgment or whether it is sufficient to rely on the failure of the defendant to show cause looks to me as a huge play on words. The matter is as I have stated above. The careful and painstaking manner in which the plaintiff set out presenting his claim, and cause of action, the summons for judgment, affidavit in support verifying the cause of action and marshalling documentary exhibits and deposing that, in his view, the defendant has no defence cannot be faulted. Can the defendant complain that there is no cause of action disclosed, or that this was not verified by affidavit as required by Order 10 Rules 1 and 2? It cannot. A plaintiff complying with the rules is deemed to have made a *prima facie* case for judgment. The *onus* then shifts to the defence. It would serve the defendant’s cause better in a case such as this, if it concentrated its argument on showing that it has a defence on the merit, clearly identifying what that defence is (not really proving the facts), or that it has some triable issues, also identifying them.

It is when the defendant has so shown cause as required by the Rules that the trial court would be in a position to determine if it has been satisfied and would then make an order, allowing it to defend or, on the other hand, empowering the plaintiff to enter judgment.

It is against the foregoing background and principles that the trial court would have proceeded to look at the affidavit of merit filed by the defence and its statement of defence. Did it not do so? The defendant seems to complain that it did not.
What the trial Judge said was this:–

“How then is a defendant required to show cause?

A defendant who has entered appearance and who is faced with an application for leave to enter judgment may show cause by filing an affidavit to show cause. But where a statement of defence alone which discloses a valid defence instead of an affidavit as prescribed under Rule 3(a) of Order 10 of the High Court of Lagos State (Civil Procedure) Rules has been filed, the Court ought to act on such a defence and let in the defendant to defend the action. This is because, all that the rule requires is a good defence to the action. Whether this good defence has been made through a statement of defence or by an affidavit would appear in effect to be immaterial.

A defendant may show cause by showing that he has a good defence that his statement of defence discloses sufficient facts to entitle him to defend the action, or show that the claim is not one which could be specially endorsed under Order 3 Rule 4 of the Rules. He may show cause by showing that the case is not within the order or that the statement of claim or affidavit in support is defective such as the verification of the claim in support.

The defendant may also show cause against the plaintiff’s application for summary judgment by a preliminary or technical objection for example, that the case is not within the order or that the statement of claim or affidavit in support is defective such as due to verification of the claim. For this type of objection, no affidavit is required. If the objection is fatal, the application will be dismissed or conditional leave given to defend. If the defect is capable of amendment, leave to amend may be given and application will proceed as amended.

The defendant may also show cause on the merits for example that he has a good defence to the claim on the merits, or that a difficult point of law is involved, or a dispute as to facts which ought to be tried, or a real dispute as to the amount due which requires the taking of an account to determine, or any other circumstances showing reasonable grounds of a bona fide defence.”

On the issue whether a defendant has a good defence or disclosed such facts as may entitle him to defend, the trial Judge also outlined the principles. He said:–

“What is required is simply to look at the facts averred in the statement of defence, where applicable and see if they prima facie afford a defence to the action . . .
The defendants’ showing cause should:–

(a) Condescend upon particulars, and as far as possible, deal specifically with the plaintiff’s claim and affidavit and state clearly and concisely what the defence is and what facts are relied on as supporting it.

(b) state whether the defence goes to the whole or part of the claim, and in the latter case, specify the part.

(c) where the defence is that the defendant is not indebted to the plaintiff, state the grounds on which the defendant relies as showing that he is not indebted. A mere showing that the defendant is not indebted will not suffice.

(d) where the affidavit states that the defendant is not indebted to the plaintiff in the amount claimed or any part thereof state why the defendant is not so indebted, and to state the real nature of the defence relied on.

(e) where the defence relied on is fraud, state the particulars of the fraud; a mere general allegation of fraud is useless.

(f) if a legal objection is raised, state clearly the facts and the point of law arising thereon.

(g) in all cases, give sufficient facts and particulars to show that there is a bona fide defence.

(h) also, matters of hearsay are admissible, provided that the sources and grounds of information and belief are disclosed.”

The learned trial Judge then considered the case of the plaintiff set out in the statement of claim, reproducing relevant paragraphs 2–4, 6–9, 13, 14, 17–20, 22–26 and 31 which were duly verified by the affidavit in support of the summons for judgment.

Against the plaintiff’s case, the defendant’s statement of defence was considered. Paragraphs 5–8, 10–11 were set out together with the defendant’s affidavit on merit in paragraphs 3–9 and 16–37.

I am bound to acknowledge that, up till this point, the trial Judge had approached the determination of this matter very meticulously and purposefully. He correctly outlined the applicable law and legal authorities as set out (supra).

Having noted this, I have myself gone on to see how the learned trial Judge also proceeded to examine one by one the
various heads of defence distilled from the statement of
defence and the affidavit of the defendant. He placed them
against the plaintiff’s claim and affidavit.

He treated the defence under the following heads:–

(1) that some of the sums claimed in the action are statute
barred;

(2) that there is adequate collateral securities provided for
the amount claimed by the plaintiff;

(3) that the amount claimed by the plaintiff had been repaid;

(4) that the plaintiff had unilaterally suspended the utilisa-
tion of the facility.

After examining each against the available evidence from
both sides, to see if they could be said to be a good defence
or defence on the merits, he then concluded in respect of
each head as follows:–

(1) That both parties agreed that the cause of action arose on
15 March, 1988 which was the last day the facility was
to be repaid and the reckoning of the six-year period
should have commenced on 16 March, 1988. The action
having been commenced on 15 March, 1994, it was not
difficult to conclude that it was filed within the limita-
tion period.

(2) Contrary to the requirement in the case of Nishizawa v
Jethwani (supra) the defendant’s statement that the
plaintiff had realised the collaterals without more, can
hardly amount to a good defence under Order 10.

This is so in the light of all the relevant exhibits put in
by the plaintiff to establish that the defendant was owing
the amount claimed and had not paid.

On the issue raised by the defendant that there was ade-
quate security for the facilities and that the plaintiff
should have claimed them, the trial Judge said it was
misconceived. For the purpose of a collateral is to pro-
vide something to fall back on if the borrower defaults in
the payment of the loan. The lender may decide to sue
for the amount owing or against the security provided by
the borrower. The provision of security is no bar to the
plaintiff’s right to sue for the loan. He concluded thus:—
“The issue of providing collateral therefore is unarguable to
justify this matter proceeding to trial.”

(3) On the defendant’s assertion that the plaintiff had real-
ised and recovered some of the collaterals, the learned
trial Judge recalled the requirement set out in Nashizawa
v Jethwani (supra).

He recalled the great details, supported with exhibits in
the plaintiff’s statement of claim and verifying affidavit,
and held that it was essential for the defendant to supply
details and particulars to back up the recoveries which
they alleged and the burden was on him to prove the re-
payment or give adequate reasons for non-payment. That
the defendant not having produced particulars necessary
to support his depositions, he had no difficulty in con-
cluding that the allegation that the plaintiff had recov-
ered the collaterals was an unarguable issue justifying
the defendant being let in to defend.

(4) On the issue of plaintiff suspending the utilisation of the
facility deposed to by the defence, the Judge held that
the plaintiff put forth more than enough documents to
show that the sum claimed was actually utilised and the
defendant had nothing against.

He then concluded, on the whole, that the defendant had
failed to show the grounds relied on to deny indebted-
ness or give sufficient facts and particulars showing a
bona fide defence to the material facts raised in the
statement of claim which had not been answered in the
statement of defence. The legal points raised by the de-
fendant were clearly unarguable and untenable.

As to the counter-claim he decided that a counter-claim
being separate and distinct action which can be conveniently
treated separately, he would set it down for hearing.

He then made an order empowering the plaintiff to enter
judgment in the sum claimed.
Was the learned trial Judge wrong in the light of the above? I think not. The learned trial Judge cannot be faulted in his consideration of the materials before him for each party – whether the plaintiff complied with the rules and properly put forward its cause of action under Order 10, on the part of the defendant, whether it complied with the rules, and satisfied the requirements in decided cases by the Supreme Court by its statement of defence and affidavit on merit. I affirm that the plaintiff duly complied with Order 10 and the principle which I earlier set out.

The great details, including the bank statements and other exhibits which it put forward were not countered in any material fact. Indeed, my observation is that paragraphs 1–20 of the defence were simply stories and information showing how the loans were procured. Then paragraphs 21–38 which one expected would clearly, and specifically, answer the plaintiff’s material averments, failed to do so in accordance with the principles earlier set out.

On the application of the law and the reasoning in the judgment appealed from, I am also unable to fault the learned Judge who took the issues systematically, analysed them, applied the law and came to conclusions which, in my humble view, clearly followed in the circumstances.

I find nothing in the judgment which the defendant ought to complain of.

For example, some of the issues of fact, particularly figures, raised in the particulars in Ground 2 of the grounds of appeal and addressed at length are matters in the defendant’s brief of argument, if considered as an important part of the defence, ought to, but were not raised in the affidavit of merit or statement of defence. They did not form part of the case placed before the trial court. They are therefore of no effect on appeal (see Akpene v Barclays Bank of Nigeria (1977) 1 SC 47).

Although the learned defence Counsel, in addressing the appeal, showed admirable conversance with the law
applicable to the Order 10 procedure for summary judgment, as can be seen from his brief of argument, and argued spiritedly to put across the defendant’s case on appeal, there are missing links which have not rewarded his effort.

Defence Counsel had in his written submission set out the background to the appeal, including the summary of the claim and prayer for summary judgment by the plaintiff, the defendant’s reactions thereto, and the judgment appealed from. Surprisingly, in his summary of the judgment, Counsel brought in what he alleged the court below decided in a motion for stay of execution, filed by the defendant after the judgment. This is not part of the judgment appealed against and must be discountenanced.

Counsel then set out two questions for determination in this appeal which in his argument he took together. He set out the principles applicable to the Order 10 summary procedure.

Then he submitted that the Order 10 procedure creates a limited exception to the constitutional right of the defendant to full plenary trial, and that the court has no right to deny him the right, unless the action falls specifically into the principles contained in the four walls of the rule.

He set out the contents of the rules, and submitted that, once the defendant shows that there is a genuine defence in law or in fact, unconditional leave to defend will be given and that the defendant needs only raise an arguable defence or triable issues, or that there are matters which require investigation. He cited the case of Miles v Bull (1969) 1 QBD 258; Nishizawa Ltd v Jethwani (supra); Sodipo v Lemminkainen (1986) 1 NWLR (Part 15) 223 at 231 (sic). He referred to various dicta by Oputa JSC and Aniagolu JSC in these cases earlier set out by me.

He also cited Jacobs v Booths Distillery Co (1901) 85 LT 262 where the House of Lords in England reversed summary judgment in an action on two promissory notes, where the defence was that upon a representation that he would incur no liability he had signed the promissory notes.
He submitted that, in this case, the defendant had established the right of defence but the court below had unjustifiably placed an onus on the defendant.

The approach of Counsel and the authorities rightly cited would have helped the defendant’s case but they did not. This link which I earlier mentioned, the defendant failed to provide *viz.*, the necessary materials at the court below as the learned trial Judge rightly in my respectful view found, and as I earlier affirmed.

The exercise undertaken by learned Counsel for the defendant under paragraphs 12.3–14.7 of his brief of argument under the title “Serious issues of fact” and “Questions from the claim itself” are relevant issues only if cushioned by opposing facts and averments in the statement of defence and defendant’s affidavit of merit. But they were not so cushioned.

It was the learned respondent’s Counsel’s submission on the complaint of the defendant that the court placed unjustified onus on them, that the defendants had in paragraph 11 of their statement of defence admitted drawing the facility. By section 137 of the Evidence Act and the decisions in *Aromolaran v Kupoluyi* (1994) 2 NWLR (Part 325) 221 and *Momodu v N.U.L.G.E.* (1994) 8 NWLR (Part 362) 336 at 351, the *onus* for showing repayment clearly rests on the defendant.

In my humble view that Counsel was on firm grounds in his submission. The burden of showing that a loan has been repaid lies on the party who asserts it. A party cannot even at the trial lead evidence of repayment without pleading the facts to be relied upon. It is these facts the court below said and now this Court is saying that the defendant failed to plead or depose to, not to evidence.

No specific facts and figures were pleaded concerning the manipulation of the defendant’s account alleged by the defence, yet the plaintiff, as rightly pointed out by the plaintiff’s Counsel, made available to it their statements of accounts, pleaded and exhibited.
For all these reasons I have inevitably come to the conclusion that the learned trial Judge was right in deciding not to let in the defendant to defend. But rather, to grant the plaintiff’s prayer to enter summary judgment.

In the premises I have come to the decision that the appeal lacks merit and is hereby dismissed. The judgment of Ade Alabi J delivered on 9 December, 1994 entering judgment for the plaintiff is affirmed.

There will be N5,000 costs to the respondent.

**Ogunyade JCA:** I read before now a copy of the lead judgment by my learned brother Nzeako JCA. I agree with her reasoning and conclusion.

I would also dismiss the appeal.

**Ademolu JCA:** A careful examination of the provisions dealing with actions on the undefended list shows that the provisions are technical. And strict compliance with the said provisions is not negotiable. By asking the plaintiff to comply strictly with those provisions it would seem that injustice is being avoided to a defendant whose right to defend the action is, by the very nature of rules, somewhat restricted. Indeed, they provide necessary safeguards to the defendant if strictly complied with. The defendant need not suffer any prejudice under the provisions if he himself complies strictly with the provisions. Part of the philosophy for the creation of rules for such an action is to ensure quick disposition of cases in court. After all, it inures to the benefit of the society that the trial of suits is not unduly prolonged in the citadel of justice. I must, however, not fail to add that a suit in an undefended list is only maintainable in a claim for a liquidated sum which invariably is an ascertained debt.

Where the plaintiff has complied strictly with the rules governing this type of action, a defendant who does not admit the claim formulated against him and who intends to defend the action shall do so by a notice manifesting that intention together with an affidavit which discloses a defence on the merit. The nature of the merit looked for in such an affidavit is one which, at least, casts doubt on the
A general statement in the affidavit of merit by the defendant that he (defendant) “has a good defence to the action” will not satisfy the requirement of the law on the undefended list procedure (see Agwuneme v Eze (1990) 3 NWLR (Part 137) 242).

I have had a careful study of the affidavit presented by the defendant, the averments therein contained are a far cry from what the provisions dictate. If anything at all, they are, in my view, calculated to dribble the plaintiff out of the court thereby denying it a deserved justice.

I have had a preview of the judgment of my learned brother, IC Nzeako JCA. I am in full agreement with the reasoning and conclusions reached in the said judgment. I am also of the undoubted view, as expressed by my learned brother in the leading judgment, that the appeal lacks merit. I also dismiss it while abiding by the order as to costs expressed in the judgment.

*Appeal dismissed.*
Bank of the North Limited and another v Mr Suleiman Bello

COURT OF APPEAL, ILORIN DIVISION
AMAIZU, OKUNOLA, ONNOGHEN JJCA
Date of Judgment: 14 JANUARY, 2000
Suit No.: CA/IL/58/99

Appeal – Ground of – Alleging error or misdirection in law – Attitude of Appellate Court – Meaning
Banking – Loan and overdraft facility – Mortgage deed as security for – Meaning of mortgage – Failure to register – Effect
Mortgage – Mortgage instrument – Registration of – Whether constitutes notice to the whole world
Mortgage – Purchase of mortgage property – “Bona fide”, “constructive notice”, “without notice” in the context of a bona fide purchaser for value without notice – Meaning of
Words and phrases – “Bona fide”, “constructive notice”, “without notice” in the context of a bona fide purchaser for value without notice – Meaning of

Facts
One JO Obasa was the holder of permit to Allocate Land No. 3432 in respect of No. 3, Olala Land, Osere Village, Ilorin, now in dispute. The said Obasa was at the material time a customer of the first defendant, now the first appellant, a commercial bank. He operated an overdraft account No. 400760 with the first appellant. Through the said account, he obtained two overdrafts.

In order to secure the facilities, he executed a deed of legal mortgage with the first appellant dated 27 August, 1979. He also executed another deed of legal mortgage dated 4 October, 1979 to cover the second overdraft. The two legal mortgages covered the property in dispute. In addition, he deposited with the first appellant:

(1) the permit to Allocate Land No. 3432;
(2) the agreement with which he purchased the land in dispute.

The total indebtedness of Mr Obasa to the first appellant as at 25 January, 1996 was N312,284. It is to be mentioned that the first appellant has not released the property in dispute to Mr Obasa since the date of the legal mortgage.

It appears that, notwithstanding the above transactions, Mr Obasa applied for and was granted a Certificate of Occupancy No. 3006 over the property in dispute. The certificate of occupancy is dated 16 May, 1979. With the said certificate of occupancy, he mortgaged the property in dispute to the Federal Mortgage Bank Nigeria Ltd. When he defaulted in servicing the loan, the F.M.B. Nigeria Ltd instructed the second defendant, now the second appellant, to sell the property by a public auction. The second appellant, a licensed auctioneer, advertised the sale in the *Nigerian Herald* of Tuesday, 3 October, 1989. The plaintiff, now the respondent, bid in the auction sale. He was the highest bidder. Before the respondent paid the money, he instructed his lawyer, Kehinde Garba, Esq., to carry out a search in the Land Registry, Ilorin in respect of the property. The search revealed, according to the respondent, that:

(1) there was a mortgage agreement between Mr JO Obasa and the Federal Mortgage Bank Nigeria Ltd in respect of the property;

(2) the said mortgage was registered as No. 70 at 70 in Vol. IX (Misc) at the Land Registry, Ilorin;

(3) the mortgage had not been discharged.

The respondent, armed with the above result, was satisfied that the property was not encumbered. He paid into the account of Mr JO Obasa with the F.M.B. Ltd the sum of N100,000. He was given:

(1) copies of demand letters from the F.M.B. Ltd to Mr JO Obasa;

(2) a certificate of occupancy;

(3) a deed of assignment.
He moved into the property almost immediately. He carried out an extensive renovation of the property and erected another storey building on the property. The value of the property now as put by the respondent is ₦3,000,000.

When Mr Obasa could not pay the first appellant the loan he obtained from it, the first appellant instructed the second appellant to sell the property by a public auction.

The second appellant advertised the sale in the *Nigerian Tribune* newspaper of 24 August, 1995. The respondent read the publication and was embarrassed. He instituted an action in the High Court claiming against the first and second appellants the following reliefs:—

“(a) A declaration that the auction notice contained in the *Nigerian Tribune* of 24 August, 1995, is null and void.

(b) A declaration that the purported deed of mortgage between JO Obasa and the first defendant is null and void.

(c) A declaration that the legal mortgage between Obasa and the third defendant is the only valid mortgage transaction over the house at Olala Close, Osere, Saw Mill Area, Ilorin.

(d) A declaration that the plaintiff who purchased from the third defendant, is a *bona fide* purchase (sic) for value without notice.

(e) A declaration that a Statutory Certificate of Occupancy confers a superior and better title to an alienation permit.

(f) An order of perpetual injunction restraining the defendants, either by themselves or through their servants and agents or privies from selling the plaintiff’s house at Olala Close, Osere, Saw Mill Area, Ilorin by way of auction or by any other means whatsoever.”

It is to be mentioned that the Federal Mortgage Bank Nigeria Ltd was later joined as the third defendant in the suit. It did not, however, take part in the trial before the High Court.

Pleadings were duly filed and exchanged by the parties. At the trial, the respondent gave evidence for himself and called no witness. The first appellant called only one witness, a top official in its establishment. After hearing the parties, and listening to the addresses of the learned Counsel for the parties, the learned trial Judge entered judgment for the
respondent as follows:–

“In the final analysis the plaintiff’s claim succeeds and all the re-
liefs sought as stated in paragraph 18(a)–(f) of the Statement of
Claim filed the 5 May, 1997 are accordingly hereby granted in its
entirety.”

The defendants/appellants were dissatisfied and appealed the
judgment of the Lower Court arguing in the main that the
Lower Court could not have in the face of the two legal
mortgages executed in their favour, which were stamped and
registered in the Land Registry earlier in time, that the pur-
chaser was a bona fide purchaser for value without notice.

They also further argued that the mortgage deed between
Obasa and the Federal Mortgage Bank, which was not
stamped or registered as required by law and on which the
court based its judgment was inadmissible in law.

Responding to the contention of the appellants that the
deed between Obasa and Federal Mortgage Bank was inad-
missible, the respondents submitted that, since the deed was
admitted without objection, the appellant could not be seem
to be objecting to it on appeal.

Held –

1. A mortgage is the creation of an interest in a property
defeasible (i.e. annulable) upon performing the condi-
tion of paying a given sum of money with interest at a
certain time. The legal consequence of the above defini-
tion is that the owner of the mortgaged property be-
comes divested of the right to dispose of it until he has
secured a release of the property from the mortgagee.

2. A mortgage deed is a registrable instrument. Failure so
to do render it inadmissible in evidence.

3. The mere fact of registration does not constitute actual
notice to the whole world. However, because of the pri-
ority it creates by virtue of the Land Registration Law of
Northern Nigeria applicable in Kwara State, notice to the
whole world may be imputed.
4. “Bona fide” in the context of a bona fide purchaser for value without notice means good faith, honestly, without fraud, collusion or participation in wrong doing.

5. “Without notice” in the context of a bona fide purchaser for value without notice means that the purchaser must have no notice of the existence of the equitable interest, that is the purchaser must have neither actual notice or constructive notice or imputed notice.

6. Constructive notice in the context of a bona fide purchaser for value without notice is notice of a fact which a party will be deemed to have upon making usual diligent, proper and full enquiries. Applying these definitions the respondent in the instant appeal could not have been described as a bona fide purchaser for value without notice.

Appeal allowed.

Cases referred to in the judgment

Nigerian

Agbaje v Adigun (1993) 1 NWLR (Part 269) 261
Ajayi v Fisher (1956) 1 SCNLR 279; (1956) 1 NSCC 82
Akerele v Atunrase (1969) NSCC 180
Akingbade v Elemosho (1964) NSCC 96
Alade v Olukade (1976) 2 NSSC 183
Amankra v Zankley (1963) 1 All NLR 304
Animashaun v Olojo (1990) 6 NWLR (Part 154) 111
Ayinla v Sijuwola (1984) 1 SCNLR 410
Oge v Ede (1995) 3 NWLR (Part 385) 564
Registered Trustees v Adeagbo (1992) 2 NWLR (Part 226) 690

Nigerian statute referred to in the judgment

Land Registration Law (Cap 58) Laws of Northern Nigeria (as applicable to Kwara State), section 15
Counsel

For the appellants: Adekeye
For the respondent: Otaru

Judgment

AMAIZU JCA: (Delivering the lead judgment) This is an appeal against the judgment of Ibiwoye J of the Kwara State High Court, sitting at Ilorin Division. The judgment is dated 5 March, 1998.

The facts of the case briefly put are as follows:

One JO Obasa was the holder of permit to Allocate Land No. 3432 in respect of No. 3, Olala Land, Osere Village, Ilorin now in dispute. The said Obasa was at the material time a customer of the first defendant, now the first appellant, a commercial bank. He operated an overdraft account No. 400760 with the first appellant. Through the said account, he obtained two overdrafts.

In order to secure the facilities, he executed a deed of legal mortgage with the first appellant dated 27 August, 1979. He also executed another deed of legal mortgage dated 4 October, 1979 to cover the second overdraft. The two legal mortgages covered the property in dispute. In addition, he deposited with the first appellant:

1) the permit to Allocate Land No. 3432;
2) the agreement with which he purchased the land in dispute.

The total indebtedness of Mr Obasa to the first appellant as at 25 January, 1996 was ₦312,284. It is to be mentioned that the first appellant has not released the property in dispute to Mr Obasa since the date of the legal mortgage.

It appears that notwithstanding the above transactions, Mr Obasa applied for and was granted a Certificate of Occupancy No. 3006 over the property in dispute. The certificate of occupancy is dated 16 May, 1979. With the said certificate of occupancy, he mortgaged the property in dispute to
the Federal Mortgage Bank Nigeria Ltd. When he defaulted in servicing the loan, the F.M.B. Nigeria Ltd instructed the second defendant, now the second appellant, to sell the property by a public auction. The second appellant, a licensed auctioneer, advertised the sale in the *Nigerian Herald* of Tuesday, 3 October, 1989. The plaintiff, now the respondent, bid in the auction sale. He was the highest bidder. Before the respondent paid the money, he instructed his lawyer, Kehinde Garba, Esq., to carry out a search in the Land Registry, Ilorin in respect of the property. The search revealed according to the respondent that:

1. there was a mortgage agreement between Mr JO Obasa and the Federal Mortgage Bank Nigeria Ltd in respect of the property;
2. the said mortgage was registered as No. 70 at 70 in Vol. IX (Misc) at the Land Registry, Ilorin;
3. the mortgage had not been discharged.

The respondent, armed with the above result, was satisfied that the property was not encumbered. He paid into the account of Mr JO Obasa with the F.M.B. Ltd the sum of ₦100,000. He was given:

1. copies of demand letters from the F.M.B. Ltd to Mr JO Obasa;
2. a certificate of occupancy;
3. a deed of assignment.

He moved into the property almost immediately. He carried out an extensive renovation of the property and erected another storey building on the property. The value of the property now as put by the respondent is ₦3,000,000.

When Mr Obasa could not pay the first appellant the loan he obtained from it, the first appellant instructed the second appellant to sell the property by a public auction.

The second appellant advertised the sale in the *Nigerian Tribune* newspaper of 24 August, 1995. The respondent read the publication and was embarrassed. He instituted an action
in the High Court claiming against the first and second appelleants the following reliefs

(a) A declaration that the auction notice contained in the Nigerian Tribune of 24 August, 1995, is null and void.

(b) A declaration that the purported deed of mortgage between JO Obasa and the first defendant is null and void.

(c) A declaration that the legal mortgage between Obasa and the third defendant is the only valid mortgage transaction over the house at Olala Close, Osere, Saw Mill Area, Ilorin.

(d) A declaration that the plaintiff who purchased from the third defendant, is a bona fide purchase (sic) for value without notice.

(e) A declaration that a Statutory Certificate of Occupancy confers a superior and better title to an alienation permit.

(f) An order of perpetual injunction restraining the defendants, either by themselves or through their servants and agents or privies from selling the plaintiff’s house at Olala Close, Osere, Saw Mill Area, Ilorin by way of auction or by any other means whatsoever.”

It is to be mentioned that the Federal Mortgage Bank Nigeria Ltd was later joined as the third defendant in the suit. It did not, however, take part in the trial before the High Court.

Pleadings were duly filed and exchanged by the parties. At the trial, the respondent gave evidence for himself and called no witness. The first appellant called only one witness, a top official in its establishment. After hearing the parties, and listening to the addresses of the learned Counsel for the parties, the learned trial Judge entered judgment for the respondent as follows:–

“In the final analysis the plaintiff’s claim succeeds and all the reliefs sought as stated in paragraph 18(a)–(f) of the Statement of Claim filed the 5 May, 1997 are accordingly hereby granted in its entirety.”

The appellants were dissatisfied with the judgment. They have appealed to this Court. The learned Counsel for the parties filed and exchanged their respective briefs of argument. The appellants filed a reply brief. Both briefs were adopted and relied upon at the hearing of the appeal.
learned Counsel for the appellants identified the following issues for determination:

1. Whether the respondent herein is a *bona fide* purchaser for value without notice of the property in dispute.
2. Whether the omission of the learned trial Judge to determine issue 2 in the appellant’s Counsel’s address did not occasion injustice to the appellants.
3. Whether the Deed of Assignment between the Federal Mortgage Bank of Nigeria and the respondent Exhibit 7 was not inadmissible.
4. Whether the decision is not against the weight of evidence.

The respondent on the other hand formulated three issues, *viz.*:

1. Whether the respondent herein is a *bona fide* purchaser for value without notice of the property in dispute.
2. Whether reliance can still be placed on Exhibits D7 and D8 dated 27 August, 1979 and 4 October, 1979 respectively which culminated in the advertisement in the *Nigerian Tribune* of 24 August, 1995, for the sale of the property in dispute after a period of over 16 years.
3. Whether the lower court was right to have found in favour of the respondent herein having regard to the oral and documentary evidence given and tendered by the parties herein.

It does seem to me that issues as formulated by the respondent bring out clearly the matters in controversy arising from the grounds of appeal. I observe also that they adequately cover the issues formulated by the appellants. I shall base my judgment on the issues raised by the respondent.

It is observed that the respondent incorporated in his brief of argument a notice of preliminary objection. The notice reads:

“Take notice that the respondent herein intends at the hearing of this appeal, to rely upon the following preliminary objection, notice whereof is hereby given to you, *viz.*:

(i) That Grounds of Appeal 1, 2, 4 and 5 contained in the Notice and Grounds of Appeal at pages 80–82 of the transcript record of proceedings are incompetent as in none of the three grounds did the appellant quote the passage in which the errors or misdirections complained in the judgment of the lower court and *a fortiori* same should be struck out.
(ii) That Grounds of Appeal No. 5 contained in the Notice and Grounds of Appeal at page 82 of the Record of Proceedings is incompetent as leave of this Honourable Court was not sought and obtained in compliance with the provisions of section 25(1) and (2)(a) of the Court of Appeal Act Cap 75 Laws of the Federation of Nigeria, 1990, having regard to the fact that the decision in respect of the admission of Exhibit 7 by the lower court was an interlocutory one.”

I consider it necessary to deal with the above preliminary objection first. This is because, if the respondent is right in challenging the above Grounds of Appeal, same will be struck out, and also any issue or issues formulated therefrom.

Arguing the preliminary objection, the learned Counsel for the respondent contended that Grounds 1, 4 and 5 are incompetent as they do not comply with the mandatory provisions of Order 3 rule 2(2) of the Court of Appeal Rules, 1981 (as amended). It is the learned Counsel’s view that the appellant should have quoted in the grounds the passage from the judgment where the error or misdirection was alleged to have occurred. He placed reliance on the cases of Atuyeye v Ashamu (1987) 1 NWLR (Part 49) 267; Oge v Ede (1995) 3 NWLR (Part 385) 564 at 577; Fadco Industries (Nigeria) Ltd and others v IBWA Ltd and others (1998) 9 NWLR (Part 565) 309 at 316.

In respect of Ground 5, the learned Counsel reminded the court that the lower court delivered its ruling on the admissibility of Exhibit 7 on 11 June, 1997. It is the learned Counsel’s view that, if the appellant had wished to appeal against the ruling, he had up to 25 June, 1997 to do so as it is an interlocutory decision. As he did not appeal within the time frame, he needed the leave of this Court. He referred to the provisions of section 25(1) and (2) of the Court of Appeal Act. He urged the court to strike out the above grounds.

In his reply, the learned Counsel for the appellant referred to the provisions of Order 3 rule 2(2) of the Court of Appeal Rules, 1981, and submitted that Ground 1 satisfies the
provision. He referred to the passage of the judgment complained against, to wit:—

“Accordingly at the time the same property was advertised for sale on 24 August, 1995 it is no more the property of JO Obasa but the property of the plaintiff who is a bona fide purchaser for value of the property in question”

and further submitted that Ground 1 as it is couched is clear without being vague or general and it is not confusing or misleading.

In respect of Ground 4, he submitted that the objection against it is misconceived. He contended that as the complaint in the ground is that the learned trial Judge omitted to consider the legal issues raised in issue 2 as identified in the appellant’s Counsel’s written address there was no need to quote any passage of the judgment.

Finally on Ground 5, the learned Counsel submitted that as the complaint in the ground is not against the admission in evidence of Exhibit 7 but against the use which the learned trial Judge made of it in his judgment, he does not need to obtain leave of this Court before raising it. He cited the case of Alade v Olukade (1976) 10 NSCC 34 at 37.

He emphasised that Ground 5 of the appeal complains of the failure of the learned trial Judge to ignore Exhibit 7 in arriving at his judgment. The complaint, the learned Counsel further remarked, has nothing to do with the decision of the learned Judge to receive the Exhibit in evidence. He urged the court to hear the appeal on its merit.

It is well settled by a long line of decided cases that when a ground of appeal alleges either an error in law or misdirection in law:—

(i) the passage of the judgment where the error or misdirection occurred must be quoted; and

(ii) full and substantial particulars of the alleged error or misdirection must be given (see Mgbede Oge v Ogili Ede (1995) 3 NWLR (Part 385) 564).

I observed, however, that it is not in every ground of appeal that it is possible or indeed necessary to quote the passage of
the judgment where the error or misdirection occurred. A careful look at Grounds 1, 4 and 5 and the judgment shows that, because of the way the grounds are framed, it is not possible to quote the passage of the judgment where the error or misdirection occurred. An example is Ground 4. The complaint is that the trial Judge omitted to consider an issue raised in the written address of the appellant. One may ask what is one to quote from the judgment in respect of that ground. This observation applies to Grounds 1 and 5.

In my respectful view, the grounds as framed are succinct and to the point. As one reads them one is immediately put on notice and appreciates the intention without any ambiguity or strain whatsoever. In my view, that is the essence of a ground of appeal.

Finally, I agree with the contention of the learned Counsel for the appellant that Ground 5 has nothing to do with the admissibility of Exhibit 7. The complaint is that the lower court should have acted only on evidence which is admissible in law. From the above, the appeal is not against an interlocutory decision. It is accordingly overruled.

I now deal with the argument of Counsel on the issues. On issue one, the learned Counsel for the appellants referred to the two deeds of legal mortgage tendered as Exhibit D7 and D8 and dated 4 October, 1979 and 27 August, 1979. He observed that they were stamped and registered by the Registrar of Deeds in the Ministry of Lands and Housing, Ilorin. He reminded the court that before the deeds were executed Mr Obasa deposited with the first appellant the original of the Alienation Permit No. 3432 dated 24 August, 1977 (Exhibit D5).

He referred to the respondent’s case that he purchased the property in a public auction following an advert in the Nigerian Tribune of 3 October, 1989. After the purchase a search was carried out by the learned Counsel for the respondent in the Land Registry, Ilorin which revealed that the property was registered in favour of Federal Mortgage Bank of
Nigeria as No. 70 at 70 in Vol. IX of the Land Registry, Ilorin. He observed that, although the fact was averred in paragraph 11 of the amended statement of claim, the deed of mortgage was not tendered in evidence. The learned Counsel who carried out the search did not give evidence. The Federal Mortgage Bank of Nigeria, the beneficiary of the alleged legal mortgage, also did not give evidence. He contended that this Court should ignore any story about the alleged mortgage in favour of the Federal Mortgage Bank of Nigeria. He cited the case of *Oyediran v Alebiosu II* (1992) 6 NWLR (Part 249) 550. He further submitted that in the absence of such evidence there is nothing to show any connection between the Federal Mortgage Bank of Nigeria and the land in dispute.

It is the learned Counsel’s contention that, if indeed the Counsel for the respondent conducted any search in the Land Registry, Ilorin, in respect of the property in dispute, he would have discovered that the property was encumbered by a mortgage transaction between Mr JO Obasa and the first appellant. He submitted that the registration of the deed of mortgage in respect of the land fixes the whole world with notice of the registration. He relied on the following cases: *Akingbade v Elemosho* (1964) NSCC 96 at 100; *Amankra v Zankley* (1963) 1 ANLR 304 at 309; *Akerele v Atunrase and others* (1969) NSCC 108 at 187; *Ayinla v Sijuwola* (1984) 1 SCNLR 410.

Finally, the learned Counsel submitted that the respondent could not have been a *bona fide* purchaser for value of the property in dispute. He further submitted that a buyer of a property does not become a purchaser for value on the basis only that he bought the property in an advertised public auction.

It is, however, the contention of the learned Counsel for the respondent that, from the evidence adduced in the lower court, the respondent is a purchaser for value of the property now in dispute. He referred to the averment in paragraph 11 of the amended statement of claim and the evidence of the respondent which the lower court accepted. He also referred
to a paragraph in the deed of assignment between the Federal Mortgage Bank of Nigeria and the respondent which reads: “The property herein assigned is free from encumbrances and claims” and submitted that the sale by a public auction vested the estate of the mortgagor in the respondent. In his view, the evidence of the respondent that he instructed his lawyer, Hassan Garba, Esq., to conduct a search in respect of the land in dispute cannot be hearsay. He urged the court to decide the issue in the respondent’s favour.

The first appellant tendered in the lower court Exhibits D7 and D8. These are two deeds of legal mortgage executed by the first appellant and the original owner of the land, Mr JO Obasa, in respect of the land in dispute. The two deeds were stamped and later registered on 27 August, 1979 and 5 October, 1979 respectively. From the dates on them, they were in existence before the Federal Mortgage Bank of Nigeria advertised the sale of the land in dispute in the Nigerian Herald issue of 3 October, 1989. It is to be noted that there is no evidence on record impugning the validity of the deeds.

It is the evidence of the respondent that, before he paid for the land in dispute, his lawyer, Hassan Garba, Esq., conducted a search in the Land Registry at Ilorin. The search revealed that the land in dispute was registered as No. 70 at 70 in Vol. IX, Ilorin. I observe that the alleged mortgage was not tendered in the court below. None of the parties to the legal mortgage, namely the Federal Mortgage Bank of Nigeria and the original owner of the land in dispute, Mr JO Obasa, gave evidence.

In my respectful view, it is evident from the above facts that if Hassan Garba, Esq., had conducted a search in the Land Registry at Ilorin, he would have come across the two deeds of legal mortgage executed by the first appellant and Mr JO Obasa. The inference to be drawn from the existence of the two deeds of legal mortgage in the Land Registry, Ilorin, is that the respondent was untruthful in his evidence in the court below that his Counsel, Hassan Garba Esq.,
conducted the search or that the Counsel was grossly negligent in the manner in which he conducted the search in the Land Registry, Ilorin.

In the case of *Alhaji Juradat Animashaun v GA Olojo* (1990) 6 NWLR (Part 154) 111 the Supreme Court defined “bona fide” in the context of a *bona fide* purchaser for value without notice as:

“*Bona fide* means good faith, honestly, without fraud, collusion or participation in wrong doing.”

On the meaning of “without notice”, in the same context, the court held that the purchaser must have no notice of the existence of the equitable interest, that is the purchaser must have neither actual notice or constructive notice or imputed notice.

Finally, on the meaning of constructive notice of a fact in the same content, the court defined it as the notice of a fact which a party will be deemed to have upon making usual diligent, proper and full enquiries. I observed earlier that the search conducted on behalf of the respondent, if indeed there was a search, was not conducted diligently.

In the light of the foregoing, it is my view that the respondent can in no way be described as a *bona fide* purchaser for value without notice. Finally on this point, I observe that a mortgage deed is a registrable instrument. The mere fact of registration does not constitute actual notice to the whole world. However, because of the priority it creates by virtue of the Land Registration Law of Northern Nigeria applicable in Kwara State, notice to the whole world may be imputed (see *Ogunyemi Dada and others v Olusegun Oshinkanlu* (1995) 5 NWLR (Part 398) 755 at 772).

On issue 2, the learned Counsel for the appellants reminded the court that:

1. Exhibits D7 and D8 are stamped and registered;
2. the alleged deed of mortgage between Mr JO Obasa and the Federal Mortgage Bank of Nigeria was not tendered before the lower court.
a He then submitted that as the deed of mortgage was not tendered, the court could not decide on whether it was properly executed or not. He further submitted that because the alleged legal mortgage was not tendered in evidence it was not established that the Federal Mortgage Bank of Nigeria had a right to sell the property in dispute to the respondent.

b On the other hand, it is the submission of the learned Counsel for the respondent that no reliance should be placed on Exhibits D7 and D8 as they are worthless. He referred in this regard to part of the judgment of the lower court which reads:–

c “Again a careful perusal of the contents of Exhibit 7 is enough to render issue 2 raised by the learned Counsel for the first and second defendants unnecessary.”

d He reminded the court that the transactions between the first appellant and Mr JO Obasa that gave rise to Exhibit D7 and Exhibit D8 took place in 1979. An attempt to recover the debt owed by Mr JO Obasa was made in 1995, that is, 16 years after the transaction. He submitted that an action to recover a debt covered by a mortgage must be instituted within a period of 12 years. He cited Eboigbe v The Nigerian National Petroleum Corporation (1994) 5 NWLR (Part 347) 649; (1994) 6 SCNJ (Part 11) 71. It is his view that the lower court was right to have found in favour of the respondent.

e I observe that Exhibit 7 is a deed of assignment between the Federal Mortgage Bank of Nigeria and the respondent. It is therefore an instrument. It is not stamped or registered. In my respectful view, it was received in error in evidence. It is trite that a court is expected in all proceedings before it to admit and act only on evidence which is admissible in law.

f The lower court should not have acted on Exhibit 7 (see Abolade Agboola Alade v Salawu Jagun Olukade (1976) 10 NSCC 34). It is the law that where an evidence has been wrongly admitted that evidence must be expunged (Michael Agbaje v Lasisi Adigun and others (1993) 1 NWLR (Part
269) 261). Accordingly, reference to Exhibit 7 is hereby expunged.

On the other hand, from the facts disclosed above, reliance should be placed on Exhibit D7 and Exhibit D8. This is because they satisfied all the conditions required by law. The answer to the second issue is therefore in the affirmative.

On the third and last issue, the learned Counsel for the appellants referred to the reliefs sought by the respondent in the court below. He contended that in view of Exhibits D7 and D8, the Federal Mortgage Bank of Nigeria could not have legally sold the mortgaged property to the respondent since the property was not released by the mortgagee. He reminded the court that the evidence of DW1 on the two deeds of legal mortgage was not challenged. The learned Counsel then remarked that, apart from the averment in paragraph 11 in respect of the alleged mortgage between the Federal Mortgage Bank of Nigeria and the original owner of the property in dispute, JO Obasa, the existence of the mortgage was not established by evidence. In that case, the learned Counsel contended, there was nothing before the lower court to show that the Federal Mortgage Bank of Nigeria had a right to sell the property to the respondent. The only mortgage transactions that were established were those between the first appellant and Mr JO Obasa. In the view of the learned Counsel, the advertised sale of the property in the Nigerian Tribune newspaper of 3 October, 1989 did not cleanse or purify the defect existing in the title of the Federal Mortgage Bank of Nigeria.

In his reply, the learned Counsel for the respondent submitted that the lower court was right to have found in favour of the respondent. He contended that the oral testimony of the respondent and the documentary evidence tendered are unassailable. The learned Counsel reminded the court that Exhibit 7 was tendered without any objection from the appellants. He contended that it is too late for the appellants to now raise any objection on the admissibility of the document. Finally he submitted that, where an appellant
challenges the judgment of the lower court, the *onus* of proof is on that appellant. It is the learned Counsel’s view that the appellants have not discharged that burden in the present case.

A mortgage is defined as the creation of an interest in a property defeasible (ie annulable) upon performing the condition of paying a given sum of money with interest at a certain time. The legal consequence of the above definition is that the owner of the mortgaged property becomes divested of the right to dispose of it until he has secured a release of the property from the mortgagee.

In the present case, the only valid deeds of legal mortgage are those between the first appellant and Mr JO Obasa. There is no evidence that those legal mortgages have been discharged. It follows that the Federal Mortgage Bank of Nigeria was not entitled to sell the property. This is because the sale is neither backed by a legal mortgage nor an order of the court. In the light of the above, the lower court should not have given judgment in favour of the respondent.

For the above reason I answer issue 3 in the negative. In consequence, the appeal succeeds and is hereby allowed. The judgment of Ibiwoye J, delivered on 5 March, 1998 is hereby set aside. In effect Suit No. KWS/148/95 as a whole is dismissed. I award N2,000 costs in favour of the appellants against the respondent.

**OKUNOLA JCA:** I have had the privilege of reading in advance the lead judgment just delivered by my learned brother, Amaizu JCA. I agree with the reasoning and conclusion therein.

The alleged legal mortgage between Mr Obasa and Federal Mortgage Bank Nigeria Ltd was not tendered in the lower court. It follows, in my considered view, that no reference should be made to it. In that case, there is no nexus between the property in dispute and the F.M.B. Nigeria Ltd. Consequently, the F.M.B. Nigeria Ltd did not pass any interest to the respondent.
I also allow the appeal. I abide by all consequential orders including that relating to costs in the lead judgment.

**ONNOGHEN JCA:** I have had the privilege of reading in draft the lead judgment of my learned brother, Patrick Ibe Amaizu JCA, just delivered.

I have no difficulty in agreeing with him that the preliminary objection be overruled and the appeal allowed.

I, however, wish to emphasis on one or two issues raised in the appeal, by the appellants.

The facts of the case have been set out in the lead judgment and I will not repeat them here.

The first issue calling for the determination of this Court is “whether the respondent herein is a *bona fide* purchaser for value without notice of the property in dispute”.

It is not in dispute that in consideration of credit facilities granted by first appellant to the original owner of the property in dispute, one Mr JO Obasa, the latter executed deeds of legal mortgage of the property dated 4 October, 1979 and 27 August, 1979 in favour of the first appellant (see Exhibits D7 and D8). These exhibits were duly registered by the Registrar of Deeds in the Ministry of Lands and Housing, Ilorin. The fact that Mr JO Obasa deposited the original Alienation Permit No. 3432 dated 24 August, 1977 (see Exhibit D5) with the first appellant is also not disputed. Those facts were not challenged at the trial.

From the evidence of the respondent, he purportedly bought the property in dispute on 3 October, 1989 during a public auction carried out by the Federal Mortgage Bank. He told the court that he bought the property after his Counsel had carried out a search on the property which showed that it was registered as No. 70 at 70 Vol. IX of the Land Registry, Ilorin.

In his judgment at 76 of the record, the learned trial Judge held that the respondent had “meticulously conducted a search at the Lands Registry as required of him”.


It is, however, settled law that registration of a deed fixes the whole world with notice of it. It is rather unfortunate that the Counsel retained by the respondent to carry out the search did not do a thorough job. If he did, he could have discovered that the property was encumbered by a legal mortgage between Mr Obasa and first appellant. Having regards to the law dealing with purchaser for value without notice, the respondent, indeed the whole world, is deemed to have notice of the registered deed of legal mortgage between the first appellant and Mr Obasa and as a result he is not qualified to be a *bona fide* purchaser for value without notice as found by the learned trial Judge (see the case of *Ak-ingbade v Elemosho* (1964) NSCC 96 at 100; *Amankra v Zankley* (1963) 1 All NLR 304 at 309; *Akerele v Atunrase and others* (1969) NSCC 180 at 187 and *Ayinla v Sijuwola* (1984) 1 SCNLR 410).

On issue No. 3 which is “whether the deed of assignment between the Federal Mortgage Bank of Nigeria and the respondent (Exhibit 7) was not inadmissible”, it is clear from the evidence that Exhibit 7 is a photocopy of a deed of assignment dated 5 October, 1989 between Federal Mortgage Bank of Nigeria Ltd and the respondent which was not registered, being an instrument affecting land as required by section 15 of the Land Registration Law (Cap 58) Laws of Northern Nigeria as applicable to Kwara State.

By the decision in the case of *Registered Trustees v Adeagbo* (1992) 2 NWLR (Part 226) 690 at 700 failure to register the said Exhibit 7 rendered it inadmissible in evidence.

However, it is the case of the respondent that it is rather too late in the day for the first appellant to raise the issue of admissibility of Exhibit 7 which was tendered and admitted without objection by learned Counsel of the appellants. He cites and relies on *I.M.B. (Nigeria) Ltd v Dabiri* (1998) 1 NWLR (Part 533) 284 at 293 and *Mainagge v Gwamna* (1997) 11 NWLR (Part 528) 191 at 206.
I agree with learned Counsel for the respondent that since the learned Counsel for the appellants did not challenge the admissibility of the Exhibit at the trial he cannot challenge same on appeal without leave of this Court as same would amount to raising a fresh issue of appeal.

However, that is not the end of the matter, the document whose admissibility was not so challenged at trial must be one admissible in law though under certain conditions.

It is not the law that where no objection is raised to the admissibility of an obviously legally inadmissible document the trial court is compelled or bound to act on that document. This is very much in accord with common sense: to err is human. Therefore, the Supreme Court has held in the case of *Ajayi v Fisher* (1956) SCNLR 279; (1956) 1 NSCC 82 at 84 that:

“In a trial by a Judge alone, as in the present case, however, it would seem that if inadmissible evidence had been received (whether with or without objection) it is the duty of the Judge to reject it when giving judgment, and if he had not done so, it will be rejected on appeal.”

It is therefore my considered view that the position of the law being what had been stated above, the learned trial Judge ought to have rejected Exhibit 7 which is clearly inadmissible in law in his judgment. Having not done so, it is the duty of this Court, being the appeal court, to reject same, which is hereby done accordingly.

On the whole I agree that there are merits in this appeal which is accordingly allowed. The judgment of Hon. Justice JA Ibiwoye delivered on 5 March, 1998, is hereby set aside. I abide by the consequential orders made by my learned brother in the lead judgment including that on cost.

*Appeal allowed.*
Thadeus A. Dike v. African Continental Bank Ltd

COURT OF APPEAL, PORT HARCOURT DIVISION
IKONGBEH, AKPIROROH, OGEBE JJCA
Date of Judgment: 1 FEBRUARY, 2000
Suit No.: CA/PH/81/91


Banking – Cheque – Dishonoured cheque – Onus on drawer of to show sufficiency of funds in account – Exception to rule

Banking – Cheque – Not presented within reasonable time – Drawer discharged

Banking – Loss of cheque by collecting bank – What it amounts to – Customer entitled to value of cheque as damages

Banking – Words “Refer to drawer” endorsed on cheque by bank – Implication of – When amounts to libel

Words and phrases – “Refer to drawer” on a cheque

Facts

The plaintiff/appellant who was a customer of the defendant/respondent bank operated an account at its Owerri branch.

The case of the plaintiff/appellant was that, following a business transaction, he was given a cheque No. 36850/304523 drawn on Union Bank of Nigeria, Onitsha, for the sum of N4,500 (Four Thousand, Five Hundred Naira) only by one Mr Jonathan Oneigbu. The appellant paid the cheque into the account with the defendant for collection on his behalf on 9 July, 1980 and was given a receipt in evidence of same by the respondent. After the transaction, the appellant did not receive any further information from the bank. On 4 March, 1981 (over six months after paying in the
checke) the appellant issued a cheque No. 31/D069402 drawn on the defendants to one Mr PE Dike for the sum of N1,000 (One Thousand Naira) only as payment following a business transaction but the cheque was returned unpaid and marked “Refer to drawer”. The appellant averred that he made the payment to Mr PE Dike by way of deposit for the supply of building materials and so was embarrassed by the dishonour of his cheque. Because of the dishonour Mr PE Dike refused to allow him to collect the agreed supply of materials, threatened to report appellant to the police and demanded him to return, without delay, materials already supplied to him. Mr PE Dike also reported him to Eze Njemanze Igwe Ozuruegbo IV of Owerri and by the intercession of the latter, the plaintiff redeemed the said cheque by payment of cash.

The appellant averred further that he complained bitterly to the defendant’s manager who promised to investigate the matter by sending a message to Onitsha. The plaintiff not hearing any information to the contrary issued a cheque No. 31/P069373 on 30 August, 1981 to Mr AO Iwuoha drawn on the defendant for the sum of N900 only as payment for cement bought by the plaintiff. Again the cheque was returned dishonoured and marked “Refer to drawer” and because of this the plaintiff lost a continuing credit arrangement with the payee whereby the plaintiff would collect cement and pay within one month of collection by post-dated cheque as the payee insisted that all collections must be by cash only. The appellant again went to the bank to protest but was told that the matter would be investigated and that a message would be sent to Onitsha.

Again in January, 1982, the plaintiff went to the defendant’s place of business and presented a cheque for cash but this was also dishonoured. The plaintiff in anger tore the cheque and then consulted his solicitor who wrote a letter dated 15 January, 1982 to the respondent demanding the return of the cheque or the value so as to arrest the situation.
The respondent Manager replied by letter dated 25 January, 1982 inviting the appellant to call at the respondent’s office. The appellant did so but again failed to receive any answer as to his payment into the bank.

The appellant complained that by reason of the said breaches he has been defamed and gravely injured in his reputation as a businessman and has suffered great hardship in executing contracts by not getting credit facilities. He therefore claimed against the respondents the sum of N4,500 being the value of the cheque as special damages and the sum of N100,000 as general damages for defamation by reason of the dishonour of his cheque.

The respondent’s defence was that it returned the appellant’s cheques with the remark “Refer to drawer” endorsed on them because, at the time they were presented, the appellant did not have sufficient resources in his account to meet them. This, it contended was because it was the bank’s practice that “when a cheque is received and sent for collection, they don’t pay on the cheque until the fate of the cheque is known”. The fate of the cheque was not known at the time the cheque issued by the plaintiff were presented for payment. The respondent also accused the appellant of being “negligent and reckless in not waiting for positive statement as to the fate of his cheque for N4,500 before issuing cheques No. 31/D068402 of 4 March, 1981, and 31/D069372 of 30 August, 1981”. The respondent denied responsibility for the non-availability of funds in the appellant’s accounts at the time of the presentment of the cheques. It also denied that it defamed the appellant by the endorsement it made on the cheques.

The appellant testified for himself but called no witness. He tendered Exhibits A (acknowledgment by the respondent of the receipt of the cheque for N4,500), B and C (the two cheques issued by the appellant to creditors and dishonoured by the respondent). The respondent too called only one witness and tendered Exhibits D and D1 (statement of appellant’s account with it) and E and F (the internal memos between the Owerri and Onitsha branches of the respondent
bank). The Manager of the Owerri branch of the respondent at the time of the trial confirmed in evidence, in line with its pleading that the cheque was in fact never presented to the drawer bank for payment because it was lost in transit between its Owerri and Onitsha branches as also confirmed by Exhibits E and F.

The trial Judge held dismissing the appellant’s case that the appellant had failed to establish the fact that his cheque was dishonoured, and that he also failed to show that he had sufficient funds in his account despite the finding by the court that the action of the respondent bordered on criminal negligence.

Aggrieved by the whole decision, the appellant appealed to the Court of Appeal.

Held –

1. Some of the terms that must of necessity be read into the contract between a banker and his customer when the banker, in the ordinary course of business opens a current account in the name of the customer are:

   (a) The terms of that contract involve obligations on both sides and requires careful statement. They appear upon consideration to include the following provisions. The bank undertakes to receive money and to collect bills for its customer’s account.

   (b) The relationship is of a class on its own subject to obligations which cannot be defined exhaustively in a single case but must be defined as occasion arises.

2. In collecting cheques and other instruments for a customer a banker acts basically as a mere agent or conduit pipe to receive payment of the cheques from the bank on whom they are drawn and to hold the proceeds at the disposal of his customer. The character in which a banker receives a cheque is a matter of fact in each case, he may be a mere collecting agent, or he may take as a holder for value or in due course. As agent for collection
a  he is bound to exercise diligence in the presentation of the cheque for payment. If a bank fails to present a cheque within a reasonable time after it reaches him, he is liable to his customer for loss arising from the delay. The endorsers, if any, are discharged if presentation is not made within reasonable time after endorsement.

Where a cheque is not presented within a reasonable time of its issue, the drawer is discharged to the extent of any actual damage he may have suffered by the failure to pay the cheque of the bank on which the cheque was drawn.

3. Where a plaintiff sues on a dishonoured cheque, he has the burden of establishing that he had sufficient funds on presentation to meet the obligation created by the cheque. If the plaintiff succeeds in establishing this fact, the burden shifts on the banker to show that at the time the cheque was presented, there was a legal impediment which justified non-payment or dishonour of the cheque.

4. In the peculiar circumstances of this case the appellant had not the burden of showing that the cheque he paid in had been cleared and credited to his account. All he had to do, and which he did, was to show that he paid in the cheque and that the time within which to reasonably expect it to be cleared had elapsed before he issued the cheques and that he heard no word from the respondent to the contrary. The respondent was not entitled to endorse on the cheque the words “Refer to drawer” or any other words that could paint the picture that the appellant issued cheques knowing he did not have sufficient funds in his account to meet them.

5. Section 74(a) of the Bills of Exchange Act (Cap 35) Laws of the Federation of Nigeria, 1990, requires cheques to be presented within a reasonable time. Of “reasonable time” paragraph (b) provides:—

“In determining what is a reasonable time regard shall be had to the nature of the instrument, the usage of the trade and of bankers, and the facts of the particular case.”
6. The facts of this particular case were that the appellant was a businessman engaged in buying and selling. He needed his cheques cashed as quickly as possible. It would be most unreasonable to expect him to wait for over six months to have a cheque paid into his account at Owerri cashed at Onitsha. No businessman worth the name would tolerate such a state of affairs.

7. The words “Refer to drawer” had been interpreted to amount to a statement by the bank that: “We are not paying, go back to the drawer and ask why” or else “Go back to the drawer and ask him to pay”. Neither of these statements paints a very good picture of a man of business. It does not inspire confidence in people who do business with him. That is why the courts regard it as actionable libel that attracts substantial damages without proof of actual damage.

8. Since he had satisfactorily shown that owing to the breach by the respondent of its contractual duty of care he lost the value of the cheque he paid in for collection he is entitled to the recovery of its value.

9. The plaintiff/appellant, being, on the evidence, in business at the time of the incident, did not have to prove actual damage to be entitled to substantial damages.

Appeal allowed.

Cases referred to in the judgment

Nigerian

Agbonmagbe Bank Ltd v CFAO (1966) 1 All NLR 140
Allied Bank (Nig.) Ltd. v Akubueze (1995) 4 NWLR (Part 390) 493
Balogun v National Bank of Nigeria (1978) 11 NSCC 133
Ebere v Onyengo (unreported) CA/PH/245/97 of 8 December, 1999
FBN Ltd v African Petroleum (1996) 4 NWLR (Part 443) 438
IKONGBEH JCA: (Delivering the lead judgment) The appellant was the plaintiff before the Imo State High Court (Nna Nwa Wachukwu J) sitting at Owerri. It was not disputed (indeed the defendant/respondent admitted) that on 9 August, 1980 the appellant paid a cheque for ₦4,500 drawn in his favour on the Onitsha Branch of the Union Bank of Nigeria (“UBN”) into his account at the Owerri Branch of the respondent bank for collection. Nor has it been disputed that on 4 March, 1981 (over six months after paying in the cheque) the appellant issued a cheque for ₦1,000 to a creditor. The respondent bank admitted also that it dishonoured the cheque by endorsing the words “Refer to drawer” on it and returning it to the creditor/payee. It admitted also that in August, 1981, another cheque issued by the appellant to another creditor was dishonoured in a similar manner. This cheque was for ₦900. In January, 1982, other cheques he issued to himself were also dishonoured. It was also common ground that the appellant made enquiries on the fate of his cheque paid in for collection. The respondent through its Owerri branch manager at the time of the trial confirmed in evidence, in line with its pleading, that the cheque was in fact never presented to the drawee bank for payment because it was lost in transit between its Owerri and Onitsha
branches. Exhibits E and F tendered by the respondent also confirm this. Because of the claims made in the respondent’s brief of argument regarding what the appellant’s case before the trial court really was I think it is necessary for me to set out the relevant averments in the statement of claim. They are contained in paragraphs 4–11 as follows:–

“(4) Following a business transaction the plaintiff was given a cheque No. 365850/304523 drawn on UBN Bank Onitsha for the sum of N\n4,500 (Four Thousand, Five Hundred Naira) only by one Mr Jonathan Onuegbu. The plaintiff paid the said cheque into his account with the defendants for collection on his behalf on the 9 July, 1980. (The plaintiff has a receipt issued by the defendants evidencing the transaction and will rely on it in his case.)

(5) The plaintiff after the above mentioned transaction did not receive any further information from the bank and on the 4 March, 1981 issued a cheque No. 31/D069402 drawn on the defendants to a certain Mr PE Dike for the sum of N\n1,000 (One Thousand Naira) only as payment following a business transaction but the cheque was returned unpaid and marked ‘Refer to Drawer’.

(6) The plaintiff who made the payment to Mr PE Dike by way of deposit for supply of building materials was so embarrassed by the dishonour of his cheque. Furthermore, Mr PE Dike refused to allow the plaintiff to collect agreed supply of materials as the plaintiff’s cheque was dishonoured and threatened to report the plaintiff to the Police for issuing dishonoured cheque. Mr PE Dike also demanded that the plaintiff return without delay [the] supply made to him stating that if the plaintiff had not by coincidence had the same surname as him, he would have dealt with him most seriously. Mr PE Dike reported the plaintiff to Eze Njemanze Igwe Ozuruigbo IV of Owerri and by the intercession of Eze Njemanze Igwe Ozuruigbo IV of Owerri the plaintiff redeemed the cheque by payment of cash. (The plaintiff is in possession of the said cheque and would rely upon it at the trial.)

(7) The plaintiff complained bitterly to the defendant’s manager who promised to investigate the matter by sending message to Onitsha.

(8) The plaintiff not hearing any information to the contrary issued a cheque No. 31/D069372 on the 30 August, 1981 to
a. Mr AO Iwuoha drawn on the defendants for the sum of ₦900 (Nine Hundred Naira) only as payment for cement bought by the plaintiff. Again the cheque was returned dishonoured and marked ‘Refer to drawer’ and because of this the plaintiff lost a continuing credit arrangement with the payee whereby the plaintiff would collect cement and pay within one month of collection by post-dated cheque as the payee insisted that all collection must be by cash only.

b. (9) The plaintiff again went to the bank to protest but was told that the matter would be investigated and that message would be sent to Onitsha.

c. (10) In January, 1982 the plaintiff went to the defendant’s place of business and presented a cheque for cash but this was again dishonoured. The plaintiff in anger tore the cheque and then consulted his solicitor who wrote a letter dated 15 January, 1982 to the defendant demanding the return of the cheque or the value so as to arrest the situation. (The plaintiff would rely on the letter in the trial.)

d. (11) The defendant’s Manager replied by letter dated 25 January, 1982 inviting the plaintiff to call at the defendant’s office. The plaintiff did so but again failed to receive any answer as to his payment into the bank” (see at 4–6 of the record of proceedings).

e. The appellant then complained in paragraph 13 that:–

“By reason of the said breaches the plaintiff has been defamed and gravely injured in his reputation as a businessman and has suffered great hardship in executing contracts by not getting credit facilities” (see page 7).

f. He therefore claimed against the respondent as follows:–

“SPECIAL DAMAGES: (i) ₦4,500 being the value of the cheque.

G. GENERAL DAMAGES: (ii) ₦100,000 to defamation of the plaintiff by the defendants refusal to honour the plaintiff’s cheque for ₦1,000 dated 4 March, 1981” (see page 7).

The respondent’s defence was, in the main, that it returned the appellant’s cheques with the remark “Refer to drawer” endorsed on them because at the time they were presented the appellant did not have sufficient resources in his account
to meet them. This was because it was the bank’s practice that “when a cheque is received and sent for collection, they don’t pay on the cheque until the fate of the cheque is known. The fate of the cheques was not known at the time the cheques issued by the plaintiff were presented for payment” (see paragraph 4 of the statement of defence). In paragraph 5 it accused the appellant of being “negligent and reckless in not waiting for positive statement as to the fate of his cheque for N4,500 before issuing cheques No. 31/D068402 of 4 March, 1981 and 31/D069372 of 30 August, 1981”. In paragraph 7 it denied responsibility for the non-availability of funds in the appellant’s account at the time of the presentment of the cheques. It also denied that it defamed the appellant by the endorsement it made on the cheques.

The appellant testified for himself but called no witnesses. He, however, tendered Exhibits A (the acknowledgment by the respondent of the receipt of the cheque for N4,500), B and C (the two cheques issued by the appellant to creditors and dishonoured by the respondent). The respondent too called only one witness and tendered Exhibits D and D1 (statement of the appellant’s account with it) and E and F (the internal memos between the Owerri and Onitsha branches of the respondent bank).

Counsel addressed the court.

In his judgment at 36 of the record the learned Judge dismissed the appellant’s claim in the following words:

“Since the plaintiff alleged that his cheque was wrongfully dishonoured, the burden of establishing that fact lies on him . . . I have no doubt in my mind that plaintiff has failed to establish the case put forward in his pleadings and that the defendants are entitled to judgment. In the result, the plaintiff’s case fails and it is dismissed.”

Earlier he observed that:

“The plaintiff has failed to discharge the duty on him by law to satisfy the Court that when he issued or when Exhibits B and C were presented, that he had credit balance sufficient to meet the demands on the cheques or that the defendants had granted him
overdraft facilities to warrant payment. Exhibits E, E1, E2 show clearly that when plaintiff issued Exhibits B and C he had only a credit balance of N4.50 which was his balance on the 5 September, 1980 as he never operated the account again until 22 of January, 1982 when he paid into his account the sum of N9,888” (see page 34).

Aggrieved by the whole decision the appellant has appealed to this Court. The notice of appeal contained only the omni-bus ground, which Mr FC Dike indicated in the appellant’s brief that he was abandoning, and which he in fact abandoned. Counsel later obtained leave of this Court and filed three additional grounds. In view of the preliminary objection that Mr BC Ofoegbu took in the respondent’s brief to these additional grounds of appeal I think it is necessary for me to set them out in full:

“(1) Error in Law and Misdirection of Facts:–

The trial court misdirected itself and therefore erred in law when it held that the plaintiff having brought his action ‘in contract as well as in libel’, the address in support of his case supported a claim in negligence which was not pleaded.

Particulars of Misdirection and Error in Law:–

(1) In contract the duty created by the relationship between the parties can be a ‘contractual duty of care’. Quin v Burch (1966) 2 QB 370 at page 380.

(2) The contents of the contractual duty of care is same as in negligence in the law of tort.

(3) The court by finding that the conduct of the defendants bordered on criminal negligence had crossed the standard of care required for breach of contractual duty of care.

(2) Error in Law and Misdirection of Facts:–

The trial court misdirected itself and thereby erred in law when having cited with approval the Supreme Court in Balogun v National Bank of Nigeria Limited to wit that the duty of a bank included inter alia ‘collection of cheques paid in by a customer’ it failed to hold the defendant liable for breach in collecting or returning the cheque presented for collection or even informing the plaintiff as to its fate over one year.
Particulars of Misdirection and Error in Law

(1) Liability in contract is generally strict except where the duty is one of contractual duty of care.

(2) The relationship between the plaintiff and the defendants in the particular instance creates a bailment for reward which is a specie of contract and for which the duty is high.

(3) Error in Law

The trial Judge misdirected himself and thereby erred in law when having admitted that the words ‘Refer to Drawer’ can be defamatory it went on to treat as closed the categories when such words can be defamatory.

Particulars of Misdirection and Error in Law:

(1) Apart from creditor and debtor relationship the legal relationship of banker and customer can also be founded at law generally in contract or tort for which breach is actionable.

(2) Plaintiff was not in debt to the bank and the bank was in breach for not making inquiry into the books before writing ‘Refer to Drawer’ which is defamatory.

(3) Case of plaintiff is that words to other effect to convey the true situation were not used by the defendants due to their own negligence.

(4) The issue was one of causation and the defendant’s conduct being negligent caused the wrong usage of words especially when defendant’s witness under cross examination said ‘we don’t usually write to a customer to say his cheque has been cleared’.

Briefs of argument were filed and exchanged. In the respondent’s brief Mr Ofoegbu argued a preliminary objection to the additional grounds of appeal. I think it is necessary to dispose of the objection before proceeding further. The objection is premised on two grounds. The first is that each of the three additional grounds complains about an error in law and a misdirection at once. Citing Order 3 Rule 2(2) of the Court of Appeal Rules, 1981, Counsel submitted that it is improper to do so and that, doing so, renders the grounds incompetent. The grounds should, therefore, be struck out. The second ground of objection is that none of the additional
grounds of appeal contains the particulars of the error or
misdirection complained of.

The second ground of objection may be quickly disposed
of now. A cursory glance at the grounds of appeal shows up
the fallacy in this ground of objection. It is apparent that
Ground 1 is supported by three particulars, Ground 2 by two
and Ground 3 by four. Even without the two accompanying
particulars Ground 2 can still stand as it has an in-built par-
ticular. This is introduced by the phrase “when having cited
with approval”. The nature of the misdirection complained
of is embedded in the ground itself. This is permissible.

The first ground of objection also cannot stand. It is true
that the Supreme Court has frowned at lumping a complaint
of error in law and misdirection together in one ground of
appeal. It has, however, never struck out any ground as
incompetent on that score alone. As Pats-Acholonu JCA
pointed out in Ebere and others v Onyengo and others (un-
reported) Appeal No. CA/PH/245/97, decided on 8 Decem-
ber, 1999, a litigant should not be denied his constitutional
right to have his appeal determined on its merit merely be-
cause his lawyers lack a good grasp of the Queen’s own
English. The fact that framing a ground of appeal in the
fashion employed by the appellant’s Counsel in this appeal
introduces two incongruous elements into a ground of ap-
peal is no good or justifiable reason for striking out the
ground, especially where, despite the inelegance in drafting,
the complaint sought to be made against the judgment of the
court is adequately brought out.

For these reasons, I find no merit in any of the grounds of
the preliminary objection. Accordingly I overrule it.

In the appellant’s brief the following three issues for de-
termination were formulated:–

(1) Are the words “Refer to drawer” defamatory?
(2) If the answer to the above is in the affirmative, then
were the defendants in the circumstances of this case
justified in using those words?
(3) Whether the defendant’s action amounted to breach of contractual duty?

Three issues were also formulated on behalf of the respondent:—

1. At the time the appellant issued the offensive cheques to his customers namely:—
   (1) PE Dike; and
   (2) AO Iwuoha:—
   had the appellant enough funds in his account to settle the value of those cheques?

2. If the appellant hadn’t enough funds in his account, would the endorsement “Refer to drawer” be considered as libellous of the appellant?

3. Did the appellant discharge the onus on him to prove his case as formulated?

The issues formulated on both sides could have been more elegantly and neatly framed. I am satisfied, however, that they have brought out enough of the matters in controversy in this appeal to enable this Court dispose of the appeal. The first two issues in either brief relate to the defamation aspect of the appellant’s claim before the trial court and arise from additional Ground 3. The third issue in either brief relates to the appellant’s claim for ₦4,500, the face value of the cheque that the appellant had deposited with the respondent for collection, and arise from additional Grounds 1 and 2.

I propose to take the third issue in each brief first. The question raised here is whether or not the appellant established his case of breach of duty he alleged against the respondent to entitle himself to the recovery from the respondent of the face value of the cheque he had left with the latter for collection.

The arguments of Mr Dike on behalf of the appellant in a nutshell is that the respondent was in breach of its contractual duty to the appellant by failing to send his cheque for collection and failing to inform him of the fact that it had not
been cashed. This breach caused him the loss of the value of the cheque. The trial court should have awarded him the value of the cheque as damages for the breach, especially as he proved it.

Mr Ofoegbu countered by arguing that the appellant’s case sounded in libel and not in negligence. It was not the appellant’s case, learned Counsel pointed out, that “the respondent did not forward his cheque for clearing or having received it honoured or dishonoured failed to notify him”. Rather, his case was, in Counsel’s view, that he had funds in his account but the respondent wrongfully dishonoured his cheques.

With all due respect to the learned Judge and the learned Counsel for the respondent, they appear not to have fully comprehended or appreciated the case that the appellant had put up before the lower court. I earlier set out the appellant’s case on his statement of claim. The portions of paragraphs 4, 5, 7, 8, 9 and 11 that I italicised show clearly that it was the appellant’s case on his pleading that he deposited his cheque with the respondent for collection but the latter neglected to give him any information on the fate of the cheque. The respondent, as has been seen, in answer to paragraphs 7 and 9 of the statement of claim averred that the cheque got lost between its Owerri and Onitsha branches. It is, therefore, too late in the day for the respondent’s Counsel to begin to argue that that was not the appellant’s case. The Judge observed, and quite rightly, that the appellant’s case sounded in contract and libel. He however went on to observe at 34:–

“As I have already said the plaintiff framed his case in contract as well as in libel. But Mr Dike’s final address was predominated by legal arguments in support of a claim in negligence which was not pleaded.”

With respect, he was wrong in two respects. In the first place, Mr Dike addressed the court not only in relation to negligence. He also addressed the court on breach of contractual duty and cited legal authorities. His short address before the lower court ran thus, at 20–21:–

“The relationship between plaintiff and defendant, is one based on contract which creates rights and duties, one of which is that the
banker must receive cash and collect proceeds of cheques for his customer’s account. *Law and Practice* by Holding, Vol. 1 Pages 32–34, see Page 88; *Joachimson v Swiss Bank Corporation* (1921) 3 KB Page 110 at 127. In such a situation, the bank acts as a bailer, a very high standard of care is required of a bailer for reward while goods or articles are in his custody. See *Michael Ogboho v IV Karunwi alias Busgbues* (1957) LLRP 345. In so far as the account of the plaintiff has not been credited with the sum of N4,500 expressed on the face of the cheque, the defendants must be held negligent in their duty to the plaintiff. See *Donoghue v Stevenson* (1932) ACP 562, also *Quinn v Burch* (1966) 2 QB P 370. Submits that the court ought to prove negligence and to grant N4,500 in respect of the first relief. It is not necessary for the payee to come to say that when he presented the cheque that the bank refused to pay and endorsed the cheque R/D. *TOS Benson v West African Pilot* (1965) LLRP 175. Plaintiff need not prove publication by the evidence of a third party. The defendants have admitted publication under cross-examination. *Rotimi Williams v West African Pilot* (1961) 1 All NLR 866 at 868. Submits that a plaintiff need not prove that he had sufficient funds to meet the obligation entered by the cheque in order to prove either breach of contract or defamation. Refer *Plunkett v Barclays Bank Ltd* (1936) 2 KB P 107. The issue is one of causation. What the plaintiff is complaining, is that the endorsement on the cheque should ‘effect uncleared’ not refer to drawer. See *Alabi v Standard Bank Ltd* (1974) 4 LRE CS Page 580. Submits that the plaintiff could have been put on notice as to the antecedent dealings between them. Submits that defendant ought to take the plaintiff as he finds him. Refer to section 69 of the Bill of Exchange Law and says it does not apply since the plaintiff had not been informed of its fate” (see at 20–21) (italics mine).

The opening sentences italicised by me show the learned Counsel’s submissions on breach of contract.

In the second place, the fact that Counsel also addressed the court on the question of negligence was no justification for the learned Judge to ignore his arguments on breach of contractual duty. I agree entirely with Mr Dike that the contractual relationship between the banker and his customer is capable of imposing a duty of care on the banker, a breach of which might fix the banker with liability for negligence *ex contractu*.
Now, was there any evidence before the lower court to establish the appellant’s allegations of breach of contractual duty of care levelled against the respondent?

DW1, the Owerri Branch Manager of the respondent, put Exhibits E and F in evidence. The latter was an internal memo from the Owerri Manager at the time to his counterpart in Onitsha, dated 21 January, 1982. It reads:–

“...We regret to inform you that we have not received the fate of our above-mentioned instrument, sent you for collection since 9 July, 1980. Needless to say that the customer has every reason to worry as evidenced by the enclosed photocopy of a letter received from Nnaji-Dike Law Chambers threatening litigation. Please advise us of the fate without delay.”

Exhibit E, the reply, dated 9 February, 1982, reads:–

“We refer to your letter dated 21 January 1982, on the above collection and to inform you that we do not appear to have received the item in question. We have cross-checked our records and could not see any trace of it. It could be possible that the schedule might have been (sic) posted to another branch. You should therefore recheck your records to this effect for a possible slip. Please let us know your findings in due course.”

Exhibit E suggests that the Owerri office of the respondent never sent the cheque out at all or sent it to the wrong place. Both documents, however, show beyond a shadow of doubt that the respondent never sent the cheque to the Union Bank, on which it was drawn. They show that it got lost within the respondent’s establishment. The learned Judge roundly condemned the respondent for its shoddy handling of the whole affair. He expressed his disgust thus at 35 of the record:–

“I am satisfied that the conduct of the defendant in the matter of the plaintiff’s cheque for N4,500 paid in for collection deserves unequivocal condemnation by this Court. Indeed, the sordid part played by the defendants in the matter of collecting the proceeds of the said cheque borders on criminal negligence, see Smith v Cox and Co (1923). The Times, March 9. I will and do hereby express disgust at the arrogant manner the defendants treated the plaintiff’s protests with complete nonchalance.”
Now, what should be the effect of this finding of fact on the relationship between the parties?

I think the answer will be found in the authorities. Atkin LJ listed some of the terms that must of necessity be read into the contract between a banker and his customer when the banker, in the ordinary course of business, opens a current account in the name of the customer (see Joachimson v Swiss Bank Corporation (1921) All ER 92 at 100). His Lordship said:

“The terms of that contract involve obligations on both sides and requires careful statement. They appear upon consideration to include the following provisions. The bank undertakes to receive money and to collect bills for its customer’s account . . .” (italics mine).

Ayoola JCA, as he then was, adopted this view, adding that:

“The relationship is of a class on its own subject to obligations which cannot be defined exhaustively in a single case but must be defined as occasion arises.”


The following statement of the law on the relationship between a collecting bank and its customer appears at paragraph 100 of Halsbury’s Laws of England Vol. 3 (4ed):

“In collecting cheques and other instruments for a customer a banker acts basically as a mere agent or conduit pipe to receive payment of the cheques from the banker on whom they are drawn and to hold the proceeds at the disposal of his customer.

The character in which a banker receives a cheque is a matter of fact in each case; he may be a mere collecting agent, or he may take as a holder for value or in due course.

As agent for collection he is bound to exercise diligence in the presentation of the cheque for payment.

If a bank fails to present a cheque within a reasonable time after it reaches him, he is liable to his customer for loss arising from the delay. The endorsers, if any, are discharged if presentation is not made within a reasonable time after endorsement.

Where a cheque is not presented within a reasonable time of its issue, the drawer is discharged to the extent of any actual damage
he may have suffered by the failure to pay the cheque of the bank on which the cheque was drawn” (italics mine).

Thus the authorities show that the collecting bank owes its customer who deposits a cheque for collection the duty to exercise due diligence in presenting the cheque for payment. He must do so within a reasonable time. They also show that if he fails in this duty he is liable to his customer for any consequent loss.

In the case now on appeal before us, not only did the respondent not present for payment the appellant’s cheque to the bank on which it was drawn within a reasonable time, it did not present it at all. Although DW1 claimed in his evidence that they “advised the plaintiff about his missing cheque”, he did not produce any evidence to back that claim. The two documents, Exhibits E and F, tendered by him, show that they only passed that information among themselves within their establishment. There is nothing concrete to show that they communicated it to the appellant, even though he kept complaining to them. As already pointed out, the trial Judge found their conduct to border on criminal negligence. The respondent has not appealed against this finding.

The next question is whether or not the appellant suffered any loss as a result of the respondent’s breach of duty. The appellant pleaded and testified that the cheque he deposited with the respondent was what he realised from a business transaction with Jonathan Onuegbu. He gave value for it to Onuegbu in the form of building materials. He pleaded and testified unchallenged that he no longer knew the whereabouts of Onuegbu. Asking the appellant to collect another cheque from him, as suggested by the respondent’s Counsel in his brief, is, therefore, out of the question.

There was, therefore, clear and abundant evidence before the trial court from which it could have reached the conclusion that the appellant suffered loss of the value of the cheque owing to the breach of contractual duty owed to him by the respondent. The third issue in either brief of argument is, therefore, resolved in favour of the appellant and against
the respondent. The appellant clearly established his entitlement to the sum of N4,500, the value of the cheque that the respondent lost in breach of its contractual duty to the appellant.

On the first and second issues in either brief, which have arisen from additional Grounds 1 and 2 of the grounds of appeal, the argument of Mr Dike, on behalf of the appellant, is simply this. It was the fault of the respondent that the appellant’s account was deficient in funds when the cheques the appellant drew on it were presented. The appellant did everything to ensure that the account was in funds by paying in the cheque. The ball was then passed into the court of the respondent to finish the process of putting it in funds. Not only did the respondent not carry out its own duty but also it failed to notify the appellant of this fact. Not being aware of the near-criminal negligence on the part of the respondent, therefore, the appellant, after waiting for over six months, issued the first of the cheques that the respondent dishonoured. He did that on the assumption that the respondent had fulfilled its own obligation of paying the proceeds of the cheque left with it for collection into the account. The court, therefore, ought not to allow the respondent to treat the appellant like someone incapable of maintaining his account in funds to meet his cheques. After all, the amounts he drew on the cheques were less than what he would have had in his account but for the default on the part of the respondent.

The learned Judge and the respondent’s Counsel did not consider the effect of the respondent’s default on the relationship between the parties. They just fastened unto the bare fact that at the time the dishonoured cheques were presented to the respondent the funds in the appellant’s account were insufficient to meet the cheques. The Judge expressed the opinion that:

“Where a plaintiff sued on a dishonoured cheque, he has the burden of establishing that he had sufficient funds on presentation to meet the obligation created by the cheque. If the plaintiff succeeds in establishing this fact, the burden shifts on the banker to show that at the time the cheque was presented, there was a legal
Impediment which justified non-payment or dishonour of the cheque. The plaintiff does not discharge the burden placed on him to show that he was in funds, by merely showing that he had paid in some cheques for collection into his account unless he can also show that the cheques had been cleared and that the proceeds yielded sufficient funds to meet the obligation. Indeed it is my view that where a banker honours a customer’s cheque drawn on uncleared effect, the banker is only granting overdraft facilities to the customer to abide the fate of his uncleared effect. Mr Dike learned Counsel for the plaintiff contended in his address that if the defendants had endorsed on Exhibit B and C ‘effect not cleared’ instead of ‘refer to drawer’ there would have been no libel. No shadow of authority was cited to me to support the proposition. I do not agree with him that this represents the law on the matter” (italics mine).

I agree with the learned Judge that the first part of his statement represents the correct position of the law. The onus is on the plaintiff suing on a dishonoured cheque to show that at the time the cheque was presented he had sufficient funds in his account. It is also the law that thereafter the burden shifts on to the banker to show that there was a legal impediment to justify his dishonour of the cheque. Where I part ways with the learned Judge, with respect, is his application of these principles to the facts of this case. In the peculiar circumstances of this case I cannot agree with the Judge that the appellant had not the burden of showing that the cheque he paid in had been cleared and credited to his account. All he had to do, and which he did, was to show that he paid in the cheque and that the time within which to reasonably expect it to be cleared had elapsed before he issued the cheques and that he heard no word from the respondent to the contrary. In my view, the respondent was not entitled to endorse on the cheques the words “Refer to drawer” or any other words that could paint the picture that the appellant issued cheques knowing he did not have sufficient funds in his account to meet them. I agree with Mr Dike that such words as “effects not cleared” or “effects uncleared” would have been less objectionable in the circumstances. Even this is debatable considering the over six months’ delay between the payment-in and the issue of the cheque by the appellant
and the learned Judge’s finding that the respondent’s handling of the matter bordered on criminal negligence. In *Agbonmagbe Bank Ltd v CFAO* (1966) 1 All NLR 140, the delay by the defendant bank in informing the S.C.O.A. of the fate of the cheques the latter paid in was not up to six months. Yet the Supreme Court held it unreasonable in the circumstances. Bairaman JSC gave the rationale at 145:–

“‘There is a business practice among bankers in regard to cheques, and we think the defendant Bank ought to have followed it, to avoid it being thought, as it would reasonably be thought by S.C.O.A., that Mrs. Amushan’s cheques were being paid.’”

The appellant was perfectly justified in assuming, without any notice to the contrary, six months after paying the cheque in, that the cheque had been cleared. Section 74(a) of the Bills of Exchange Act (Cap 35) Laws of the Federation of Nigeria, 1990, requires cheques to be presented within a reasonable time. Of “reasonable time” paragraph (b) provides:–

“In determining what is a reasonable time regard shall be had to the nature of the instrument, the usage of the trade and of bankers, and the facts of the particular case” (italics mine).

The facts of this particular case were that the appellant was a businessman engaged in buying and selling. He needed his cheques cashed as quickly as possible. It would be most unreasonable, in my view, to expect him to wait for over six months to have a cheque paid into his account at Owerri cashed at Onitsha. No businessman worth the name would tolerate such a state of affairs. Nor, I daresay, ought any bank worth that name.

The words “refer to drawer” have been interpreted to amount to a statement by the bank that, “We are not paying, go back to the drawer and ask why” or else “Go back to the drawer and ask him to pay”. Neither of these statements paints a very good picture of a man of business. It does not inspire confidence in people who do business with him. That is why the courts regard it as actionable libel that attracts substantial damages without proof of actual damage (see
Ikongbeh JCA

Thadeus A. Dike v. African Continental Bank Ltd

(a) *Balogun v National Bank of Nigeria* (1978) 11 NSCC 135 at 140–146). This is especially so if the words have been used by the very person who unjustifiably placed his victim in a position where the words could be used on him.

(b) Having regard to all the circumstances of this case I have no difficulty in coming to the conclusion that by endorsing the words “Refer to drawer” on the appellant’s cheque and passing same to third parties the respondent published a libel of and concerning the appellant. I therefore resolve the two issues here in favour of the appellant.

All three issues having gone in favour of the appellant the appeal must succeed. I allowed it. The order of the lower court dismissing the plaintiff’s/appellant’s claim is hereby set aside. In its place I enter judgment for him. Since he has satisfactorily shown that owing to the breach by the respondent of its contractual duty of care he lost the value of the cheque he paid in for collection he is entitled to the recovery of its value. I award him the sum of ₦4,500, being the value of the cheque. I have pointed out that the plaintiff/appellant, being, on the evidence, in business at the time of the incident, did not have to prove actual damage to be entitled to substantial damages. He claimed ₦100,000 as general damages. In *Allied Bank (Nigeria) Ltd v Akubueze* (1995) 4 NWLR (Part 390) 493 at 508–509, this Court, per Ejiwunmi JCA as he then was, guided by what the Supreme Court did in *Balogun v NBN (supra)* awarded a businessman, whose cheque was wrongfully dishonoured, the sum of ₦72,000. In the circumstances of this case I think the award of that amount is in order. I accordingly award the sum of ₦72,000 to the plaintiff/appellant against the defendant/respondent as general damages for libel.

The learned Judge made no order as to costs. I too will make none in the court below. The respondent will, however, pay the costs of this appeal assessed at ₦3,000.

Ogebe JCA: I read in advance the lead judgment of my learned brother, Ikongbeh JCA, just delivered and I agree with his reasoning and conclusion.
I also allow the appeal and endorse the consequential orders made in the lead judgment including the order of costs.

AKPIROOH JCA: I agree.

Appeal allowed.
Federal Republic of Nigeria v Dr Femi Adekanye and others

**FEDERAL HIGH COURT, LAGOS DIVISION**

ABUTU J

Date of Judgment: 1 FEBRUARY, 2000

Suit No.: FHC/L/FBCR/3/99

**Banking – Failed Banks Decree No. 18 of 1994 (as amended) – Authority to prosecute – Whether the Federation Attorney-General can delegate his power to a private legal practitioner before the coming into force of the Constitution of the Federal Republic of Nigeria, 1999 – Section 24(2) of the Failed Banks Decree No. 18 of 1994 (as amended)**

**Constitutional law – Authority to prosecute under section 24(2) of the Failed Banks Decree No. 18 of 1994 (as amended) – Whether can be inquired into under the Constitution of the Federal Republic of Nigeria, 1999**

**Facts**

The three accused in this case were challenging the authority of the two legal practitioners to prosecute them.

They averred that under the 1979 Constitution the Attorney-General of the Federation could only delegate his authority to prosecute before any court or tribunal to officers of his Department. They also submitted that, by virtue of section 1(1) and (3) and section 174(2) of the 1999 Constitution, any authority conferred by the provision of section 24 of the Failed Banks Decree No. 18 of 1994 was no longer valid.

In arguing the motion the learned Counsel for the accused/applicants placed reliance on the affidavit and the further and better affidavit filed in support of the motion. He then submitted that there is no valid charge against the accused persons in that the person who instituted the proceedings has no locus standi to do so. He cited *Comptroller of Nigeria Prisons Services v Adekanye and others* (1999) 6 NWLR...
(Part 602) 167 at 169–173, sections 125 and 160 of the 1999 Constitution in support of his submission.

**Held** –

1. The Attorney-General of the Federation, no doubt had power under section 24(2) of Decree No. 18 of 1994 to authorise a private legal practitioner to undertake the prosecution of any of the offences prescribed in the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree No. 18 of 1994. Therefore the power donated by the Attorney-General is for the prosecution of the offence prescribed in the Decree and the authority so conferred cannot by virtue of the provision of subsection (3) of section 24 be questioned by any person except the Attorney-General of the Federation himself. Since the authority in this case was granted on 3 August, 1995 to the prosecutors when the Decree No. 18 of 1994 was superior to the 1979 Constitution, and not after the coming into force of the 1999 Constitution, the accused in this case are by virtue of the provision of section 24(3) of the Decree prohibited from questioning the validity of the authority granted by the Attorney-General.

2. By the provision of section 6(6)(b) of the 1999 Constitution any authority granted to a private legal practitioner to prosecute any of the offences prescribed in Decree No. 18 of 1994 after the coming into force of the 1999 Constitution can be questioned on the ground of inconsistency with any of the provisions of the 1999 Constitution.

*Motion dismissed.*

**Cases referred to in the judgment**

*Nigerian*

a Comptroller of Nigeria Prisons Services, Ikoyi, Lagos v Adekanye (1999) 6 NWLR (Part 602) 167
Ekpenkhio v Egbadon (1993) 7 NWLR (Part 308) 717
b Olu of Warri v Kparegboyi (1994) 4 NWLR (Part 339) 416
Pabod Supplies Ltd v Beredugo (1996) 5 NWLR (Part 448) 304
c Nigerian statutes referred to in the judgment
d Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree No. 18 of 1994 (as amended), section 24(2), (3)
Habeas Corpus Laws of Lagos State, 1994, section 15(2)
e Book referred to in the judgment
Halsbury’s Laws of England (4ed) at 797, 814
f Counsel
For the prosecution: Nwandialor

Judgment
g Abutu J: The motion on notice dated 20 September, 1999 is for an order:–
1. setting aside the proceedings of this Court in this case;
2. setting aside the warrant for the arrest of the first and third accused/applicants made on the 6 September, 1997; and
3. striking out the charge on the ground that it is irregular, incompetent, null and void.
i The grounds of the application as set out in the motion paper are in the following terms:–
“1. The first, second and third applicants were not served notice of any proceedings of this Honourable Court on the above charge.
2. That the prosecuting private legal practitioner Emeka Ngige, Esq. had no *fiat* of the Attorney-General of the Federation to file criminal charges against the first, second and third applicants herein, either at the Failed Banks Tribunal or before this Honourable Court at the time the said charge was filed at Zone IV, Failed Banks Tribunal.

3. That under section 160 Constitution of the Federal Republic of Nigeria, 1979 (in force when the cause of action arose) and section 174 Constitution of the Federal Republic of Nigeria (presently in force), only the Attorney-General of the Federation had and has powers to prosecute the applicants.

4. That the powers conferred on the Attorney-General of the Federation can only be exercised by him personally or through officers from the Federal Ministry of Justice.

5. That learned prosecuting Counsel can only prosecute if he has the authority of the Attorney-General of the Federation executed under the hand of the Attorney-General.

6. That no *fiat* or authority of the Attorney-General of the Federation has been produced to this Honourable Court.

7. That this Honourable Court can neither assume or ignore the implementation of a constitutional requirement for the prosecution of the applicants.

8. That the criminal charge herein was filed without authority and is irregular, incompetent, null and void.

9. That the incompetence of the charge herein fatally affects the jurisdiction of this Honourable Court to try the applicants.

10. That before the proceedings of this Honourable Court on the above charge, there has been a subsisting prerogative order of prohibition in Suit No. M/45/99 forbidding any further proceedings in the criminal charge filed against the applicants before the Failed Banks Tribunal holden at Zone IV (wherein sat the Honourable Justice Edokpayi).

11. That the said order of prohibition was obeyed by Zone IV, Failed Banks Tribunal before the Tribunals were scrapped.

12. There having been no valid criminal charge before Zone IV of the Failed Banks Tribunal, there is nothing to be transferred for adjudication before this Honourable Court under Decree No. 62 of 1999.

13. That there is presently pending before the Court of Appeal, Lagos Division, an appeal of the respondents in Suit No.
M/45/99 against the order of prohibition which has not been determined.

14. That the applicants have been released unconditionally by the High Court of Lagos in Suit No. M/626/98.

15. That the State appealed unsuccessfully at the Court of Appeal, Lagos Division, releasing the applicants in a Writ of Habeas Corpus Ad Subjiciendum.

16. That the State has further appealed to the Supreme Court of Nigeria against the decision of the Court of Appeal, Lagos Division, which upheld the decision of the Lagos High Court.

17. That the applicants and others affected by the decision of the Court of Appeal have also appealed to the Supreme Court against the minority order of the said Court of Appeal releasing the applicants and others affected conditionally.

18. That on the authorities of Mohammed v Olawunmi (1993) 4 NWLR Part 287, P.254, Ratio 5 and Nigeria Arab Bank Ltd v Gomes CA/L/130M/95 delivered on 3 May, 1999, it will be highly improper and contrary to the established principle governing the hierarchy of courts in our criminal and civil jurisprudence if the appeal before the Court of Appeal and the Supreme Court of Nigeria is rendered nugatory.

19. That the consequential order directing further arraignment of the applicants and others before the Federal High Court is a minority order (Coram GA Oguntade JCA).

20. The other two justices (Coram, Aderemi and Galadima JCA) made no order after upholding the decision of Lagos High Court and dismissing the appellants’ appeal in its entirety.

21. That there is nothing to urge at law in favour of the minority order of GA Oguntade JCA.”

The motion which was brought pursuant to Order 8 Rules 1 and 2 of the Rules of this Court, sections 36 and 174(1), (2) and (3) of the 1999 Constitution and Article 7 of the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act, 1990 is supported by an affidavit of 15 paragraphs to which nine documents were annexed as Exhibits EA1–EA9. In reaction to the motion the learned Senior Advocate for the prosecution tendered from the Bar the letter dated 3 August, 1995 and his letter of authority to institute the criminal proceedings dated 3 August, 1995 and the two documents were admitted respectively as Exhibits A
and B. The accused/applicants in reaction to Exhibits A and B filed with leave of the court a further and better affidavit of nine paragraphs to which three documents marked Exhibits EA1, EA2 and EA3 were annexed.

In arguing the motion the learned Counsel for the accused/applicants placed reliance on the affidavit and the further and better affidavit filed in support of the motion. He then submitted that there is no valid charge against the accused persons in that the person who instituted the proceedings has no **locus standi** to do so. He cited *Comptroller of Nigerian Prisons Services v Adekanye and others* (1999) 6 NWLR (Part 602) 167 at 169–173, section 160 of 1999 Constitution and section 125 of the 1999 Constitution in support of his submission.

The learned Counsel drew the attention of the court to Exhibit EA1 annexed to the affidavit in support of the motion. He submitted that the order of the Lagos State High Court in Exhibit EA1 prohibiting the tribunals from trying the accused/applicants being a subsisting order of a court of competent jurisdiction the proceedings in this case is incompetent. He cited *IBWA v Kennedy Transport Ltd* (1993) 7 NWLR (Part 354) 238 at 241; *ELF Marketing Nigeria v Oyeniyi and Sons Ltd* (1995) 7 NWLR (Part 407) 371 and *Nigerian Army and others v Mowarin* (1994) 4 NWLR (Part 235) 345 at 358 in support of his submission. This Court, learned Counsel contended, having regard to the provision of section 23 of Decree No. 62 of 1999, is bound to comply with the order of prohibition in Exhibit EA1.

It is the learned Counsel’s further submission that the accused/applicants, in view of the order releasing them unconditionally in the *habeas corpus* application and the pendency of the appeal against the order cannot be rearrested in connection with the matter which led to their arrest in the first place. He cited in support of his submission section 15(2) of the Habeas Corpus Laws of Lagos State and Halsbury’s *Laws of England* (4ed) at 797. He contended that the present criminal proceedings is having regard to the order of
prohibition and the pendency of the appeal against the order
an abuse of court process. He cited *Saraki v Kotoye* (1992) 1
NWLR (Part 264) 156 at 169 and *Mohammed v Olawunmi*
(1993) 4 NWLR (Part 287) 254 at 261 in support of his
contention. Learned Counsel urged the court to discounte-
nance the order of Oguntade JCA at page 21 of Exhibit EA9
directing that the respondents, some of whom are the ac-
cused/applicants in the instant case, be brought before the
Federal High Court for the issue of their bail to be consid-
ered, on the ground that after the order of Oguntade JCA,
dismissing the appeal, he no longer had jurisdiction to make
the order he made at page 21. He urged finally that the
charge be dismissed.

The motion was opposed by the learned Senior Advocate
for the prosecution. He submitted that the two issues for
determination are:–

1. whether the prosecutor has *locus standi* to institute
   the criminal proceedings; and
2. whether the order of prohibition has the effect of
   rendering the proceedings incompetent.

The learned Senior Advocate drew the attention of the court
to pages 2 and 3 of Exhibit EA1 wherein reliefs 1 and 2 of
the motion are set out. He also drew the attention of the
court to orders 1 and 2 in Exhibit EA1. He submitted that the
order of prohibition in Exhibit EA1 not being one made on
the ground that the prosecutor has no *locus standi* to institute
the criminal proceedings the contention of the learned Coun-
sel for the accused/applicants based on the order of prohibi-
tion should be discountenanced.

Learned Senior Advocate further submitted that the law
governing his authority to institute the criminal proceedings
is the Failed Banks (Recovery of Debts) and Financial Mal-
practices in Banks Decree No. 18 of 1994. He contended
that he was authorised to institute the criminal proceeding in
the exercise of the powers conferred by section 24(2) of the
Decree and that by virtue of the provisions of subsection (3)
of the said section 24 of the Decree the accused/applicants
cannot question his authority to institute the proceedings. He
drew the attention of the court to Exhibits A and B and he
contended that there is presumption of regularity in favour
of the two letters of authority, that is Exhibits A and B. He
urged the court to hold that he has *locus standi* to institute
the criminal proceedings.

With regard to the second issue learned Senior Advocate
submitted that the order of prohibition being one directed at
the inferior tribunals this Court is not bound to obey it. He
cited section 2(4) of Decree No. 62 of 1999 in support of his
submission. He submitted that the consequential order made
by Oguntade JCA at page 21 of Exhibit EA9 directing that
the respondents, some of whom are the present accused/applicants, be brought before the Federal High Court is
competent. He urged finally that the motion be dismissed.

In reply learned Counsel for the accused/applicants sub-
mitted that the present proceeding being one commenced at
the tribunal the order *nisi* in Exhibit EA1 prohibiting the
tribunal from hearing the case ought to be obeyed by this
Court. He contended, relying on Order 53 Rule 3(1) of the
Supreme Court Practice, 1979, Order 42 Rule 10(a) of the
High Court of Lagos (Civil Procedure) Rules, 1994 and
Halsbury’s *Laws of England* (4ed) at 814 that an order *nisi*
in a *habeas corpus* application operates as a stay of proceed-
ings pending the determination of the application.

Learned Counsel drew the attention of the court to Exhibit
EA5 which shows that the appeal filed against the order of
prohibition is still pending. He then submitted that the pre-
sent proceedings is an abuse of court process.

Exhibits A and B, learned Counsel submitted, being pho-
tocopies of public documents which have not been certified
ought to be expunged on the ground that the documents are
not legal evidence. He contended that Exhibits A and B
being documents issued in 1995, one year before the arrest
of the accused/applicants cannot be an authority to the
prosecutor to institute the present criminal proceedings.
a against the accused/applicants. Learned Counsel drew the attention of the court to the fact that the present case is not mentioned in Exhibits A and B. He submitted that because it is not manifest from Exhibits A and B that the present case was assigned to the prosecutor it should be held that the prosecutor has no authority to institute the present proceedings. He cited Attorney-General, Bendel State v Attorney-General Federation and others (1982) 3 NCLR 1 at 6 and

b Comptroller Nigerian Prisons Service v Adekanye and others (supra) in support of his submission.

c Learned Counsel further submitted that Decree No. 18 of 1994 having been repealed by virtue of section 1(1) and (3) and section 174(2) of the 1999 Constitution any authority conferred by the provision of section 24 of the Decree is no longer valid. He cited Olu of Warri v Kparegboyi (1994) 4 NWLR (Part 339) 416 at 423 in support of his submission.

d The foregoing is a summary of the submissions made by Counsel on both sides in this application. The issue whether or not Exhibit EA1 contains an order of prohibition to be obeyed by this Court is to be considered first. A careful perusal of Exhibit EA1 reveals that the court did not make therein any order of prohibition. The court in Exhibit EA1 simply granted leave to the applicants in respect of reliefs iv, v and vi of the application in the following terms:

\[ \text{THE COURT ORDERED AS FOLLOWS:--} \]

\[ \text{1. An order of certiorari quashing all and/or any proceeding(s), ruling(s) and judgment(s) of the second, third, fourth, fifth and sixth respondents on any of the applicants that occurred after the mandatory 21 (twenty-one) working days \textit{from the day of the first sitting of the respondents} commanded by the law maker in section 4(1) Failed Banks (Recovery of Debts) and Financial Malpractices in Bank’s Decree No. 18 of 1994.} \]

\[ \text{2. An order of certiorari directed to the second, third, fourth and fifth respondents directing the said second, third, fourth, fifth and sixth respondents to bring all proceedings, rulings, judgments and orders relating to the applicants, occurring after the 21 (twenty one) working days commanded} \]
by the law-maker in section 4(1) of Failed Banks Decree No. 18 of 1994, before Zones II, III, IV, V and VI of the Failed Banks Tribunal, Lagos, before the High Court of Lagos State to be dealt with in order to ensure that the applicants may have ‘the more sure and speedy justice’.

3. An order of prohibition directed to the second, third, fourth, fifth and sixth respondents, pursuant to Order 43 Rule 3(10)(a) High Court of Lagos (Civil Procedure) Rules, 1994 forbidding further proceedings against the applicants in Zones II, III, IV, V and VI of Failed Banks Tribunal, Lagos.

4. That in respect of reliefs 1, 2 and 3 of the application, leave shall be considered after the respondents have been served.”

Reliefs IV, V and VI of the application are merely reproduced in paragraphs 1, 2 and 3 of Exhibit EA1 as the reliefs in respect of which leave was granted to the applicants. It is my respectful view that the order nisi in Exhibit EA1 contains no order prohibiting the tribunal from continuing with the criminal proceedings instituted against the applicants.

It is my respectful view that even if Exhibit EA1 contains an order prohibiting the tribunal from continuing with the criminal proceedings the order of prohibition, having regard to the complaints of the applicants in reliefs 1 and 2 of the application pertaining to the competence of the tribunal to continue to entertain the case after the expiration of a period of 21 working days from the day of first sitting of the tribunal, is not applicable to this Court. The issue on the basis of which the order nisi was made must be the issues raised in the application; in this case the question whether the tribunal had power to continue to hear a matter after the expiration of a period of 21 working days from the date of first sitting of the tribunal raised in reliefs 1 and 2 of the application. With regard to the power of this Court to conduct the present criminal proceedings that issue is irrelevant. Also the fact that there is a pending appeal on the issue does not render the present proceedings an abuse of court process. For it to be an abuse of court process, the parties, the subject matter and the issues in both cases must be the same (see Saraki v Kotoye (supra) at 188 and Pharmateck Industries Ltd v Ojo and another (1994) 2 NWLR (Part 359) 751 at 759).
The leave granted in Exhibit EA1 no doubt operates as a stay pending the determination of the habeas corpus application (see Order 53 Rule 3(1) of the Supreme Court Practice, 1988 and Order 42 Rule 10 of the High Court of Lagos State (Civil Procedure) Rules, 1994). It was the proceeding before the tribunal that was stayed. Now that the application has been determined there is no order of stay subsisting.

I now turn to consider the question whether or not the prosecutors who signed the charge in this case, namely Fidelis Nwadialor, S.A.N., and Emeka Ngige, Esq., have authority to institute the criminal proceedings. Exhibit A in this case is the letter tendered to show that Emeka Ngige, Esq., has the authority of the Attorney-General of the Federation to institute the present criminal proceedings while Exhibit B is the letter tendered to show that Mr Fidelis Nwadialor (S.A.N.) has the authority to institute the criminal proceedings. Exhibits A and B were issued on 3 August, 1995 by Chief MA Agbamuche, S.A.N., the then Attorney-General of the Federation and Minister of Justice. Exhibits A and B are the original copies of the two letters. The contents of the two letters are the same and are in the following terms:—

"APPOINTMENT AS PROSECUTING COUNSEL IN THE FAILED BANK TRIBUNAL, LAGOS ZONE.

I hereby appoint you a prosecuting Counsel for the Failed Bank Tribunal, Lagos Zone. As the Chief Law Officer of the Federation, you have my fiat to prosecute cases arising from the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree No. 18 of 1994, as will be, assigned to you.

Other terms and conditions of your appointment will be communicated to you in due course.

Kindly acknowledge receipt of this letter.

Chief MA Agbamuche (S.A.N.)

Hon. Attorney-General of the Federation and Minister of Justice.”

Before me in this application learned Counsel for the accused/applicants has in his arguments dwelt mainly on the provisions of section 160 of the 1979 Constitution pertaining
to the powers of criminal prosecution of the Federal Attorney-General. That provision was considered in *Comptroller, Nigeria Prison Service, Ikoyi, Lagos and others v Dr Femi Adekanye and others* (supra) at 176 wherein the court, per Oguntade JCA, stated thus:–

“There is no doubt that under section 160 of the 1979 Constitution, the Attorney-General of the Federation or Attorney-General of the states under section 191 could donate his or their powers to officers in his or their departments. There is however no power in the Attorney-General to donate his power to someone not an officer in his department.”

The view of the Court of Appeal above reproduced is a useful guide when the issue to be decided is whether or not power donated by the Attorney-General of the Federation by virtue of the provision of section 160 of the 1979 Constitution was validly donated.

The issue in this case is different. The learned Senior Advocate for the prosecution has relied on the provision of section 24(2) of the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree No. 18 of 1994 for his contention that he was validly authorised to institute the instant criminal proceedings. The said section 24(2) of Decree No. 18 of 1994 is in the following terms:–

“Section 24(2):–

Prosecutions for offences under this Decree shall be instituted before the Tribunal in the name of the Federal Republic of Nigeria by the Attorney-General of the Federation or such officer in the Federal Ministry of Justice as he may authorize so to do, and in addition thereto, he may:–

a. after consultation with the Attorney-General of any state in the Federation, authorise the Attorney-General or any officer in the Ministry of Justice of that state, or

b. if a Tribunal so directs or if the Central Bank of Nigeria or the Nigeria Deposit Insurance Corporation so requests, authorize any other legal practitioner in Nigeria to undertake any such prosecution directly or assist therein.”
In subsection (3) of the said section 24 of the Decree it is provided thus:

“3. The question whether any or what authority has been given in pursuance of subsection (2) of this section shall not be inquired into by any person other than the Attorney-General of the Federation.”

The Attorney-General of the Federation no doubt has power under section 24(2) of Decree No. 18 of 1994 to authorise a private legal practitioner to undertake the prosecution of any of the offences prescribed in the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree No. 18 of 1994. The power donated by virtue of Exhibits A and B is for the prosecution of the offence prescribed in the decree and the authority so conferred cannot by virtue of the provision of subsection (3) of section 24 be questioned by any person, except the Attorney-General of the Federation himself.

The Failed Banks (Recovery of Debts) and Malpractices in Banks Decree No. 18 of 1994 is an existing law within the purview of section 315(4)(b) of the 1999 Constitution. When it is shown that any of its provisions is inconsistent with a provision of the Constitution that provision of the Decree is for its inconsistency invalid, null and void. Also anything done or purportedly done under it after the coming into force of the Constitution is null and void (see His Highness Erejuwa II, the Olu of Warri and others v Egbaregbeyiwa O. Kparegboyi and others (supra) at 438–479). Inconsistency exists when the affirmative words of a statute are contradictory to the affirmative words of another statute and it is clear that they are in conflict and that the two cannot stand together. In the present case it seems to me that the provision of section 24(3) of Decree No. 18 of 1994 is in conflict with the provision of section 6(6)(b) of the 1999 Constitution and that the said section 24(3) of the Decree was impliedly repealed by the provision of section 6(6)(b) of the 1999 Constitution on the date the Constitution came into force. The implication of this conclusion is that any authority granted to a private legal practitioner to prosecute any of the offences
prescribed in Decree No. 18 of 1994 after the coming into force of the 1999 Constitution can now be questioned on the ground of inconsistency with any of the provisions of the 1999 Constitution. The provision of subsection (2) of section 24 of Decree No. 18 of 1994 is certainly not inconsistent with section 174 of the 1999 Constitution.

But the authority in this case was granted on 3 August, 1995 to the prosecutors when the Decree No. 18 of 1994 was superior to the 1979 Constitution (see Attorney-General Anambra State v Attorney-General, Federation (1993) 6 NWLR (Part 302) 696; Ekpenkhio v Egbadon (1993) 7 NWLR (Part 308) 717 and Pabod Supplies Ltd v Beredugo (1996) 5 NWLR (Part 448) 304). It was not granted after the coming into force of the 1999 Constitution. As settled by the authorities the accused/applicants in this case are by virtue of the provision of section 24(3) of the Decree prohibited from questioning the validity of the authority granted as per Exhibits A and B. See His Highness Erejuwa II, the Olu of Warri and others v Kparegboyi and others (supra) at 438 wherein the Supreme Court, per Wali JSC put it thus:

“The decision in Uwaifo’s case prohibits the courts, even after 1 October, 1979 from questioning any Edict or Decree made between 1 January, 1966 and 30 September, 1979 on the ground that the person or authority which made it has no capacity or power to make it, but did not preclude the courts from questioning the validity of such laws or any of their provisions that are inconsistent with the provisions of the 1979 Constitution. In other words courts are precluded from questioning the capacity and power of the authorities in promulgating such law. They are equally prohibited from questioning the validity of what the authorities did under such laws or interfering with any accrued or subsisting rights by virtue of such actions at the time they were still valid and subsisting.”

It is therefore my respectful view that the authority granted in 1995 to Mr Fidelis Nwadialor, S.A.N., and Emeka Ngige, Esq., to institute the present criminal proceedings cannot now be questioned by the accused/applicants. It is my conclusion that Fidelis Nwadialor (S.A.N.) and Emeka Ngige, Esq., have authority to institute the criminal proceedings.
a I think, having regard to the conclusions which I have reached hereinbefore, that the present application ought to fail. It fails and the motion is hereby dismissed.
Linton Industrial Trading Company Limited v National Bank of Nigeria

FEDERAL HIGH COURT, LAGOS DIVISION

UKEJE J

Date of Judgment: 10 FEBRUARY, 2000

Suit No.: FHC/L/CS/469/95

Banking – Banker and customer relationship – Contract between – Nature of

Banking – Foreign exchange – Remitting of by bank – Central Bank of Nigeria not approving – Whether customer’s bank can be liable for negligence

Banking – Foreign exchange – Remitting of by bank – Naira element deposited by customer – Whether bank agent of customer in respect of

Facts

The plaintiff deposited some money with the defendant, his bankers, for the purchase of foreign exchange which would be remitted to an overseas company for purchase of some goods.

Before the defendant could do this, however, he would need the approval and allocation from the Central Bank of Nigeria.

The defendant claimed that, despite all their efforts, the Central Bank of Nigeria did not allocate the required foreign currency, hence they could not forward the sum to the overseas creditor of the plaintiff.

The plaintiff, aggrieved by the alleged non-performance of the defendant, claimed the following reliefs:

“1. A DECLARATION that the defendants are in breach of contract having failed to remit the sum of US$19,530 (Nineteen Thousand, Five Hundred and Thirty US Dollars) to Messrs. Linton Industrial Company Limited, Hong Kong, being proceeds from 3 lots of CKD Watch Component Parts, despite approval and allocation of foreign exchange vide Form M Numbers 008436, 008437 and 008438, by the
first defendant and by same in local currency by the plain-
tiff.

2. A DECLARATION that the plaintiff is entitled to special
damages as a result of the defendant’s failure or neglect to
remit the sum of US$19,530 (Nineteen Thousand, Five
Hundred and Thirty US Dollars) to Messrs. Linton Indus-
trial Company Limited, Hong Kong, being amount for the
proceeds for 3 Lots of CKD Watch Component Parts vide
Proforma Invoice No. W0572 W0579 which were awaiting
shipment then, despite approval and allocation of foreign
exchange by the defendant and payment of same in local
currency by the plaintiff.

3. The sum of N8,800,000 being special damages resulting
from the said breach by the defendants.

4. Payment of US$19,530 (Nineteen Thousand, Five Hundred
and Thirty US Dollars) at current exchange rate, being an
amount due to the plaintiff as a result of the non remittance
of the said sum to Linton Industrial Company Limited,
Hong Kong.

5. Interest on the said sum at the current prevailing bank rate
as from 1984 till payment is made.

6. 100% interest on the said sum as in paragraphs 3 and 4 after
judgment.”

The plaintiff averred that the defendants did not try hard
enough while the latter denied this and contended that they
had no control over the Central Bank of Nigeria.

Held –

1. It is trite that the relationship between a banker and his
customer is basically that of contract.

2. The terms of a contract between the banker and cus-
tomer involve obligations on both sides and require care-
ful statement. The truth of the matter is that the relation-
ship is of a class of its own and subject to obligations
which cannot be defined exhaustively in a single case
but must be defined as occasion arises.

3. However, in the circumstances of this case, the defen-
dant is not the agent of the plaintiff as regards the Naira
element deposited with the defendant against the ship-
ning documents deposited in compliance with a bills
for collection transaction. Rather, the defendant is and
remains the agent of the exporter/beneficiary as regards that funds and only the beneficiary can now collect that sum or instruct any person as to its disposal.

4. It is in the exclusive domain of the Central Bank of Nigeria, under the legal regime in force at the time 1984–1986, to give or to refrain from giving approval and releasing foreign exchange for any transaction. In that regard, the Central Bank of Nigeria was “a law unto itself” and there was nothing the defendant could do to coerce the Central Bank of Nigeria to release the requisite funds for the plaintiff’s transaction.

In the instant case, the defendant did everything within its power to get foreign exchange released but all to no avail. The defendant could not therefore be held liable for breach of contract to the plaintiff with whom it had no specific collateral contract in that regard. His duty was to the buyer to transmit foreign exchange upon release by Central Bank of Nigeria, which never happened.

5. When a collecting bank releases documents to a buyer pursuant to instructions of the remitting bank contained in the remittance letter, the collecting bank is not entering into any contract with the buyer, the collecting bank is the remitting bank’s agent.

In the instant case, the defendant incurs no liability to the importer, but may be regarded as agent of the bank of Hong Kong or the exporter, and the plaintiff having collected the goods cannot also turn around and seek to collect the Naira value deposited against the documents.

*Suit dismissed.*

**Cases referred to in the judgment**

*Nigerian*

*ABCOS Nig. Ltd v KWPT Ltd* (1987) 4 NWLR (Part 67) 894

*ACB Plc v Uzo Bros. (Nig.) Ltd* (1997) 6 NWLR (Part 570) 584
By its particulars of claim dated 26 April, 1995 and filed on 28 April, 1995, the plaintiff claimed from the first and second defendants jointly and severally the following reliefs:

1. A DECLARATION that the defendants are in breach of Contract having failed to remit the sum of US$19,530 (Nineteen Thousand, Five Hundred and Thirty US Dollars) to Messrs. Linton Industrial Company Limited, Hong Kong, being proceeds from 3 lots of CKD Watch Component Parts, despite approval and allocation of foreign exchange vide Form M Numbers 008436, 008437 and 008438, by the first defendant and by same in local currency by the plaintiff.

2. A DECLARATION that the plaintiff is entitled to special damages as a result of the defendant’s failure or neglect to remit the sum of US$19,530 (Nineteen Thousand, Five Hundred and Thirty US Dollars) to Messrs. Linton Industrial Company Limited, Hong Kong, being amount for the proceeds for 3 Lots of CKD Watch Component Parts vide Proforma Invoice No. W 0572 W0579 which were awaiting shipment then, despite approval and allocation of foreign exchange by the defendant and payment of same in local currency by the plaintiff.

3. The sum of ₦8,800,000 being special damages resulting from the said breach by the defendants.

4. Payment of US$19,530 (Nineteen Thousand, Five Hundred and Thirty US Dollars) at current exchange rate, being an amount due to the plaintiff as a result of the non remittance of the said sum to Linton Industrial Company Limited, Hong Kong.
5. Interest on the said sum at the current prevailing bank rate as from 1984 till payment is made.

6. 100% interest on the said sum as in paragraphs 3 and 4 after judgment.”

(At the inception of the suit the Central Bank of Nigeria was sued as the first defendant but following a notice of preliminary objection, dated 22 September, 1995, the Central Bank of Nigeria was struck off as a party after a considered ruling delivered on 7 November, 1996).

Pleadings were ordered and the plaintiff filed an 18-paragraph statement of claim dated 15 August, 1995 and filed on 16 August, 1995.

The defendant, then as second defendant filed a 19-paragraph statement of defence dated 19 November, 1996 and filed on 21 November, 1996.

The plaintiff then filed a 13-paragraph reply to the second defendant’s statement of defence dated 11 December, 1996.

Upon application dated 14 January, 1997 and with leave of court granted, the plaintiff filed a 17-paragraph amended statement of claim dated 20th and filed on 21 January, 1997.

For its part, the defendant by a motion dated 28 February, 1997 and filed on 6 March, 1997, an 18-paragraph further amended statement of defence which was later replaced with a 21-paragraph further amended statement of defence dated 20 June, 1997.

In this suit therefore the plaintiff’s claim was fought on the basis of the plaintiff’s 18-paragraph statement of claim dated 15 August, 1995 and the 13-paragraph reply to the second defendant’s defence dated 16 December, 1996.

For its part, the defendant’s suit was fought on the basis of the further amended statement of defence, amended by order of court dated 11 March, 1997. Trial in this matter opened on 6 March, 1999 when plaintiff’s Counsel then, Orisanusi, put the plaintiff’s first PW1 in the witness box.

During trial, two witnesses were called, one each by the plaintiff and the defendant respectively, PW1 and DW1. In
addition 17 (seventeen) documentary Exhibits (Exhibits A–A2 and R–R6) were tendered Exhibits A–A2 to P with PW1 tendering 15. DW1 tendered two documentary exhibits, Exhibits Q and R–R6.

PW1 was Sule Adebayo Aroweyu, executive director Linton Industrial Trading Limited, the plaintiff herein, while D1 was Julius Olorungbemi Adeyeye (a banker in the International Banking Division) of the defendant bank.

PW1: Sule Adebayo Aroweyu, Muslim, sworn by the Holy Koran.

In a nutshell, the evidence of PW1 was that, in 1984, the plaintiff company applied to the Central Bank of Nigeria (CBN), through the defendant (NBN) for foreign exchange of US$19,500 for the purchase of three lots of CKD watch component parts from Linton Hong Kong, the application was through form Ms. Invoices and Trade Debt refinancing. The following documents were tendered and admitted in evidence with or after overruling objection:

1. Photocopy of Form Ms, CBN No. 008436 admitted as Exhibit A–A2;
2. Original of trade debt refinancing claim admitted as Exhibit B–B2;
3. Invoice of 11,00 sets of watch components dated 1 September, 1983 admitted as Exhibit C–C2;
4. Letter of NBN dated 5 November, 1988 admitted as Exhibit D–D1;
5. Letter of NBN dated 11 July, 1984 admitted as Exhibit E;
6. Letter of NBN dated 3 August, 1984 admitted as Exhibit F;
7. Letter of NBN dated 29 April, 1984 admitted as Exhibit G.

Testifying further, the witness said that it was the responsibility of the defendant to remit the money to the beneficiary after the CBN had approved. But that in this case the defendant failed to remit the said sum, on the claim that the CBN
had not allocated the foreign exchange. The defendant wrote letters and telex pleading with them.

The following letters were admitted in evidence as Exhibits:–

(i) Telex No. MSG 078 dated 26 April, 1984 as Exhibit H;
(ii) Letter from NBN dated 25 April, 1984 as Exhibit J;
(iii) Letter dated 24 September, 1984 from NBN to Lin-ton Hong Kong admitted as Exhibit K.

Despite all those, the defendant did not remit the money, whereupon the plaintiff instructed Counsel to write to both the defendant and the Central Bank, claiming damages for breach of contract

(iv) Letter from Orisanusi and Company dated 10 No-

November, 1984 admitted as Exhibit L–L1;
(v) Letter from NBN dated 30 December, 1994 admit-

ted as Exhibit M;
(vi) Letter from Orisanusi dated 28 March, 1995 admit-

ted as Exhibit N.

PW1 further testified that the plaintiff would have realised N8,800,000 had the defendant remitted the sum, per plaintiff’s sales invoice, which showed that each of the 8,800 of the eight lots cost N1,000 each making N8,800,000.

(vii) plaintiff’s Sales Invoices Booklet No. 2051–21500 admitted as Exhibit P.

The witness stated that per the Form M tendered, goods from US$1,000 to N5,000 were exempted from SGS exami-

nation.

Under cross-examination, the witness testified that it was the CBN that allocated foreign exchange and also released foreign exchange.

As between plaintiff and defendant, the defendant’s duty was only to submit everything to the National Bank of
a Nigeria who would, after complying with all necessary requirements, in turn submit to the Central Bank.

The witness admitted that the goods were shipped to the plaintiff and the witness was aware that the defendant applied to the CBN as instructed by the plaintiff. Witness read Exhibit K in which defendant promised to send the foreign exchange to beneficiary when same was released by CBN.

b The witness admitted that at the time of application only US$4,000 was deposited. The witness also read Exhibit H, a letter of plaintiff to their supplier in Hong Kong, that foreign exchange would be released.

c The witness could not remember the exchange rate of Naira to Dollar in 1994, the year of the transaction.

That was PW1’s testimony.

d DW1 was Julius Olorungbemi Adeyeye, a banker with National Bank of Nigeria since 1979, Christian, sworn on Holy Koran. The witness had been working in the International Division since 1984. DW1 gave an extremely detailed and lengthy testimony, both in chief and under cross-examination.

In a nutshell, DW1’s testimony in chief was to the effect that the plaintiff was a very long-standing customer of the defendant.

e In 1994, the plaintiff submitted three Form M applications through the defendant to the CBN (the witness identified Exhibits A–A2 as the three Form Ms), submitted under the “Bills for Collection” term, which permitted the exporter to send the goods and the shipping documents to the defendant who would sell same and return the money to the exporter.

In the transaction herein, the plaintiff was the importer, while the exporter was Linton Industrial Co Ltd Hong Kong.

f That the Form M and all accompanying documents were sent to the CBN for foreign exchange, allocation through an Application Schedule No. M.NBN/DP/84/404. A photocopy of the document titled Application Schedule dated 7 August, 1984 was admitted as Exhibit Q, which is a document by
which the CBN indicated is acceptance or rejection to allocate foreign exchange in respect of an application. In this case, the application was accepted, an indication that foreign exchange would be allocated for the transaction.

The foreign exchange allocated to this transaction was not released as the transaction fell within the period of scarcity of foreign exchange which the CBN allocated in respect of all applications on a preferential basis and at its absolute prerogative.

That plaintiff continued to check on the CBN to see if it would released the foreign exchange for the benefit of the beneficiary. The defendant even sent a letter to the plaintiff that the Central Bank had granted cover but was yet to release the foreign exchange. The witness identified Exhibit K as the letter and Exhibit H as the telex.

That position remained until 26 September, 1986, when a new foreign exchange guideline under the second tier foreign exchange market (SFEM) was started.

With SFEM, the defendant re-submitted the applications. He referred to Exhibits E and F.

The CBN then sent forms to both importer and exporters. The forms were completed and sent to CBN’s accredited representative in New York, the Chase Manhattan Bank, New York, under the Refinancing Programme.

The claim was rejected, marked “Unmarched” by the Chase Manhattan Bank and the Unmarched Certificate informed the defendants, Exhibits B–B2. A photocopy of the document titled Chase Manhattan dated 25 September, 1984 was admitted as Exhibits R–R6 (the certificates relate to each of the applications in Exhibits B–B2), stating that the application was rejected for SGS Query.

Foreign exchange was not released and the defendant duly informed the plaintiff.

Having done all that was required of it, the plaintiff had no coercive power over the CBN who had an absolute prerogative on whom to allocate foreign exchange.
Testifying further, the witness stated that the plaintiff had collected the goods, hence the plaintiff’s liability to submit the exchange control documents.

It was mandatory on the defendants to collect the Naira value equivalent of the goods, which was ₦14,655.57 which the defendant put in a suspense account unpaid bills awaiting CBN cover, on behalf of Linton Industrial Company, Hong Kong, awaiting the release of the foreign exchange by CBN. Consequentially, that the foreign exchange in possession of the defendant belongs to Linton Industrial Ltd, Hong Kong in the beneficiary. The plaintiff herein cannot lay claims to the Naira in the defendant’s possession, without the consent of the beneficiaries for having received the goods, the money is no longer that of the plaintiff.

Further, the witness stated that the defendant is not a party to the contract between the plaintiff and the beneficiary and that the defendant did not receive the letter (Exhibit O).

In conclusion, the witness stated that the plaintiff is not entitled to the reliefs it claims in the statement of claim against the defendant bank, for the bank did its best and all it could do to ensure that the CBN released to the plaintiff but CBN did not do that, hence the position that plaintiff is not entitled to any relief against the bank.

Instead the court should refuse all the reliefs the plaintiff seeks and award substantial costs to the defendant.

Under *cross-examination*, DW1 admitted that the defendant complied with all requirements then necessary for the allocation of foreign exchange by the CBN. The documents were received and accepted by the CBN, giving the impression that foreign exchange would be allocated and released.

But the application was rejected on account of a SGS Query, and the Chase Manhattan stated that it was un-marred, that is not accepted as a debt by the exporting country as a trade debt, as in Exhibits Q–Q6.

As at that time, goods below US$4,000 were not subjected to pre-inspection, which was why the application was accepted and transmitted to CBN which rejected same; and
there was nothing the defendant could do other than inform the customer as in Exhibit G, a letter from Linton, Hong Kong to CBN.

The witness admitted that the defendant accepted commis-

sion from plaintiff and so were an agent of the plaintiff. But the witness insisted that, as an agent, the plaintiff acted
diligently, efficiently and effectively carried out their job. They used all their moral persuasion to convince the CBN to release forex but all to no avail. The witness insisted that the defendant did all within its power to secure foreign ex-

change for the plaintiff (Exhibit Q). The witness insisted that he had told the court the whole truth and was visibly angry when learned Counsel suggested that the witness was lying.

The witness rejected Counsel’s suggestion that the defen-
dant was in distress because of the type of inefficiency dis-

played in the plaintiff’s case and insisted that it was a boardroom squabble and withdrawal of funds by parastatals.

In answer to the suggestion that the money which the defen-
dant put in the suspense account, the witness explained that:

(I) In a bill for a collation transaction, the customer comes for shipping documents which the bank releases on payment of the Naira equivalent, which the defendant puts in a suspense account awaiting CBN cover. The shipping documents are endorsed to the importer, who then collects the goods in ques-
tion.

(II) The Naira equivalent now belongs to the benefici-

ary, and the importer who now claimed the goods can no longer claim this money unless he receives the consent of the exporter.

That was the end of the cross-examination and there was no re-examination.

Oladigbólú, learned Counsel on behalf of the defendant, and Orisanusi, learned Counsel on behalf of the plaintiff, both addressed the court extensively.
Oladigbolu started by identifying the state of the pleadings herein as already stated supra and then raised six issues for determination as follows:

1. Whether the action herein is not Statute barred.
2. (a) Whether the defendant had done all that was expected of it under a bill for collection transaction/contract.  
   (b) What is the main cause of the CBN’s refusal to finally release foreign exchange on behalf of the plaintiff in this transaction.
3. Whether there was a breach of contract by the defendant under the bill for collection contract between the plaintiff and the defendant.
4. Is the plaintiff entitled to any damages as claimed by it in this matter.
5. Can a party who has taken benefit under a contract sue upon the same and, consequently, whether the plaintiff can institute this action without the consent or authority of the beneficiary.
6. Can an amount be kept in a suspense account.”

Learned Counsel submitted that from the pleadings of both parties and the evidence before the court the following issues are not in dispute:

1. That the plaintiff applied through the defendant to the CBN for foreign exchange allocation in 1984. (Paragraph 3 of the Amended Statement of Claim and paragraphs 6 and 7 of the Further Amended Statement of Defence, and evidence of PW1 and DW1.)
2. That the defendant processed and forwarded the documents to CBN for foreign exchange allocation, paragraph 4 of the Amended Statement of Claim and Exhibit Q.
3. That the CBN granted Foreign Exchange cover in principle but foreign exchange was not released to defendant by CBN. Exhibits H and K and paragraph 9 of Statement of Claim and paragraphs 8 and 9 of Statement of Defence.
4. That the plaintiff applied for a Refinancing of the Programme during the Trade Debt Refinancing Programme (Exhibits E, F, G–G1 and R–R6).
5. That the plaintiff received and disposed of the goods in this transaction, Exhibit A–A2; Exhibit D.
6. The Naira deposit or its equivalent with the debt is for the benefit of Linton, Hong Kong.”
As shown by paragraphs 8 and 9 of the statement of claim; paragraphs 15 and 16 of the defendant’s further amended statement of defence and Exhibit A–A1 (Item 2) and the evidence of DW1, under cross-examination on 17 June, 1998.

The issues raised by defendant’s Counsel, as set out supra, were argued in very extensive detail *seriatim*. The purport of those submissions will be adverted to as appropriate in the course of this ruling.

For his part, *Umoru*, learned Counsel on behalf of the plaintiff, formulated the following issues for determination, that is to say:—

“(1) Whether there is a Contract between the plaintiff and the defendant herein.
(2) If there is such a Contract, whether the defendant has breached that Contract; and
(3) If the answer to the *quaere* raised in (1) and (2) supra is in the affirmative, whether the plaintiff is entitled to any relief.”

Arguing, learned Counsel submitted that an evaluation of the evidence of both PW1 and DW1 shows clearly that there is a contract between the plaintiff and the defendant.

Learned Counsel referred to Exhibits A–A2, Exhibits B–B2 and Exhibits C–C2; and paragraphs 1, 2 and 3 of the amended statement of claim.

Next, learned Counsel submitted that the defendant is in breach of the contract between the parties, for failing to remit the proceeds of the three lots of watch components to the plaintiff’s customers, Linton Industrial Company Limited, Hong Kong, “the Beneficiary”, despite the compliance with all conditions for foreign exchange allocation upon the excuse that it is the prerogative of the Central Bank of Nigeria to allocate and release foreign exchange, and that the plaintiff had not complied with all conditions, a position at variance with DW1’s evidence, under-cross examination on 11 June, 1998, that plaintiff had complied with all necessary conditions supported by all relevant documents.
Further, that DW1 showed by documentary Exhibit that the application had been marched and accepted by the Central Bank, per Exhibit Q, dated 11 March, 1984.

Learned Counsel for defendants had submitted that ordinarily that foreign exchange would have been granted but for the introduction of the Second Tier Foreign Exchange Market (SFEM) on 6 September, 1986 (Cap 114) Laws of the Federation of Nigeria, 1990), and that plaintiff was informed of it; whereupon the application was rejected by the CBN due to SGS Query.

That PW1 adduced evidence that SGS inspection was not necessary and so SGS Query did not arise (Exhibits A–A2; Exhibits L–L1 and Exhibit M).

Learned Counsel, Umoru, therefore submitted that the defendant was in breach because it had neglected to inform the Central Bank of Nigeria of the exemption from SGS Inspection despite the defendant’s knowledge of such exemption.

Further, that the defendant was unable to show by evidence that it had tried to convince the Central Bank that the plaintiff had complied with all the necessary conditions required under the law.

Learned Counsel finally submitted that the defendant’s failure to inform the Central Bank that the plaintiff’s application was exempted from SGS inspection amounts to negligence.

In support, learned Counsel cited the following cases:

1. Abcos Nigeria Ltd v KWPT Ltd (1987) 4 NWLR (Part 67) 911;

Now, for my part, for determination, I shall, based on the issues raised for determination by each of the parties raise the following issues for determination in this ruling, that is:—

(1) Whether the plaintiff’s Suit herein is statute barred;
(2) Whether there is a contract between the plaintiff and the defendant herein, such as would confer on the
plaintiff, the *locus standi* to institute and maintain this action;

(3) Whether the defendant is in breach of its contractual obligation to the plaintiff, in the conduct of the transactions leading to this Suit; and in that regard:–

(a) Whether the defendant did all that was expected of it under a “bill for collection” transaction.

(4) Depending on the answer to the *quaere supra*, whether:–

(a) the plaintiff is entitled to damages in the circumstances of this case;

(b) the plaintiff is still entitled to the Naira value of the sum due to the exporter in Hong Kong, the plaintiff having cleared the goods and taken the benefit thereof.

(5) Whether an amount kept in a suspense account can earn interest.

(6) To make consequential orders.

I shall now treat the issues raised *seriatim*.

1. *Whether the suit herein is statute-barred.*

It is the position of Oladigbolu, learned Counsel on behalf of the defendant, that the suit herein is statute barred.

Umoru, learned Counsel on behalf of the plaintiff, counters and contends that this Court, having earlier entertained that argument and entered a definitive considered ruling thereon, the issue cannot arise any more for determination.

Oladigbolu, conversely, posits that the issue determined by this Court on the relevant ruling relates to mortgage and not to this suit.

In that regard, I would wish, as a short take, to refer to the case of *Udo v Obot* (1989) 1 NWLR (Part 95) 59 wherein the Supreme Court, at 77, held as follows:–

“A party is precluded from contending the contrary or precluded from contending the contrary or opposite of a specific point, which having once been distinctly put in issue, has with certainty and solemnity been determined against him.”
The Supreme Court further went on at 59 to say that:

“It is therefore important for the issues in the earlier case to be identical with those in the current case in which the estoppel is raised.”

By a considered ruling dated 7 November, 1996, following a notice of preliminary objection dated 22 September, 1995 brought by the erstwhile first defendant (Central Bank of Nigeria), the court found in ratio 2, inter alia, as follows

2. The action herein, in so far as it concerns the second defendant is not statute barred.

The action was revived by the first defendant’s letter to the plaintiff dated 5 June, 1995 (Exhibit 3) and the plaintiff’s letter dated 14 April, 1996 and the payment of ₦25,000 to the first defendant.

Accordingly, the action as revived, is still alive.

3. Pleadings will hereafter be ordered and when settled, the Suit will proceed to be heard and determined upon its merits between the plaintiff and the second defendant.”

That very clear and definitive order was the basis of this full long drawn-out trial which started on 6 March, 1997 and ended on 24 November, 1999.

It does not therefore avail the defendant under any guise or colour to raise once more in this suit, the issue of statute of limitation. In any case, no issue of mortgage was raised before this Court in the motion culminating in that ruling.

That issue therefore fails and is dismissed.

3. Whether there is a contract between the plaintiff and the defendant in the circumstances of this suit

It is the firm contention of the plaintiff that there is a contract between the parties in this suit, which in turn imposes on the defendant certain contractual obligations.

Briefly, in the case of Royal Petroleum Co. Ltd v FBN Ltd (1997) 6 NWLR (Part 510) 584, the court held, inter alia, as follows at 599:

“It is trite that the relationship between a banker and his customer is basically that of contract.”

It is common ground between the parties that the defendant is the plaintiff’s banker. Accordingly, there is no doubt but
that there is a contract between the parties by virtue of the banker-customer relationship between them.

In that regard, I would wish to advert to the following documents:

(i) the three “Form M” relating to the transaction herein admitted as Exhibits A–A2 (National Bank of Nigeria Limited is “the Bank to which Application is addressed”; while the applicant is Linton Industrial Trading Company (Nigeria) Limited).

(ii) Exhibits B–B2 Trade Debt Refinancing claim under CBN Circular ECD/AD/10184, plaintiff is designated as importer, while defendant is the bank in Nigeria.

(iii) Exhibits D–D1, a letter from the defendant bank to the plaintiff informing that the defendant has received shipping documents etc.

4. Is the defendant in breach of its contractual obligation to the plaintiff herein

In this regard, the issue that actually arises is to determine whether the plaintiff has done all that was required of it to cause foreign exchange to be remitted to the plaintiff’s exporter, Linton Industrial, in Hong Kong. It is the main fulcrum of the defendant’s defence that it has done all that was required of it to remit the foreign exchange to Hong Kong. However, the Central Bank did not approve the release of the said foreign exchange backing.

For its part, the plaintiff equally strongly posits that the defendant did not do enough, did not advert to the Central Bank that the plaintiff’s goods were at the time exempt from pre-shipment inspection of goods, being goods below ₦5,000.

DW1, the defendant’s only witness, gave extensive and very informed, professional and expert evidence both in his evidence-in-chief and under an equally well-conducted cross-examination of all the action taken by the defendant to ensure that foreign exchange was released by the Central
There are also several documentary exhibits tendered and admitted before the court, chiefly thus:

(i) Exhibit D1, which is a letter from defendant to Linton Hong Kong and paragraphs 2 and 3 request the exporter to:

“Kindly send the relative documents urgently to enable the drawee [to] clear the goods. We shall remit proceeds . . . On the release of foreign exchange) cover by the Central Bank of Nigeria.”


In the case of *FBN Ltd v AP Ltd* (1996) 4 NWLR (Part 443) 438, the Court of Appeal held:

“The terms of a contract between a banker and its customer involve obligations on both sides and require careful statement.”

The court went on:

“The truth of the matter, in my view, is that the relationship is of a class in its own and subject to obligations which cannot be defined exhaustively in a single case but must be defined as occasion arises.”

So it must be in this case.

In support of the defendant’s case that it is the Central Bank that failed to release the requisite foreign exchange cover herein, there are before the court, in addition to Exhibits E and F, *supra*, the following:

(a) Exhibit H: An “Applications Schedule” showing that the CBN had “checked and accepted” the plaintiff’s application herein.

(b) Exhibit H: Message of 26 April, 1984 from defendant to HOVCOMBANK, Hong Kong. It reads in full:

“We confirm that we have received foreign exchange cover for your collection totalling US$19,530 only, from Central
Bank of Nigeria. We shall revert proceeds of the collection to you when CBN releases relevant Foreign Exchange Allocations, Kind regards.”

(c) Then there is Exhibits R–R6: Summary of approved CBN application issued by Chase Manhattan Bank for processing of trade debts refinancing, in respect of plaintiff’s three applications amounting to US$19,530.

The application was said to be “Marched with Tolerance and rejected by CBN due SGS Query”.

Those exhibits show that in the final analysis, Central Bank refused to release matching foreign exchange due to SGS query.

It is the strong case that it is the absolute prerogative of the Central Bank to release or withhold the release of foreign exchange.

In that regard, I would wish to rely on Central Bank of Nigeria v Manexport SA and others (1987) 1 NWLR (Part 47) 86 (a case virtually on all fours with this suit), wherein the Court of Appeal held at 94 and 95 that:

“It is clear that the first respondent, as plaintiffs, is saying that the appellant is obliged to provide the foreign exchange necessary for the transaction between them and the second and third respondents and claiming the amount due as already approved by the appellants under Form M, exhibited as Exhibit B. It is not averred anywhere that there is a contract between the appellant (CBN) and the first and second respondents for furnishing the foreign exchange or that the respondents made any payment to the appellant. Rather it appears to be the contention of the first respondent that the appellant was obliged to furnish the foreign exchange . . . by the mere fact that the appellant (CBN) had approved their Form M.”

The court then held:

“We were not referred to any statute which makes it obligatory for the Central Bank of Nigeria to furnish foreign exchange to any person, corporate or unincorporate; and I could find none.”

It follows therefore that it is within the exclusive discretion of the Central Bank to release foreign exchange or to refuse to do so. It matters not that it had earlier approved the relevant Form M.
A fortiori, the defendants herein are in no wise able to compel the Central Bank to release the foreign exchange cover for the plaintiff’s goods herein.

Next, in the case of *ACB Plc v Uzo Bros. (Nigeria) Ltd* (1997) 6 NWLR (Part 510) 584, the Court of Appeal held, *inter alia*, that:

“In international trade, documentary credit as a mode of payment is any arrangement whereby a bank (the issuing bank) acting at the request and on the instructions of a customer (the applicant or the credit/buyer) is to make payment to or to order of a third party (the beneficiary/seller) provided the terms of the credit are complied with. In the instant case, there was no issuing bank and the appellant cannot be regarded as incurring any obligation arising from the transaction which the respondent had with the Chinese Suppliers in regard to the payment of goods.”

Again, in *Abcos (Nigeria) Ltd v KWPT Ltd* (1987) 4 NWLR (Part 67) 894, the Court of Appeal held:

“As between the buyer and the issuing bank, there is strictly no direct foreign exchange element involved and the obligation of the buyer is usually to pay to the issuing bank, the Union Bank, the necessary sum involved in Naira. In the instant case, it was for the issuing bank to apply to the Central Bank for foreign exchange cover.”

The totality of all the foregoing high judicial authorities is to the effect that:

(i) The business between the plaintiff and the defendant herein is as to the Naira element of the transaction. Admittedly, it is the duty of the defendant to apply to the Central Bank for foreign exchange cover.

(ii) However, the defendant has no coercive power over the Central Bank as to whether or not the CBN will release foreign exchange to any person, whether corporate, unincorporate or natural.

(iii) The defendant does not incur any obligation to the supplier/exporter, Linton Industrial, Hong Kong, arising from the non-release of foreign exchange to the plaintiff, the defendant having done all within its power but failed.
5. The fate of the Naira element deposited by the plaintiff with the defendant in the face of the findings supra

It is common ground between the parties that in payment for the goods in the transaction to this suit, that is, the eight lots of CKD watch components, the plaintiff deposited with the defendant the Naira value equivalent to secure foreign exchange from CBN.

It is the contention of the defendant that the plaintiff, having taken delivery of the goods, can no longer lay claim to the Naira sum deposited which now belongs to the beneficiary and that it is only the beneficiary who can now sue to recover the said indebtedness.

The plaintiff disagrees and contends quite strenuously that the plaintiff is competent to institute this action.

In this regard, I would wish to refer to Exhibits A–A2, copies of the three Form M documents in this matter, which show Linton Industrial Company Limited, Hong Kong, as the beneficiary; and Exhibits B–B2, trade debt refinancing of 15 March, 1984, which still show Linton Industrial Company Limited, Hong Kong, as the beneficiary.

The issue that arises under this head is whether the plaintiff has the locus standi to institute this action.

In ABCOS Nigeria Ltd v KWPT Ltd (1987) 4 NWLR (Part 67) 894, the Court of Appeal held:–

“There is in my view nothing in the Exchange Control Act which forbids a foreign creditor from instituting legal proceedings for the recovery of his debts in our courts. There are also no prior conditions to be fulfilled before instituting such an action in court. Nigerians as members of the international community must pay their honest debts to the foreign creditors if and when due. They have not got eternity to make the payment.”

Again, in ACB Plc v UZO Brothers (Nigeria) Ltd (1997) 6 NWLR (Part 510) 692, the Court of Appeal held that:–

“In international trade, documentary credit is a mode of payment in any arrangement whereby a bank (the issuing Bank), acting at the request and on the instruction of a customer (the applicant for the credit/buyer) to make payment to or to the order of a third”
party (the beneficiary seller) . . . In the instant case, the appellant (ACB) cannot be regarded as incurring any obligation arising from the transaction which the respondent (Uzo Bros. Ltd) had with the Chinese Suppliers in regard to the payment for the goods.”

The court went on at 702:–

“When a collecting bank releases documents to a buyer pursuant to instructions of the remitting bank contained in the remittance letter, the collecting bank is not entering into any contract with the buyer, the collecting bank is the remitting bank’s agent.”

The court then concluded that:–

“In the circumstances of this case, the question of the responsibility of the appellant (ACB) to the Bank of China, even if the latter can be regarded as the remitting bank is of little importance.”

So it is in this case. The defendant incurs no liability to the importer but may be regarded as an agent of the Bank of Hong Kong, or the exporter.

Also, the plaintiff, having collected the goods, cannot also turn around and seek to collect the Naira value deposited against the documents.

The defendant holds that money in trust for the exporter, who is at liberty to deal directly with the defendant concerning its release, or with any person authorised in that behalf by the exporter.

As to the propriety of leaving the Naira deposit in a suspense account, I shall refrain from making any comments thereon as it may likely arise for determination at a future possible suit at the instance of the exporter/beneficiary, or his nominee.

However, the defendant shall forthwith transfer that sum from the suspense account to an interest yielding account and shall credit interest to the account with effect from the date of this judgment until its final release to the exporter/beneficiary at the rate of 10% p.a. in terms of the Federal High Court Rules, 1999, Order 42 Rule 7.
Finally, perhaps, I should advert to the case of *ABCOS Nig. Ltd v KWPT Ltd* (1987) 4 NWLR (Part 67) 894, wherein the Court of Appeal held:

“Although Counsel to both sides did not make reference to the Second Tier Foreign Exchange Market Decree, 1986 (No. 23), either in their briefs or oral arguments, the court is nevertheless bound to take judicial notice of all laws or enactments having the force of law in any part of Nigeria by virtue of section 73(1)(a) of the Evidence Act, 1945.

Since the introduction of the Second Tier Exchange Market, foreign exchange may be purchased from the Market and repatriated from Nigeria without prior approval of the Minister of Finance or the Central Bank or any other Exchange Control requirement. *Vide* section 12 of the Second-Tier Decree.”

In all situations, parties to a suit are duty bound to remain alert so as to cut their losses to the barest minimum.

Those are the findings of this Court in this suit, that is to say:

1. The issue whether this suit is statute barred, having formed the basis of an earlier ruling, in which the court held that the suit is not statute barred, cannot be re-litigated now. That issue fails against the defendant.

2. There is a contract between the plaintiff and the defendant herein arising generally from their banker/customer relationship.

   However, in the circumstances of this case, the defendant is not the agent of the plaintiff as regards the Naira element deposited with the defendant against the shipping documents deposited in compliance with a bills for collection transaction.

   Rather, the defendant is and remains the agent of the exporter/beneficiary as regards that funds and only the beneficiary can now collect that sum or instruct any person to as its disposal.

3. It is in the exclusive domain of the CBN, under the legal regime in force at the time 1984–1986, to give or to
refrain from giving approval and releasing foreign exchange for any transaction.

In that regard, the CBN was “a law unto itself” and there was nothing the defendant could do to coerce the CBN to release the requisite funds for the plaintiff’s transaction.

I find as a fact that the defendant did everything within its power to get foreign exchange released, but all to no avail.

The defendant cannot therefore and thereby be held liable for breach of contract to the plaintiff, with whom upon the high judicial authorities, supra, it had no specific collateral contract in that regard. His duty was to the buyer to transmit foreign exchange upon release by CBN, which never happened.

4. The Naira element deposited by the plaintiff with the defendant now belongs to the beneficiary and the plaintiff cannot lay any claim to same. Only the beneficiary can instruct in that regard.

5. The defendant shall forthwith transfer the Naira deposit in this case from suspense to an interest yielding account and shall credit it with interest with effect from the date of this judgment at the rate of 10% in terms of Order 42 Rule 7 of the Federal High Court Rules, 1999, until the sum is released/transfered to the beneficiary at its instruction, either acting directly or through any nominee.

6. The plaintiff, having collected the goods cannot now lay claim to the Naira element and, therefore, has no locus standi to canvass that head of claim.

Finally, therefore, the suit herein fails in its entirety and is dismissed.
Alhaji Nuhu Abdullahi v Waje Community Bank

COURT OF APPEAL, KADUNA DIVISION

OBADINA, OMAGE, SALAMI JJCA

Date of Judgment: 17 FEBRUARY, 2000

Banking – Interest rates – Interest charged by banks – Basis of – Guidelines for – Rights of banks to charge interest on loans, advances or credit facilities – Where derived – Nature of – Section 15 of the Banking Act construed

Facts

As a current account holder of the respondent, the appellant applied and was granted an overdraft facility in the sum of N1 million. An overdraft facility, dated 7 May, 1997, was duly executed by the parties. Pursuant to the agreement the respondent advanced the sum of N1 million to the appellant in March, 1998. Upon expiration of the facility and the inability of the appellant to repay same in spite of repeated demands, the respondent sued the appellant.

The respondent’s claim was for the sum of N1,931,893k being money payable by the appellant to the respondent as at 8 October, 1998, for money lent by the respondent at the appellant’s request, and for interest agreed thereon, till judgment. The writ was supported by an affidavit in support and a further affidavit in support of the notice of intention to defend. The appellant admitted receipt of the facility of N1 million but disputed the interest and urged that the matter be placed on the General Cause List.

At the end of the trial, the trial court entered judgment in favour of the respondent.

Aggrieved and dissatisfied with the judgment, the appellant appealed to the Court of Appeal.

Held –

1. By virtue of section 15 of the Banking Act (Cap 28) Laws of the Federation of Nigeria, 1990, the rates of
interest charges on advances, loans or credit facilities or paid on deposits by any licensed bank is to be linked to the minimum rediscount rate of the Central Bank subject to stated minimum and maximum rates of interest and the minimum and maximum rates of interest when so approved, are to be the same for all licensed banks. The interest structure of each licensed bank is subject to the approval of the Central Bank.

2. A banker has the right to charge interest at a reasonable rate on all overdrafts by the universal custom of banking.

3. Compound interest on an overdraft is chargeable only where the customer has agreed to it or where he is shown or must be taken to have acquiesced in the account being kept on that basis. In the instant case there was evidence that the appellant received a statement of account but never protested the interest charged. Also, although the rate of interest was not stated in the agreement, the parties thereto agreed to interest being charged.

Appeal dismissed.

Cases referred to in the judgment

Nigerian

Adigun v Attorney-General of Oyo State (1987) 1 NWLR (Part 53) 678
Deduwa v Okorodudu (1976) 9–10 SC 329
Ekwunife v Wayne (West Africa) Ltd (1989) 5 NWLR (Part 122) 422
Kotoye v CBN (1989) 1 NWLR (Part 98) 419
Olaloye v Balogun (1990) 5 NWLR (Part 148) 24
Oyenuga v The Provisional Council of the University of Ife (1965) NMLR 9
Rickett v B.W.A. Ltd (1960) SCNLR 227
Solicitor-General, Western Nigeria v Adebonojo (1971) 1 All NLR 178
This is an appeal against the judgment of the Kano State High Court delivered on 10 May, 1999 in favour of the respondent in Suit No. K/743/98.

At all times material to this action, the appellant was a current account holder of the respondent bank and accordingly a banker/customer relationship subsisted between the parties. In the course of that relationship, the appellant, being a current account holder of the respondent, applied to the respondent for an overdraft facility in the sum of ₦1,000,000 (One Million Naira) only. The application was approved by the respondent and an overdraft agreement dated 7 May, 1997 was executed by the parties.
Pursuant to the said overdraft agreement, the respondent advanced the sum of N1,000,000 (One Million Naira) to the appellant sometime in March, 1998. Upon expiration of the facility and the inability of the appellant to repay same in spite of repeated demands, the respondent took out a writ of summons against the appellant.

In the writ of summons issued on the Undefended List, the respondent, as plaintiff, claimed against the appellant as defendant in the following terms:

“The plaintiff’s claim is for the sum of N1,931,893.88K (One Million, Nine Hundred and Thirty-one Thousand, Eight Hundred and Ninety-Three Naira, Eighty-Eight Kobo) being money payable by the defendant to the plaintiff as at the 8 October, 1998, for money lent by the plaintiff to the defendant at the defendant’s request, and for interest agreed to be paid on money so lent. Defendant has refused, neglected and failed to pay the said sum despite repeated demands.

Wherefore the plaintiff claims the said sum of N1,931,893.88K Plus interest at the rate of 21 per cent from the said 8 October, 1998 till judgment is entered and thereafter at the court’s rate until liquidated.

And the plaintiff claims the costs of this action.”

The writ was supported by an affidavit in support of writ of summons on the Undefended List.

The appellant, in response to the writ filed, a notice of intention to defend, an affidavit in support and a further affidavit in support of notice of intention to defend.

At the end of the trial, the trial court entered judgment in favour of the respondent in the sum of N1,386,893K (One Million, Three Hundred and Eight-Six Thousand, Eight Hundred and Ninety-Three Naira) and the interest agreed to be paid on the money.

The appellant was aggrieved and dissatisfied with the judgment of the trial court. He therefore appealed to this Court against the decision of the trial court, on six grounds of appeal.
From the six grounds of appeal, the appellant formulated three issues for determination of this Court. The issues formulated read as follows:

“(1) Whether the respondent’s affidavit dated 19 November, 1998 *per se* as supported by Exhibit KNI are sufficient in establishment of the respondent’s claim in Undefended List, regard being had to the fact that the premises upon which the respondent’s claim for interest, charges, commission on the turnover and other expenses were not stated in the affidavit.

(2) Whether failure of the trial lower court to transfer the cause to a general cause list does not amount to the denial of the appellant’s right to fair hearing regard being had to the fact that the appellant was not allowed to exercise his right of calling witnesses, cross-examining the respondent’s witnesses and proffering his defence in respect of a matter over which the plaintiff/respondent’s affidavit dated 19 November, 1998, is in conflict with the defendant/appellant’s affidavit and further affidavit in support of notice of intention to defend dated 15 March, 1999 and 17 March, 1999 respectively on vital issues.

(3) Whether Exhibit K3 in support of the plaintiff/respondent’s affidavit can rightly be said to have spoken for itself in proof of the plaintiff/respondent’s claim under undefended list.”

The respondent also formulated one issue for determination of this Court, namely:

“Whether the affidavit of the appellant disclosed a defence on the merits within the meaning of Order 23 Rule 3(1) of the Kano State High Court (Civil Procedure) Rules, 1988, to warrant a transfer to the General Cause List, especially as the action was brought on the Undefended List.”

The appellant again filed an appellant’s reply brief in response to the respondent’s brief.

From the totality of arguments of the appellant in the appellant’s briefs, the crux of the appellant’s complaint is that the appellant’s affidavits in support of the notice of intention to defend disclose a defence on the merit when regard is had to the affidavit in support of the respondent’s claim on the undefended list. In that regard the first issue raised by the
a) appellant and the only issue formulated by the respondent are identical and the same in substance. They are both seeking to know whether the claim as constituted is a proper case to be tried on the undefended list of the court. The plaintiff/respondent issued his writ of summons against the appellant on the undefended list pursuant to Order 23 Rule 1 of the Kano State High Court (Civil Procedure) Rules, 1988. Order 23 Rule 1 of the Rules provides as follows:–

b) “Whenever application is made to a court for issue of a writ of summons in respect of a claim to recover a debt or liquidated money demand and such application is supported by an affidavit setting forth the grounds upon which the claim is based and stating that in the deponent’s belief there is no defence thereto, the court shall, if satisfied that there are good grounds for believing that there is no defence thereto, enter the suit for hearing in what shall be called the ‘Undefended List’, and mark the writ of summons accordingly, and enter thereon a date for hearing suitable to the circumstances of the particular case.”

c) Order 23 Rule 1 of the Rules, as quoted above, empowers the court to enter the suit for hearing on the undefended list, if the court is satisfied that there are good grounds for believing that there is no defence to the suit. The fact that the court places a suit on the undefended list does not necessarily mean that the case would be heard on the undefended list. Whether the suit would be heard on the undefended list as placed, would depend on whether the defendant could disclose a defence to the suit. Order 23 Rule 3 of the Rules has the following to say on the issue:–

```plaintext
3(1) If the party served with this writ of summons and affidavit delivers to the Registrar a notice in writing that he intends to defend the suit together with an affidavit disclosing a defence on the merit, the court may give him leave to defend upon such terms as the court may think just.

3(2) Where leave to defend is given under this rule, the action shall be removed from the Undefended List and placed on the Ordinary Cause List, and the court may order pleadings, or proceed to hearing without further pleadings.”
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From the combined provisions of Order 23 Rules 1, 2 and 3 of the High Court (Civil Procedure) Rules, Kano State, 1988, the fact that the court places a suit on the undefended
list of the court does not necessarily mean that the suit will be finally heard on the undefended list. Whether it will be finally heard on the undefended list will depend on whether the defendant can disclose in his affidavit a defence on the merit of the case. Therefore from the totality of the evidence proffered by the parties in this appeal, the issues for determination are as follows:

(1) Whether, in view of the claim of the respondent, the affidavit in support of the notice of intention to defend filed by the appellant disclosed a defence on the merit to justify the transfer of the case to the general cause list; and

(2) whether failure of the trial court to transfer the cause to the general cause list amounts to a denial of the appellant’s right to a fair hearing.

In his brief of argument, the appellant referred to Exhibit KN1 and the affidavit in support of the respondent’s writ of summons. He argued that Exhibit KN1 expressly shows that the appellant was charged some bank charges and commissions on turnover, interest on overdraft, among others, while the affidavit in support of the summons did not explain how the interest, commissions and charges accrued. He said the affidavit did not show whether the parties agreed on the charges and commissions as a term of the contract on the basis of which the interest and charges were charged. He argued that the affidavit in support of the summons did not show the percentages, if any, agreed upon by the parties to be charged as interest, and whether the interest should be compound or simple. He submitted that the learned trial court was in error when he entered judgment on the undefended list on the strength of the affidavit. He further submitted that a bank could only charge compound interest on an overdraft facility where the customer agrees for it to be charged. He relied on *UBN v SAX (Nigeria) Ltd* (1994) 8 NWLR (Part 361) 150. He submitted that for a judgment on the undefended list to be entered for interest, commissions, bank charges and other expenses, the respondent must
expressly give account of the genesis of the charges and commissions as to whether they arose from an agreement and/or banking custom or tariffs. He submitted that, where interest is being claimed as a matter of right, the proper practice is to claim entitlement to it on the writ, and plead facts which show such entitlement in a statement of claim. He urged the court to hold that the respondent’s affidavit in support of the writ in this case did not claim any entitlement to any interest, commission on turnover and C.M.C. charges, and the judgment could not be entered on the undefended list.

In his further submission, the appellant referred to Exhibit KN3 in support of the respondent’s writ of summons which is the overdraft agreement between the parties. He argued that the agreement did not shed any light as to what constitutes usual commissions and customary banking charges, costs, expenses or incidental expenses relating to overdraft facilities. He submitted that, where there is no agreement between a banker and its customer as to payment of interest on a loan account of the customer, the trial Judge couldn’t infer payment of such interest from an alleged universal custom, unless such custom is established by evidence to exist in Nigeria. He said the respondent’s affidavit in support of the writ did not indicate what constitutes usual commissions and customary banking charges and the percentage that is chargeable as interest, and therefore the trial court was in error in law holding that Exhibits KN1 and KN3 and the affidavit in support of the writ established the items relating to interest, charges, costs and expenses. He urged the court to allow the appeal.

In his own argument, the learned Counsel for the respondent referred to paragraphs 3(g) and 3(j) of the affidavit in support of the appellant’s notice of intention to defend filed by the appellant. He said the appellant did not controvert the assertion that the appellant owed the principal sum of ₦1 Million (One Million Naira). He also referred to page 3 lines 3–7 of the appellant’s brief wherein the appellant admitted taking an overdraft of ₦1 Million (One Million Naira) from the respondent some time in 1998. The learned Counsel
referred to the affidavit in support of the writ of summons filed by the respondent and Exhibit KN3 attached thereto, that is, the overdraft agreement between the parties. He also referred to paragraph 3(e) of the affidavit in support of the appellant’s notice of intention to defend wherein the appellant acknowledged Exhibit KN3 as the overdraft agreement between the parties. He referred to paragraphs 2 and 4 of the agreement, Exhibit KN3, that is, the unilateral right to charge all the interest and other charges reflected in the statement of account (Exhibit KN1) and that the court is precluded from holding to the contrary. He relied on the case of *JE Oshevire Ltd v Tripoli Motors* (1997) 4 SCNJ 246; (1997) 5 NWLR (Part 503) 1. He submitted that the appellant couldn’t vary the terms of the agreement by oral evidence. He said the respondent charged interest and other commissions reflected in Exhibit KN1, in the exercise of the discretionary power conferred by clauses 2 and 4 of Exhibit KN3, the agreement between the parties. The learned Counsel for the respondent further argued that, assuming there was no agreement between the parties regarding interest, he submitted that the respondent would still be entitled to interest because, in the normal banking practice and in consonance with the universal custom of banking, it is an implied term of an overdraft or loan agreement between the bank and the customer that a reasonable interest will be charged on such loan or overdraft where no rate of interest is expressly agreed upon. He cited as an authority the case of *Faagol Instrument Ltd v NBN Ltd* (1993) 1 NWLR (Part 271) 586 at 587.

He urged the court to hold that Exhibits KN1, KN3 and the affidavit in support of the writ filed by the respondent have established the respondent’s claim and affirm the judgment of the trial court.

The main complaint of the appellant is that in Exhibit KN1 (a statement of account) the respondent charged him (the appellant) some banking charges and commissions; that he (appellant) was also charged with CMC charges, commission on turnover, interest on the overdraft, among others,
while the affidavit in support of the writ of the respondent did not explain how the interest, commissions and charges accrued. He further said that the affidavit in support of the writ of the respondent also did not show that the parties agreed on the charges, commissions and interest as terms of their contract.

In the affidavit in support of the writ filed by the respondent, the respondent stated, *inter alia*, as follows:—

**“(iii)”** Sometime in March, 1998, at the defendant’s request, the plaintiff allowed the defendant [to] overdraw his account (with No. 591) with the plaintiff. This situation continued in varying degrees till 8 October, 1998 by which time the outstanding balance in the defendant’s account had escalated to the sum of **₦1,931,893.88K** (One million, Nine Hundred and Thirty-one, Eight Hundred and Ninety Three Naira, Eighty-Eight Kobo). Attached in this regard is a copy of the statement of account of the defendant’s account with the plaintiff. It is marked Exhibit KN1.

**“(iv)”** On various occasions since 8 October, 1998, the plaintiff has demanded the repayment of the said overdraft by the defendant; the defendant has failed, neglected and refused to heed the said demands.

**“(v)”** The plaintiff was as a result constrained to brief our firm (M.A. Bello and Co Solicitors) with explicit instructions to institute these proceedings to recover the said sum from the defendant, which sum is still due and continues to attract interest at the rate of 21% agreed by the defendant with the plaintiff prior to the grant of the overdraft.

**“(vi)”** By a letter dated 21 October, 1998, the said firm of M.A. Bello and Co Solicitors, further demanded of the defendant the payment of the said sum of **₦1,931,893.88k** due to the plaintiff to no avail. A copy of the said letter is attached hereto, marked Exhibit KN2.

**“(vii)”** The defendant also executed an overdraft agreement with the plaintiff in respect of his said overdraft of his account with the plaintiff. A copy of the said agreement, dated 1 January, 1998 is attached hereto marked Exhibit KN3.

**“(viii)”** The defendant has no defence to this action.”

The appellant, as defendant, filed a notice of intention to defend supported by an affidavit in conformity with Order
23 Rule 3(1) of the Kano State High Court (Civil Procedures) Rules, 1988.

In the affidavit in support of the notice of intention to defend, the appellant stated in paragraph 3 of the affidavit *inter alia* as follows:–

“3(b) That he maintains a current account No. 391 with the plaintiff’s bank, Waje Community Bank Ltd, Kano and a ledger card evidencing every transaction was being maintained by the bank.

(c) That the statement of claim in support of the plaintiff’s claim does not reflect true position of the plaintiff’s and the defendant’s transaction.

(d) That the statement of claim does not provide sufficient information as to the agreement of the parties on the interest, usual commissions and other banking charges chargeable in respect of the transaction and the mode of their computation.

(e) That the plaintiff and defendant agreed by paragraph 4 of Exhibit KN3 in support of the writ that chargeable interest should be based on agreement.

(f) That the plaintiff unilaterally charged interest, and other bank charges without any agreement reached relating thereto.

(g) That the defendant was charged compound interest on the facility and the interest so charged was added to the principal debt when no agreement to that effect was reached between the plaintiff and defendant.

(h) That the amount charged as commission and other banking services were arbitrarily charged by the plaintiff without any express agreement reached between the parties.

(i) The amount claimed from the defendant by the plaintiff cumulated to One Million, Nine Hundred and Thirty-one Thousand, Eight Hundred and Ninety-three Naira, Eighty-eight Kobo (₦1,931,893.88k) mainly due to unilateral and arbitrary charges debited and compounded to the defendant’s current account without an agreement and consent of the defendant sought and obtained thereto.

(j) That reversal of the arbitrary charges and establishment of actual debt will certainly drastically reduce the defendant’s debt.
(k) That the actual debt of the defendant can only be ascertained through normal process of proof and evidence.

(l) That the defendant has a defence to substantiate and unascertained amount claimed by the plaintiff and is desirous of advancing the same before the court.”

From the affidavit in support of the notice of intention to defend, there is no paragraph where the appellant denied taking an overdraft facility of ₦1 Million (One Million Naira) from the respondent; on the contrary, in paragraph 3(g) of the affidavit the appellant admitted that there was a facility but complained that a compound interest was charged and added to the principal debt when there was no agreement to that effect between the parties. In paragraph 3(e) of the affidavit, the defendant also admitted that there was an agreement, Exhibit KN3, between the parties in respect of the overdraft facility and that the agreement of the parties was that the interest chargeable should be based on their agreement.

From the combined contents of the affidavit in support of the writ of summons filed by the respondent and the exhibits attached thereto and the affidavit in support of the notice of intention to defend filed by the appellant, it is common ground:

(1) that the respondent granted an overdraft facility in the suit of ₦1 Million (One Million Naira) to the respondent sometime in 1998;

(2) that the parties executed an overdraft agreement, Exhibit KN3, in respect of the transaction.

In paragraph 3(d) of the affidavit filed by the appellant, the appellant complained that the statement of claim (I suppose he is referring to the affidavit in support of the writ by the respondent) does not provide sufficient information as to the agreement of the parties on the interest, usual commissions and other banking charges, chargeable in respect of the transaction and the mode of their computation.

Since there is an agreement between the parties in respect of the transaction, the propriety of the claim by the
respondent will depend on the provisions of the agreement. In that regard what does the agreement say on the issues of interest, usual commissions and other banking charges chargeable in respect of the transaction and their mode of computation against which the appellant is now complaining?

Clauses 1, 2 and 4 of the agreement, Exhibit KN3, read as follows:

“(1) The borrower will pay to the bank on demand all monies and liabilities now or hereafter due and owing to the bank by the borrower in any manner whatsoever whether as principal or surety, either solely or jointly with any other company, society, corporation, person or persons in partnership or otherwise and when the said monies shall become due and payable herein to pay interest from time to time of such demand until actual payment thereof at the rate aforesaid computed with monthly interest with interest owing at the date in each month to which interest is normally computed being added monthly to the amount owing so as to form one aggregate sum carrying interest at the rate aforesaid.

(2) That the overdraft facilities granted by the bank, the borrower shall include interest computed in accordance with the prevailing interest rate of the bank or such other rates as the bank may from time to time determine including all usual commissions and customary banking charges and all costs and expenses incurred in connection with or incidental to the overdraft facilities.

(4) That if and when the overdraft facilities expire, there remains a balance unpaid or so long as the same or any part thereof shall remain due and unpaid the borrower shall pay back to the bank interest thereon at the same rate as agreed. It shall be lawful for the bank to charge all commissions, costs, bank charges and expenses relating to overdraft facilities and same shall subsists until final liquidation of any sum outstanding.”

See Exhibit KN3 at 14 of the record of appeal.

That is the agreement entered into and signed by the parties in respect of the overdraft facilities.

In clause 2 of the agreement, Exhibit KN3, the parties agree that the overdraft facilities granted by the respondent
to the appellant shall include interest computed in accordance with the prevailing interest rate of the respondent bank or such other rates as the respondent may from time to time determine including all usual commissions and customary banking charges and all costs and expenses incurred in connection with or incidental to the overdraft facilities.

Clause 2 of Exhibit KN3, the agreement between the parties, empowers the respondent to charge interest on the overdraft. It empowers the respondent to compute the interest so chargeable in accordance with the prevailing interest rate of the respondent bank or to compute the interest in accordance with such other rates as the respondent may from time to time determine. In determining the interest chargeable, the respondent may include all usual commissions and customary banking charges, and all costs and expenses incurred by the respondent in connection with or incidental to the overdraft facilities.

Similarly, clause 1 of the agreement, Exhibit KN3, enjoins the appellant, when the monies under the overdraft become due and payable, to pay interest from time to time of such demand until actual payment thereto. When clauses 1 and 2 of the agreement, Exhibit KN3, are read together, it shows that interest payable shall be computed in accordance with the prevailing interest rate of the respondent bank, and shall be computed with monthly interest with interest owing at the date in each month to which interest is normally computed being added monthly to the amount owing so as to form one aggregate sum. In other words, a sober reading together of clauses 1 and 2 of the agreement shows that the interest chargeable to the overdraft, the subject matter of Exhibit KN3, shall be compound interest.

Again, the effect of the combined provisions of clauses 2 and 4 of the agreement is that when the said overdraft facilities expire, and there remains a balance unpaid or so long as the overdraft itself or any part of it remains unpaid, the appellant shall pay to the respondent interest on the facilities at a rate computed in accordance with the prevailing interest rate of the respondent bank and it shall be lawful for the
respondent to charge all commissions, costs, bank charges and expenses relating to the overdraft facilities. Those are the provisions of the agreement between the parties.

It is the general rule that where parties to an agreement have set out the terms thereof in a written document, extrinsic evidence is not admissible to add to, vary, subtract from or contradict the terms of the written instrument (see Olaloye v Balogun (1990) 5 NWLR (Part 148) 24; Union Bank Nigeria Ltd v Ozigi (1994) 1 NWLR (Part 333) 385 and UBN Ltd v SAX (Nigeria) Ltd (1994) 8 NWLR (Part 361) 150 at 164; section 131(1) the Evidence Act, 1990). Therefore, if there is any disagreement between the parties to a written agreement as to what is the term of the agreement on any particular point, the authoritative and legal source of information for the purpose of resolving the disagreement is the written agreement executed by the parties. In this case, the document containing the terms of the agreement relating to the overdraft (Exhibit KN3) (see UBN Ltd v SAX (Nig.) Ltd (supra) at 164).

The provisions of the agreement between the parties, Exhibit KN3, are very clear and unambiguous. When the document is clear and unambiguous, the operative words in it should be given their simple and ordinary grammatical meaning. Further, the general rule is that, when the words of any instrument are free from ambiguity in themselves and when the circumstances of the case have not created any doubt or difficulty as to the proper application of the words to claimants under the instrument or the subject matter to which the instrument relates, such an instrument is always to be construed according to strict, plain, common meaning of the words themselves (see UBN Ltd v SAX (Nigeria) Ltd (supra) at 165).

Once the conditions necessary for the formation of a contract are fulfilled by the parties thereto, they are bound by it. It is not the business of the court to make a contract for the parties or to re-write the one which they have made (see
In the present case on appeal, the agreement between the parties (Exhibit KN3) clearly empowers the respondent bank to charge interest at the prevailing interest rate of the bank. The respondent is also empowered by the agreement to charge all commissions, costs, bank charges and expenses relating to the overdraft facilities. The agreement does not enjoin the respondent, in computing the interest on the overdraft facility, to consult the appellant. Under no circumstance should new or additional words be imported into the text unless the document would be by the absence of that which is imported, impossible to understand (see Solicitor-General, Western Nigeria v Adebonojo (1971) 1 All NLR 178 cited with approval in Union Bank of Nigeria Ltd v Ozigi (supra)).

In the circumstances, the respondent having attached Exhibit KN3 to his affidavit in support of the writ of summons and stating that, in his belief the appellant had no defence to the claim, I am of the view that the respondent has sufficiently set forth the grounds upon which the claim was based to justify an order placing the cause on the undefended list. The affidavit of the respondent with Exhibits KN1 and KN3 attached thereto contained sufficient materials to ground the order made by the learned trial Judge placing the cause on the undefended list.

The other aspect of the issue for consideration is whether the affidavit of the appellant in support of the notice of intention to defend disclosed a defence on the merit to warrant an order of the court for the case to be tried on the general cause list.

At 17–20 of the record of appeal, the appellant filed a notice of intention to defend and supported the notice by affidavit and further affidavit with an Exhibit marked as Exhibit 1.

A critical examination of the affidavit and further affidavit in support of the notice of intention to defend filed by the
appellant does not show any paragraph where the appellant denied ever taking the overdraft facilities from the respondent. All the complaints of the appellant relate to the interest element and other banking charges made by the respondent. The only semblance of a defence is that sum of N545,000 (Five Hundred and Forty-five Thousand Naira), which the appellant paid (vide Exhibit 1 attached to the further affidavit). The money was paid after the last date on Exhibit KN1.

After a sober reflection on the affidavit and further affidavit in support of the notice of intention to defend, it seems to me all the complaints made by the appellant in respect of the interest elements and other banking charges and commissions aspect of the debt being claimed are misconceived in that the overdraft agreements between the parties, Exhibit KN3, empowers the respondent to charge interest and other banking charges and commissions as it did.

The power given by the relevant clauses of the overdraft agreement between the parties (Exhibit KN3) could not properly be used to stipulate an arbitrary rate of interest or rates of interest contrary to the guidelines given by the Central Bank of Nigeria, because under section 15 of the Banking Act (Cap 28) of the Laws of the Federation of Nigeria, 1990, the rates of interest charged on advances, loans or credit facilities or paid on deposits by any licensed bank is to be linked to the minimum rediscount rate of the Central Bank subject to stated minimum and maximum rates of interest and the minimum and maximum rates of interest when so approved are to be the same for all licensed banks. The interest structure of each licensed bank is subject to the approval of the Central Bank.

Upon consideration of the totality of the evidence before the learned trial court, it seems to me the affidavits filed by the appellant in support of the notice of intention to defend does not disclose a defence on the merit to justify the invocation of Order 23 Rule 3(2) of the Kano State High Court (Civil Procedure) Rules, 1988 by the learned trial Judge. With Exhibit KN3 attached to the affidavit in support of the
summons by the respondent, the learned trial Judge was right in holding that the items relating to interest, charges, costs and expenses claimed by the respondent have been established.

The next issue for consideration is whether the failure of the trial court to transfer a cause to the general cause list amounts to a denial of the appellant’s right to a fair hearing.

In arguing the issue in his brief of argument, the learned Counsel for the appellant referred to paragraphs 3(f) and 3(g) of the appellant’s affidavit in support of the notice of intention to defend, where, according to the learned Counsel, the appellant categorically denied the existence of an express agreement on the chargeable interest rate and other bank charges. He submitted that since Exhibit KN1, i.e. the statement of account, incorporates claims on bank charges and compound interest as constituting the whole sum claimed by the respondent, there was an irreconcilable conflict between the deposition of the respondent and that of the appellant. He submitted that the conflict could only be resolved by the trial court calling oral evidence. He cited National Bank v Are Brothers (1977) 6 SC 97; Pharmacists Board v Adebesin (1978) SC 43.

He further submitted that where the trial court failed to allow the determination of the truth in respect of affidavits that are conflicting on vital issues, the refusal borders on the infringement of the right of the parties to a fair hearing, as their right of cross-examining the witnesses for the purpose of ascertaining the truth had been infringed. He argued that the affidavit of the respondent and those of the appellant were in conflict on vital issues, and that such vital issues could only be resolved by calling oral evidence.

He submitted that since the affidavits of the appellant in support of the notice of intention to defend disclosed some doubt on the case for the respondent, the failure of the trial court to transfer the matter to the general cause list is a breach of section 33(1) of the Constitution of the Federal Republic, 1979. He urged the court to allow the appeal.
One of the cardinal principles of our judicial system is the adoption of the principle of fair hearing. The basic criteria and attributes of fair hearing include:

(a) that the court or tribunal hear both sides not only in the case but also on all material issues in the case before reaching a decision which may be prejudiced to any party in the case;

(b) that the court or tribunal shall give equal treatment, equal opportunity and equal consideration to all concerned; and

(c) that, having regard to all the circumstances in every material decision in the case, justice must not only be done but must manifestly and undoubtedly be seen to have been done.


In the present case on appeal, the writ was issued on the undefended list under the provisions of Order 23 Rule 1 of the Kano State High Court (Civil Procedure) Rules, 1988. According to the provisions of the rule, a matter instituted on the undefended list is determined purely on the basis of affidavit evidence. For ease of reference, I shall set out the relevant positions of Order 23 of the Kano State High Court (Civil Procedure) Rules, 1988. It provides:

“Order 23

(1) Whenever application is made to a court for issue of a writ of summons in respect of claim to recover a debt or liquidated money demand and such application is supported by an affidavit setting forth the grounds upon which the claim is based and stating that in the deponent’s belief there is no defence thereto, the court shall, if satisfied that there are good grounds for believing that there is no defence thereto, enter the suit for hearing in what shall be called the ‘Undefended List’, and mark the writ of summons...
accordingly, and enter thereon a date for hearing suitable to the circumstances of the particular case.

(3)(1) If the party served with this writ of summons and affidavit delivers to the Registrar a notice in writing that he intends to defend the suit together with an affidavit disclosing a defence on the merit, the court may give him leave to defend upon such terms as the court may think just.

(3)(2) Where leave to defend is given under this rule, the action shall be removed from the ‘Undefended List’ and placed on the ordinary cause list; and the court may order pleadings or proceed to hearing without further pleadings.

(4) Where any defendant neglects to deliver the notice of defence and affidavit prescribed by rule 3(1) or is not given leave to defend by the court, the suit shall be heard as an undefended suit, and judgment given thereon, without calling upon the plaintiff to summon witnesses before the court to prove his case formally.

(5) Nothing herein shall preclude the court from hearing or requiring oral evidence, should it so think fit, at any stage of the proceeding under Rule 4.”

In the instant case, application for a writ of summons on the undefended list was made under Order 23(1) and the suit was placed on the undefended list for hearing. The appellant was served with the writ and the affidavit in support in accordance with Order 23(2) of the Rules and he took advantage of Order 23(3)(1) and delivered to the Registrar a notice in writing that he intended to defend the suit. He filed an affidavit and further affidavit with an Exhibit in support of the notice of intention to defend.

The matter came up for hearing. The appellant and the respondent were each represented by Counsel, and heard by the court on their respective affidavit evidence, under Order 23(3)(1) of the Rules. The court considered both the affidavit in support of the summons with the exhibits attached thereto and the affidavits with the Exhibit in support of the notice of intention to defend. In the consideration of the case of both parties, the learned Judge stated *inter alia* as follows:–

“The contention of the defendant over his indebtedness to the plaintiff is not on the principal sum borrowed by him but on the interest and other charges. The defendant in paragraph 3(d) of his
notice of intention to defend averred that the statement of claim does not provide sufficient information as to the agreement of the parties on the interest, usual commissions and other bank charges chargeable in respect of the transaction and the mode of their computation. In paragraphs 3(e) and 3(f) of the affidavit in support of notice of intention to defend the defendant said that both the plaintiff and the defendant agreed by paragraph 4 of Exhibit KN3 in support of the writ that chargeable interest should be based on agreement but the plaintiff unilaterally charges interest and other bank charges without any agreement reached with the defendant.”

The learned trial Judge then construed Exhibit KN3 which the appellant alleged governed the transaction between the parties and came to the conclusion that there was no merit in the notice of intention to defend filed by the appellant to transfer the matter into the general cause list as the affidavit in support of the notice did not disclose a defence to the action. The suit was then heard as an undefended suit and judgment was given in accordance with Order 23(4) of the Rules (see at 24–33 of the record of appeal).

The appellant was imploring the trial court to transfer the cause to the general cause list, according to the appellant, because there were conflicts between the affidavit in support of the summons and the affidavits in support of the intention to defend. The case of the respondent was based on Exhibits KN1 and KN3. A close and analytical reading together of the affidavit in support of the summons filed by the respondent and the affidavits in support of the notice of intention to defend filed by the appellant clearly shows that the appellant did not join issues with the respondent on the respondent’s Exhibits KN1 and KN3 which is the appellant’s statement of account with the respondent and the overdraft agreement between the parties respectively. The appellant did not deny taking the overdraft facilities in the sum of ₦1 Million (One Million Naira). He did not say how much exactly he was owing to contradict the amount stated in Exhibit KN1, he did not state in his affidavits how much interest or other charges the respondent ought to have charged as opposed to what he now charged. Furthermore, the appellant did not
deny the agreement entered into by the parties (Exhibit KN3); indeed, he admitted Exhibit KN3 as the agreement governing the transaction between the parties. In that regard, I think no further evidence was necessary for the learned trial Judge to resolve the issues raised by the parties.

The complaint of the appellant is that the respondent unilaterally and arbitrarily charged interest and other bank charges and commission without the appellant’s consent. The issue as to whether the respondent has power to charge the interests and other bank charges as it did cannot be resolved by oral evidence that the appellant requested for. The issue can only be and must only be resolved by close examination for the written agreement, Exhibit KN3, between the parties. Oral evidence is not admissible to vary, subtract from or contradict the terms of Exhibit KN3 with respect to the powers of the respondent to charge interest and other bank charges in respect of the overdraft facilities between the parties (see UBN Ltd v SAX (Nigeria) Ltd (supra) 164–165).

From the totality of the evidence before the trial court, it seems to me that the trial court only followed the procedure under Order 23 of the Kano State High Court (Civil Procedure) Rules, 1988, as should be followed and, by virtue of the combined provisions of Order 23 Rules 3 and 3(1) of the Rules, a defendant is given an opportunity of being heard. Indeed the appellant took advantage of Order 23(3)(1) after he has been served with the summons by filing a notice of intention to defend in accordance with the Rules.

In conclusion I am of the view that the appeal is unmeritorious and should be dismissed. I therefore dismiss the appeal and affirm the judgment of the trial court dated 10 May, 1999. The appellant shall pay costs of ₦5,000 (Five Thousand Naira) to the respondent.

SALAMI JCA: I read before now the judgment just delivered by my learned brother, Obadina JCA, with which I am entirely in agreement. I agree with the reasoning contained in it and the conclusion he arrived at.
Generally, an award of interest in Nigeria is still subject to the common-law principle and practices as stated in the Supreme Court decision in *Ekwunife v Wayne (West Africa) Ltd* (1989) 5 NWLR (Part 122) 422 at 488 where it was decided that interest may be claimed where it was contemplated by the agreement between the parties or under a mercantile practice or under a principle of equity such as breach of fiduciary relationship.

By universal custom of banking, a banker has the right to charge interest at reasonable rate on all overdrafts (*Crosskill, Bower, Bower v Turner* (1863) 32 LJ Ch 54). The practice of bankers debiting interest on overdrawn accounts was considered in *Yourell v Hibernian* (1918) AC 372 in which Lord Atkinson at 385 of the report said:–

“The bank, by taking the account with these half-yearly rests, secured for itself the benefit of compound interest. This is usual and perfectly legitimate mode of dealing between banker and customer.”

The Federal Supreme Court, however, in *Rickett v B.W.A. Ltd* (1960) 5 FSC 113 at 118; (1960) SCNLR 227 was of the view that compound interest on an overdraft is chargeable only where the customer has agreed to it or where he is shown or must be taken to have acquiesced in the account being kept on that basis (Halsbury’s *Laws of England* Vol. 2 (3ed) at 299). There is evidence of the appellant receiving a statement of account and he never protested the interest charged therein. Although the rate of interest was not stated in the agreement, the parties thereto agreed to interest being charged.

In the circumstance, there is no substance in the contention of the learned brother, Obadina JCA, which I adopt as mine. I also dismiss the appeal.

I adopt all the consequential orders including the order as to costs proposed in the said lead judgment.

**Omage JCA:** The facts in this appeal can be summarised as follows: The appellant in the course of the business borrowed through overdraft facilities from the respondent, the
The loan carried an interest according to the agreement at the rate of the current banking rate. When the sum became due for repayment, the respondent caused its solicitor to demand the sum due, the appellant did not pay, upon which reason, the respondent commenced proceedings in the High Court claiming from the appellant the sum of ₦1,931,893.88 with interest at 21% from 8 October, 1988 until judgment was delivered. The writ filed was under the undefended list procedure. It was accompanied by an affidavit setting forth the facts of the loan, the interest accruable and the failure of the appellant, then defendant, to make the payment when it became due. There were also annexures to the affidavit of the respondent, one of which is Exhibit KN3. The appellant, as defendant, filed in the court below a notice of intention to defend the claim, to which he annexed an affidavit. In the affidavit, the appellant admitted the receipt of facilities of a loan of One Million Naira but contested the issue of interest which swelled up the sum of his liability to the respondent. On this defence he urged the court to place the suit on the general cause list. After consideration of the affidavit of both parties, the court below declined to place the claim on a general cause list, and acting under Order 23 Rules 1–2 and 3 of the Kano State High Court (Civil Procedure) Rules pronounced judgment in favour of the respondents against the appellants in many words amongst which are the following: “Judgment is accordingly entered for the plaintiff against the defendant in the sum of ₦1,386,893 (One Million, Three Hundred and Eighty-six Thousand, Eight Hundred and Ninety-three Naira) being money payable by the defendant to the plaintiff and the interest agreed to be paid on money lent.” On the issue of interest alleged by the appellant as not being due to the plaintiff. This is what the trial court said:—

“I found no merit in the notice of intention to defend filed by the defendant to transfer the matter into the general cause list because even from the submission of defence Counsel and the notice of intention to defend, the defendant has no defence to this action. Paragraph 4 of KN3, which the defendant referred to for itself. The
defendant misinterpreted that paragraph when he asserts that agreement as to the interest rate and other bank charges has not been reached. Paragraph 4 of Exhibit KN3 speaks for itself. The defendant having executed KN3 cannot back out from the agreement, etc."

It is against the above judgment that the defendant in the court below appealed, filing six grounds of appeal, and he formulated three issues for determination in this Court. The three issues are as contained in the lead judgment of my learned brother, O Obadina JCA. I am in agreement that ground one of the appellant raised in Issue one the same issues as formulated by the respondent, which is the only issue which in my view goes to the substance of the issue to be determined in this appeal. It is this: “Whether the affidavit of the appellant disclose a defence on the merit within the meaning of Order 23 Rule 3(1) of the Kano State High Court (Civil Procedure) Rules, 1988 to warrant a transfer (of claim) to the general cause list especially as the action was brought on the undefended list.”

Upon receipt of the respondent’s brief, the appellant filed a reply brief; the contents of the reply brief in an elucidation of the appellant’s contention.

Before proceeding to consider the submissions of the parties it is pertinent here to state the provisions of Order 23 Rule 1 and 5 of the Kano State (Civil Procedure) Rules, 1988:–

“Whenever an application is made to a court for issue of a writ of summons in respect of a claim to recover a debt or liquidated money demand and such application is supported by an affidavit setting forth the grounds upon which the claim is based, stating that in the deponents beliefs there is no defence thereto, the court shall if satisfied that there are no grounds for believing that there is no defence thereto enter the suit for hearing in what shall be called ‘undefended list’ etc.”

Rule 3(1) reads:

“If the party served with the civil summons and affidavit as provided in Rules 1 and 2 deliver to the Registrar not less than 5 days..."
before the date fixed for hearing the court may give him leave to defend etc. Nothing therein shall preclude the court from hearing or requiring oral evidence should think it fit at any stage of the proceedings etc.”

The appellant also averred in the second issue formulated that he was denied a fair hearing because the claim was not transferred to the general cause list. Generally, the rule of procedure as contained in the Evidence Act Cap 112 of the Laws of Federation of Nigeria, 1990 and in our adversary system of obtaining a just and equitable resolution of a dispute enable both parties, in the first instance the plaintiff, to submit his claim to the court by viva voce evidence by tendering documentary evidence at the proceedings. The defendant is also enabled by the procedure to present his defence viva voce. There is a cross-examination and re-examination of the oral evidence tendered. In the case of the procedure under the undefended list under Order 23 Court Procedure Rules proof of a claim is by affidavit evidence. Though oral evidence is permitted at the hearing of a claim under an undefended suit, it is not a trial. It is a hearing.

The discretion to place a suit on an undefended list belongs to the Judge, because the rules says: “If the court is satisfied that there are good grounds for believing that there is no defence thereto.” That being so, can the procedure under Order 23 not be supposed to be an aberration? A departure from the norm? When therefore the appellant and the respondent submit in their separate briefs and the appellant asks whether there were sufficient defence offered by the defendant for the claim to be transferred to the general cause list. He queries the discretion of the court below to decide whether its discretion was judiciously exercised. Since the transfer of the case to the general cause list is the discretion of the Judge can it be said that a fair hearing is denied? My view is that the issue of denial of a fair hearing does not arise.

The matters to be determined in the instant case have been competently considered in the lead judgment with which I agree. The issue turns on this.
Did the defendant, now appellant, present any viable defence in the court below, which warrant the transfer of the case to the general cause list? When it is clear that the defendant has admitted the receipt of the capital sum of one million naira from the plaintiff/respondent and the annexure to the plaintiff affidavit shows that the defendant signed the Exhibit, which gave right to the plaintiff claiming to charge interest, at current bank rate. There is nothing of contest to the plaintiff’s claim. There is therefore nothing to send to the general cause list. It is for the reasons that I affirm the judgment of the Kano High Court delivered by Honourable Justice JY Hassan, and dismiss the appeal. I abide by the Order for costs made in the lead judgment.

*Appeal dismissed.*
First Bank of Nigeria Plc v Dr Abdulkadir Oniyangi

COURT OF APPEAL, ILORIN DIVISION

AMAIZU, OKUNOLA, ONNOGHEN JJCA

Date of Judgment: 28 FEBRUARY, 2000

Suit No.: CA/IL/42/99

Banking – Loan – Recovery of – Action therefor – Whether prior demand for repayment a sine qua non

Facts

Before the lower court, the appellant’s claim was for the sum of N976,051.14 being the outstanding loan remaining unpaid by the respondent as at 31 October, 1996. It also claimed an interest rate of 20.5% per annum from 1 November, 1996 till delivery of judgment.

The appellant’s case was that in February, 1986 the respondent applied for and was granted a loan of N100,000 with which to execute a project. In April of the same year the respondent applied for an additional loan of N89,965.80 which was also approved, thus bringing the total loan granted to N189,965.80. Initially, the interest rate of the loan was fixed at 13% per annum. The parties later entered into a mortgage agreement wherein the terms of the loan were clearly specified. According to the appellant, the respondent made irregular periodic payments to liquidate the loan amounting to N224,679 and the amount was deducted before arriving at the amount claimed by the appellant.

The respondent’s case was that he had refunded a total of N308,000 and thus overpaid the loan by N118,000. At the close of hearing, and after addresses by Counsel for the parties, the learned trial Judge dismissed the appellant’s case as lacking in proof.

Aggrieved, the appellant appealed to the Court of Appeal. Counsel for the appellant contended inter alia that a debt is repayable either on demand, or on notice given or upon any other condition agreed by the parties, and that since in the present case the parties agreed on a specific date for
repayment of the loan, a demand or notice was no longer necessary.

**Held**

A demand is not necessary in law when a bank seeks to recover a loan in the present case unless there is an agreement to that effect.

*Appeal allowed.*

**Cases referred to in the judgment**

**Nigerian**

*Anyaebosi v R.T. Briscoe (Nigeria) Ltd* (1987) 3 NWLR (Part 59) 84

*Balogun v Labiran* (1988) 3 NWLR (Part 80) 66

*Ekpenyong v Nyong* (1975) 2 SC 71

*Lewis and Peat (NRI) Ltd v Akhimien* (1976) 7 SC 157

*Mogaji v Odofin* (1978) 4 SC 91

*Odoﬁn v AR Mogaji* (1978) NSCC 275

*Odunsi v Bamgbala* (1995) 1 NWLR (Part 374) 641

*Okoebor v Eyobo Engineering Services (Nigeria) Ltd* (1991) 4 NWLR (Part 187) 553

*Olufosoye v Olorunfemi* (1989) 1 NWLR (Part 95) 26

*UBA Ltd v O Abimbola and Co.* (1995) 9 NWLR (Part 419) 371

*UBN v Ozigi* (1994) 3 NWLR (Part 333) 385

**Judgment**

AMAIZU JCA: *(Delivering the lead judgment)* This is an appeal against the judgment of Gbadeyan J of Kwara State High Court, sitting at the Ilorin Judicial Division.

The judgment was delivered on 23 December, 1997.
In the suit, the plaintiff, now the appellant, claimed against the defendant, now the respondent, as follows:-

“An order that the defendant should pay the plaintiff the sum of ₦976,051.14k (Nine Hundred and Seventy-six Thousand and Fifty-one Naira, Fourteen Kobo) being the outstanding loan remaining unpaid by the defendant as at 31 October, 1996 and the same amount to be paid at the interest rate of 20.5% per annum from 1/11/96 until judgment is delivered.”

Pleadings were duly filed and exchanged. Both parties amended their pleadings at least once. Thereafter the trial proceeded on the amended pleadings.

Two officials of the appellant company gave evidence. The first witness was the appellant’s credit officer. It is his evidence that the appellant is a public liability company carrying on banking business. The respondent is one of its customers. Sometime in February, 1986, the respondent applied for a loan of ₦100,000 with which to execute a project. The loan was granted to the respondent.

In April of the same year, the respondent applied for an additional loan of ₦89,965.80k. This was also approved, thus bringing the total loan granted to the respondent to ₦189,965.80k. Initially, the interest rate on the loan was fixed at 13% per annum. Later the parties entered into a mortgage agreement (Exhibit 4) wherein the terms of the loan were clearly specified.

It is his evidence that the respondent made irregular periodic payments to liquidate the loan. The witness put the total repayments made by the respondent at ₦224,679. It is his evidence that he deducted the amount before arriving at the sum now claimed by the appellant.

The witness tendered Exhibit 3 which is the record of the loan account of the respondent kept by the appellant. According to the witness, the only evidence that denotes payment into the appellant bank is a teller which is stamped and signed by a cashier in the appellant bank. When the witness was shown Exhibit 7(1–29), the tellers used by the respondent in making his payments, he acknowledged some
payments in the said exhibits which were not reflected in Exhibit 3.

Following this, the learned Counsel for the appellant applied for and was granted leave to amend his statement of claim. In consequence of the amendment, Exhibit 8 was tendered to replace Exhibit 3.

PW2 testified that all the interest shown in Exhibit 8 were fixed by the Central Bank of Nigeria. The total amount outstanding in Exhibit 8 is ₦747,698.70k.

On the other hand DW1, a chartered accountant who prepared the books of the respondent, testified that the total amount, principal and interest owed to the appellant by the respondent is ₦387,300.71k. It is further his evidence that he used both clause 2 of Exhibit 4 and the rate of interest in Exhibit 8 in arriving at this conclusion.

The respondent in his evidence claimed that he has refunded a total of ₦308,000 and that he overpaid by ₦118,000.

At the close of the hearing and after addresses by the learned Counsel for the parties, the learned trial Judge in a reserved judgment held as follows:

“In this case, the case of the defendant is far more coherent and credible than that of the plaintiff. The defence however owed no duty to prove anything. It is the plaintiff who brought the defendant to court who has a binding duty to prove by satisfactory evidence that the plaintiff is entitled to what it was claiming from the defendant. Unless there be satisfactory evidence by the defence in support of the plaintiff’s case, which is totally lacking in the instant case, the plaintiff has to succeed on the strength of his case and not on the weakness of the defendant’s. Exhibit D1 of September, 1997, prepared for the purpose of this case when the hearing was already in progress to say the least, has a doubtful propriety, and above all, it lacks probative value . . . whichever way one looks at this case, it stands no chance of success, and it shall be and it is hereby dismissed.”

The appellant was dissatisfied with the judgment. It has appealed against it into this Court. In compliance with the
Court’s Rules, the parties, through their Counsel, filed and exchanged briefs of argument. Before us the parties adopted their respective briefs and relied on the submissions made therein.

In its brief of argument, the appellant set the following issues for determination:–

1. Whether the learned trial Judge was right in dismissing appellant’s case on the ground that it did not prove the case by “satisfactory evidence”? Vide Ground 1.

2. Whether the learned trial Judge was correct in his finding that while the appellant’s evidence was contradictory, the evidence of the respondent was credible? Vide Ground 2.

3. Whether the learned trial Judge was correct in his finding that the interest rate of Central Bank of Nigeria (CBN) was not tendered and that the amount claimed by the appellant was not pleaded? Vide Ground 3.

4. Whether the trial Judge’s judgment was not against the weight of the evidence before him? Vide Ground 5.

The respondent in his brief of argument, adopted the above four issues formulated by the appellant. I will determine this appeal on the four issues.

On issue 1, Chief Odeyemi of Counsel, submitted that the standard of proof required in a civil case, is proof on preponderance of evidence or on balance of probabilities. He cited Balogun v Labiran (1988) 6 SCNJ 71 at 79–80; (1988) 3 NWLR (Part 80) 66; Elias v Omo Bare (1982) 5 SC 25 at 47.

It is his contention that the learned trial Judge did not apply this yardstick of preponderance of evidence but rather the learned trial Judge dismissed the appellant’s case on the ground that it did not prove its case by satisfactory evidence.

In support of this, the learned Counsel referred to the following passages in the judgment:–

(i) Page 75 lines 6–9:–

“It goes without saying that when a plaintiff alleges anything of which the defendant denies, a duty is imposed on
the plaintiff to prove such facts by proffering satisfactory evidence.”

(ii) Page 76 lines 23–26:–

“There is no defence of non est factum against the mortgage deed but the defendant has by the way challenged his not being given a copy and there is no satisfactory evidence that he was ever given his own copy.”

The learned Counsel contended that the appellant proved by preponderance of evidence that the respondent was given his own copy of the mortgage deed. He referred to the evidence of:

(i) PW1 that both parties executed the mortgage deed and that the respondent was given his own copy; and

(ii) DW1 that he was given a copy of the mortgage deed by the respondent.

He urged the court to answer Issue 1 in the negative.

In his reply on Issue 1, Salman, Esq., S.A.N., submitted that the learned trial Judge was right in dismissing the appellant’s case on the ground that the appellant did not prove its case by satisfactory evidence. He further submitted that, in law, satisfactory evidence simply means evidence which a trial Judge hears, accepts, believes and puts on imaginary scale and finds that it weighs more than that of the other party. It is the learned S.A.N.’s view that it is when the evidence of one party weighs more than that of the other party on the imaginary scale that the evidence satisfies the definition of preponderance of evidence or proof on the balance of probabilities. It is further his view that it is the learned trial Judge that is the person who must be satisfied after hearing the witness and watching his demeanour in the witness box as to whether the evidence is acceptable and believable before putting it on the imaginary scale (Mogaji v Odojin (1978) 4 SC 91 at 93). The learned S.A.N. submitted that satisfactory evidence is no more than that evidence which reached the standard of proof known as preponderance of evidence or proof on the balance of probabilities. In
his view, the learned trial Judge has not offended against the rule laid down in *Balogun v Labiran* (1988) 6 SCNJ 71 at 79–80; (1988) 3 NWLR (Part 80) 66 and *Elias v Omo Bare* (1982) 5 SC 25 at 47.

Finally he submitted that the learned trial Judge was right when he said that when a plaintiff alleges anything he must prove it by satisfactory evidence.

It has been accepted by a long line of decided cases that in a civil case the burden of proof is generally on a plaintiff. In order to succeed, a plaintiff has to prove his case on a preponderance of evidence or on a balance of probabilities. In the case of *Madam Rabiatu Odofin and others v A.R. Mogaji and others* (1978) NSCC 275 the Supreme Court explained what it meant when it is said that a civil case is decided on the balance of probabilities or on a preponderance of evidence. It is the view of that court that, before a Judge before whom evidence adduced by the parties in a civil case comes to a decision as to which evidence he believes or accepts and which evidence he rejects, he should first of all put the totality of the testimony adduced by both parties on that imaginary scale. He will put the evidence adduced by the plaintiff on one side of the scale and that of the defendant on the other side of the scale and weigh them together. He will then see which is heavier, not by the number of witnesses called by each party, but by the quality or the probative value of those witnesses.

My understanding of the above explanation by the apex court is that proof in a civil case is not influenced by personal feelings or opinions. In other words, proof is objective and not subjective.

It does seem to me that to require a plaintiff as was done in this case to prove its case by satisfactory evidence imports an element of subjective judgment. It is because of this, in my view, that the Supreme Court, when it described the standard of proof in a civil case of *Aliyu Balogun v Alhaji Labiran* (1988) 3 NWLR (Part 60) 66; (1988) 1 NSCC 1056
at 1064, stated thus:–

“. . . he had to satisfy the trial court on the preponderance of evidence that at the time of the trespass he was in exclusive possession of the house . . .” (italics mine).

In the present suit, the respondent averred in his amended statement of defence as follows:–

“The defendant says a copy of the mortgage deed prepared by the plaintiff was not made available to him.”

In his oral evidence, the respondent did not say if a copy of the mortgage deed was given to him or not. His witness DW1, however, stated as follows:–

“I used Exhibit 4 clause 2 because I saw the signature of my client on the document which he gave to me.”

In addition to the above evidence, PW1 in his evidence said:–

“It is not true that we did not give the defendant a copy of the mortgage deed. The defendant himself brought the consent to mortgage and went away with a copy of the mortgage deed.”

In spite of the above overwhelming evidence showing that the respondent had a copy of the mortgage deed, the trial Judge held as follows:–

“There is no defence of non est factum against the mortgage deed but the defendant has, by the way, challenged his not being given a copy and there is no satisfactory evidence that he was ever given his own copy . . .”

I hold that the learned trial Judge came to this wrong conclusion because he used a wrong standard of proof to evaluate the evidence before him, to wit, proof by satisfactory evidence instead of proof by preponderance of evidence or balance of probabilities. I uphold the submission of the learned Counsel on this issue.

On issue 2 Chief Odeyemi of Counsel contended that the learned trial Judge was wrong to have held that the evidence of the appellant was contradictory, while the evidence of the respondent was credible. The learned Counsel observed that
Amaizu JCA

First Bank of Nigeria Plc v. Dr Abdulkadir Oniyangi

1. The learned trial Judge did not show how PW1 and PW2 contradicted each other in their evidence.

   It is his view that the learned trial Judge came to the wrong conclusion because he made use of Exhibit 3 which was replaced with Exhibit 8. He submitted that once there was an amended statement of claim and an amended statement of account the learned trial Judge was no longer entitled to make use of the original statement of claim, and the original statement of account earlier tendered. He placed reliance on the case of *Colonel Rotimi and others v Macgregor* (1974) 1 All NLR (Part 11) 325 at 340–341. He then emphasised that PW2 in his evidence urged the court to disregard Exhibit 3 and use Exhibit 8 in arriving at his judgment. It is his view that it was the evidence of the respondent and his witness that contradicted each other. To buttress his point, the learned Counsel referred to the evidence of witnesses on the total indebtedness of the respondent to the appellant.

   1. At page 65 lines 29–31 of the record of proceedings DW1 said: “We did some computation of both the principal and interest owed by Dr Oniyangi as at 31 January, 1996 based on the agreed interest with the bank.”

   Continuing at page 66 lines 12–13 he said:–

   “The total indebtedness computed by us is ₦387,300.71 principal plus interest.”

   2. The respondent in his evidence at page 67 lines 32 to page 68 lines 1–2 said:

   “Although the bank says in Exhibit 8 that I owe ₦717,698.70, I disagree because I have settled the loan by overpaying to the tune of ₦118,000.”

   He contended that in view of the conflict in the evidence, the learned trial Judge should not have held that the evidence adduced on behalf of the respondent was credible. He urged the court to answer issue 2 in the negative.

   In his reply, *Salman*, Esq., S.A.N., of Counsel, submitted that the learned trial Judge was right in his decision that
there was contradiction in the evidence of the appellant’s witnesses. In his view, there are many contradictions in the evidence produced for the appellant. In this regard, the learned Counsel referred to the evidence of PW1 that the respondent did not make any repayment in 1993. The witness later agreed when he was shown Exhibit 7(19) which showed that the respondent made a repayment. It is his view that, even though the statement of account was amended and replaced with Exhibit 8, he had the right to ask questions on Exhibit 3. He contended that the case of *Colonel Rotimi v Macgregor* (1974) 1 All NLR (Part 11) 325 was irrelevant to this case.

It does seem to me necessary in order to appreciate the points being made by the learned Counsel for the parties in this suit to refer to the amended statement of claim filed by the appellant. In paragraph 8 thereof, the appellant pleaded an amended statement of account. The said document was later received in evidence on 12 March, 1997.

It is my view that a document referred to in a pleading is part of that pleading. It is therefore subject to the rules that regulate amendments of pleadings. It is trite that, once pleadings are amended, what stood before the amendment is no longer material before the court and no longer defines the issues to be tried. Exhibit 3 is therefore no exception to the rule. I accept, however, that Exhibit 3 can be used to cross-examine a witness. If an answer elicited from the cross-examination is not believed by the court that is the end of Exhibit 3.

As I observed earlier, Exhibit 8 was tendered on 12 March, 1997 by the consent of both Counsel after PW1 had been cross-examined.

In other words, PW1 did not give any evidence on the contents of Exhibit 8. From the record of proceedings, PW2 on the other hand did not give evidence on the contents of Exhibit 3. It does seem to me that as the parties gave evidence on two different documents their evidence cannot contradict each another.
Finally, from the above excerpts of the evidence of DW1 and the respondent which the learned Counsel for the respondent did not attempt to reconcile, it cannot rightly be said that “the evidence of the respondent was credible”. I answer issue 2 in the negative.

On issue 3, Odeyemi, Esq., of Counsel, urged the court to hold that the learned trial Judge was wrong in his finding that the appellant neither tendered the interest rate of the Central Bank of Nigeria (CBN) nor pleaded the amount claimed. He referred to paragraph 12 of the amended statement of claim. He then referred to the evidence of PW2 that:

“20.5% was the agreement but all the interests charged in Exhibit 8 were the interest fixed by the Central Bank.”

The learned Counsel referred to the evidence of DW1, a witness called by the respondent which agreed with the evidence of PW2. It runs thus:

“I have seen clause 2 of Exhibit 4 which contains the agreed interest rate. That is one I used. I used Exhibit 4 clause 2 because I saw the signature of my client on the document which he gave me to use etc.”

The learned Counsel then reminded this Court that the respondent did not contest the rate of interest either in his amended statement of defence or in his evidence in court.

On the issue of pleading the amount claimed by the appellant, the learned Counsel referred to paragraphs 11 and 16 of the amended statement of claim wherein the appellant pleaded the sum of ₦747,698.70k.

He reminded the court that, in the course of his evidence, DW1 spotted some mistakes in Exhibit 8. After taking care of the said mistakes, the amount eventually proved by the appellant was ₦568,512.13k.

He submitted that a court of law has power to award the lesser amount proved, that is the sum of ₦568,512.13k. He placed reliance on the case of Ekpenyong and others v Nyong and others (1975) 2 SC 71 at 81.)
In his reply *Salman*, Esq., of Counsel, submitted that the learned trial Judge was right in his finding that the interest rate of the Central Bank of Nigeria was not tendered and that the amount claimed by the appellant was not pleaded. He contended that the fact that the agreement between the parties, Exhibit 4, was tendered, is not evidence of any variation by the Central Bank on the interest rate at the relevant period. He further contended that, if a witness wants to give evidence in proof of a fact, that fact must be pleaded.

It is the learned S.A.N.’s view that the mere tendering of the mortgage deed, Exhibit 4, does not prove that in actual fact the Central Bank made any variation. It is further the learned Counsel’s view that, whether the Central Bank actually made variations or not in the interest rate during the relevant period, is a matter of fact.

Finally, the learned Senior Advocate of Nigeria conceded that a court of law has power to award less than the amount a party has claimed. He added, however, that the trial Judge must know the amount claimed by the appellant. This, according to the learned Senior Advocate of Nigeria, is to enable the learned trial Judge to know whether he is awarding less or more than a party is claiming. In his view, the case of *Ekpenyong v Nyong* (1975) 2 SC 71 at 81 supports his stand.

I agree entirely with the submission of the learned Senior Advocate of Nigeria that, if a witness wants to give evidence in proof of a fact, that fact must be pleaded. In order, in my view, to decide on whether the appellant pleaded the rate of interest fixed by the Central Bank of Nigeria or not, one has to refer to the pleading filed by the appellant.

In paragraph 12 of the amended statement of claim the appellant pleaded as follows:

“The plaintiff shall at the trial rely on the agreement between the parties which reads as follows:–

‘The Borrower will in the mean time pay to the Bank so long as any moneys shall be owing on the security hereof interest at the rate of 20.5% per annum over/below First
Bank of Nigeria Ltd prime lending rate ruling from time to time but never less than Central Bank of Nigeria minimum lending rate ruling from time to time such interest shall be calculated on the balance owing from day to day and to be payable by monthly instalments on the last day of each month. Provided always that if any such interest or interests payable on arrears of interest capitalised under this present clause shall remain unpaid after the day on which the same ought to have been paid the same shall be added for all purpose to the general balances of accounts hereby secured and shall thenceforth bear interest payable at the rate and on the day aforesaid.’

The plaintiff complied with this provision of the mortgage deed and the Central Bank of Nigeria guidelines on rates of interest in the preparation of the defendants statement of account.”

In reply to the above averment, the respondent averred in his amended statement of defence as follows:–

“The defendant denies paragraphs 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18 and 19 of the statement of claim and puts the plaintiff to the strictest proof thereof.”

The question then is, has the appellant by the averment in paragraph 12 above pleaded the interest rates fixed by the Central Bank of Nigeria. I answer the question in the positive. This is because in the paragraph the appellant pleaded facts in support of interest rates fixed by the Central Bank. In the case of Odunsi v Bamgbala (1995) 1 NWLR (Part 374) 641 at 647 it was held that where facts in support of a document are pleaded the document need not be pleaded.

The next question is, did the respondent deny the averment of the appellant that it complied with the CBN guideline on interest rate? The answer, in my opinion, is no. This is because, since the decision in the case of Messrs Lewis and Peat (NRI) Ltd v AE Akhimien (1976) NSCC 360; (1976) 7 SC 157 it has been held that there must be a proper traverse in order to join issues in a suit. In other words, if a defendant refuses to admit a particular allegation in the statement of claim, he must state so specifically, and he does not do this satisfactorily by pleading as the respondent has pleaded in this case.
But this is not all. PW2 in his evidence at the trial stated thus:–

“20.5% was the agreement, but all the interests charged in Exhibit 8 were the interest fixed by the Central Bank.”

The evidence of the respondent through his witness, DW1, on the issue is:–

“I have seen clause 2 of Exhibit 4 which contains the agreed interest rate. That is the one I used.”

“I used Exhibit 4 clause 2 because I saw the signature of my client on the document which he gave me to use.

I followed the rates of interest used in Exhibit 8.”

Of course, an admitted fact is not in issue (Chief Adebayo Bashorun Olufosoye and others v Johnson Olorunfemi (1989) 1 NWLR (Part 95) 26).

In my view, the respondent having admitted that Exhibit 4 contains the agreed rate of interest there was no need for the appellant to tender a copy of the CBN guidelines on the rate of interest.

On the issue of pleading the amount claimed by the appellant, paragraphs 11 and 16 show that the respondent’s debt to the appellant stands at $747,698.70. The respondent was able to show through the evidence of DW1 three defects in Exhibit 8, the loan account of the respondent. DW1 stated on oath that:–

“The correct figure ought to be 562,518.59 if these errors are taken care of based on the interest rates which the bank has used in its own computations and using the same compound interest applied by the bank.”

The trial Judge in his judgment rejected Exhibit D1 prepared by DW1 because according to him “it has a doubtful propriety and above all, it lacks probative value”.

It is evident that from the records the appellant proved that the respondent was indebted to it in the sum of 562,518.59. This amount is less than the amount which the appellant pleaded as owed to it. I agree with the submission of the learned Counsel for the appellant that the learned trial
Judge should have awarded it that amount. I answer issue 3 in the negative.

Finally, on issue 4, Odeyemi, Esq., of Counsel, submitted that the decision of the learned trial Judge is against the weight of evidence. In this regard, he referred to the evidence of the respondent and his witness on the amount owed to the appellant.

He then reminded the court that the present action was taken after the expiry of the six years stipulated in Exhibit 4 for payment of the debt. It is his view that a debt is repayable either on demand or on notice given or upon any other condition agreed by the parties. He cited Ishola v S.G. Bank (1997) 25 SCNJ 1 at 17; (1997) 2 NWLR (Part 488) 405.

He submitted that, since in the present case the parties agreed on a specific date for repayment of the loan, a demand or notice is no longer necessary.

It is his view that Exhibit 8 clearly shows that the learned trial Judge was wrong to have held that the interest on the loan was charged on a daily basis. He submitted that the dismissal of the appellant’s case by the learned trial Judge is therefore against the weight of evidence.

In his reply, Salman, Esq., S.A.N., submitted that the learned trial Judge’s decision was in accordance with the weight of the evidence before him. He further submitted that it is the duty of the appellant as plaintiff to adduce evidence which, when put on the imaginary scale, weighs more than the evidence produced by the respondent as the defendant. He referred to the evidence of DW1 that from his calculation the respondent owed the appellant N387,300.71k. He observed that the appellant did not plead this amount. He submitted that the appellant should have produced evidence showing the principal loan and the cumulative interest, how much was paid and how much remains to be paid. It is his view that the evidence of the two witnesses who testified on behalf of the appellant do not help his case.

It is trite that when an appeal complains that judgment is against the weight of evidence, all it means is that when the
evidence adduced by the appellant is balanced against that adduced by the respondent the judgment given in favour of the respondent is against the weight which have been given to the totality of the evidence before the learned trial Judge.

In the present suit, the learned trial Judge held that Exhibit D1 prepared by DW1 was lacking in probative value. The only evidence remaining then is Exhibit 8 as amended by the evidence of DW1. Unfortunately, the learned trial Judge was of the opinion that Exhibit 3 was part of the appellant’s case. It is because of this that the learned trial Judge also came to another wrong conclusion when he held that the sum of N568,512.13k claimed by the learned Counsel for the appellant after taking into account the observations of DW1 on Exhibit 8 should have been pleaded.

The law is that a party is entitled to judgment for any part of his claim he is able to establish to the satisfaction of the court even though the reduced sum was not expressly claimed and consequently not pleaded (Benson Okoebor and Others v Eyobo Engineering Services (Nigeria) Ltd and others (1991) 4 NWLR (Part 187) 533). I observed that a demand is not necessary in law when a bank seeks to recover a loan as in the present case unless there is an agreement to that effect (UBA Ltd v Michael O Abimbolu and Co. (1995) 9 NWLR (Part 419) 371).

For the above reasons I answer issue 4 in the positive. In consequence of the foregoing, the appeal succeeds and is hereby allowed.

The judgment of Gbadeyan J delivered on 23rd December, 1997 is hereby set aside. In its place, judgment is given to the appellant for the sum of N568,512.13k. I award N3,000 as costs in favour of the appellant against the respondent.

OKUNOLA JCA: I have had the benefit of reading in draft the leading judgment delivered by my learned brother, Amaizu JCA, in which he ably dealt with all the issues canvassed. I entirely agree with his reasoning and conclusion that the appeal be allowed.
Accordingly, the appeal is allowed.

I abide with all the consequential orders including his order as to costs.

**ONNOGHEN JCA:** I have had the advantage of reading in draft the lead judgment of my learned brother, Patrick Ibe Amaizu JCA, just delivered.

I agree with him that this appeal has merits and should be allowed. I may, however, wish to emphasise on one or two of the issues raised in the appeal.

The facts of the cases have been well set out in the lead judgment so I will not bother to go over them here.

The first issue I wish to comment on is Issue No. 3 which is “whether the learned trial Judge was correct in his finding that interest rate of Central Bank of Nigeria (CBN) was not tendered and that the amount claimed by the appellant was not pleaded *vide* Ground 3”.

Both parties agree that the rate of interest contained in Exhibit 8 were in accordance with Central Bank of Nigeria rates as agreed upon by the parties in clause 2 of Exhibit 4.

PW2 said under re-examination at 63 of the record:–

“20.5% was the agreement but all the interests charged in Exhibit 8 were the interest fixed by the Central Bank.”

While DW1, a chartered accountant employed by the respondent to compute his indebtedness to the appellant in connection with this case, had this to say at 66 of the record:–

“I followed the rates of interest used in Exhibit 8. On Exhibit D1, I used the rate of interest of 20.5% from 1986 to 1987 in accordance with Exhibit 4. In 1988 I used 18.5% as the rate of interest as used by the bank itself. I used both clause 2 of Exhibit 4 and the rate of interest in Exhibit 8 in arriving at my conclusion.”

It is important to note that DW1, who should know, never said that the interest rates used by the bank in Exhibit 8 is above the interest rate approved by the Central Bank of Nigeria.

It is obvious that, if it were, DW1 would not have hesitated in saying so. Rather he confirmed their authenticity by
adopting the same rates in his calculations. It is therefore my opinion that the non-tendering of the Central Bank of Nigeria approved interest rates by the appellants became a non-issue in view of the facts of the case, particularly the evidence of DW1 in this regard.

The necessary guidelines on the rate of interest on loans are given by the Central Bank of Nigeria from time to time generally and not to a particular bank or in relation to a particular loan transaction. Thus, where, as in this case, a bank lends money to its customer on an agreement that the rate of interest shall be the rate as stipulated from the Central Bank guidelines, then such a rate cannot be fixed as the prevailing rates by the Central Bank of Nigeria also vary.

Consequently, where the bank changes interest rates, a customer cannot complain that the bank has arbitrarily or unilaterally varied the interest rate at will (see the Supreme Court decision in *UBN v Ozigi* (1994) 3 NWLR (Part 333) 385 at 403–404).

A very disturbing aspect of the judgment of the trial court has to do with the alleged non-pleading of the amount claimed by the appellant as a result of which the learned trial Judge refused to award any amount to the appellant. Going through the record of proceedings it is observed that paragraphs 11 and 16 of the amended statement of claim at 23 and 24 confirm the fact that the appellant pleaded that it claimed the sum of ₦747,698.70k as being what was due and payable by the respondent to the appellant on account of the credit facilities extended by the appellant to the respondent, the subject-matter of the litigation. It is clear from the totality of the evidence adduced by the parties that the appellant did not prove the whole amount due to certain mistakes committed in the computation exercise.

However, DW1, a chartered accountant by profession, admitted under oath at 66 of the record of proceedings:—

“That total indebtedness computed by me is ₦387,300.71 ie principal plus interest. We use the interest rate of 13% first agreed on
in 1986 and in 1987, the deed of mortgage increased the rate to 20.5% in 1996.”

However, the learned trial Judge in dealing with the issue of non-pleading of the amount claimed stated thus at 76–77 of the record:

“Besides, the plaintiff, who originally claimed about ₦1,000,000 later, as he was entitled to do, amended the claim to read ₦747,698.90 not supported by any evidence let alone credible evidence but in his Counsel’s address he asked for judgment for ₦568,572.18 which was no where pleaded in the statement of claim or admitted in the statement of defence. That is an entirely new case unsupported by any pleading . . .”

It is my considered opinion that the learned trial Judge erred in so holding.

The Supreme Court has held in the case of Ekpenyong v Nyong and others (1975) 2 SC 71 at 81 to the effect that where a party claims a particular amount but was able to prove less, the court of law has the power to award the lesser amount proved, but not more than what the party has claimed (see also the case of Anyaebosi v R.T. Briscoe (Nigeria) Ltd (1987) 6 SCNJ 9; (1987) 3 NWLR (Part 59) 84).

From the facts of this case, it is clear that the appellants admitted making certain mistakes in calculating the total indebtedness of the respondent. It is my view that the amounts admitted to have been added to the total sum due and payable can be deducted from what was originally claimed and the balance awarded to the plaintiff. This can be done even if the appellant failed to move the court to effect amendments.

There is a wide world of difference between not pleading the amount claimed and not proving the amount claimed. In the instant case, the appellant did plead the amount claimed but did not prove the exact amount claimed. He proved less than what he pleaded.

There is also the finding by the trial Judge that there is no satisfactory evidence that the respondent was ever given a copy of Exhibit 4. This finding is perverse. In the first place, the respondent did not testify to the fact that he was never
given a copy of the document even though he pleaded it. It is trite law that where evidence is not adduced in support of pleaded facts the facts so pleaded are deemed abandoned.

That apart, there is evidence from DW1 to the effect that the respondent was given a copy of that document when he stated at 66 of the record under cross-examination thus:–

“I have seen clause 2 of Exhibit 4 which contains the interest rate. That is the one I used. I used Exhibit 4 clause 2 because I saw the signature of my client on the document which he give me to use” (emphasis mine).

The question is how did the respondent get the copy of Exhibit 4 which he gave to DW1 if it is true that he was never given a copy? There is no evidence explaining how he came by the copy he gave to DW1 other than what the appellant said through PW1 at 53–54 of the record that:–

“It is not true that we did not give the defendant a copy of the mortgage deed. The defendant himself brought the consent to mortgage and went away with a copy of the mortgage deed.”

On the issue of proof by satisfactory evidence being the standard of proof employed by the learned trial Judge, I am of the firm view that by the Supreme Court authority of Mogaji v Odofin (1978) 4 SC 91 at 93 the standard of proof in civil matters has always been on the preponderance of evidence or balance of probabilities. This test of the balancing of the imaginary scale of justice is very objective, not subjective.

Therefore, for the learned trial Judge to use the “standard of proof by satisfactory evidence” he is, in my considered opinion, substituting a subjective test for the objective.

As envisaged by the Supreme Court in Mogaji v Odofin’s case cited supra; the evidence that may satisfy Judge A in respect of a particular case may not satisfy Judge B in a similar case.

However, if the objective test is used, any person looking at the imaginary scale of justice after the evidence of both parties have been placed thereon will surely see clearly which side weighs more than the other.
I am of the view that the learned trial Judge is wrong in his use of the term “prove by satisfactory evidence” in this case. On the whole I agree that there are merits in this appeal which is accordingly allowed. I abide by the consequential orders made by my learned brother, Patrick Ibe Amaizu JCA, in the lead judgment including the order as to costs. 

*Appeal allowed.*
Oceanic Bank International Nigeria Limited v G. Chitex Industries Limited

COURT OF APPEAL, ENUGU DIVISION
FABIYI, MUHAMMAD, UBAEZONU JJCA

Date of Judgment: 6 MARCH, 2000
Suit No.: CA/E/76/98

Banking – Remittance of funds overseas – Duty of bank to remit – Failure to remit – Breach of duty – Bank claiming there was fluctuation in value of naira as defence – Quantum of damages for breach

Banking – Remittance of funds overseas by bank – Fund transfer form containing condition “for my account and risk” – Exclusion clause – Effect on liability of bank

Facts
The plaintiff’s/respondent’s claim against the defendant/appellant was for the sum of ₦66,000 being damages for loss occasioned by appreciation of the dollar and depreciation of the Naira and also damages for loss of credit facilities, goodwill, profits and future prospects estimated at ₦3,500,000. The total claim was for ₦3,566,000.

The plaintiff’s case was that it wanted to remit some funds to its business associates Chin Jung Industry Company Limited in Taiwan. It paid into the defendant’s bank the sum of ₦390,000 on 3 June, 1993. At the material time, the rate of exchange was ₦32.50 per one US dollar. The equivalent in dollars was US$12,000. A deposit slip covering the amount paid in was issued to the plaintiff who also paid a remittance fee of ₦2,000 as consideration.

The money was to be transferred by telegraphic means which was described by PW1 as the fastest method of transferring money to overseas countries. It was the plaintiff’s case that the defendant’s manager had maintained that the transfer would take four days because its headquarters was in Lagos. However, after the plaintiff had waited for some time without confirmation of the transfer from its business
associate in Taiwan, PW1 went to the defendant’s manager who stated that the transfer was not effected because the bank’s head office did not have the dollar equivalent. The plaintiff/respondent then collected the money (i.e. N390,000) and purchased US$12,000 from the open market at N38 per dollar hence the loss of N66,000. It was the plaintiff’s case that it had been in business with its Taiwan associate for 12 years and that by reason of the non-remittance of the US$12,000, the company lost face with its Taiwan associates and lost credit facilities. It therefore claimed the sum of N3,500,000 as general damages.

The defendant’s/appellant’s case was that the plaintiff purchased $12,000 “free funds” from it on 3 June, 1993. It stated that the purchase was subject to the exclusion clause “for my account and risk” and that, with this clause, it was absolved from liability. The plaintiff was told about this clause before making the purchase.

The defendant further stated that it could not remit the money to Taiwan because of the fluctuation in foreign exchange. Besides, the plaintiff was duly informed of the fluctuation and shortfall. The plaintiff opted to take his money when the exchange rate was N34.50 per dollar. Then, the total shortfall was N24,000. An offer was made to the plaintiff to pay N30,000 to offset the shortfall but the plaintiff rejected the offer. The plaintiff was thereafter given its money. The defendant denied liability for any loss suffered in the transaction with Taiwan suppliers as the defendant was not privy to the transaction.

The learned trial Judge found for the plaintiff. He awarded the total sum of N3,566,000 as damages in favour of the plaintiff as claimed against the defendant made up of N66,000 as damages for loss occasioned by the appreciation of dollar and the depreciation of Naira and N3,500,000 for loss of credit facilities, goodwill, profits and future prospects. The defendant appealed to the Court of Appeal.

**Held** –

1. It is manifest from the fund transfer form, exhibit J, that
US$12,000 to its Taiwan associates by name Chi Jung Industries Co Ltd and the sum of N390,000 being its equivalent in Naira had been paid in by PW1 on 3 June, 1993. The appellant agreed to carry out the bargain and got a consideration of N2,000, called a remittance fee or bank charge. The money to be remitted by telex was not sent and this was found out by the respondent some 13 days after 3 June, 1992. Although the appellant gave an excuse that there was a fluctuation in the value of the Naira with an attendant shortfall, it offered the respondent the sum of N30,000 to offset the shortfall. This clearly showed that the appellant by conduct acknowledged the breach of contract.

2. The exclusion clause “for my account and risk” in the funds transfer form, Exhibit J, is not clear and precise and by section 133(3) of the Evidence Act (Cap 112) no oral evidence should be given of its intended meaning. Since ambiguity arises as to the meaning of the exclusion clause, it will be construed against the appellant bank.

3. Breach of a fundamental term occurs in contract when a party fails to carry out the contract in its essential respect. Such a breach goes to the root of the contract and a party in breach cannot be allowed to rely upon it.

4. A fundamental term is a term of the contract which is by reason of the intention of the parties or as the result of the operation of the rule of law. It is considered to be of such importance that any breach of it goes to the root of the contract and entitles the innocent party to treat himself as discharged. In the instant case, the appellant failed to carry out its own side of the contract to transfer the money by telex to the business associates of the respondent in Taiwan. This was a fundamental breach and the respondent was entitled to treat itself as discharged. Therefore, the appellant is precluded from relying on the exclusion clause in Exhibit J by operation of law. The
exemption clause in Exhibit J is of no avail to the appellant.

5. Breach of contract is a failure, without legal excuse, to perform any promise which forms the whole or part of a contract. It is an unequivocal, distinct and absolute refusal to perform an agreement.

In the instant case, the appellant refused absolutely to perform the agreement entered into by it with the respondent on 3 June, 1993 and it is no doubt liable in damages that proved to exist.

6. General damages are such as the law itself implies or presumes to have accrued from the wrong complained of, for the reason that they are its immediate, direct and proximate result, or such as did in fact result from the wrong, directly or proximately, and without reference to the special character, condition, or circumstances of the plaintiff.

7. Special damages are those which are the actual, but not necessarily, result of the injury complained of, and which in fact follow it as a natural and proximate consequence in the particular case, that is by reason of special circumstances or conditions. Special damages must be specially pleaded and proved.

Appeal allowed in part.

Cases referred to in the judgment

Nigerian

Alao v Inaolaji Builders Ltd (1990) 7 NWLR (Part 160) 36

Balogun v Balogun (1974) ALL NLR (Part 2) 66

Barau v Cubitts (Nig.) Ltd (1990) 5 NWLR (Part 152) 630

Boshali v Allied Commercial Exporters Ltd (1961) 2 SCNLR 322; (1961) 1 All NLR (Part 4) 917

Dumez Nig. Ltd v Ogboli (1972) 1 All NLR (Part 1) 241
Egiri v Uperi (1974) 1 N.M.L.R. 22
Finnih v Imade (1992) 1 NWLR (Part 219) 511
Kojo v Solaz (1938) 4 W.A.C.A. 191
Narumal and Sons v NBTC Ltd (1989) 7 NWLR (Part 146) 730
Niger Insurance Co Ltd v Abed Brothers Ltd (1976) 6 E.C.S.L.R. 131
Nkado v Obiano (1997) 5 NWLR (Part 503) 31
Nwabuoku v Ottih (1961) 2 SCNLR 232
Obere v Board of Management Baptist Eko Hospital (1978) 67 SC 15
Okongwu v NNPC (1989) 4 NWLR (Part 115) 296
Olaoye v Balogun (1990) 5 NWLR (Part 148) 24
Onwuigbufor v Okoye (1996) 1 NWLR (Part 424) 252
Orji v Anyaso (2000) 2 NWLR (Part 643) 1
Oseyomon v Ojo (1993) 6 NWLR (Part 299) 344; (1993) 7 SCNJ 365
P.Z. and Co Ltd v Ogedengbe (1972) 1 All NLR 202
Soetan v Ogunwo (1975) 6 SC 67
UBN v Ozigi (1994) 3 NWLR (Part 333) 385

**Foreign**

Bentsen v Taylor and Sons (1893) 2 Q.B. 274
Hadley v Baxendale (1854) 9 Exch. 341
Harbutts Plasticine Ltd v Waynes Tank and Pump (Y) (1970) Q.B. 447
Karsales (Harrows) Ltd v Wallis (1956) 2 All ER 866
L’Estrange v F. Graucob (1934) 2 K.B. 394
Photo Productions Ltd v Securicor Transport Ltd (1980) A.C. 827
Robinson v Harman (1848) LEX 850
a **Nigerian statutes referred to in the judgment**
Contract Law (Cap 30) Laws of Anambra State, 1986, sections 190, 191, 423(4)

b **Court of Appeal Act (Cap 75) Laws of the Federation of Nigeria, 1990, section 16**
Evidence Act (Cap 112) Laws of the Federation of Nigeria, 1990, section 133(3)

c **Book referred to in the judgment**
Black’s *Law Dictionary* (5ed) at 171, 353, 354

d **Counsel**
For the appellant: *Asiegbu*
For the respondent: *Okongwu*

e **Judgment**

**FABIYI JCA: (Delivering the lead judgment)** This is an appeal against the judgment delivered at the High Court of Justice, Onitsha, in Anambra State of Nigeria on 5 March, 1998. In the judgment, the learned trial Judge awarded a total sum of ₦3,566,000 in favour of the plaintiff/respondent against the defendant appellant herein.

The plaintiff at the trial court claimed against the defendant as follows:–

“(1) Damages for the loss occasioned by appreciation of dollar and depreciation of Naira (₦456,000 – ₦390,000) = ₦66,000.

(2) Damages for the loss of credit facilities, goodwill, profits and future prospects estimated at ₦3,500,000.

Total ₦3,566,000.”

At the trial court, pleadings were duly filed and exchanged by the parties. Two witnesses testified on behalf of the plaintiff while an official of the defendant testified on its behalf.

For a proper appreciation of the issues strongly canvassed in this appeal, it is imperative to recapitulate the facts, as same transpired at the trial court, with some measure of detail.
Onyechi Ifezue, the director of the plaintiff, gave evidence as PW1. Indeed, he was the principal witness for the plaintiff. He paid into the defendant’s bank the sum of N390,000 on 3 June, 1993. The defendant was to remit the dollar equivalent to plaintiff’s business associates, Chin Jung Industry Company Limited, in Taiwan. At the material time, the rate of exchange was N32.50 per one US dollar. The equivalent in dollars was US$12,000. A deposit slip covering the amount paid in is Exhibit B. He paid a remittance fee of N2,000. This was the consideration.

PW1, he said, completed the fund transfer form, Exhibit J. The money was to be transferred by telegraphic means described by the witness as the fastest method of transferring money to overseas countries. He said the defendant’s manager maintained that the transfer would take four days as the defendant had its headquarters in Lagos. After a while, he did not receive confirmation of the transfer from his business associate in Taiwan. He went to the defendant to find out the reason. The defendant’s manager said the transfer was not effected because the head office did not have the dollar equivalent. He briefed Counsel who wrote Exhibit C to the defendant who then asked the witness to collect his money. The witness said he collected the money and purchased US$12,000 from the open market at N38 per dollar. He tendered Exhibit D to show that the plaintiff suffered a loss of N66,000.

PW1 said the plaintiff had been in business with the Taiwan associate for 12 years. He tendered Exhibits E1–E7 to depict the association. He tendered Exhibit F to show his debit account in the sum of US$54,186 owed by his company to the associates. He tendered a sales agreement which is Exhibit G as well. PW1 said that, because of the failure to remit the US$12,000, the company lost face with the Taiwan associates and lost credit facilities. He tendered Exhibit H which he said conveyed the message to him. He maintained that his turnover then was US$300,000.
Rigorously cross-examined, PW1 admitted that he saw “for my account and risk” on Exhibit J. He maintained that the transaction with the defendant did not depend on the defendant having foreign exchange. The defendant’s manager said it would take four days to transfer money overseas as their headquarters was in Lagos. Otherwise the transfer would have been done on the same date of purchase since it was a telegraphic transfer. PW1 agreed that from 1986, he had been dealing with a company in Taiwan known as Shine S Industrial Corporation. The transfer was to be made to a company in Taiwan known as Chi Jung Industries Company Limited. PW1 said that a telex sent from abroad contained a telex number at times. And at times, it did not due to telecommunication problems in this country. He denied that all telexes from anywhere in the world contained the number or origin. He denied that Exhibit H was prepared for this case.

PW2 was Solomon Ochimgha, a banker with African Continental Bank from 1986–1989 and then with the Nigerian Agricultural and Co-operative Bank. He said he was conversant with the transfer of money from Nigeria to overseas countries. He maintained that a transfer of money overseas is mainly carried out by telegraphic means and such takes about 24 hours to be effected.

Cross-examined, PW2 said the expression “for my account and risk” in Exhibit J means that a customer was allowed to fill the purchase needed by himself and if he did not correctly fill in the form the risk could be his. He said because a transfer was supposed to be done within 24 hours, there may be no fluctuation in the rate given to a customer.

DW1, Ladipo Akingbe Sote, branch manager of the defendant, testified on its behalf. He confirmed that the plaintiff purchased $12,000 “free funds” from the defendant on 3 June, 1993. He defined “free funds” as the purchase of foreign exchange in the autonomous market. He said the plaintiff was told the meaning of “for my account and risk” in Exhibit J before he made the purchase. DW1 said that the defendant could not remit money to Taiwan because of the fluctuation in foreign exchange. The plaintiff was duly
informed of the fluctuation and shortfall. He said the plain-
tiff opted to take his money when the exchange rate was 
₦34.50 per dollar. Then, the total shortfall was ₦24,000.

DW1 said that the defendant invited the plaintiff to open 
an account with the money as he was not an account cus-
tomer of the defendant. The defendant offered to pay 
₦30,000 to offset the shortfall so as to attract the plaintiff as a customer. Exhibit K was tendered through this witness.

DW1 admitted that he was not the branch manager of the 
defendant bank at the time of transaction. He did not transact the business with PW1. He said he was involved at his own level. He did not hold any discussion with PW1. He admitted that he did not know when the defendant made the offer to pay the shortfall of ₦30,000. DW1 said that Exhibit H was from Nigeria. The plaintiff did not accept the offer of ₦30,000 to offset the shortfall and he was given his money. DW1 said that the defendant was not liable to the plaintiff for any loss suffered in his transaction with the Taiwan suppliers as the defendant was not involved in the transac-
tion.

DW1 admitted that he never held any discussion with PW1 as a person. He said he did not know whether the offer of ₦30,000 was made to the plaintiff after this action was insti-
tuted at the trial court.

The learned trial Judge, in his judgment dated 5 March, 1998, found for the plaintiff. He awarded the total sum of 
₦3,566,000 as damages in favour of the plaintiff as claimed against the defendant.

As from now, I shall refer to the defendant as appellant and the plaintiff as respondent in this judgment.

The appellant felt dissatisfied and appealed (vide its notice of appeal dated 11 March, 1998 and filed on the same date). The complaint in the notice of appeal is against the whole decision. Two grounds of appeal accompanied the notice of appeal. One further ground of appeal was filed within the
As usual, briefs of argument were exchanged. On 10 January, 2000, when this appeal fell due for hearing, learned Counsel on both sides adopted briefs of argument as filed on behalf of the parties.

At page 2 of the appellant’s brief C.J. Asiegbu, Esq., of Counsel listed four issues for determination at paragraph 2.01. It appears that he was not sure of himself at page 3 paragraph 3.06 of the brief, he postulated three main issues. For what they are worth, I reproduced “the issues” as formulated by Counsel. They read as follows:

- Whether having regard to Exhibit J there was a breach of contract which entitled the respondent to the award of N66,000;
- Whether the claim of the respondent for loss of credit facilities, goodwill, profit and future prospects was not in the nature of special damages and if it was;
- Whether in an action for breach of contract the respondent would not set out particulars of special damage and lead evidence in prove (sic) of same and whether the court was right in awarding general damages of N3.5 million in an action for breach of contract when general damages belong to the realm of torts.”

At page 1 of the respondent’s brief, Chief Chike Okongwu of Counsel cleverly formulated three issues for determination. The issues formulated by him are more pragmatic and to the point in determining this appeal. The three issues distilled from the three grounds of appeal are as follows:

- Whether the trial Judge was not right in finding that there was a breach of contract to transfer the respondent’s funds by telegraphic means.
- Whether the exclusion or exemption clause ‘for my account and risk’ contained in Exhibit J avails the appellant from liability for the breach.
- Whether the trial Judge was not right in awarding special and general damages on the strength of the evidence and pleadings in the claim.”

Even then, issues 2.01 and 2.02 formulated by Chief Okongwu can be merged into one issue. I condense both as
follows: Whether there was a breach of contract by the appellant in not sending the respondent’s money to his Taiwan associates as requested by it. The last issue should be whether the damages awarded in favour of the respondent were maintainable on the strength of the evidence and pleadings before the trial court. I shall rely on the issues formulated on behalf of the respondents.

From page 4 of appellant’s brief, learned Counsel, by inadvertence, argued grounds of appeal, not the issues formulated by him. He goofed in this respect. Learned Counsel for the respondent cleverly pointed same out with adequate precision. Issues pin-pointed for determination should be argued, not grounds of appeal (refer to Finnih v Imade (1992) 1 NWLR (Part 219) 511 at 534). Such issues to be argued must relate to the grounds of appeal as filed in a bid to puncture a judgment under fire.

On behalf of the appellant, learned Counsel observed that the respondent signed Exhibit J, the fund transfer form, which contains the expression, “For my account and risk”. He submitted that Exhibit J is binding on the respondent and the clause therein excluded the liability of the appellant. He maintained that it was not necessary to draw the attention of the respondent to it. He placed utmost reliance on the case of L’Estrange v F. Graucob (1934) 2 K.B. 394.

Learned Counsel referred to Exhibit C wherein the respondent demanded the sum of ₦24,000 from the appellant, being the difference in exchange rate at the time he asked for his deposit. He observed that if the court finds that appellant was in breach, the respondent is only entitled to ₦24,000. He further observed that time was not stated as an essence of the contract and, if stated, such was not proved. Therefore, a breach of contract did not arise according to learned Counsel.

Learned Counsel submitted that there was no credible evidence in proof of the actual company in Taiwan that withdrew the credit facilities of the respondent. He observed that
Exhibit H tendered in evidence to prove that the respondent’s credit facilities had been withdrawn did not disclose the company that sent it. He submitted that it is not the duty of the court to engage itself in a voyage of discovery. He observed that Exhibits E1–E7 and F contain names of different companies in Taiwan and nothing in Exhibit G supports the respondent’s case on the point.

The learned Counsel submitted that it was wrong for the trial Judge to award general damages after finding that there was a valid contract that was breached by the appellant. He referred to Barau v Cubitts (Nigeria) Ltd (1990) 5 NWLR (Part 152) 630 at 646; P.Z. and Co Ltd v Ogedengbe (1972) 1 All NLR 202 at 210.

Learned Counsel submitted that the respondent did not give the particulars of his loss of credit facilities and goodwill and that the claim appears speculative. He submitted that the damages recoverable are the losses reasonably foreseeable by the parties and foreseen by them at the time of the contract as inevitably arising if one of them broke faith with the other. There should be no room for a speculative or sentimental claim unless provided for by the terms of contract.

Learned Counsel opined that damages was not proved. He maintained that Exhibit F did not confirm that the respondent had credit facilities with his Taiwan associates. Exhibit F, according to Counsel, shows respondent’s statement of account as at 26 April, 1993. Exhibit G, a sales agreement, does not help matters as it does not contain any form of credit facility extended to the respondent. He urged the court to hold that that arm of the claim was not proved and that same be set aside.

The learned Counsel for the respondent observed that it is common ground that by Exhibit J, the parties contracted for a transfer of the respondent’s funds by the appellant by telegraphic means but the transfer never took place. He maintained that the appellant, in paragraph 7 of the statement of defence, admitted the breach. By pleading extenuating circumstances like fluctuation of the dollar and relying
on defence of exclusion clause, the appellant cannot be heard to argue that there was neither contract nor breach of it at the same time. It cannot approbate and reprobate at the same time. It cannot modify or vary the contents of Exhibit J by oral evidence. He referred to *Koju v Solaz* (1938) 4 W.A.C.A. 191 at 193.

Learned Counsel submitted that, since the appellant admitted a breach of contract, the respondent was entitled to judgment. He referred to *Nwabuoku v Ottih* (1961) 2 SCNLR 232; (1961) 1 All NLR 487. He further submitted that the respondent need offer no further proof (*vide* section 75 of the Evidence Act (Cap 112) Laws of the Federation of Nigeria, 1990). Learned Counsel submitted that findings of fact by the trial Judge were not perverse having arrived at them after a proper evaluation. He referred to *Balogun v Balogun* (1974) All NLR (Part 2) 66; *Nasiru v Commissioner of Police* (1980) F.N.R. 80; *Nkado v Obiano* (1997) 5 NWLR (Part 503) 31; 50 L.R.C.N. 1084 at 1115.

On the exclusion clause in Exhibit J, learned Counsel submitted that it had to be read with the express fundamental term which the parties must regard as of great importance at the time of the contract. He referred to *Bentsen v Taylor and Sons* (1893) 2 Q.B. 274 and section 191 of the Contract Law (Cap 30) Laws of Anambra State, 1986. Learned Counsel opined that, read together, the exclusion clause rendered itself ambiguous in relation to the express fundamental term of the mode of transfer in Exhibit J – “transfer by telex” – which cannot be contradicted, altered, modified or added to by oral evidence. He referred to *Olaoye v Balogun* (1990) 5 NWLR (Part 148) 24 at 39; *Union Bank of Nigeria v Ozigi* (1994) 3 NWLR (Part 333) 385; *Kojo v Solaz* (supra).

Learned Counsel submitted that the exclusion clause was ambiguous and subject to conflicting interpretations through PW2. The exclusion clause was not clear and precise and no oral evidence may be given of its intended meaning. He referred to section 133(3) of the Evidence Act, 1990. The terms of a contract must be interpreted strictly. Where there
a. exists any ambiguity the court will construe it against such a party.

   Learned Counsel further submitted that, even if the exclusion clause is not ambiguous, it will not avail the appellant for failure to carry out the contract in its essential respect – fundamental term. The breach goes to the root of the contract and disentitles the appellant from relying on it. He referred to *Adel Boshali v Allied Commercial Exporters Ltd* (1961) 2 SCNLR 322; (1961) 1 All NLR (Part 4) 917 at 918; *Karsales (Harrows) Ltd v Wallis* (1956) 2 All ER 866 at 868; *Photo Productions Ltd v Securicor Transport Ltd* (1980) A.C. 827; *Niger Insurance Co Ltd v Abed Brothers Ltd* (1976) 6 E.C.S.L.R. 131; *Harbutts Plasticine Ltd v Waynes Tank and Pump* (1970) Q.B. 447 and sections 190 and 191 of the Contract Law (Cap 30) Laws of Anambra State, 1986.

b. Learned Counsel opined that general damages apply to contract and not tort only. He referred to *Robinson v Harman* (1848) L.E.X. 850 at 865; (1848–60) All ER 383 at 385; *Hadley v Baxendale* (1854) 9 Ex. 341; (1843–60) All ER 461 at 465. He contended that, where a party suffers loss flowing from a breach of contract which loss is not easily ascertainable but can only be merely estimated, general damages can be awarded. He referred to section 423(4) of the Contract Law (Cap 30) Laws of Anambra State, 1986. Such general damages can include those recoverable for loss of opportunity and enhanced reputation. Proof of quantum of loss is unnecessary. He referred to *Soetan v Ogunwo* (1975) 6 SC 67. He finally submitted that it will not be right for this Court to substitute the award made by the trial court with a lesser figure. He referred to *Obere v Board of Management Baptist Eko Hospital* (1978) 6–7 SC 15 at 24.

c. I shall consider issues 2.01 and 2.02 formulated by the respondent together. I have earlier on encapsulated both to read: Whether there was a breach of contract by the appellant in failing to send the respondent’s money to its Taiwan associates as requested by it.
It is clear that Exhibit J is the bedrock of the agreement between the parties. It is manifest on the face of Exhibit J that the respondent requested the appellant to remit US$12,000 to its Taiwan associates by name Chi Jung Industries Co Ltd. The sum of N390,000, being its equivalent in Naira, had been paid in by PW1 on 3 June, 1993. The appellant agreed to carry out the bargain and got a consideration of N2,000, called a remittance fee or bank charges. The money to be remitted by telex was not sent. This was found out by the respondent some 13 days after 3 June, 1993. The appellant’s excuse sounds ludicrous. It said there was a fluctuation with an attendant shortfall.

The appellant then offered the respondent the sum of N30,000 to offset the shortfall. It said it wanted to lure or “lobby” the respondent to open an account with the bank. This appears very queer as banks are usually very frugal in the manner in which they dole out their funds. Even then, lobbying should be the in thing in some other quarters in the polity, not in appellant bank. What I have tried to depict is that the appellant’s conduct in the episode shows that it had breached the contract it had with the respondent. The appellant, by conduct, acknowledged the breach of contract.

The appellant tried to cling tenaciously to the exclusion clause in Exhibit J which reads, “For my account and risk”. In the first place, different interpretations were made as to the purport of the exclusion clause in Exhibit J. The appellant, through DW1, attempted to say that it had to do with the fluctuation of the dollar in relation to the naira which had to be borne by the respondent. Such was to no avail as PW2, a banker, said the clause means that a customer was allowed to fill the purchases needed by himself and if he did not correctly fill in the form the risk could be his. The clause is, no doubt, ambiguous as it is capable of varying meanings. Such must be and is hereby discountenanced. It is not clear and precise and no oral evidence should be given of its intended meaning (see section 133(3) of the Evidence Act (Cap 112) Laws of the Federation of Nigeria, 1990). And
since ambiguity arises as to the meaning of the exclusion clause, I construe it against the appellant. The content of Exhibit J, the exclusion clause therein inclusive, cannot be modified or varied by oral evidence (refer to *Kojo v Solaz* (*supra*) at 193).

The last point to be considered in relation to the exclusion clause is breach of a fundamental term in the contract. Breach of a fundamental term occurs in contract when a party fails to carry out the contract in its essential respects. Such a breach goes to the root of the contract and a party in breach cannot be allowed to rely upon it (refer to *Adel Boshali v Allied Commercial Exporters Ltd* (*supra*) at 918; *Niger Insurance Co Ltd v Abed Brothers Ltd* (*supra*) at 131).

Fundamental breach or breach of a fundamental term has been codified by sections 190 and 191 of the Contract Law (Cap 30) Laws of Anambra State, 1986. The two sections read as follows:–

“190. Nothing in the foregoing provision shall be construed as to enable a party guilty of fundamental breach of contract or a breach of fundamental term to rely upon an exemption clause so as to escape liability.

191. Fundamental breach is a breach by one party which is sufficiently serious to entitle the other party, not merely to claim damages, but to elect to treat himself as discharged from further performance under the contract.

Fundamental term is a term of the contract which is, by reason of intention of the parties or as the result of the operation of the rule of law, considered to be of such importance that any breach of it goes to the root of the contract and entitles the innocent party to treat himself as discharged.”

The fundamental term in Exhibit J is “transfer by telex”. It is the fastest mode of transferring money in international business circles. According to PW2, a banker, such should be carried out within 24 hours. The appellant flagrantly failed to carry out its own side of the bargain. It did not send the money across to Taiwan as bargained. And that was a fundamental breach. It was no wonder that the respondent treated itself as discharged. I think the respondent was in
order in this respect. The appellant is precluded from relying on the exclusion clause in Exhibit J by operation of law. In short, the exemption clause in Exhibit J is to no avail.

There is clearly a breach of contract established against the appellant. “Breach of contract is failure, without legal excuse, to perform any promise which forms the whole or part of a contract . . . Unequivocal, distinct and absolute refusal to perform agreement” (see Black’s Law Dictionary (5ed) at 171). The appellant is caught in the web of the meaning stated above. It failed to perform its bargain. It had no legal excuse. It refused absolutely to perform the agreement entered into by it with the respondent on 3 June, 1993 and it is no doubt liable in damages, as may be proved to exist. I accordingly resolve issues 2.01 and 2.02 in favour of the respondent.

I now come to the last issue formulated by the respondent. It is whether the trial Judge was not right in awarding special and general damages in contract matters. This, to my mind, is erroneous. For the avoidance of doubt, general damages are:–

“Such as the law itself implies or presumes to have accrued from the wrong complained of, for the reason that they are its immediate, direct and proximate result, or such as did in fact result from the wrong, directly or proximately, and without reference to the special character, condition, or circumstances of the plaintiff. Myers v Stephens 43 Cal. Reptr 420, 433.”

And special damages are:–

“Those which are the actual, but not necessarily, result of the injury complained of, and which in fact follow it as a natural and proximate consequence in the particular case, that is by reason of special circumstances or conditions. Twin Coach Co v Chance Vought Aircraft Inc. 2 Storey 588 . . . Special damages must be specially pleaded and proved” (see Black’s Law Dictionary ibid at 353, 354).

I must quickly stress the point that, in contract, there is no dichotomy between special and general damages as it is the position in tort. The narrow distinction often surmised is one without a difference. In contract, it is damages simpliciter.
for loss arising from breach. Such loss must be in the contemplation of the parties or one reasonably contemplated. The loss must be real, not speculative or imagined. In contract, authorities galore talk of damages *simpliciter* without distinction or dichotomy (refer to *Barau v Cubits (Nigeria) Ltd* (supra) at 646; *P.Z. and Co Ltd v Ogedengbe* (supra) at 210; *Photo Productions Ltd v Securicor Transport Ltd* (supra); *Harbutts Plasticine Ltd v Waynes Tank and Pump* (supra); *Karsales (Harrows) Ltd v Wallis* (supra) at 868). Refer to sections 190 and 191 of the Contract Law (Cap 30) Laws of Anambra State, 1986 already quoted above in this judgment.

Damages awarded by the trial Judge in favour of the respondent have two heads. The sum of ₦66,000 was awarded as damages for the loss occasioned by the appreciation of the dollar and the depreciation of the Naira. Another sum of ₦3.5 million was awarded as damages for loss of credit facilities, goodwill, profit and future prospects. I shall treat them in their sequence.

On the award of ₦66,000, the trial Judge at 39 of the record of appeal found as a fact that PW1 purchased dollars from other source at ₦38 per dollar. He debunked the view of DW1 that the appellant offered ₦30,000 to the respondent and that if it had accepted same it would not have suffered any loss. Such did not make sense to the trial Judge because if ₦30,000 would have taken care of the loss and the appellant was ready to pay it, the appellant would have sent the money without referring same to the respondent. I am at one with the trial Judge in his plausible rationale. Exhibit D is material here. The respondent purchased US$12,000 from Basic Bureau De Change on 22 June, 1993 and paid ₦456,000 for procuring same. He incurred a loss of ₦456,000 – ₦390,000 which is ₦66,000 as a result. This head of award must remain inviolate. I endorse it. The loss arose from the breach of contract as diagnosed earlier on.

I shall now consider the award of ₦3.5 million for alleged loss of credit facilities and the like. At paragraph 14 of the statement of claim, the respondent pleaded that its associates
in Taiwan, by telex, stopped his credit facilities. By para-
graph 16 of the statement of defence, the appellant denied
same and put the respondent to the strictest proof of the
allegations. By paragraph 17, the appellant said the issues
raised were made up for the purpose of the suit.

The contested telex from Taiwan is Exhibit H. PW1 was
cross-examined on Exhibit H as to its origin and authentic-
ity. He said that at times a telex contains numbers and at
times it does not due to telecommunication problems in this
country. He denied that all telexes from anywhere in the
world contain numbers or sources of origin. He denied that
Exhibit H was prepared for this case.

DW1 who testified for the appellant emphatically said that
Exhibit H is from Nigeria.

Exhibit H should be the fulcrum on which the award of
₦3.5 million for loss of credit facilities, goodwill and future
profits revolves. That is the only document that is relevant to
sustain the head of damage. Exhibit F, the statement of ac-
count, and Exhibit G, the sales agreement, relied upon by the
trial Judge are not relevant. Both exhibits, dated 26 April,
1993 and 22 October, 1991 respectively, come before the
transaction of 3 June, 1993. They are not of moment. In any
event, there is no withdrawal of credit facilities in them.

The parties, both in their pleadings and evidence, made
heavy weather of Exhibit H. Curiously, the learned trial
Judge did not say a word about Exhibit H. He should have
made findings of fact on it and applied the appropriate law.
But the trial Judge brushed it aside, as it were. The trial
Judge had a duty to make findings of fact on Exhibit H and
ascrue probative value to it if any (see Egiri v Uperi (1974)
1 N.M.L.R. 22; Onwugbufor v Okoye (1996) 1 NWLR (Part
424) 252; 1 K.L.R. 1 at 31). Since the trial Judge failed to
make the necessary findings of facts on Exhibit H, this Court
can consider it and make necessary findings of fact. This
Court has power to do so by the combined effect of the
provisions of section 16 of the Court of Appeal Act (Cap 75)
Laws of the Federation of Nigeria, 1990 and Order 1 rule 20 of the Court of Appeal Rules, 1981, as amended. See also *Narumal and Sons v NBTC Ltd* (1989) 2 NWLR (Part 106) 730 at 756 where Obaseki JSC maintained pungently that, where evaluation is a sham and justice is thrown to the wind and perverse decision is given, the Court of Appeal has a duty to intervene and give or substitute a decision that the justice of the case demands.

So there is no evaluation of a vital document to wit: Exhibit H. A yawning gap is created. I shall attempt to cover same to the best of my ability. Exhibit H is said to be a telex from Taiwan to the respondent. It bears no telex number. It has no date and no country of origin. It is not traceable to the sender. PW1 attempted to ascribe it to telecommunication problems in this country. That was most uncharitable. The bleak fact is that all telexes from abroad should have numbers and dates and must be traceable to the sender. I agree with the appellant that Exhibit H was sourced from within Nigeria and made for the purpose of this case.

Exhibit H is a farce and a ruse. It is a make believe, sourced from within our border. The respondent who paid ₦2,000 as consideration for the contract wants to have ₦3.5 million into its kitty. I am not here concerned with adequacy of consideration. I only want to stress the point that it has the burden of proof as regard this head of damages (*vide* section 135 of the Evidence Act, 1990). The respondent has a duty to prove that it lost credit facilities on the balance of probability. This can be done through an official of its Taiwan associates who will be subject to cross-examination or through an *authentic* telex message. I think seriously that Exhibit H is suspect and that must be what operated in the mind of the trial Judge which made him brush it aside as having no probative value. In short, there is no proof that the respondent’s credit facilities and goodwill/profit got extinct through withdrawal resulting from the appellant’s conduct. The award of ₦3.5 million for loss of credit facilities and the like must consequently be set aside. And I order accordingly.
One word more and I shall be done. The claim of the respondent in respect of the alleged loss of credit facilities and the like, to say the least, appears gold-digging and speculative. The award of N3.5 million appears, in the same vein, capricious and arbitrary. “Gold diggers” should keep off from courts of law as well as that of equity. And the court should always be wary of “gold diggers” and not allow the institution to be used unwittingly as an instrument for attaining their nefarious and mundane desires. A party who is entitled to a “pound of flesh” should not be given one hundred of same as a Judge is not a Father Christmas. I say no more.

The appeal is allowed in part. The award to the respondent is hereby varied to the sum of N66,000 only. This shall be the judgment of the court. As the respondent partially succeeded in this appeal, I leave the cost awarded in its favour by the trial court.

The respondent shall pay costs to the appellant in this appeal which I assess at N3,000.

UBAEZONU JCA: I agree.

MUHAMMAD JCA: I had a preview of my learned brother, Fabiyi JCA’s, leading judgment. I agree that the appeal should succeed in part.

Let me join his Lordship in emphasising one or two points raised in the appeal.

Admittedly the award of damages in breach of contract matters by a trial court is an exercise of judicial discretion. Where discretion is exercised without due regard to the evidence before the court, which should form the basis of such an exercise, the award will be adjudged perverse and tampered with by an Appellate Court.

I am of the firm view that damages recoverable against the party in breach are such losses within the reasonable contemplation of the parties. The duty of the court in an instance of breach is based on the evidence led by a claimant, to restore an injured party as far as is monetarily practicable.
to the position he would have been but for the breach. There must be a conspicuous relation between the award made and the injury suffered by the beneficiary of the award (see Oseyomon v Ojo (1993) 6 NWLR (Part 299) 344; (1993) 7 SCNJ 365; Orji v Anyaso (2000) 2 NWLR (Part 643) 1 at 32).

In the appeal before us, the evidence before the trial court had not been made the basis of the award of N3.5 million damages against the appellant. Judicial authorities abound to the effect that it is not justice to take an award beyond the quantum proved by a claimant (see Okongwu v NNPC (1989) 4 NWLR (Part 115) 296; Dumez Nigeria Ltd v Ogboli (1972) 1 All NLR (Part 1) 241; Alao v Inaolaji Builders Ltd (1990) 7 NWLR (Part 160) 36).

It is a duty to set aside an injustice occasioned by such an arbitrary award.

For this and the fuller reasons advanced in the lead judgment I allow the appeal in part. The respondent is entitled, based on available evidence before the trial court, to an award of N66,000.

The sum is hereby ordered in his favour.

I make the same order relating to cost as in the lead judgment.

Appeal allowed.
African Continental Bank Plc v Victor Ndome-Egba

COURT OF APPEAL, CALABAR DIVISION
EDOZIE, OPENE, EKPE JJCA
Date of Judgment: 11 APRIL, 2000
Suit No.: CA/C/88/99

Banking – Cheque – Forged cheque – Bank paying forged cheque – Whether can debit customer’s account – Principles applicable

Banking – Cheque – Forged cheque – Implications of – Consequences for bank honouring such cheque

Facts

The respondent as plaintiff commenced this action on behalf of Ndome-Egba, Ebri and Company, a firm of solicitors. The partners were at all material times Chief Victor Ndome-Egba, the senior partner and Richard Ebri as a partner. The firm maintained a current account no. 05756 with the appellant at the latter’s Calabar branch.

The respondent’s claim was for the sum of ₦331,000 unlawfully withdrawn from the respondent’s account; interest on the principal sum at the rate of 52% from date of withdrawal until judgment. The respondent also claimed ₦5 million being general damages for breach of contract, negligence and loss of reputation.

The respondent’s case was that the partnership firm of Ndome-Egba, Ebri and Company operated a client’s current account with Victor Ndome-Egba (PW1) and Richard D. Ebri (PW2) as joint signatories of the account. A mandate card, Exhibit 1, was completed during the opening of the account with the specimen signatures of the partners. It was a joint account and, according to the mandate, cheques drawn on the account had to be signed by the two partners. The partnership later paid into the account the sum of ₦500,000. It then issued on that account a cheque dated 12 March, 1993 for the sum of ₦375,000 to its client, Reynold
Construction Company Limited (RCC), through a sister company Nigerian Water Resources Development.

On 30 March, 1993, PW1 called on the appellant bank to confirm the payment of the said cheque for ₦375,000 and was informed that the cheque had not come in for payment, but that, if it did, it could not be honoured for the reason of insufficient funds. The cheque was subsequently returned to the respondent as unpaid (vide letter dated 3 April, 1993, Exhibit 14).

Enquiries as to insufficiency of funds revealed that three strange debits for various sums totalling ₦331,000 were made. The appellant’s branch manager brought out three cheques, Exhibits 2, 3 and 4, upon which various sums were drawn and on examination PW1 confirmed that they were all forged with regard to the signature of PW1, although the signature of his partner PW2 thereon was regular and genuine. It was admitted that a letter dated 31 March, 1993 written by PW2 was addressed to appellant bank with the cheque, Exhibit 2, a request to issue a bank draft for the amount stated thereon in favour of the Federal Super Phosphate Fertilizer Company Limited, Kaduna. The respondent Counsel asked the appellant bank to credit the respondent’s firm account with the amounts fraudulently withdrawn, only to be met by a denial of liability and threat of action for defamation, arguing that the cheque in question was brought by an accountant from the respondent’s firm. The respondent reported the matter to the police and engaged a firm of auditors to audit the account but this could not be done as the appellant did not co-operate with them.

For the appellant, its case was that none of the cheques, Exhibits 2, 3 and 4, was forged as alleged by the respondent. They maintained that, even if the signature of PW1 on those cheques were forged, the admission that the signature of PW2 on them was valid and regular raised an estoppel against the partners, having regard to Exhibit 16.

Upon conclusion of the trial the Judge found for the respondent. He awarded the ₦331,000 claimed with interest and general damages in the sum of ₦500,000.
Aggrieved, the appellant appealed to the Court of Appeal.

Held –

1. *Prima facie*, a bank paying a forged cheque is not entitled to debit the customer’s account. A forged drawing is inoperative as indeed an unauthorised drawing, and the position is the same as if no mandate had ever been issued. Accordingly, it is quite immaterial that the forgery was so skilful that it could not reasonably have been detected. The exception to this rule result from estoppel or from ratification.

2. The law is that a document in cheque form to which the customer’s name as drawer is forged or placed thereon without authority is not a cheque but a mere nullity and unless a banker can establish adoption or estoppel, he cannot debit the customer with any payment made on it. In the instant case it is clear that Exhibits 16 and 2, being the acts of PW2 as agent of the partnership and the acts having been done in the ordinary course of business, are binding on PW1 as well as on the partnership firm. In the same vein since PW2 had signed Exhibits 2, 3 and 4 and wrote Exhibit 16, he had by the act induced the appellant bank to act on Exhibits 2, 3, 4 and 16 and neither he nor PW1 nor the firm is permitted to set up PW2’s own act to the prejudice of the appellant whom PW2 had misled.

*Appeal allowed.*

Cases referred to in the judgment

*Nigerian*

*A.C.B. Plc v Haston (Nig.) Ltd* (1997) 8 NWLR (Part 515) 110

*Adelaja v Alade* (1999) 6 NWLR (Part 608) 544

*Arubo v Aiyeleru* (1993) 3 NWLR (Part 280) 186
African Continental Bank Plc v. Victor Ndoma-Egba

a. Bank of the North v Lake Chad Research Institute (1995) 6 NWLR (Part 403) 607
Edokpolo and Co Ltd v Ohehen (1994) 7 NWLR (Part 358) 511

b. Ekwunife v Wayne (West Africa) Ltd (1989) 5 NWLR (Part 122) 422

Elias v Omo-Bare (1982) All NLR (Part 1) 70
Ezeonwu v Onyechi (1996) 3 NWLR (Part 438) 499
Himma Merchants Ltd v Aliyu (1994) 5 NWLR (Part 347) 667

c. Ikenye v Ofune (1985) 2 NWLR (Part 5) 1
Ikoku v Oli (1962) 1 SCNLR 307
Nwobodo v Onoh (1984) 1 SCNLR 1

d. Tewogbade v Obadina (1994) NWLR (Part 338) 326
Udukeson Ent. Ltd v Okafor FCA/B/103.78 of 13 August, 1979

f. Statutes referred to in the judgment

Nigerian
Evidence Act (Cap 112) Laws of the Federation of Nigeria, 1990, sections 91(3), 108(1), 149(a) and 151

Foreign
Partnership Act, 1890, sections 5, 10 and 15

h. Books referred to in the judgment
Lord Chorley Law of Banking (6ed) at 95
Fidelis Nwadiayo Modern Nigerian Law of Evidence at 62

Counsel
For the appellant: Akobundu
Respondent in person: Ndoma-Egba
Judgment

EDOZIE JCA: *(Delivering the lead judgment)* This appeal emanated from Suit No. C/98/93 commenced at the Calabar High Court but concluded at the Ogoja High Court to which the trial Judge was transferred. It was commenced by the respondent as plaintiff suing on behalf of Ndoma-Egba, Ebri and Company which is a firm of solicitors. The partners were at all material times Chief Victor Ndoma-Egba, the senior partner, and Richard D. Ebri (now deceased) as a partner. The suit was against the appellant bank with respect to its Calabar branch in which the respondent opened and operated a current account no. 05756. Upon the order of the court, parties filed their pleadings terminating in the respondent’s amended statement of claim and the appellant’s amended statement of defence. As articulated in paragraph 18 of the amended statement of claim, the terms of the claim read as follows:–

“18. Whereof, the plaintiff claims from the defendant:–

(i) The sum of ₦331,000 unlawfully withdrawn from the plaintiff’s current account.

(ii) Interest on the principal sum calculated at the rate of 52% from the date of withdrawal until judgment.

(iii) ₦5 million (Five Million Naira) being general damages for breach of contract, negligence and loss of reputation.”

In the ensuing trial, the respondent and his partner gave evidence while the appellant’s case was presented by one witness.

The case of the respondent is that the partnership firm of Ndoma-Egba, Ebri and Company opened a client’s current account no. 05756 at appellant’s Calabar branch with Victor Ndoma-Egba (PW1) and Richard D. Ebri (PW2) as joint signatories to the account. At the opening of the said account, a mandate card, Exhibit 1, was completed on which the specimen signatures of the partners were written. It was a joint account and, according to the mandate, cheques drawn on the account had to be signed by the two partners.
The partnership later paid into the account the sum of \( \text{₦}500,000 \) (Five Hundred Thousand Naira). It then issued on that account a cheque dated 12 March, 1993 for the sum of \( \text{₦}375,000 \) (Three Hundred and Seventy-Five Thousand Naira) to its client, the Reynolds Construction Company Limited (RCC) through a sister company, Nigerian Water Resources Development (N.W.R.D.). On 30 March, 1993, PW1 called on the appellant bank to confirm payment of the said cheque for \( \text{₦}375,000 \) but was informed that the cheque had not come in for payment but that, if it did, it could not be honoured for the reason of insufficient funds. The cheque was subsequently returned to the respondents as unpaid (vide letter dated 3 April, 1993, Exhibit 14).

It is the respondent’s case that, upon further enquiry as to why the account was not in funds, PW1 discovered from the relevant ledger cards, three strange debits for various sums of money, viz.: \( \text{₦}225,000 \) (made on 1 March, 1993), \( \text{₦}31,000 \) (made on 1 March, 1993) and \( \text{₦}75,000 \) (made on 12 February, 1993) all totalling \( \text{₦}331,000 \). The appellant’s branch manager at the time, one Mr I.S. Omenye, brought out three cheques, Exhibits 2, 3 and 4, upon which the various sums were withdrawn and on examination PW1 confirmed that they were all forged with regard to the signatures of PW1 although the signatures of his partner PW2 thereon were regular and genuine. It was admitted that a letter dated 31 March, 1993 (Exhibit 16) was written by PW2. It was addressed to the appellant bank with the cheque, Exhibit 2, as a request to issue a bank draft for the amount stated thereon in favour of the Federal Super Phosphate Fertilizer Company Limited, Kaduna. Furthermore, it is the respondent’s case that by letters, respectively dated 31 March, 1993 (Exhibit 5) and 6 April, 1993 (Exhibit 6), the PW1 and their Counsel, Kanu G. Agabi and Associates, asked the appellant bank to credit the firm with the amounts fraudulently withdrawn but, in response to those letters, the appellant’s solicitor, by letter dated 8 April, 1993 (Exhibits 7 and 8), denied liability and threatened an action for defamation arguing that the cheques in question were presented for
payment by an accountant in the employment of the partnership. The respondent reported the matter to the police, engaged auditors to audit the account but this they could not do as the appellant did not co-operate with them.

On the part of the appellant, it was contended that none of the cheques, Exhibits 2, 3 and 4, was forged as alleged by the respondent and further that, even if the signature of PW1 on those cheques were forged as contended by the respondent, the admission by the partnership that the signature of PW2 on them was valid and regular raises an estoppel against the partners having regard to Exhibit 16. Upon the foregoing facts, the learned Judge Okoi I. Itam J entered judgment for the respondent in the following terms:–

(a) ₦331,000 unlawfully withdrawn from its current account No. 05756 as a result of the defendant’s negligence.

(b) The plaintiff is however entitled to interests for its funds tied up which are assessed and fixed at the conservative rate at 10 per centum per annum with effect from 1 March, 1993.

(c) It is further directed that the defendant shall also pay to the plaintiff interest upon the calculated judgment debt/interest herein at the rate of 8 per centum reckoned from tomorrow 23 September, 1999.

(d) I hereby award general damages in favour of the plaintiff against the defendants in the sum of ₦500,000.”

The appellant bank was not satisfied with the judgment, hence it promptly filed the instant appeal against it. The notice of appeal has a total of 11 grounds of appeal. Briefs of arguments were filed and exchanged by Counsel who adopted same at the hearing of the appeal. In the appellant’s brief, the following five issues were identified for the determination of the appeal:–

(i) Whether upon a calm view of the pleadings and evidence, the plaintiff proved that any one of Exhibits 2, 3 and 4 was a forged cheque.

(ii) Whether the plaintiff and the partner thereof, are estopped from contending that any of Exhibits 2, 3 and 4 were forged, the partners having admitted that
Exhibit 16 was written on behalf of the partnership and in furtherance of the partnership’s business and that the signature of one of them, i.e. Richard D. Ebri, was regular and valid on each of Exhibits 2, 3, 4 and 16.

(iii) Whether upon a calm view of the pleadings and evidence, the learned trial Judge at the court below was right when he held that the defendant wrongfully dishonoured plaintiff’s cheque, Exhibit 14.

(iv) Whether the award of one lump sum to the plaintiff as “general damages for breach of contract, negligence and loss of reputation” is sustainable in law.

(v) Whether the award of interest to the plaintiff at 10 per cent per annum with effect from 1 March, 1993 is legally sustainable having regard to the pleadings and evidence.

On his part, the respondent formulated three issues viz:

1. Does any estoppel arise from Exhibit 16 when Exhibit 1 is a joint mandate to the appellant and Exhibits 2, 3 and 4 tainted with illegality?

2. Whether upon a calm view of the pleadings and evidence, the plaintiff was bound to call an expert witness to prove that Exhibits 2, 3 and 4 were forged?

3. In view of the preponderance of evidence, both oral and documentary in support of the plaintiff’s claims, whether the reasons adduced by the learned trial Judge for granting all the claims of the respondent are justified?

After a careful comparison of the above two sets of issues, I am satisfied that those issues formulated in the appellant’s brief are germane to the grounds of appeal and adequately embrace all the issues in the respondent’s brief. Accordingly, I adopt the appellant’s issues in the consideration of this appeal.

With respect to appellant’s issue No. 1 which covers respondent’s issue No. 2 it was submitted in the appellant’s
brief settled by HN Udechukwu, Esq., S.A.N., that upon a calm view of the pleadings and evidence the respondent did not establish that any one of Exhibits 2, 3 and 4 was a forged cheque. Reference was made to paragraph 10(ii) of the amended statement of claim where it was averred that the signatures purported to be those of the plaintiff and his partner were in fact fraudulent. This statement, it was contended, was contradicted by the oral evidence of PW1 and PW2 who admitted that it was only the signature of PW1 that was forged. It was therefore submitted that, since the oral evidence of PW1 and PW2 was at variance with the pleadings, both the pleadings and oral evidence had to be ignored. Reference was also made to paragraph 9 of the amended statement of claim where it was pleaded that the report of a handwriting expert, Ref. Dxx/21/93 dated 4 May, 1993, and the police report on the fraud would be relied upon to prove the forgery of Exhibits 2, 3 and 4. The respondent, having failed to tender those documents as pleaded, was precluded from relying on oral evidence of facts contained in the written documents (vide the case of Elias v Omo-Bare (1982) (Part 1) Vol. 1 All NLR 70; A.C.B. Plc v Haston (Nigeria) Ltd (1997) 8 NWLR (Part 515) 110 at 131). It was further contended that forgery is a crime which ought to be proved beyond reasonable doubt and the respondent, having failed to tender the documentary evidence he pleaded to prove the forgery, he could not rely on the ipse dixit of the partners nor could the courts fall back on section 108 of the Evidence Act to compare the disputed signatures on Exhibits 2, 3 and 4 with the admitted signatures on Exhibit 1. Furthermore, and on the authority of Ezeonwu v Onyechi (1996) 3 NWLR (Part 438) 499 at 528, it was contended that mere dissimilarity of signatures is neither conclusive proof nor a rational basis to ground a finding that such signatures were not in fact made.

In response to the above submissions, the respondent in his brief settled by himself submitted that Exhibits 2, 3 and 4 were established to be forged cheques and that paragraph 10 of the amended statement of claim was not contradicted by
the testimonies of PW1 and PW2. Counsel contended that the procedure adopted by the court below in comparing the admitted signature in Exhibit 1 with those disputed in Exhibits 2, 3 and 4 was in conformity with the provision of section 108(1) of the Evidence Act.

The main controversy on this issue relates to the alleged forgery of the cheques, Exhibits 2, 3 and 4. The respondent alleged they were forged but the appellant stated the contrary. Forgery is a criminal offence. The onus is on the party who alleges to establish the forgery and this he must do beyond reasonable doubt. Where a party denies making a document which he is alleged to have executed or signed or thumb-printed, such denial is tantamount to saying that the document is a forgery or a fake. In such a situation the burden of proof of the forgery rests on the party who alleges since forgery is a crime, the onus of proof on him who alleges is proof beyond reasonable doubt (Ikoku v Oli (1962) 1 SCNLR 307; Adelaja v Alade (1999) 6 NWLR (Part 608) 544 at 557–558). In the instant case the respondent in paragraph 9 of the amended statement of claim averred thus:

"... At the trial of this case the plaintiff shall also rely on the report of an handwriting expert. Reference No. Dxx/21/93 dated 4 May, 1993 and the Police Report on the fraud."

At the trial, no such document as pleaded above was tendered in evidence and no evidence was led by the respondent in proof of the alleged fraud beyond the mere *ipse dixit* of PW1 and PW2. This, in my humble view, does not constitute proof beyond reasonable doubt in the face of the denial by the appellant that the cheques in question were forged. In the amended statement of defence, it was pleaded in paragraph 15 thereof as follows:

"... The defence will at the trial object to the tendering of the report of a handwriting expert and the police reports."

Commenting on the above comment, the court below at 165 of the record observed:

"But the defendant on paragraphs ... of the amended statement of defence stated that it will object to the tendering of the two reports at the trial. I take it that the defendant did not want the said reports
In support of the above findings, learned Counsel for the respondent has submitted in his brief, that it was wrong for the defence having pleaded in paragraph 15 of the defence as reproduced above to turn around to contend that for the respondent to prove forgery, the reports in question must be tendered. This, Counsel submitted, amounts to approbating and reprobating. In my view, that is no justification for the failure by the respondent to prove his case as required by law. Even if the appellant had not raised the question about the non-tendering of those reports, it is incumbent on the court to raise it and invoke the provisions of section 149(a) of the Evidence Act and hold that, had the documents in question been produced, they would have been adverse to the respondent. In reaching the conclusion that the disputed signatures of PW1 on the cheques in question were forged, the court below embarked upon a comparison of those signatures with PW1’s admitted signature of Exhibit 1 and came to the conclusion that, because of the dissimilarities on the characters of the signature in Exhibit 1 on the one hand and Exhibits 2, 3 and 4 on the other hand, that the latter documents were forged.

It cannot be disputed that a Judge has the power to make a comparison of signatures or writings independent of expert evidence. But he had some limitations in the matter beyond which he could not go. Where the comparison is not very obvious but involves matters which are in the competence of an expert, it will not be proper for the Judge to constitute himself an expert and proceed to form his own opinion in a handwriting in issue (Udukseson Ent. Ltd v Okafor FCA/B/103/78 of 13 August, 1979). In the instant case, the learned trial Judge at 164 et seq. commented as follows:

“3. I have also compared by way of examination the signature on Exhibit 1 on one hand, and those on Exhibits 2, 3 and 4 on the other hand, and I clearly find the following obvious
and material differences, namely:—

(a) The general impression of that on Exhibit 1, is that of a normal, free signature whilst that in Exhibits 2, 3 and 4 are those of a copied or printed effort.

(b) The writing in one gives the impression of a fast smooth and minute one whilst the others are that of a laborious painstaking, calculated, premeditated one and are obviously larger.

(c) In the first the stroke connecting ‘N’ and ‘d’ is slanting and obvious. In the others it is horizontal or absent entirely.

(d) In the first the long line or stroke under the signature is straight and clearly extends beyond the last alphabet (a).

(e) In the first the last word ‘a’ is itself long and extensive. In the others it has no line to it and ends sharply and abruptly with the ‘a’.

(f) In the first the ‘E’ of Egba appears like a big ‘q’ and the proceeding ‘a’ connects it with a lien at the upper side. In the others the connection at the bottom side and it looks like an ‘E’ instead of ‘q’.

(g) In the first the ‘g’ of Egba below the long line is proceeded by 2 dots. In the others it is between the 2 dots.

(h) In the first the character of the alphabets are smallest, sedate, smooth and uniform. In the others they are abrupt, noisy, obvious, loud and clear.”

From the above extract, it cannot be gainsaid that the trial Judge had not assumed the role of an expert in determining whether the disputed signature in question was forged. This, he is not permitted to do, he not being a witness nor a handwriting expert.

In the case of George Obi Ikenye and another v Akpala Ofune (1986) 1 Q.L.R.N. 209; (1985) 2 NWLR (Part 5) 1 it was held that it is not the function of the trial Judge by his own exercise and ingenuity to supply evidence or carry out the mathematics of arriving at an answer which only evidence tested by cross-examination could supply.

The Supreme Court in the case of Ezeonwu v Onyechi (supra) at 528 of the report observed:—

“I accept the plaintiff’s contention that mere dissimilarity in signatures is neither conclusive evidence nor a rational basis to ground a
finding that such signatures were in fact not made by one and the same person particularly when the authorship of such signature is accepted by one and the same person. The Court of Appeal was therefore in gross error by affirming the speculative and unsubstantiated opinion of the trial court that because of the alleged dissimilarity in the signature, the plaintiff was not the maker of the signature on Exhibit FOE 15.”

In the same vein, it seems to me that in the instant case, neither the opinion of the court below nor the mere *ipse dixit* denial of PW1 and PW2 is sufficient to establish beyond reasonable doubt that PW1’s signatures on Exhibits 2, 3 and 4 were forged. I will therefore resolve this issue in favour of the appellant.

I will now advert to appellant’s issue No. 2 which agrees with respondent’s issue No. 1 which relates to the question of estoppel. The contention of the appellant is that, assuming but without conceding that the signature of PW1 on Exhibits 2, 3 and 4 was in fact not written by him, PW1 and PW2, that is the partnership, are estopped from contending that any of the said exhibits are forged, the partners having admitted that Exhibit 16 was written on behalf of the partnership and in furtherance of the partnership’s business and that the signature of one of them, i.e. Richard D. Ebri (PW2), was regular and valid on each of Exhibits 2, 3 and 4. In support of the contention the learned Senior Advocate cited sections 5, 10 and 15 of the Partnership Act, 1890, English Statute of General Application as at 1900 applicable in Cross River and also section 151 of the Evidence Act.

In reply, learned Counsel for the respondent submitted in his brief of argument that Exhibit 16 cannot operate as estoppel against the respondent so as to prevent him from contending that Exhibits 2, 3 and 4 were forged having regard to Exhibit 1 by which the appellant is bound to honour only cheques duly and jointly signed by the partners. Counsel craved in aid the case of *Callia v Cyprus Finance Corporation (London) Ltd* (1982) 2 U.B. 759. It was argued that the effect of Exhibit 16 operating as an estoppel will be to override or circumvent positive and conventional rules of
banking in view of the joint mandate, Exhibit 1. Reference was made to the *Modern Nigeria Law of Evidence* by Fidelis Nwadialo S.A.N. at 62 and the cases of *Onamade v A.C.B. Ltd* (1997) 1 NWLR (Part 480) 194; *Attorney-General of Bendel State v Attorney-General of the Federation and 22 others* (1981) 10 SC 1 at 40 and 41; (1982) 3 NCLR 1. Learned Counsel argued that the provisions of sections 5, 10 and 15 of the Partnership Act, 1890 cited by the appellant do not apply in the instant case because DW1, the sole witness for the appellant denied in his evidence that the respondent’s account was a partnership account.

According to banking practice, a bank paying a forged cheque is not entitled, *prima facie*, to debit the customer’s account. A forged drawing is inoperative as indeed is an unauthorised drawing, and the position is the same as if no mandate had ever been issued; it is accordingly quite immaterial that the forgery was so skilful that it could not reasonably have been detected. The exceptions to this rule result from estoppel or from ratification (see *Law of Banking* by Lord Chorley (6ed) at 95). These principles are exemplified in the case of the *Bank of the North v Lake Chad Research Institute* (1995) 6 NWLR (Part 403) 607 at 615 cited by the respondent where it was held:

“A document in cheque form to which the customer’s name as drawer is forged or placed thereon without authority is not a cheque but a mere nullity and unless a banker can establish adoption or estoppel he cannot debit the customer with any payment made on it.”

In the instant case controversy centres not on ratification but on estoppel. It is necessary to review the evidence to see if a plea of estoppel avails the appellant. Exhibit 16 is the letter written by PW2 on the letterhead of the partnership. It was an application for a bank draft addressed to the appellant bank and bears the partnership stamp of the firm. It reads thus:

“NDOMA-EGBA, EBRI and CO
BARRISTERS-AT-LAW and SOLICITORS
31 March, 1993

The Manager,
African Continental Bank Plc,
Calabar Road,
Calabar.
Dear Sir,

Re: Bank Draft

Kindly issue a Bank draft of ₦225,000 (Two Hundred and Twenty-Five Thousand Naira) only in favour of Federal Super Phosphate Fertilizer Company Limited, Kaduna.

Enclosed herewith is (sic) our Bank Cheque No. 388684 in your favour.

Treat as urgent.

Yours faithfully,
for: Ndoma-Egba, Ebri and Co
Sgd. Richard D. Ebri
(Partner)"

Testifying with respect to the above letter, Exhibit 16, DW1 at 135 of the record said:—

“The withdrawal of ₦225,000 was authorised and therefore not fraudulent. The amount was used in settling a Fertilizer Company in Kaduna on behalf of the plaintiff through a draft he issued. The instruction was given by PW2 vide Exhibit 16. Exhibit 2 is the cheque referred to in Exhibit 16. The cheque shown to me is the original of Exhibit 2. Tendered without objection as Exhibit 17. The plaintiff or PW2 has never complained that the instruction on Exhibit 16 was not complied with. We issued the draft sought in Exhibit 16.”

Referring to the above Exhibit 16, PW2 said: “Yes, it said I signed Exhibit 16. I am aware that the defendant complied with Exhibit 16” (record at 129 lines 12–13).

Referring to the same Exhibit 16, PW2 repeated:—

“I signed Exhibit 16. I am aware that the defendant complied with Exhibit 16” (record at 129 lines 12–13).

At page 129 line 16, the witness further testified:—

“I am convinced that PW1’s signature in Exhibit 1 is not the same as that in Exhibits 2, 3 and 4.”

In spite of the conviction, he wrote Exhibit 16 and attached Exhibit 2 to it and directed the appellant to act on it. He also signed Exhibits 3 and 4 with the knowledge that his
partner’s signature thereon was different from that in the specimen signature card. In those circumstances, it seem patent to me that by his conduct he induced the appellant bank to treat Exhibits 2, 3 and 4 and 15 as genuine.

The respondent has contended that the provisions of the Partnership Act, 1890 are inapplicable in the circumstances of this case because the account in question is not a partnership account. However, in his evidence under cross-examination at 126 line 27 et seq, he said:–

“Account no. 05756 was opened as a partnership account. Yes, the partners are himself and Richard Ebri. It was opened by the partnership to serve as a client’s account. The signature of Mr Ebri on Exhibit 2 is his genuine signature.”

And in paragraph 1 of the amended statement of claim at 27 of the record line 10 et seq, it was pleaded thus:–

“1. The plaintiff is a Legal Practitioner a Senior Partner in the Firm of Ndoma-Egba, Ebri and Company, a Law Firm registered under the Company and Allied Matters Decree with its registered office at 101, Marian Road, Calabar, Cross River State of Nigeria.”

In the face of the above two extracts it cannot be seriously contended that the account in question is not a partnership account. It is immaterial that it was opened as a client’s account. I am clearly of the view that sections 5, 10 and 15 of the Partnership Act, 1890, are applicable to the circumstances of the case.

The sections provide:–

“Section 5 Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership, and the acts of every partner who does any act for carrying on in the usual way business of the kind by the firm and his partners, unless the partner so acting, has in fact no authority to act for the firm in the partnership matter, and the person with whom he is dealing either knows that he had no authority or does not know or believe him to be a partner.

Section 10 Where by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of his co-partners, loss or injury is caused to any person not being a partner...
in the firm or any penalty is incurred, the firm is liable therefore to the same extent as the partner so acting or omitting to act.

Section 15 An admission or representation made by any partner concerning the partnership affairs and in the ordinary course of business is evidence against the firm.”

Applying the above provisions to the instant case, it seems clear to me that Exhibit 16 and Exhibit 2 being the acts of PW2 as agent of the partnership and the acts having been done in the ordinary course of business are binding on PW1 as well as on the partnership firm.

Since PW2 has signed Exhibits 2, 3 and 4 and wrote Exhibit 16, he had by his act induced the appellant bank to act on Exhibits 2, 3, 4 and 16, neither he nor PW1 nor the firm is permitted to set up PW2’s own act to the prejudice of the appellant whom PW2 had misled. I resolve this issue in favour of the appellant.

The appellant’s third issue for determination which forms part of the respondent’s third issue is whether, upon a calm view of the pleadings and evidence, the learned trial Judge was right when he held that the defendant wrongfully dishonoured plaintiff’s cheque, Exhibit 14 (sic). As a basis of his claim in general damages, the respondent in his amended statement of claim pleaded that:

“By reason of the defendant’s negligence, the balance in the plaintiff’s account has been insufficient to cover the cheques issued by the plaintiff...”

At the trial, the plaintiff shall find upon the cheque to R.C.C. through N.W.R.D. aforesaid which was presented to R.C.C. and was returned unpaid.”

At the trial, in an effort to prove the above averments, the respondent tendered the letter dated 30 April, 1993 written by the R.C.C. as Exhibit 14 with the cheque in question as annexure. The appellant’s contention is that the cheque, the annexure to the letter Exhibit 14 bore the endorsement “signature irregular” implying that the cheque was dishonoured not because of lack of funds as pleaded but on account of the irregular signature on it. It was contended that, as the
Evidence was at variance with the pleadings, the court was in error to have found in favour of the respondent. It was further contended that the letter, Exhibit 14, having been written at the time proceedings between the parties were pending was inadmissible in evidence in proof of its contents by virtue of section 91(3) of the Evidence Act. I have carefully examined the letter, Exhibit 14. It does not indicate that the cheque annexed to it was returned on ground of lack of funds in the account on which it was drawn. It seems to me a mere academic exercise to determine whether or not it is inadmissible in evidence.

With respect to the endorsement on the cheque for ₦325,000 annexed to Exhibit 14, it needs to be pointed out that it was not the appellant’s case in the court below that the cheque was dishonoured on the ground of irregularity in the signature of the drawer. Going through paragraph 19 of the amended statement of defence which is a denial of paragraph 11 of the respondent’s amended statement of claim, it seems to me that the appellant did not dispute the allegation that the cheque in question was dishonoured on the ground of insufficiency of funds. What is admitted needs no proof. The evidence of the endorsement on the cheque was a mere surplusage. It was not disputed that the respondent paid into the joint account the sum of ₦500,000. It was also not disputed that total sum of ₦331,000 was withdrawn from the said account. What was disputed was whether or not the withdrawals were authorised. Clearly, if the sum of ₦331,000 is withdrawn from the account the balance would be insufficient to meet a cheque of ₦375,000. Being of the view that the alleged fraudulent withdrawals were indeed authorised, I am unable to hold that the respondent had established a wrongful dishonour of his cheque to entitle him to damages.

The appellant’s fourth issue which also forms part of the respondent’s third issue poses the question whether the award of one lump sum to the plaintiff as “general damages for breach of contract, negligence and loss of reputation” is sustainable in law. In paragraph 18(ii) of the amended
statement of claim the respondent claimed ₦5,000,000 being general damages for breach of contract, negligence and loss of reputation arising from the alleged unlawful withdrawal from the joint client account. The court below held that the withdrawals were unlawful and awarded the sum of ₦500,000 as damages in that regard. Having expressed the view that the withdrawals were not unlawful, it goes without saying that the award is unsustainable. It becomes a mere academic exercise discussing whether the claim and award as formulated are bad in law. It is therefore my view that there is merit in this issue.

The appellant’s fifth and last issue for determination which also touches on the respondent’s third issue relates to the claim and award of interest. The respondent claimed 52% interest per annum on the principal sum of ₦331,000 allegedly withdrawn unlawfully from the respondent’s joint partnership account and the court below awarded 10% interest rate. It is settled law that a claim based on special rate of interest sounds in special damages and therefore must be strictly pleaded and proved (see Himma Merchants Ltd v Aliyu (1994) 5 NWLR (Part 347) 667; A.C.B. Plc v Haston Nigeria Ltd (1997) 8 NWLR (Part 515) 11; Reuben Ekwunife v Wayne (West Africa) Ltd (1989) 5 NWLR (Part 122) 422 at 445). In the last of these cases, Nnaemeka-Agu JSC observed as follows:–

“Interest may be claimed as a right where it is contemplated by the agreement between the parties, or under a mercantile custom or under a principle of equity such as breach of a fiduciary relationship. See London Chatham and Dover Railway v S.E. Railway (1893) A.C. 429 at 434. Where interest is being claimed as a matter of right, the proper practice is to claim entitlement to it on the writ and plead facts which show such an entitlement in the statement of claim. In Nigeria, as the law is that a statement of claim supersedes the writ for which see Udechukwu v Okwuka (1956) 1 FSC 70 at 71; (1956) SCNLR 189; Ekpan and another v Uyo (1986) 3 NWLR (Part 26) 63, if even it was not claimed on the writ but facts are pleaded in the statement of claim and evidence given which show entitlement thereto, the court may, if satisfied with the evidence award interest. Adjudication on the plaintiff’s
right to interest in such a case will also establish the proper rate of interest and the date from which it should begin to run whether from the accrual of the cause of action or otherwise” (italics supplied).

In the contribution, Agbaje JSC had this to say at 453–454 of the report:–

“So, in my judgment for a claim for interest to properly exist for determination in the High Court of Plateau State, it must be stated in the endorsement of the claims to the writ of summons or in the statement of claim whether the claim for interest is based on contract or statute and the grounds upon which the claim is based. A defect in this regard in the indorsement to the writ can be cured in the statement of claim since the latter supersedes the writs.

I have copied above paragraph 7 of the plaintiff’s statement of claim where there is only a bare statement as to claim for interest on the sum of ₦16,000 claimed by the plaintiff. It is not stated whether the claim for interest is based on contract or statute. Nor are the grounds of the claim for interest shown on the statement of claim. Because of what I have just said, my conclusion would be that the plaintiff has not properly raised his claim for interest in this case, at least, up to the date of judgment. So, the trial court in my judgment was wrong to have awarded interest at all on the amount claimed by the plaintiff up to the date of judgment” (italics for emphasis).

In the instant case, apart from the bare reference to interest in paragraph 18(ii) of the amended statement of claim, it is not stated whether the claim is based on contract or statute and the grounds for the claim. The claim for interest was therefore not properly raised nor was evidence led in that regard. It follows therefore that the award of interest by the court below is untenable.

In the light of the foregoing, this appeal succeeds and is accordingly allowed. The judgment of the court below is set aside. In its place, I dismiss the respondent’s claim. I award to the appellant against the respondent costs assessed and fixed at ₦5,000.

OPENE JCA: I have been privileged to read in advance the judgment just delivered by my learned brother, Edozie JCA. I entirely agree with him that there is merit in the appeal and that it should be allowed. The finding and the decision
arrived at by the learned trial Judge are not supported by evidence before the trial court.

It has been the contention of the respondent that the sum of N331,000 for which a judgment was entered for him was unlawfully withdrawn from his current account but at the trial, both PW1 and PW2 admitted that the signatures of PW2 in the three cheques, Exhibits 2, 3 and 4, upon which the various sums of money were withdrawn were regular and genuine and that only the signature of PW1 on the cheques were forged. PW1 and PW2 also admitted that Exhibit 16 was written by PW2. Exhibit 16 authorised the issue of a bank draft for the sum of N225,000. The respondent, having pleaded that Exhibits 2, 3 and 4 were forgeries, the onus is therefore on him to lead evidence and establish it. Forgery is an allegation of crime and the standard of proof is beyond reasonable doubt (see Edokpolo and Co Ltd v Samson Ohehen and another (1994) 7–8 SCNJ 500; (1994) 7 NWLR (Part 358) 511; Gabriel Adewole Tewogbade v Mrs. V.A. Obadina (1994) 4 SCNJ 16; (1994) 4 NWLR (Part 338) 326; Chief Jim Nwobodo v Chief C.C. Onoh (1984) 1 SC 1; (1984) 1 SCNLR 1).

The respondent in paragraph 9 of his statement of claim pleaded that he would rely on the report of a handwriting expert at the trial. This was abandoned as no expert evidence was called and the learned trial Judge took it upon himself to compare and contrast the signature on Exhibit 1 with those on Exhibits 2, 3 and 4 and then issued his own report on which he based his finding that Exhibits 2, 3 and 4 were forged.

The appellant having failed to lead an expert witness to show that Exhibits 2, 3 and 4 were forged, the learned trial Judge should have dismissed the appellant’s claim as it has not been proved. It is a very grave error on the part of the learned trial Judge to turn himself into an expert witness in order to help the appellant to win his case by supplying the expert evidence which is lacking in this case (see Chief...
Further, even if it has been established that the signatures of PW1 on these exhibits are forged, the action will still not succeed in view of the fact that the partnership firm of Victor Ndoma-Egba, Ebri and Company operated the said account with PW1 and PW2 as joint signatories. It was admitted by PW1 and PW2 that the signatures of PW2 on Exhibits 2, 3 and 4 were regular and genuine and also that Exhibit 16 was written on behalf of the partnership and in furtherance of the partnership business and by virtue of sections 5, 10 and 15 of the Partnership Act, 1890, the partnership is therefore estopped from contending that any of the signatures was forged.

If the learned trial Judge had addressed his mind to these facts and the applicable law, especially the provisions of sections 5, 10 and 15 of the Partnership Act, 1890, obviously he would have arrived at a very different conclusion.

For these and the fuller reasons given in the leading judgment, I am fully of the view that the appeal is meritorious and that it should be allowed.

I therefore allow the appeal. I abide by the consequential order made in the leading judgment including the order as to costs.

EKPE JCA: I have read in advance the leading judgment delivered by my Lord Edozie JCA and I entirely agree with his opinion and conclusion that this appeal has merit and should be allowed.

I also allow the appeal and abide by the orders of my learned brother including the order as to costs.

Appeal allowed.
Union Bank of Nigeria Plc v Chief J.D. Okubama

COURT OF APPEAL, BENIN DIVISION
IBIYEYE, BA’ABA, ROWLAND JJCA

Date of Judgment: 11 APRIL, 2000

Banking – Cheque – Dishonour of – Customer’s account in debit – Banker not liable in contract or negligence – Wrongful dishonour – Relief for same in liquidated damages not damages for negligence – Section 2 and section 57 of the Bills of Exchange Act (Cap 35) Laws of the Federation of Nigeria, 1990

Banking – Cheque – Dishonour of – Customer’s account in debit – Subsequent honouring of five cheques after dishonouring of two not breach of contract but exercise of discretion of a banker

Banking – Overdraft – Customer exceeding overdraft facility – Issuing a cheque – Asking for loan – Bank’s discretion to honour or dishonour – Refusal of – Not granting cause of action

Banking – Overdraft – Limit of – Determined by approval of banker and not value of property mortgaged as security

Banking – Rate of exchange – Not to be judicially noticed – Need to prove by expert evidence

Facts

The plaintiff/respondent sued the defendant/appellant at the Delta State High Court claiming the sum of ₦9,664,250 as special and general damages for negligence and breach of contract suffered by the plaintiff/respondent.

The sum of ₦1,047,905 claimed as special damages was the Naira equivalent of $12,779.33. The sum of ₦1,062,996 was claimed to be monetary damages of the loss by the appellant to honour two cheques drawn by the respondent on the appellants, despite the fact that the respondent had sufficient funds in his account at the material time.
The plaintiff/respondent also claimed the sum ₦7,553,349 as damages he suffered as a result of the appellant’s refusal to honour the respondent’s cheques and damages for shock, inconvenience; frustration and loss of reputation arising from the appellant’s refusal to honour the respondent’s cheques.

At the hearing the plaintiff/respondent testified and called a witness and the same witness who was a staff member of the defendant also testified for the defendant.

The gist of the case of the plaintiff/respondent was that he operated a current account with the defendant/appellant in which he had sufficient funds. He drew on the account two cheques numbers 287763 and 287764 for ₦4,848.87 and ₦2,385.69 respectively in favour of the Nigerian Ports Authority (NPA) in settlement of harbour dues. The defendant/respondent failed to honour the two cheques and this made him incur demurrage to the tune of 18,152 German Marks and to lose a refund of $12,779.33 from the Nigerian Ports Authority as well as a loss of reputation. Upon the refusal of the appellant to honour these cheques he met the appellant’s branch manager who apologised to him and he subsequently issued five other cheques which were honoured by the appellant.

The defendant’s case on the other hand was that, notwithstanding the fact that the deed of mortgage made between the appellant and the respondent was stamped to cover ₦60,000, the overdraft facility granted to the respondent was pegged at ₦40,000. At the time the respondent issued the two cheques which the appellant refused to honour, the respondent had overstretched the approved overdraft facility of ₦40,000 to ₦53,413.44. In the circumstances, the appellant no longer had any legal obligation to honour the respondent’s cheque drawn on the account. The appellant was only being magnanimous by honouring the subsequent five cheques drawn after the first two dishonoured cheques.

The trial court gave judgment and granted the respondent’s claim in part and awarded special damages, of ₦1,047,905 being the Naira value of the sum of $12,779.33 and the sum
of ₦4,553,349 being general damages for the appellant’s refusal to honour the respondent’s cheques and for the resultant shock, inconvenience, frustration and loss of reputation suffered by the respondent.

Dissatisfied with the judgment, the appellant appealed to the Court of Appeal contending among others that the trial court had no jurisdiction to hear the suit as the plaintiff/respondent did not pay the statutory fees for filing the claim and that the damages awarded in favour of the respondent were without regard to the evidence adduced before the court.

**Held** –

1. When a customer who has exceeded his overdraft facility issues a cheque, he is indeed asking for a loan and the bank has a discretion to honour or dishonour the cheques.

2. In the instant case, there is sufficient evidence that the respondent’s account with the appellants was in debit. It is settled law that in the circumstances that the respondent found himself, the appellant had no duty to honour the said two cheques.

3. It is also trite to say that the refusal of such cheques cannot grant a cause of action in the absence of proved evidence to the contrary.

4. Exceeding overdraft facilities by a bank’s customer is not a legal right but a privilege. The bank does not become liable in dishonouring such cheques neither will the bank be liable in negligence.

5. The rate of fiscal conversion cannot be judicially noticed. There is a need to call in aid an expert and most reliably that expert should be from the Central Bank of Nigeria which controls the rates of exchange and has sufficient documentation of the periods at which different rates applied.
6. That the appellant had a discretionary power to honour or dishonour the respondent’s cheques issued while his account with the appellant was in debit and so the honouring of subsequent five cheques after dishonouring the first two cannot amount to breach of contract for dishonouring the first two cheques as the bank was exercising its discretion.

7. It is improper for a party in a banker/customer relationship to seek relief for negligence when the cheque issued by the customer is dishonoured by the banker. Such relief should instead be sought as liquidated damages for breach of contract. This rules out the applicability of the principle in *Hadley v Baxendale* (1854) Exch. 341; 156 ER 145 which is to the effect that, where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be as much as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such breach of contract itself or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it.

8. Since a cheque is a bill of exchange under section 2(1) of the Bill of Exchange Act (Cap 35) Laws of the Federation of Nigeria, 1990 the measure for the award of damages is by virtue of section 57 which essentially stipulates that, where a bill is dishonoured, the measure of damages shall be deemed to be liquidated damages. The holder may recover from any party liable on the bill and the drawer who has been compelled to pay the bill may recover from the acceptor or from the drawer or from a prior endorser:

(a) the amount of the bill;

(b) interest thereon from the time of presentment if the bill is payable on demand, and from maturity of the bill in any other case; and
(c) the expenses of noting, or when protest is necessary, and the protest has been extended, the expenses of the protest.

9. The learned trial Judge erred in law when he awarded the claim of ₦1,047,905.50 which is in negligence and awarded that amount for breach of contract. By virtue of section 57 of the Bills of Exchange Act, since the total sum of the dishonoured cheques was ₦7,432.56, this ought to be the amount that should be awarded as liquidated damages but this was not strictly proved.

10. The award of ₦4,000,000 as general damages, ₦500,000 as general damages and ₦1,047,905 as special damages amounted to double compensation for general damages and the special damages being awarded without strict proof was a mistake of law and cannot be sustained.

11. The respondent did not pay the statutory fees in respect of relief for ₦1,000,000 and ₦9,664,250 when the amended statement of claim was filed and no excuse was proffered for that and so the trial court lacked jurisdiction ab initio to entertain the matter.

Appeal allowed.

Cases referred to in the judgment

Nigerian

Adereti v A-G Western Nigeria (1965) All NLR 254
ELF (Nigeria) Ltd v Sillo (1994) 6 NWLR (Part 350) 258
Eze v Federal Republic of Nigeria (1987) 1 NWLR (Part 51) 506
Highgrade v First Bank of Nigeria Ltd (1991) 1 SCNJ 100; (1991) 1 NWLR (Part 167) 290
Ifeanyi Chukwu Osondu Co Ltd v Akhigbe (1999) 11 NWLR (Part 625) 1
Union Bank of Nigeria Plc v. Chief J.D. Okubama

**a** Ijebu-Ode Local Government v Adedeji Balogun and Co Ltd (1991) 1 NWLR (Part 166) 136

Madukolu v Nkemdilim (1962) 1 All NLR 587; (1992) 2 SCNLR 341

**b** Onwegbufor v Okoye (1996) 1 NWLR (Part 424) 252

Salami v Savannah Bank of Nigeria Ltd (1990) 2 NWLR (Part 130) 106

**c** UBN Plc v SCPOK Nigeria Ltd (1998) 12 NWLR (Part 578) 439

UBN Plc v Sax Nigeria Ltd (1994) 8 NWLR (Part 361) 150; (1994) 9 SCNJ 1


**e** Weide and Co (Nig.) Ltd v Weide and Co Hamburg (1992) 6 NWLR (Part 249) 627

**Foreign**

**f** Hadley v Baxendale (1854) 9 Exch. 341; (1843–60) All ER Rep. 461

**Nigerian statutes referred to in the judgment**

**g** Bills of Exchange Act (Cap 35) Laws of the Federation of Nigeria, 1990, section 57

Evidence Act (Cap 112) Laws of the Federation of Nigeria, 1990, section 74

**h** Book referred to in the judgment

Sheldon and Filders *Practice and Law of Banking* (11ed) at 26, 36, 170–171 and 181–191

**Counsel**

For the appellant: Akpojure, S.A.N. (with him Agboron)

For the respondent: Jessa
Judgment

IBIYEYE JCA: (Delivering the lead judgment) This is an appeal against the judgment of Onafite Kuejubola J of the Delta State High Court of Justice sitting in Warri on 25 September, 1998. The plaintiff, who is the respondent in this appeal, claimed in paragraph 26 of his further amended statement of claim against the defendant as appellant as follows:

“WHEREAS the plaintiff claims against the defendant the sum of N9,664,250 (Nine Million, Six Hundred and Sixty-four Thousand, Two Hundred and Fifty Naira) as special and general damages being the loss suffered by the plaintiff.

PARTICULARS OF NEGLIGENCE
Based on cheques issued by the plaintiff to the Nigerian Ports Authority to be drawn on the defendant, the defendant refused, failed and/or negligently refused to pay same despite the sufficiency of funds at the material time.

PARTICULARS OF SPECIAL DAMAGES
Amount of refund plaintiff is entitled to from Nigeria Ports Authority is $12,779.33 (Twelve Thousand, Seven Hundred and Seventy-nine Dollars and Thirty-nine cents) . . . At N82 per $1.00 . . . N1,047,905 demurrage incurred as a result of NPA refusal to allow plaintiff’s vessels sail is 19,15208 German Marks at N55.5029 = N1,062,996

GENERAL DAMAGES
4. Damages suffered by plaintiff as a result of defendant’s failure to honour the withdrawal of $200.00 from plaintiff’s domiciliary account when there was sufficient fund ................................................................. N3,000,000

4a Damages suffered by the plaintiff when the defendant failed to honour plaintiff’s cheque when there was sufficient fund in the current account ........... N4,000,000

4b Damages suffered by the plaintiff for shock, inconvenience, frustration and loss of reputation .... = N553,349

Grand Total ........................................... = N9,664,250”

Pleadings were ordered and, by the leave of the court, amended and exchanged several times over by both parties with the eventual titles of further, further amended statement of claim and further amended statement of defence.
The case proceeded to hearing whereby the plaintiff testified and called a witness and the same witness who is a staff of the defendant also testified for the defendant.

The salient aspects of the plaintiff’s testimony are that he had sufficient funds in his current account with the defendant’s bank and that the failure of the defendant to honour his two cheques, numbers 287763 and 287764, for N4,848.87 and N2,383.69 respectively drawn in favour of the Nigerian Ports Authority (hereinafter referred to as NPA) in settlement of harbour dues made him to incur demurrage to the tune of 18,152.08 German marks and to lose a refund of $12,779.33 from NPA as well as loss of reputation.

Consequently, upon the alleged recalcitrant attitude of the defendant, the plaintiff sought the reliefs set out in paragraph 26 of the further amended statement of claim (supra).

The defendant, on its part, testified, albeit, succinctly that as at the time the plaintiff issued those two cheques, he had overstretched the approved overdraft facility of N40,000 to the tune of N53,413.49. In view of the negative development in the plaintiff’s current account, the defendant asserted that it no longer had any legal obligation to honour any cheque drawn on that same current account. It added that all that was left in its relationship with the plaintiff was purely discretionary.

Learned Counsel for both parties at the close of case thereafter extensively addressed the trial court. On 25 September, 1998, the learned trial Judge delivered a considered judgment partly in favour of the plaintiff by allowing the reliefs claimed in subparagraphs (2), 4(a) and 4(b) of paragraph 26 (above). The sum total of the reliefs sought in the said subparagraphs added up to N5,547,905 (Five Million, Five Hundred and Forty-seven Thousand, Nine Hundred and Five Naira). The learned trial Judge apparently made an unsolicited order that the said judgment sum be paid to the plaintiff by the defendant within 14 days from the date of judgment.
The defendant was aggrieved by this decision and appealed to this Court on nine grounds. The defendant, now appellant, thereafter sought and got leave of this Court to file and argue four additional grounds of appeal. The original and additional grounds of appeal are eventually 13 in number.

The appellant distilled the following five issues from the eventual 13 additional grounds of appeal.

1. Whether the trial court made proper evaluation of the evidence before it and made proper inferences therein having regard to the evidence and state of pleadings before it.
2. Whether the payment of subsequent cheques after the two dishonoured cheques can amount to a breach of contract of the dishonoured cheques.
3. Whether the damages awarded by the trial court was (sic) unwarranted, excessive and unjustifiable warranting the interferences by the Appellate Court.
4. Whether the trial court had jurisdiction to entertain the suit having regard to the reliefs sought by the respondents.
5. Whether the award of ₦1,047,905 for negligence for the two cheques dishonoured have been proved.

The respondent, on his part, formulated only two issues from the 13 grounds of appeal. The two issues are as follows:

1. Whether having regards (sic) to the issues properly joined by the parties in their pleadings vis-à-vis the totality of admissible and credible evidence led in support thereof, the trial court was right in coming to the conclusion in effect, that the dishonour of the two cheques was wrongful and thus occasioned loss and damages.
2. Whether the damages awarded are excessive to warrant intervention of the Appellate Court.

I shall cursorily remark that the two issues formulated by the respondent do not adequately encompass the 13 grounds of appeal. I am mindful of the trite position at law that the scantiness of the issues formulated by the respondent will not attract any sanction as he can even afford not to formulate any issues. In the event of the respondent failing to formulate issues from the grounds of appeal when there is no cross appeal, the court is entitled to hold that the respondent has, by implication, adopted the issues formulated by
the appellant (see Weide and Co (Nigeria) Ltd v Weide and Co Hamburg (1992) 6 NWLR (Part 248) 627 at 637). It is equally settled that, where a respondent decides to formulate issues, it must do so with reference to all the grounds of appeal filed (see J.N. Eze v Federal Republic of Nigeria (1987) 1 NWLR (Part 51) 506 at 521 and 522). In view of the sparsely and/or inadequately formulated issues by the respondent from the extensive grounds of appeal, I shall prefer the issues formulated by the appellant which are comprehensive enough.

At the hearing of this appeal on 19 January, 2000, Chief E.L. Akpofure, S.A.N., and B.A. Jessa, Esq., the learned Counsel for the appellant and respondent respectively, adopted the parties’ briefs and amplified on them. It should be pointed out that the learned Senior Advocate for the appellant did not only adopt an amended brief of argument but he also adopted the appellant’s reply brief of argument.

On issue 1 the learned Senior Advocate for the appellant took up the issue of banking facility granted to the respondent by the appellant on whether or not it was at a ceiling of N60,000 or N40,000. He argued that evidence abound on behalf of the appellant that the facility granted to the respondent was pegged at N40,000. He referred to Exhibits F and U dated 3 February, 1987 (not 3 February, 1997 as claimed by him) being letters which are to the effect that the facility was pegged at N40,000. He went on to add that the respondent under cross-examination admitted on seeing Exhibit F which is a copy of Exhibit U that the facility he enjoyed in the defendant’s bank had been pegged at N40,000 as at 3 February, 1987. The learned Senior Advocate of Nigeria further strengthened the fact that the sum of N40,000 was the ceiling of the facility made available to the respondent by the appellant, when Buraimoh Martins, the appellant’s witness (DW1) who was also the witness of the respondent, identified Exhibit U as a copy of the letter written to the respondent by the appellant which the former signed in acknowledgment. He argued that these items of appellant’s evidence were not controverted by the
respondent. He therefore submitted that, in the face of the unchallenged appellant’s evidence on the issue of the quantum of facility availed the respondent by the appellant, the trial court was in error in holding that the pegging of the sum of N40,000 was inconclusive.

Learned Senior Advocate further argued that the conclusion of the trial court that the amount of facility at the disposal of the respondent was N60,000 and not N40,000 was not borne out by the evidence of the respondent. He went on to buttress his argument that it is trite to say that, where documentary pieces of evidence are tendered and they support the oral testimony, the court should place reliance on the aspect or aspects in the documentary evidence which support the oral evidence. He relied on the case of *Kindey v Governor or Gongola State* (1988) 2 NWLR (Part 77) 445, (1988) 5 SCNJ 28. He urged the court to hold that Exhibits F and U support the oral evidence of DW1. He further argued that the oral evidence of the respondent relating to N40,000 could not have varied or modified the contents of Exhibits F and U and that the sum of N60,000 alluded to by the learned trial Judge was not part of the evidence of the respondent. He went on to submit that unchallenged evidence should be deemed admitted and, in the absence of anything to the contrary, the trial court ought to believe it. He relied on the case of *Otuedon v Olughor* (1997) 9 NWLR (Part 521) 355 at 376 paragraphs C–D; *Akhinobare v Omoregie* (1976) 12 S.C. 11 at 18 and *Obemhe v Wemabod* (1977) 5 S.C. 115.

On the issue of the two dishonoured cheques, the learned Senior Advocate submitted that the learned trial Judge improperly evaluated the evidence before her. Thus the evidence before the learned trial Judge was to the effect that the respondent’s current account in the appellant’s bank had no funds to back the demand on each of the two cheques. He therefore submitted that the appellant was justified in dishonouring the two cheques issued in favour of NPA and that, in the prevailing circumstances, the appellant was not in any way negligent in its obligation towards the
respondent. The fact of the indebtedness of the respondent beyond the approved N40,000 loan facility was exemplified by reference to page 35 lines 20–23 of the printed record that the respondent under cross-examination admitted the contents of Exhibits L and G (that is to say the respondent’s statement of account) that his account was in debit.

The learned Senior Advocate conceded the fact of the existence of a legal mortgage on the respondent’s property dated 6 September, 1977 to cover N60,000 but argued that that mortgage was a security for the overdraft which was subsequently pegged at N40,000 on 3 February, 1987 as per Exhibits F and U. He further argued that it has nothing to do with the issuance of the two cheques. He added that the position and meaning of overdraft in law are that where a customer who is enjoying a facility limited to a certain amount, as in the instant case where the overdraft facility was pegged at N40,000 on 3 February, 1987, has exceeded its limit, issues a cheque, he is indeed asking for a loan which is at the discretion of the bank which reserves the right to honour or dishonour the said cheque. He relied on the case of *Adereti and another v Attorney-General Western Nigeria* (1965) 1 All NLR 254 at 257. He submitted that it is manifest from available evidence that the respondent predicated the two cheques on insufficient funds and that if they were honoured that act would crystallise into a contract. The appellant behaved regularly in dishonouring the two cheques in the absence of sufficient funds in the respondent’s account. He cited the case of *Highgrade v First Bank Nigeria Ltd* (1991) 1 SCNJ 100 at 122; (1991) 1 NWLR (Part 167) 290.

On the award of the naira equivalent of $12,779.23 for which the sum of N1,047,905.50 was awarded by the trial court based on N82 to N1 as reflected at paragraph 26 of the further, further amended statement of claim dated 20 June, 1996, the learned Senior Advocate argued that the averment did not stipulate the period the said rate of the dollar as applicable to the naira nor did the respondent give any evidence on the period. He (the respondent) instead said that he
did not know the value of the naira to the dollar when the cause of action arose in 1987. He therefore submitted that there was no evidence before the learned trial Judge of the rate of exchange either at the time the cause of action arose, at the time the plaintiff gave evidence or at the time judgment was delivered. He argued that, since this head of claim is under special damages for negligence, it must be strictly proved and he cited the cases of Ijebu-Ode Local Government v Adedeji Balogun and Co Ltd (1991) 1 NWLR (Part 166) 136 and Inland Container (Mg.) Ltd v R.C.T. Co Ltd (1997) 8 N.W.L.R. (Part 517) 505.

He therefore submitted that there was no proof or scintilla of evidence to justify such award of special damages at a prevailing rate. It is also not, that is the rate of exchange, one of those things any court can judicially notice under section 74 of the Evidence Act (Cap 112) Laws of the Federation of Nigeria, 1990. It is hardly the province of the court to go on a voyage of discovery in the absence of tested and proven evidence before it. He cited the case of Green v Green (1987) 3 NWLR (Part 61) 480; (1988) 7 SCNJ 255 at 296.

Learned Senior Advocate furthered his argument by saying that the learned trial Judge erred when she held that subsequent honouring of cheques after dishonouring the two cheques in issue showed that there was a special agreement between the appellant and respondent for the latter to draw upon his account and that failure on the part of the former to honour the first two cheques amounted to a breach of contract. He contended that this conclusion is not borne out by evidence apart from pegging the overdraft facility at ₦40,000 as per Exhibits F and U. He finally submitted that from the available pieces of evidence, no proper evaluation was made and, where it was made, wrong inferences were drawn. He urged the court to resolve this issue in the negative.

In reply to issue 1, B.A. Jessa, Esq., the learned Counsel for the respondent, contended that the respondent led oral
a evidence and tendered documents establishing that the initial facility was ₦60,000 as per Exhibit Z6. In an attempt to fault the dishonouring of the two cheques, the learned Counsel for the respondent referred to page 32 lines 27–29 of the record that the respondent testified that after the two cheques were dishonoured, he complained to an unnamed branch manager of the appellant who apologised on behalf of the appellant. He submitted that this piece of evidence which stands uncontradicted is consistent with the equally established fact that, shortly after the two cheques were dishonoured, the appellant honoured five subsequent cheques issued by the respondent and he referred to Exhibits N, O, P, Q and R. I doubt if the contention and submission of the learned Counsel for the respondent adequately negate the contention of the appellant that as at the time the two vexed cheques were tendered the respondent was in debit at the appellant bank.

b Learned Counsel for the respondent contended that there is no conclusive evidence that Exhibit U was received by the respondent. He urged the court to resolve issue 1 in the affirmative because the dishonouring of the cheques was wrongful as the appellant owed the respondent a duty of care in their relationship of banker/customer and was recklessly negligent in failing to honour the respondent’s cheques when his (respondent’s) account was still within the limit of the overdraft facility granted him.

c In reply to issues canvassed in the respondent’s brief in which the learned Counsel for the respondent made so much weather about Exhibit Z6 in which he held steadfastly that the initial overdraft was ₦60,000 the learned Senior Advocate argued that the said Exhibit does not state that the initial overdraft was ₦60,000. Exhibit Z6 is instead stamping of legal mortgage to cover ₦60,000 and not that that amount was the loan initially granted.

d The contentions of both the appellant and the respondent on issue 1 are twofold: First, whether the initial loan facility was ₦60,000; secondly, whether as at the time the two
vexed cheques were issued and presented for withdrawal the respondent’s account in the appellant bank had functional funds.

As regards the first poser, the respondent placed so much reliance on Exhibit Z6 to buttress his argument that the initial loan facility was ₦60,000 and that as at 12 March, 1987, when the two cheques were returned by the appellant, his current account was in funds. The appellant retorted by saying that the ceiling of the loan facility availed to the respondent was ₦40,000 and that as at the time the said two cheques were presented, the respondent had overshot his facility from ₦40,000 to ₦53,413.49.

I am of opinion that a close consideration of Exhibits Z6 and F and/or U will probably proffer an answer. Thus Exhibit Z6 is a letter written by W.A. Ogbaudu Onoriobe and Co, who are the respondent’s solicitors, to the appellant in respect of the account of the respondent’s company. It is dated 26 May, 1986, that is the letter (Exhibit Z6), the addressee and the last paragraph are of moment and they are reproduced as follows:–

“The Manager, Union Bank of Nigeria Ltd, Warri/Sapele Road, Warri.

Dear Sir,

Registration and Stamping of Legal Mortgage dated 6 September, 1977 Registered as 50/50/458 Legal Mortgage to Cover ₦60,000, Account: Okubama Sons and Brothers (West Africa)

Bill of professional charges for search, Military Governor’s approval, Stamping, registration and disbursements in respect of the above mentioned property in your instructions vide your letter of 2 March, 1986...

We enclose herewith the original Deed of Mortgage dated 26 May, 1986 registered as 31/31/697, Benin city, Please.”

Equally of relevance to the issue of whether or not ₦60,000 is the initial loan is one of the documents making up Exhibit Z3. That document reads in part as follows:–

“Military Governor’s Office
Department of Lands and Survey  
(Lands Division)  
Benin City.

14 May, 1986  
Ref No. L. 9125/9,  
Mr Johnson D. Okubama,  
C/o W.A.O. Onoriobe Esq.  
P.O. Box 1842,  
Warri

Dear Sir,

I am directed to refer to your application Ref. No of 27 March, 1986 for consent for subsequent transaction in respect of the property the particulars of which are as follows:–

(1) Nature of Grant  
Deed of Lease

(2) Date:  
6 September, 1977

(3) Registration Particulars  
50/50/458

(4) Size of Land  
1034.82 Sq Yard”

The purport of Exhibit Z6 is that the respondent executed a mortgage on his property valued ₦60,000 on 6 September, 1977 while Exhibit Z3 is the consent in the Military Governor of Bendel State (as it then was) for the respondent to mortgage the same property from 27 March, 1986. None of the two exhibits portrays that the sum of ₦60,000 was in respect of a loan facility. The best deduction from Exhibit Z6 is that the respondent to all intents and purposes simply informed the appellant that he had a property which had been regularly registered and stamped as legal mortgage up to the limit of ₦60,000. There is no evidence that the appellant approved the sum of ₦60,000 as either a loan facility or an initial loan facility. The only documentary evidence that the appellant approved a “banking facility” for the
respondent is as per Exhibit F or U dated 3 February, 1987. It is clearly stated in Exhibit F by the appellant that in view of the respondent’s “unsatisfactory level of performance” of his account, “the Bank has therefore decided to peg facility” marked for this business at “O/D – N40,000 (Forty Thousand Naira) for the time being”.

It is obvious from the foregoing that as at 3 February, 1987 the ceiling of the overdraft facility available to the respondent was N40,000. Exhibit F went further to state that the said facility would expire on 25 June, 1987.

The respondent confirmed the fact of pegging the loan facility as per his evidence at page 35 lines 16 and 17 of the record. Here he said:–

“As at 3 February, 1987, the bank as per Exhibit F had pegged my facility to N40,000.”

It is worthy of note that Exhibit F was tendered through the respondent who admitted receiving it. At the same page 35 lines 21–23 of the record respondent said:–

“From Exhibit G, I can see the 2 cheques relating to NPA. The dates the cheques were returned is (sic) 12 March, 1987 i.e. the 2 cheques. The account of same as at 9 March, 1987 was reading N3,413.49 (Fifty-three Thousand, Four Hundred and Thirteen Naira, Forty-nine Kobo) as debt.”

From the foregoing, can it be said that the respondent’s current account with the appellant was in functional funds? The answer is utterly in the negative. It is obvious that when the two cheques were returned by the appellant the respondent’s account was in debit. It is trite that when a customer who has exceeded his overdraft facility issues a cheque he is indeed asking for a loan and the bank has a discretion to honour or dishonour the cheques (Adereti and another v Attorney-General Western Nigeria (supra) at 27). In the instant case there is sufficient evidence that the respondent’s account with the appellant was in debit. It is settled law that the circumstances in which the respondent found himself, the appellant had no duty to honour the said two cheques (see Highgrade v First Bank of Nigeria Ltd (supra) at 122).
It is also trite to say that the refusal of such cheques cannot grant a cause of action in the absence of proved evidence to the contrary (see Union Bank Nigeria Plc v Sax Nigeria Ltd (1994) 8 NWLR (Part 361) 150; (1994) 9 SCNJ 1 at 9). It is equally settled that exceeding overdraft facilities by a bank’s customer is not a legal right but a privilege. The bank does not become liable in dishonouring such cheques neither will the bank be liable in negligence.

As regards the award of ₦1,047,905.50 converted from $12,779.33 as special damages, I entirely agree that there was no strict proof of the rate of conversion when the cause of action arose in February, 1987. The rate of fiscal conversion cannot be judicially noticed. There is need to call in aid an expert and most reliably that expert should be from the Central Bank of Nigeria which controls the rates of exchange and has sufficient documentation of the periods in which different rates applied.

In view of the foregoing, it is abundantly clear that the learned trial Judge failed in her duty to properly evaluate the evidence before her and to draw proper inferences. The resultant effect of the irregular evaluation, inferences and conclusions is the interference by this Court with finding of facts of the trial court (see B. Ude and others v N. Chimbo and others (1998) 12 NWLR (Part 577) 169; (1998) 10 SCNJ 23 at 40 and Ifeanyi Chukwu Osondu Co Ltd v Akhigbe (1999) 11 NWLR (Part 625) 1 at 18). I according interfere with the finding of facts of the trial court and resolve issue 1 in the negative.

As regards issue 2, the learned Senior Advocate for the appellant submitted that the learned trial Judge palpably erred to have held that, since subsequent cheques were honoured after the dishonoured two cheques, the respondent was entitled to draw upon his account. He reiterated the clear evidence of both the appellant and the respondent, as reflected in Exhibits F and page 35 lines 20–23 of the record, that the respondent’s account with appellant was in debit. He also referred to page 46 lines 23–34 of the record where the appellant’s sole witness explained that the subsequent five
The respondent did not controvert this assertion, which only portrayed an exercise of discretion in respect of demands in excess of the overdraft facility. He submitted that, if a customer exceeds his overdraft facilities and the bank honours a subsequent cheque or cheques, it does not confer a legal right but a privilege which is at the discretion of the banker. If the bank dishonours such cheque or cheques, the bank does not become liable in negligence and he relied on the cases of *Union Bank of Nigeria Plc v Sax (Nigeria) Ltd* (supra) at 19 and *Highgrade v First Bank of Nigeria Ltd* (supra) at 122 as well as Sheldon and Filders *Practice and Law of Banking* (11ed) particularly at 26, 36, 170–171 and 181–191. Learned Senior Advocate referred to page 11 lines 22 and 23 of the record where the learned trial Judge opined that, since the subsequent cheques were honoured by the appellant, it amounted to a “special agreement”. He submitted that the learned trial Judge was in grave error to have held so in the absence of any legal proof that the respondent was not enjoying a discretionary and magnanimous gesture of the appellant.

The respondent was apparently silent in his brief and the oral amplification by his learned Counsel on this issue. It therefore means that the respondent has little to urge on the court on this issue. Despite the overt silence of the respondent on this issue, it is the bounden duty of the court to consider the merit or demerit of the appellant’s argument.

I have carefully considered the submission of the learned Senior Advocate in relation with the pleading and the evidence on printed record, I entirely agree that the appellant had a discretionary power to honour or dishonour the respondent’s cheques issued while his account with the appellant was in debit. This discretionary power could hardly, in the prevailing circumstances, confer any legal right on the respondent whose account was in debit. Furthermore, I equally agree with the learned Senior Advocate that the appellant merely invoked its discretion when it honoured the
subsequent five cheques. That gesture could not have amounted to a “special agreement” because there is no evidence to that effect. Accordingly, the payment of the subsequent cheques could not amount to breach of contract, instead it is an exercise of the appellant’s discretionary power. Issue 2 is therefore resolved in the negative.

Issue 3 deals with the award of damages by the trial court. Learned Senior Advocate submitted that excessive damages, such as in this appeal, cannot be awarded in a purely contractual action and where it is done the appellate court is duty bound to review them downwards where they are high and upwards where they are low. He cited the cases of Allied Bank of Nigeria Ltd v Jonas Akubueze (1997) 6 NWLR (Part 509) 374 at 406 and Union Bank of Nigeria v Odu slote Book Stores Ltd (1995) 12 SCNJ 175 at 203; (1995) 9 NWLR (Part 421) 558.

Learned Senior Advocate further submitted that the learned trial Judge was wrong to have awarded triple damages of ₦1,047,905 for appellant’s negligence in dishonouring the two cheques, ₦4,000,000 as general damages for dishonouring two cheques and ₦500,000 as general damages for shock, inconveniences and loss of reputation arising from the dishonouring of the two cheques. He contended that these three awards relate to the same subject-matter and amounted to triple compensation and that it is wrong to do so. He relied on the cases of Artra Industry Ltd v Nigeria Bank for Commerce and Industry (1998) 4 NWLR (Part 546) 357; (1998) 3 SCNJ 67 at 130; Agaba v Otobusin (1961) 1 SCNLR 13, (1961) 1 All NLR 312 at 315; Ogbechie v Onochie (1988) 1 NWLR (Part 70) 370 at 372; Onaga v Micho and Co (1961) All NLR 324 at 328; (1961) 2 SCNLR 101 and Medical and Dental Council of Nigeria v System Information Ltd (1998) 12 NWLR (Part 577) 258 at 264. He finally urged the court to hold that this is an appropriate case to interfere with the excessive and arbitrary awards and he relied on the Akubueze case (supra) and ELF v Sillo (1994) 6 NWLR (Part 350) 258 at 274.
In reply, the learned Counsel for the respondent was prudent enough to concede that the learned trial Judge erred in awarding double compensation.

In view of the concession of the learned Counsel for the respondent and the state of the pleading, particularly paragraph 26 of the further, further amended statement of claim (supra) no further useful purpose will be served by embarking on any incisive consideration of this issue. Suffice it to say that both the awards of ₦500,000 and ₦4,000,000 as general damages in the same case amounted to double compensation. As regards the sum of ₦1,047,905 awarded as special damages, it has already been held in this appeal that there is no strict proof of this head of claim as it is required by law. It is trite that an Appellate Court will not ordinarily interfere with the award of damages by the trial court unless the award is shown to be either manifestly too high or manifestly too low or the court has acted under a mistake of law (see Ijebu-Ode Local Government (supra) at 136; Elf (Nigeria) Ltd v Sillo (supra) at 274 and Ifeanyi Chukwu Osondu Co Ltd v Akhigbe (supra) at 25).

In view of the above principle, the learned trial Judge acted under a mistake of law in awarding double compensation and want of strict proof in a claim for special damages. I accordingly set aside that three heads of claim for damages and resolve this issue in the affirmative.

Issue 4 deals with want of the court’s jurisdiction where the respondent is alleged not to have paid the prescribed fees for monetary claims.

The learned Senior Advocate for the appellant meticulously highlighted the several monetary claims in this matter from its inception to the several amendments to the statement of claim and contended that the prescribed fees had not been paid. He submitted that this is clearly in contravention of the provision of the Second Schedule Part 1 to the High Court (Civil Procedure) Rules, 1988 of the defunct Bendel State (now applicable to Delta State). He further submitted
that, since the respective statutory fees were not paid in respect of reliefs for ₦1,000,000 and ₦9,664,250 when the amended statement of claim was filed at different times, the trial court lacked jurisdiction in entertaining the case. He equally submitted that the payment of statutory fees in any civil litigation by any plaintiff is a condition precedent before the trial court can assume jurisdiction. The failure of the respondent to meet the said condition precedent, he contended, was an act in error, which has adversely affected the entire judgment and renders it null and void. He went on to submit that it is trite law that a court shall not entertain a relief claimed without the payment of the prescribed requisite fees unless such fees have been waived or remitted by the court or such fees are payable by any government department or local government pursuant to the provisions of the High Court Rules. He cited the case of Onwugbufor and others v Okoye and others (1996) 1 SCNJ 1 at 36; (1996) 1 NWLR (Part 424) 252.

The learned Counsel for the respondent appeared to have refrained from this issue in his brief of argument. This issue relates to the competence of the trial court to adjudicate in this matter. It is settled law that a court is competent to adjudicate in an issue before it if:

1. It is properly constituted as regards numbers and qualifications of the members of the bench and no member is disqualified for one reason or another; and
2. the subject-matter of the case is within its jurisdiction and there is no feature in the case which prevents the court from exercising jurisdiction; and
3. the case comes before the court initiated by due process of law and upon fulfilment of any condition precedent to the exercise of jurisdiction.

Any defect in competence is fatal for the proceedings and a nullity, however well conducted and decided, the defect is extrinsic to jurisdiction” (see Gabriel Madukolu and others v Johnson Nkendilim (1962) 1 All NLR 587 at 595; (1962) 2 SCNLR 341 at 348).

I have perused the record of proceedings with particular reference to the several pleadings in the form of amendments filed by the respondent and I observed that he (the
respondent) did not pay the prescribed fees on the monetary reliefs therein. The respondent did not venture to proffer any excuse for this omission when he testified. In view of the principles enunciated in the cases of Onwugbofor and three others v Okoye and three others (supra) and Madukolu v Nkemdilim (supra) I hold that the trial court lacked jurisdiction ab initio in this matter and it is accordingly struck out. Issue 4 is therefore resolved in the negative.

On issue 5 the learned Senior Advocate reiterated that the claim of the sum of N1,047,905.50 is for the tort of negligence occasioned when the appellant failed to honour the two cheques issued to NPA. Despite the fact that the relief sought by the respondent was for negligence, the trial court held that the failure to honour those cheques was a breach of contract. He submitted without conceding that, even if the claim in negligence was regular, it has not been strictly proved as it is a claim for special damages and he relied on the cases of A.G. Anduba Ltd v Onuselogu Enterprises Ltd (1956–88) (M.S.) NSCC 50; Inland Containers (Mg.) Ltd v R.C.T. Co Ltd (1997) 8 NWLR (Part 517) 505 and Sommer v F.H.A. (1992) 1 NWLR (Part 219) 548. He contended that the tort of negligence presupposes the existence of a duty of care and went on to submit that no evidence had been established that a duty of care towards the respondent had been breached by the appellant.

The question is:–

What is the propriety in seeking damages for negligence where cheques have been dishonoured in a banker/customer relationship? It is improper for a party in a banker/customer relationship to seek relief for negligence when the cheque issued by the customer is dishonoured by the banker. Such relief should instead be sought as liquidated damages for breach of contract. This rules out the applicability of the principle in Hadley v Baxendale 9 Exch. 341; (1843–60) All ER Rep. 461 which is to the effect that, where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of
such breach of contract should be as much as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such breach of contract itself or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it (see Salami v Savannah Bank of Nigeria Ltd (1990) 2 NWLR (Part 130) 106 at 127).

Since a cheque is a bill of exchange under section 2(1) of the Bill of Exchange Act (Cap 35) Laws of the Federation of Nigeria, 1990 the measure for the award of damages is by virtue of section 57 which essentially stipulates that where a bill is dishonoured the measure of damages shall be deemed to be liquidated damages. The holder may recover from any party liable on the bill and the drawer who has been compelled to pay the bill may recover from the acceptor and an endorser who has been compelled to pay the bill may recover from the acceptor or from the drawer or from a prior endorser:

(a) the amount of the bill;
(b) interest thereon from the time of presentment if the bill is payable on demand and from maturity of the bill in any other case; and
(c) the expenses of noting, or when protest is necessary and the protest has been extended, the expenses of the protest.

UBN Plc v SCPOK (Nigeria) Ltd (1998) 12 NWLR (Part 578) 43 also decided that the award and measure of damages under the said section 57 do not include an award of general damages. The permissible award is liquidated damages.

The foregoing principles deal with a situation where a cheque has been wrongfully dishonoured by the banker.

In the instant case the learned trial Judge apparently veered from the basis of the claim of ₦1,047,905.50 which is in negligence and awarded that amount for breach of contract. This digression, in my view, appears not to have assisted the situation because of non-compliance with the provision of
section 57 of the Bills of Exchange Act (supra) which stipulated, *inter alia*, that the amount recoverable as liquidated damages is the amount of the bill. In the instant case the sum total on the dishonoured two cheques is ₦7,432.56. In effect, the liquidated damages recoverable from the appellant is ₦7,432.56 as opposed to the outrageously staggering amount of ₦1,047,905.50.

It is worthy of note that the sum of ₦1,047,905.50 which the respondent claimed and was awarded as special damages had been held under issue 1 (supra) that it was not strictly proved as expected in law (see [Salami v Savannah Bank of Nigeria Ltd](#) (supra) at 126 and 127).

From the foregoing, the award of ₦1,047,905.50 by the learned trial Judge was borne under a mistaken appreciation of the applicable law and that mistake has afforded this Court the power to interfere with the award. Issue 5 is resolved in the negative and the award of ₦1,047,905.50 is accordingly set aside.

In the final analysis, I find merit in the appeal and it is allowed. The decision of the trial court delivered on 25 September, 1998 is set aside. I award the sum of ₦5,000.00 costs to the appellant.

**Rowland JCA:** I had the privilege of reading the draft of the judgment just delivered by my learned brother, Ibiyeye JCA. The facts of the case are fully set out therein. All the issues raised and canvassed in the appeal are also well set out and fully discussed. I entirely agree with his conclusion that this appeal has merit and it is therefore allowed.

I endorse the order on costs.

**Ba’aba JCA:** I agree.

*Appeal allowed.*
Alhaji Ibrahim Umaru Wuro Hausa v First Bank of Nigeria Plc

COURT OF APPEAL, JOS DIVISION
AKPABIO, CHUKWUMA-ENEH, MANGAJI JJCA
Date of Judgment: 12 APRIL, 2000
Suit No.: CA/J/295/98

Banking – Overdraft – Award of interest thereon by the court – Rate of pre-judgment and post-judgment – Power of court

Facts

The plaintiff/respondent brought an action against the defendant/appellant at the Adamawa State High Court sitting at Yola, under the undefended list in the sum of N769,796.46 representing principal and interest due to the respondent bank from the appellant as at 25 October, 1996. The amount was said to have arisen as a result of an overdraft facility allowed the appellant at his request by the respondent bank. The respondent also claimed interest at the rate of 21% per annum from 23 October, 1996 until judgment and 10% per annum from date of judgment until payment.

The court granted the plaintiff/respondent the relief sought as per his writ of summons.

Dissatisfied with this verdict, the defendant/appellant appealed to the Court of Appeal contending that the lower court had no power to award any interest whether pre-judgment or post-judgment other than as prescribed by the provisions of Order 40 Rule 7 of Gongola State High Court (Civil Procedure) Rules of 1987 applicable in Adamawa State as follows:–

“The Court at the time of making any judgment or order or any time afterwards, may direct the time within which payment or other acts is to be made or done, reckoned from some other point of time as the Court thinks fit, and may order interest at a rate not exceeding Ten Naira (₦10) per centum to be paid upon any
judgment, commencing from the date thereof or afterwards as the case may be.”

Held –

1. There are two types of interest charges usually awarded by the courts in Nigeria, namely (a) pre-judgment interest; and (b) post-judgment interest.

2. Pre-judgment interest must be claimed by the plaintiff on his writ of summons and evidence subsequently adduced in proof of it failing which the court will not award it. Also the award of pre-judgment interest is usually dependent on the agreement of the parties and the custom of the trade concerned.

3. The court will readily award a pre-judgment interest where the plaintiff is a commercial bank and the rate of interest fixed at the inception of the loan or overdraft transactions, whereas if the plaintiff was a private person, or the loan stated to be a “friendly loan” and nothing said about interest charges at the time of entering into the loan agreement, the court will not award interest in such circumstances.

4. A post-judgment interest as its name implies is usually awarded by the court at the end of a trial, after the amount of judgment debt would have been determined, and because there is usually no agreement about this between the parties in advance, the matter is usually left to the court’s discretion at the end. In most States of the Federation the rates of interest to be awarded by the court is usually fixed by the Rules of Court and it usually varies between 5% and 10%.

5. In the instant case, the lower court clearly had jurisdiction to award both a pre-judgment and a post-judgment interest within the limits prescribed by law, which were not exceeded.

Appeal dismissed.
Cases referred to in the judgment

Nigerian

Barclays Bank of Nigeria Ltd v Abubakar (1977) All NLR 278
Barclays Bank D.C.O. v Hassan (1961) 1 All NLR 836
Himma Merchants Ltd v Aliyu (1994) 5 NWLR (Part 347) 667
Momodu v Momoh (1991) 1 NWLR (Part 169) 608
Onifade v Olayiwola (1990) 7 NWLR (Part 161) 130

UBN Ltd v Ozigi (1994) 3 NWLR (Part 333) 385
UBN Ltd v Salami (1998) 8 NWLR (Part 543) 538
UBN v Sax (Nigeria) Ltd (1994) NWLR (Part 361) 150

Nigerian rules of court referred to in the judgment

High Court of Gongola State (Civil Procedure) Rules, 1987 applicable to Adamawa State Order 40 rule 7

Counsel

For the appellant: Moze
For the respondent: Jegede

Judgment

AKPABIO JCA: (Delivering the lead judgment) This is an appeal against a judgment of Lawi J of Adamawa State High Court sitting at Yola in suit no. ADSY/25/97 delivered on 5 November, 1998, wherein he entered judgment in favour of the plaintiff against the defendant in a suit brought under the undefended list in the sum of ₦769,796.46k representing principal and interest due to the plaintiff bank from the defendant as at 25 October, 1996 as a result of an overdraft facility allowed the defendant at his request by the plaintiff bank plus interest at the rate of 21% per annum from 23 October, 1996 until judgment and 10% per annum from date of judgment until payment.
From the affidavit in support which was filed along with the writ of summons to support its placement on the undefended list, it was disclosed that the defendant was granted an overdraft facility in the sum of ₦70,000 (Seventy Thousand Naira) on his account no. 103010588 with the plaintiff bank sometime in 1985, which said overdraft facility was to have expired on 30 November, 1989. To secure the said overdraft, defendant deposited the certificate of occupancy (i.e. title deed) in respect of his house and premises known as Wum Howa “B” Yola.

However, ever since the collection of the said overdraft, the defendant had not paid a single kobo as a refund of the said loan, in spite of repeated demands by plaintiff, and in spite of repeated assurances and promises by the defendant to liquidate the overdraft facility. Also supporting the claim was a six-page statement of account no. 00101010588 starting from 21 May, 1990 to 27 August, 1995, showing that the defendant had not paid a single kobo ever since the inception of the overdraft facility.

In reply to the claim of the plaintiff, the defendant filed a notice of intention to defend supported by an 11-paragraph affidavit in support, sworn to by the defendant himself, in which he admitted being granted an overdraft facility of ₦70,000 by the plaintiff as alleged. He admitted knowing that his account with the plaintiff bank was overdrawn, but not by any sum near ₦769,796.46 as at 23 October, 1996. He concluded by saying that for the past 12 years or more the plaintiff had not sent to him a comprehensive statement of his account showing a detailed debt balance.

After considering both the plaintiff’s affidavit in support of the plaintiff’s claim and the relevant exhibits, as well as the defendant’s notice of intention to defend and its affidavit in support, the learned trial Judge, Lawi J, came to the conclusion that there was no triable issue between the parties as to warrant the suit being transferred to the general cause list. He therefore entered judgment in favour of the plaintiff in
terms of its writ of summons as already set out in the introductory paragraphs of this judgment.

Dissatisfied with the said judgment, the defendant, who will henceforth in this judgment be referred to as the “appellant”, has now appealed to this Court on two grounds, from which the following issues for determination have been formulated:

“(1) Whether the trial court had jurisdiction to award interest of 21% from 25 October, 1996 on the sum of ₦769,796.46 until judgment contrary to Order 40 Rule 7 of the Gongola High Court (Civil Procedure) Rules, 1987, applicable to Adamawa State.

(2) Whether, upon a careful perusal of the documents filed by the respondent and the annexures some of which were illegible, the trial court granted the appellant fair hearing by entering judgment against the appellant in terms of the writ of summons.”

In response to the above, the plaintiff who will hereinafter be referred to as “respondent” also filed a brief in which two issues were also formulated as follows:

“Issues for determination:

(1) Whether given the facts of this case the trial court was right to award interest of 21% from 25 October, 1996 to date of judgment on the claim of ₦769,796.46.

(2) Whether the trial court was not justified in hearing the case as undefended suit and giving judgment for the respondent as per its claim.”

Since the two sets of issues are almost identical, I shall proceed at once to resolve them in accordance with the formulation in the appellant’s brief as follows:

“(1) Whether the trial court had jurisdiction to award interest of 21% from 25 October, 1996, on the sum of ₦769,796.46 until judgment contrary to Order 40 rule 7 of the Gongola State High Court (Civil Procedure) Rules 1987 applicable to Adamawa State?”

Under this issue, it was submitted on behalf of the appellant that the trial court lacked jurisdiction to award 21% interest on the sum of ₦769,796.46 from 25 October, 1996 until judgment, as claimed by the respondent in the writ of summons. This was so because of the provisions of Order 40
rule 7 of the Gongola State High Court (Civil Procedure) Rules, applicable to Adamawa State which reads as follows:—

“The court at the time of making any judgment or order or at any-time afterwards, may direct the time within which the payment or other act is to be made or done, reckoned from the date of judgment or order or from some other point of time as the court thinks fit, and may order interest at a rate not exceeding ten naira per centum to be paid upon any judgment, commencing from the date thereof or afterwards as the case may be.”

It was then pointed out that in the instant case, not only did the learned trial Judge in the second leg of the claim award interest at the rate of 21% per cent, which was much higher than the 10% maximum allowed by the rules, but the date of commencement of payment of such interest was 23 October, 1996 which antedated the judgment. For that reason he urged this Court to hold that the award in respect of the second leg of the claim (i.e. “21% per annum from 23 October, 1996”) was illegal and should be set aside. Learned Counsel for the appellant said nothing about the third leg of the claim which was “10% interest from judgment until payment”. The cases of Himma Merchants Ltd v Alhaji Inuwa Aliyu (1994) 5 NWLR (Part 347) 667 and Ekwunife v Wayne (W.A.) Ltd (1989) 5 NWLR (Part 122) 422 were cited as authorities for this submission.

In reply to the above submission it was submitted on behalf of the respondent as follows:—

There are two classes of interests awardable in a court of law, viz:—

(a) where interest is claimed as of right; which usually depends on the agreement of the parties; and

(b) where there is power conferred by statute on the court to do so in exercise of the court’s discretion.

It was then pointed out that all the arguments of the learned Counsel for the appellant, and all the authorities cited related to the third arm of the claim or relief of the respondent against which there has been no appeal. In respect of that
relief which falls under category (b) above, learned Counsel for the respondent conceded that where discretionary interest was to be awarded under the Rules of Court, the trial court cannot award interest in excess of 10% per annum and such can only take effect from the date of judgment. That was the position of the law as stated in the two cases of *Ekwunife* and *Himma Merchants Ltd* (*supra*) cited and heavily relied upon by his learned friend.

However, as regards the award of interest of 21% per annum from 23 October, 1995 to judgment, that was a claim under category (a) above, which was claimed as of right. In respect of such, respondent may claim interest as of right and there was no law dictating the limit of the interest rate to be awarded and the time the interest will start to run. In conclusion under this issue it was submitted that where a claim for interest before judgment is established and proved by the relationship between the parties and the evidence, such interest can be awarded to take effect before the date of judgment and in excess of what is spelt out in the rules. Therefore, given the relationship between the parties, and the evidence before the court, it was submitted that the learned trial Judge was right to award interest of 21% per annum which was the prevailing interest rate in favour of the bank from 1996 to judgment. The recent case of *U.B.N. Ltd v Salami* (1998) 3 NWLR (Part 543) 538 was cited in support. The court was then urged to answer the first issue in the affirmative, namely that the trial court had jurisdiction to award interest predating (or antedating) judgment and in excess of 10% per annum where such was claimed as of right.

I have carefully considered all the arguments canvassed above by learned Counsel on both sides, and must agree with learned Counsel for the respondent that there are two types of interest charges usually awarded by the courts in this country, namely (a) pre-judgment interest; and (b) post-judgment interest. As submitted by the learned Counsel for the respondent, pre-judgment interest must be claimed by the plaintiff in his writ of summons, and evidence
subsequently adduced in proof of it, failing which the court will not award it. I should also mention the fact that the award of pre-judgment interest is usually dependent on the agreement of the parties and the custom of the trade concerned. The court will readily award pre-judgment interest where the plaintiff is a commercial bank, and the rate of interest fixed at the inception of the loan or overdraft transaction, whereas if the plaintiff was a private person, or the loan stated to be a “friendly loan” and nothing said about interest charges at the time of entering into the loan agreement, the court will not award interest in such circumstances. See the cases of *UBN v Sax (Nigeria) Ltd* (1994) 8 NWLR (Part 361) 150; *UBN Ltd v Ozigi* (1994) 3 NWLR (Part 333) 385. See also the recent case of *UBN Ltd v Salami* (1998) 3 NWLR (Part 543) 538 where the Court of Appeal (Kaduna Division) per I.T. Muhammad JCA at 544–546 had the following to say:

“(3) On power of bank to charge compound interest and rationale therefore.”

A bank has power to charge compound interest on loans or other advances granted to a customer even where there was no express agreement on the rate of interest to be charged. This is because the customer is taken to impliedly consent to an interest to be charged to his account (*Barclays Bank of Nigeria Ltd v Abubakar* (1977) All NLR 278–280; *Barclays Bank D.C.O. v Hassan* (1961) 1 All NLR 836 referred to at 544–545 paragraphs H–A) per Muhammad JCA at 345–346:

“I think it will work injustice on the judgment creditor if interest shall be refused on his judgment debt which is the fruit of his judgment particularly, with the appellant as a banking institution. There is no gain saying that in the present modern banking system where interest seems to be the only revenue yielding mechanism relied upon by the banks, if same will be obliterated, or where customers refuse, neglect or circumvent in a way, to pay same as agreed between them and the bank, I am afraid, the banking system is bound to collapse. It is both illegal and immoral in the system for a customer to enjoy the facilities granted him by the bank,
a repayment of which, in addition to all interests and other charges, he has undertaken to effect, should refuse or neglect to fulfil.”

On the other hand, post-judgment interest, as its name implies, is usually awarded by the court at the end of trial, after the amount of judgment debt would have been determined. And because there is usually no agreement about this between the parties in advance, the matter is usually left to the court’s discretion at the end. In most States of the Federation, the rate of interest to be awarded by the court is usually fixed by the rules of court and it usually varies between 5% and 10%. I have also looked at the case of Himma Merchants Ltd v Aliyu (1994) 3 NWLR (Part 347) 667, which was heavily relied upon by the appellant, and found that that case was not on all fours with the instant case. In the first place the plaintiff therein was not a licensed commercial bank, and therefore had no powers or legal rights to charge interest on any loan or debt owed to it. The full facts of the case may be summarised as follows:

The respondent as plaintiff sued the appellant as defendant at the Bauchi State High Court claiming under the undeposited list the sum of N16,500 as well as 10% interest on the sum from July, 1989 till final payment. The respondent was the owner of a petrol filling station which the appellant took on lease at an annual rent of N7,000 with five years’ rent payable in advance. The respondent claimed that the appellant paid the sum of N18,000 out of the total sum of N35,000 leaving a balance of N16,500. At the end of the trial, the learned trial Judge gave judgment in favour of the respondent for the said sum of N16,500 together with interest at 20% per month from July, 1988. On appeal to the Court of Appeal against the award of interest, the appeal was dismissed. But on further appeal to the Supreme Court the appeal was unanimously allowed. The Supreme Court per Onu JSC in the lead judgment held inter alia as follows:

“5. On proof of interest claimed on judgment debt:–

The best method of satisfying a court about the existence of the ground for the award of interest is by adducing credible, sufficient and satisfactory evidence about it. In the case in hand, there is no evidence whatsoever about the rate of
interest agreed upon by the parties and the basis upon which it is computed” (at 676 paragraphs E–F).

It will be seen therefore that unlike the case in hand in which the respondent claimed two types of interest at different rates (i.e. a pre-judgment interest at 21% per annum, and a post-judgment interest at 10% per annum respondent in the Himma Merchants Ltd case (supra) claimed only one rate of interest at 20% without specifying whether it was a post-judgment or a pre-judgment interest. If it was a post-judgment interest, then the court would not be able to grant it as it was clearly more than 10% which the court was empowered to award under the rules. If it was a pre-judgment interest the court would also not be able to award it as there was no evidence whatsoever to show that there was any agreement between the parties for the appellant to pay interests, and at what rate. In the instance case, however, the respondent was a licensed commercial bank, which by law and mercantile customs was entitled to charge interest. As for the rate of interest it was clearly stated in a document dated 2 July, 1985, and headed “Authority, for Limits”, that the interest margin was “Prime + 1% – 13%”.

This to my mind clearly meant that at the commencement of the facility, interest rate was 13%, but gradually moved to 21% according to Central Bank guidelines on credit policy, issued to commercial banks annually. In any case, the issue for determination formulated by the appellant in this Court is not that the rate of interest was excessive or not agreed to by him, but rather that the trial court had no jurisdiction to award a pre-judgment interest of 21% from 25 October, 1996 on the sum of N769,796. But, as has been amply shown by all the decided cases discussed above, the trial court clearly had jurisdiction to award both a pre-judgment and a post-judgment interest within the limits prescribed by law, which were not exceeded. Issue 2 is therefore hereby resolved in favour of the respondent, namely that the trial court had jurisdiction to award both pre-judgment and post-judgment interest at the rate it awarded.
a  “Re Issue No. 2:
Whether, upon a careful perusal of the documents filed by the respondent and the annexures some of which were illegible, the trial court granted the appellant fair hearing by entering judgment against the appellant in terms of the writ of summons.”

b  Under this issue it was contended on behalf of the appellant, that the trial court did not properly discharge its duties as an impartial arbiter in the proceedings, which occasioned a miscarriage of justice. The annexures to the respondent’s application, especially Exhibit H, were not comprehensive and legible enough to establish the appellant’s indebtedness in the colossal sum of ₦769,796.46. It was therefore submitted that in the circumstances of this case the trial Judge should have “treated cautiously” rather than the hasty judgment he proceeded to enter against the appellant. The case of Garba v University of Maiduguri (1986) 1 NWLR (Part 18) 550 at 558, was cited in support. In conclusion it was submitted that the trial court did not give the appellant a fair hearing in the proceedings appealed against. The court was therefore urged to allow the appeal.

c  In response to the above, it was submitted on behalf of the respondent that the issue of unfair hearing certainly did not arise from Ground 2 of appellant’s grounds of appeal. Even if such was covered by the ground of appeal, appellant was indeed afforded opportunities of putting his case across and heard and no rules of natural justice was violated. The court was therefore urged to resolve the second issue in favour of the respondent and dismiss the second ground of appeal.

d  However, if this Court ruled otherwise, it was further argued that, given the fact that the suit was instituted under the undefended list pursuant to Order 23 rule 3(2) of the Gongola State High Court (Civil Procedure) Rules Edict, 1991 there was no room for giving oral evidence or a viva voce cross-examination of any of the parties unless such was transferred to the general cause List. The purpose of an undefended list procedure was to facilitate expeditious hearing of cases heard under it. It was pointed out that the
appellant was duly allowed to file his notice of intention to defend, as well as his affidavit in support. But when it was found that even the appellant himself conceded having collected the overdraft facility of N70,000 in 1985 followed by his further admission that he was owing N130,000 in 1989, coupled with the fact that he has not paid a single kobo since collecting the money 13 years ago, the learned trial Judge was right in holding that the appellant’s affidavit did not disclose any defence on the merits. This Court was therefore urged to dismiss this appeal and affirm the judgment of the trial court.

I have carefully considered all the arguments canvassed above, and also read afresh both Ground 2 of the grounds of appeal as well as issue 2 formulated in this Court for determination, to see whether the issue arises from the grounds, and regret to say that I cannot see how issue 2 can by any stretch of the imagination be said to have arisen from Ground 2 of the grounds of appeal. The said Ground 2 of the grounds of appeal, even with its particulars read as follows:

“Ground 2 – Error in law and facts”

The learned trial Judge erred in law and on the facts when he accepted the evidence by the plaintiff/respondent, hook, line and sinker in granting the relief sought in terms of the writ of summons.

Particulars of error:–

“(a) The documents constituting Exhibit ‘H’ to in paragraph 8 of the respondent’s affidavit in support of the motion ex parte are not legible nor comprehensive to clearly impose an outrageous sum of N769,796.46K as the appellant’s oral indebtedness.

(b) The failure by the trial Judge to transfer the case to the general cause list and hear evidence viva voce has occasioned miscarriage of justice.

(c) A customer’s indebtedness to a commercial bank is not a magna carta to award incredible sums as interest where there is no legal basis.
The plaintiff did not adduce any evidence to show the basis for the claim of interest sought and granted as required by law.”

From the foregoing extracts, it will be seen that throughout the length and breadth of Ground 2 and the four particulars there was no mention of the words “fair trial” or “unfair trial”. Only in the formulation of issue 2 in this Court were the words “fair hearing” mentioned. The appellant complained that some of the pages of the statement of account exhibited as Exhibit H to respondent’s affidavit in support were not legible. Even if that were so appellant failed to ask for “further and better particulars” as he was entitled to do under the rules. Clearly illegibility of documents cannot ground a complaint for “unfair hearing”. Before ending this judgment, I must say that, even on the merits, the appellant did not disclose any triable issue as to warrant the case being transferred to the general cause list at the court below. Throughout his affidavit in support of his intention to defend, there was nowhere he averred or deposed that he paid any money, as part settlement of the overdraft, but which was not credited to this account, nor that interest charges were wrongly debited to his account. If there had been such a complaint, this Court would not have hesitated to send the case back for retrial to get the point resolved.

On the totality of the foregoing, I find that issue 2 of the appellant did not arise from ground 2 of his grounds of appeal. That issue was only a subtle attempt to canvass issues which appellant failed to canvass at the trial court. It is our law that, when an issue for determination did not arise from the ground of appeal filed, it should be struck out or discountenanced (see Onifade v Olayiwola (1990) 7 NWLR (Part 161) 130 at 157; Momodu v Momoh (1991) 1 NWLR (Part 169) 608 at 620–621). Issue 2 in this appeal is therefore hereby struck out.

In view of the fact that issue 1 has already been resolved in favour of the respondent, this appeal fails and is hereby dismissed. I affirm the judgment of the court below. I assess
costs of this appeal in this Court at ₦3,000 (Three Thousand Naira) in favour of the respondent, against the appellant.

CHUKWUMA-ENEH JCA: I had the privilege of reading in advance the lead judgment of my learned brother, Akpabio JCA, and I agree that the appeal should be dismissed and I dismiss it with costs of ₦3,000 against the appellant.

MANGAJI JCA: I have had a preview of the lead judgment of my learned brother, Akpabio JCA. I agree absolutely with his reasoning and conclusions in dismissing the appeal. The undisputed facts have been correctly and admirably stated and the issues for determination raised by both learned Counsel have been thoroughly examined. I have nothing more to usefully add. I will, in the circumstance, also dismiss the appeal and abide by the order of costs contained in the lead judgment.

Appeal dismissed.
Savannah Bank of Nigeria Plc v Blessing A. Fakokun

COURT OF APPEAL, LAGOS DIVISION
IGE, GALADIMA, SANUSI JJCA
Date of Judgment: 12 April, 2000

Banking – Cheque – Duty of banker to honour cheques drawn on account – Scope of

Facts

The respondent was an employee of the appellant bank. The appellant alleged that the respondent was involved in the manipulation of records, irregularities in granting of unauthorised facilities, which was investigated by the police, and the respondent was subsequently dismissed by the appellant. The respondent issued a cheque for N100 which the appellant dishonoured. The respondent thereafter instituted this action for wrongful dismissal and damages for breach of duty on a banker to honour a cheque presented by the customer.

At the conclusion of the hearing, the court entered judgment in favour of the respondent granting his claims for declaration that the dismissal was void and for special damages. The court however refused the prayer for general damages.

The appellant was dissatisfied with the judgment and appealed to the Court of Appeal.

The respondent also cross appealed against the decision refusing to grant general damages.

Held –

It is the duty of a bank to honour the cheques paid in by its customers, the bank is, however, not bound to honour the cheque if the drawer or customer lacks sufficient funds in his account.

Appeal and cross appeal dismissed.
Cases referred to in the judgment

**Nigerian**

*Agbaje v National Motors (Nigeria) Ltd* (1970) NCLR 266  
*Aiyetan v NIFOR* (1987) 3 NWLR (Part 59) 48  
*Anakism v UBN Ltd* (1994) 1 NWLR (Part 322) 557  
*Baba v Nigerian Civil Aviation Training Centre Zaria* (1991) 5 NWLR (Part 192) 388  
*CCB Nigeria Ltd v Nwankwo* (1993) 4 NWLR (Part 286) 159  
*Garba v University of Maiduguri* (1986) 1 NWLR (Part 18) 550  
*Ijebu-Ode Local Government v Adedeji Balogun and Co Ltd* (1991) 1 NWLR (Part 166) 136  
*Imoloame v WAEC* (1992) 9 NWLR (Part 265) 303  
*Iwuchukwu v Nwizu* (1994) 1 NWLR (Part 357) 379  
*Kaduna Textiles Ltd v Umar* (1994) 1 NWLR (Part 319) 143  
*NBN Ltd v P.B. Olatunde and Co Ltd* (1994) 3 NWLR (Part 334) 512  
*Omonuwa v Wahabi* (1976) 4 SC 37  
*Sule v Nigeria Cotton Board* (1985) 2 NWLR (Part 5) 17

**Counsel**

For the appellant: *Salami*

**Judgment**

**IGE JCA:** *(Delivering the lead judgment)* This is an appeal against the judgment of the Lagos High Court delivered on 5 July, 1996 in Suit No. LD/94/93. In the court below the respondent, who was an employee of the appellant, brought an action against the appellant bank claiming the following reliefs:—

"i. A declaration that the defendant’s letter of summary dismissal dated the 12 May, 1992 is wrongful and/or null, void and of no effect whatsoever."
The sum of ₦1,000,000 as special damages for breach of the plaintiff’s contract of employment with the defendant, being the amount the plaintiff would have been entitled to under the contract of employment if the contract of employment had run to its end.

iii. The sum of ₦500,000 as general damages for breach of plaintiff’s contract of employment with the defendant and for refusal to honour the plaintiff’s cheque when he had enough money to cover the amount in the cheque.”

After pleadings had been ordered by court and filed by parties, the case proceeded to trial. Evidence was led by both sides and several exhibits were tendered during the trial. At the close of the case the learned trial Judge gave judgment in favour of the plaintiff/respondent granting two of the three claims of the plaintiff and refusing the third relief.

The defendant/appellant is dissatisfied with the judgment and has appealed to this Court by filing seven grounds of appeal. It has also formulated the following five issues for determination:

1. Whether the letter of employment is a special ingredient to prove the terms and conditions of contract of employment as stated in the main collective agreement, Exhibit ‘A’.

2. Whether there was a fair hearing before the dismissal of the respondent.

3. Whether negligence is a misconduct sufficient enough to warrant a summary dismissal.

4. Whether the plaintiff/respondent can be awarded salaries, allowances and other emoluments, while a finding of wrongful dismissal is apparent.

5. Whether the plaintiff/respondent is entitled to the award of general damages.”

On his own part the respondent has also filed a cross appeal against a part of the decision of the lower court, i.e. the portion of the judgment where the lower court refused to grant the respondent substantial damages as a result of the appellant’s wrongful refusal to honour the cheque of ₦100 when there was sufficient proof of monies in the respondent/cross-appellant’s account. The respondent/cross-appellant
filed the following three grounds of appeal together with their particulars:

“i. The lower court erred in law and in fact in holding that the plaintiff/cross-appellant had failed to prove in evidence that he had sufficient funds in his account to cover the amount on his cheque.

**Particulars of Error**

(a) The plaintiff/cross-appellant under examination-in-chief gave oral evidence that he had enough funds in his account to cover the amount on his cheque.

(b) The defendant/cross-respondent both in their cross-examination of the plaintiff/cross-appellant and their own evidence in their examination-in-chief never denied that the plaintiff/cross-appellant had enough funds in his account to cover the amount on his cheque.

(c) The evidence of the plaintiff/cross-appellant on the sufficiency of funds in his account having not been challenged should have been acted upon by the lower court.

ii. The lower court erred in law in failing to award the plaintiff/cross-appellant a professional banker, substantial damages for wrongful dishonour of his cheque by the defendant/cross-respondent.

**Particulars of Error**

(a) Damages flow naturally from the wrongful refusal by a banker to pay a customer’s cheque who has sufficient funds with the bank to cover the cheque amount.

(b) The failure to honour the plaintiff/cross-appellant’s cheque amounted to a breach of contract for which the bank, the defendant/cross-respondent is liable in damages.

iii. The decision is against the weight of evidence.”

From the above grounds of appeal coupled with the grounds of appeal filed by the appellant, the cross-appellant has formulated the following four issues for determination:

“1. Whether the learned trial Judge was right in holding that the appellant’s summary dismissal of the respondent/cross-appellant by its letter dated 12/5/1992, Exhibit G is unlawful, void and of no effect.
2. Whether the learned trial Judge was right in awarding the respondent/cross-appellant salaries, and other benefits from the 12/5/1992 until the respondent/cross-appellant’s appointment is properly terminated.

3. Whether the learned trial Judge was right in awarding the respondent/cross-appellant general damages for breach of the contract of employment.

4. Whether the learned trial Judge was right in refusing to award the respondent/cross-appellant damages for the defendant/appellant’s refusal to honour his cheque.”

I propose to deal with this appeal on the premise of the issues as formulated by the appellant.

The first issue has asked the question whether the letter of appointment is a special ingredient to prove the terms and conditions of the contract of employment as stated in the main collective agreement, Exhibit A.

The appellant has argued that the inability of the respondent to tender his letter of appointment is injurious to his claim. In support of this contention he cited the cases of Kaduna Textiles Ltd v Umar (1994) 1 NWLR (Part 319) 143 at 157 and Morohunfola v Kwara College of Technology (1990) 4 NWLR (Part 145) 506; (1990) 21 NSCC 27 at 37. Counsel also submitted that the respondent cannot rely on Exhibit A which is the main collective agreement made between the Nigeria Employers’ Association of Banks, Insurance and Allied Institutions and the Association of Senior Staff of Banks, Insurance and Financial Institutions, because he is not a party to the agreement, neither is he privy to it. To buttress his argument on this point he referred to the case of UBN Ltd v Edet (1993) 4 NWLR (Part 287) 288.

Looking through the brief filed by the respondent, there is no reaction on its part to the question of failure to tender the appellant’s letter of appointment. The learned trial Judge noted in his judgment that the respondent did not tender his letter of appointment on the ground that it was stolen at Ilorin.
I agree with the submission of the appellant’s Counsel that it is necessary for the respondent to plead and tender in evidence his letter of appointment, and failure to do so may be fatal to his case. But where there is otherwise ample evidence to establish the terms of the contract of employment, failure to tender the letter of appointment will not necessarily be fatal to the respondent’s case (see the case of *Kaduna Textiles Ltd v Umar* (1994) 1 NWLR (Part 319) 143).

In the instant case the respondent pleaded his letter of appointment but failed to tender it in evidence, but there are other letters tendered in evidence to show that the respondent was appointed by the appellant bank and he was even promoted and commended by his employers (see Exhibits B, C and D). In Exhibit D, the bank made reference to the senior staff salary between the Nigerian Employers’ Association of Banks, Insurance and Allied Institutions and Association of Senior Staff of Banks, Insurance and Financial Institutions’ Employees before agreeing to implement the new harmonised salary structure. By this the appellant cannot now be heard to say that Exhibit A does not apply to the case of the plaintiff/respondent in the court below. The learned trial Judge was right in giving consideration to Exhibit A along with other documents as part of respondent’s terms of employment.

The second issue deals with the issue of whether there was a fair hearing before the dismissal of the respondent.

In his brief of argument the appellant’s Counsel submitted that the respondent was given ample opportunity of knowing what he had done wrong through the query, Exhibit E, served on him. The respondent was asked to explain his role on the following three issues: (1) irregular practice; (2) spurious entries; and (3) concealment of vital information. The respondent alleged that he replied Exhibit E by Exhibit F but the appellant denied receipt of Exhibit F from the respondent.
Counsel further submitted that the respondent refused to take a full advantage of the opportunity of a fair hearing accorded him. According to him, in a master/servant relationship, a disciplinary committee or an administrative panel of enquiry is enough to look into an allegation of crime against a servant (see the case of *CCB (Nigeria) Ltd v Nwankwo* (1993) 4 NWLR (Part 286) 159).

Counsel stated further that, though there was an element of criminality in the complaint against the respondent, it does not mean that the court of law has to adjudge the respondent guilty before the dismissal has to be effective and lawful. To buttress his argument Counsel referred to the case of *Yusuf v Union Bank of Nigeria Ltd* (1996) 6 NWLR (Part 457) 632.

The respondent has argued that he was not given a fair hearing in accordance with section 33(4) of the 1979 Constitution which provided as follows:–

> “Whenever any person is charged with a criminal offence, he shall unless the charge is withdrawn be entitled to a fair hearing in public within a reasonable time by a court or a tribunal.”


The respondent conceded the fact that an employer has the right to dismiss an employee, a dismissal based on an allegation of crime for which the police had been invited as in this case can only be based on a fair hearing if the employee has been prosecuted and convicted by a court of law. To do otherwise would mean the employer is acting as accuser, prosecutor and Judge at the same time. He distinguished this case from the cases cited by the appellant in that in this case the police were invited and they investigated the allegations and exonerated the appellant while some others were prosecuted.

First of all let us examine the contents of Exhibit G which is the purported letter of dismissal of the respondent. Exhibit G reads thus:–

> “SAVANNAH BANK OF NIGERIA PLC

12 May, 1992

RC 6263
Mr B.A. Fakokun  
Savannah Bank of Nig. Plc,  
Ilorin Branch  
Thro’ Manager, Ilorin Branch  

Dear Mr Fakokun,

SUMMARY DISMISSAL

We refer to your role in the manipulations of records, irregularities and unauthorised facilities at Ilorin branch which was investigated by inspection division. Having reviewed the facts of the case, management resolved that your conduct in the circumstances of the case constituted gross misconduct and consequently a breach of Part II (section 1) Article 4(iv) sub-sections 1 of the Senior Staff Collective Agreement.

Consequently, management has decided that your services be dispensed with. You are hereby, summarily dismissed from the services of the bank with immediate effect. Furthermore, our records indicate that you are indebted to the bank to the tune of \textbf{N4,043.40} being the balance of loans granted you by the bank. You are however advised to liquidate the loans if you do not want the bank to take legal action against you.

You are advised in your own interest, to surrender all property of the bank in your possession (Savannah Bank Staff Identity Card and any unused cheque leaves in respect of your Staff Account) to the Operations Officer Ilorin Branch immediately on receipt of this letter.

Please acknowledge receipt of this letter on the attached duplicate copy and return same to us.

Yours sincerely.

(Sgd.) B.M. Bawa  
for: PERSONNEL MANAGER.”

From Exhibit G, the respondent was accused of manipulations of records, irregularities and unauthorised facilities at Ilorin branch which was investigated by inspection division. The management reviewed the facts of the case and resolved that respondent’s conducts constituted gross misconduct and consequently a breach of Part II (section 1) Article 4(iv) subsection a-I of the Senior Staff Collective Agreement. Consequently management decided that his services were dispensed with with immediate effect.
It is an obvious fact that the respondent was dismissed on allegations of crimes. The fact that the appellant bank resorted to calling the criminal allegations as gross misconduct does not by itself rule out the allegations being crime. To show that the allegations were discovered to be criminal, the bank called in the police after receiving the report of their investigation panel.

In a case where the dismissal of an employee is based on an allegation of crime, such allegation must first of all be proved before the dismissal can stand (see the cases of Garba v University of Maiduguri (1986) 1 NWLR (Part 18) 550; Aiyetan v NIFOR (1987) NWLR (Part 59) 48; Anakism v UBN Ltd (1994) 1 NWLR (Part 322) 577 at 567). The police investigated the criminal allegations against the respondent and others but they found no case made against him. He was exonerated.

Assuming that the management had the right to take disciplinary action against the respondent, their employee, on the basis of their investigations, why did they call in the police if it did not involve the commission of a crime? The investigating panel compiled a report, was the report ever served on the respondent?

The appellant said they never received a reply to the query issued against the respondent and yet they went on to review the facts of the case. Surely this cannot be a fair hearing. In order to accord a person a fair hearing, such a person accused of gross misconduct or any misconduct whatsoever, must be confronted with the result of whatever investigation was conducted or, if charged, be allowed to defend himself or offer an explanation (see the case of Baba v Nigerian Civil Aviation Training Centre Zaria (1991) 5 NWLR (Part 192) 388 at 416). It is my view that the appellant in this case has failed to observe the rules of natural justice and the requirement of a fair hearing before reviewing the facts of the case against the respondent and deciding to dismiss him summarily.

There are various degrees of misconduct which can give an employer liberty to dismiss an employee, eg dishonesty or
fraud of employee in his employment, grave and weighty misconduct, dissatisfaction with the employee’s misconduct or a case of infidelity (see the case of *Sule v Nigerian Cotton Board* (1985) 2 NWLR (Part 5) 17). While an employer is not bound to give any reason for lawfully terminating a contract of service he must give a reason for summarily dismissing the servant. In this case their reason was for gross misconduct which borders on criminal allegations not proved. By their action the appellants have deprived the respondent of his right of a fair hearing as provided for in section 33 of the 1979 Constitution and section 36 of the 1999 Constitution. Issue 2 is also resolved in favour of the respondent.

With regard to issue 3 which refers to negligence as sufficient enough to warrant a summary dismissal. The answer is a straightforward “yes” if it is proved. I agree with the submission of the respondent’s Counsel that negligence was never made an issue in Exhibit G, the letter of dismissal. I have therefore resolved that issue 3 is a non-issue.

Issue 4 deals with whether the respondent can be awarded salaries, allowances and other emoluments, while a finding of wrongful dismissal is apparent. The learned Counsel for the appellant has submitted that the learned trial Judge was wrong to have awarded salaries, emoluments and allowances in favour of the respondent as if he was still in the employment of the appellant. According to him, in a case of wrongful dismissal, the dismissal was complete and the employee can only sue for damages. He cited the following cases to support his submission: *Imoloame v WAEC* (1992) 9 NWLR (Part 265) 303; *Olatunbosun v NISER Council* (1988) 3 NWLR (Part 80) 25; (1988) 1 NSCC Vol. 18 1025; *Ilodibia v NCC Ltd* (1997) 7 NWLR (Part 512) 174. Counsel also submitted that the learned trial Judge in his calculation of damages was wrong as he did not take into consideration the fact that the respondent failed to mitigate his loss. He stated further that the respondent can only be entitled to reasonable
and nominal damages, not his salaries, allowances and emolument as held by the learned trial Judge. In response to the above the respondent said the learned trial Judge has rightly held that the dismissal of the respondent was invalid and ineffectual, there is no dismissal (see the case of Imoloame v WAEC (1992) 9 NWLR (Part 265) 303).

The consequence of this is that the respondent was entitled to all his salaries and benefits until his appointment was properly terminated.

On question of plaintiff/respondent mitigating his loss, Counsel submitted that the onus is on the appellant to establish that there were alternative appointments and that the respondent should have obtained one of such alternative appointments.

In the plaintiff’s/respondent’s statement of claim, he claimed for a declaration that the defendant’s letter of summary dismissal dated 12 May, 1992 is wrongful, null, void and of no effect whatsoever. His two other reliefs were the sum of ₦1m as special damages for breach of contract of employment and ₦500,000 as general damages for breach of contract and for refusal to honour the plaintiff’s cheque when he had enough money to cover the amount in the cheque.

The learned trial Judge in his judgment held that the dismissal of the plaintiff by the defendant by a letter dated 12 May, 1992 was unlawful and therefore void and of no effect.

A proper scrutiny of the facts of this case shows that the case is that of master and servant and the determination of the services has been based on the conduct of the erring servant. The employment in this case is not governed by any statutory provision neither does it enjoy any statutory protection. The learned trial Judge has rightly found that the letter of dismissal was unlawful, void and of no effect because the dismissal was based on unproved crimes. The court has taken into cognisance the law that one cannot foist on an unwilling employer an employee in whom it has lost
confidence (see the case of *Iwuchukwu v Nwizu* (1994) 7 NWLR (Part 357) 379). I agree with the learned trial Judge that the respondent is entitled to his salary and other benefits and entitlements with effect from 12 May, 1992 until the time of his action, i.e. by one month’s notice or salary in lieu of notice with effect from the date of action and not date of judgment.

An employee who has been wrongfully dismissed, as in this case, has by this implication put an end to his contract of service. He is therefore entitled to damages for breach of contract.

The respondent has claimed for both special and general damages. In a case of this nature there is no need to distinguish between the two forms of damages. All that he needed to claim was for general damages for breach of contract (see *Omonuwa v Wahabi* (1976) 4 SC 37 at 47–48 and *Ijebu-Ode Local Government v Adedeji Balogun and Co Ltd* (1991) 1 NWLR (Part 166) 136 and *Agbaje v National Motors (Nigeria) Ltd* (1970) NCLR 266.

The sum of ₦100,000 damages awarded by the learned trial Judge is reasonable in my view and should be confirmed. I so confirm it.

On the question of mitigation of damages by the plaintiff/respondent finding alternative appointment, the onus is on the defendant/appellant to show that the plaintiff had actually obtained an alternative employment or has made no efforts to obtain one. This onus was not discharged by the defendant/appellant. On the contrary, the appellant gave the reason why it will not offer any employment to the person of respondent’s calibre.

The cross appeal is based on the failure of the learned trial Judge to award substantial damages to the respondent when the appellant wrongfully dishonoured the respondent’s cheque for ₦100. The respondent/cross-appellant has claimed the sum of ₦500,000 damages from the defendant/cross-respondent for dishonouring his cheque of ₦100 dated
22 May, 1992. There is evidence to show that the cheque was presented to the bank and there is also evidence that the bank received the cheque and stamped it. What is not known is why the bank refused to pay the cheque. The cross-appellant said he had enough funds in the bank to cover the said amount of ₦100. While it is the duty of the bank to honour the cheques paid in by its customers, they are not bound to honour the cheque if the drawer or customer lacks sufficient funds in his account. It is the duty of anyone who asserts that must prove (see the case of NBN Ltd v P.B. Olatunde and Co Ltd (1994) 3 NWLR (Part 334) 512).

The plaintiff/cross-appellant has failed to prove his claim for damages for failure of appellant to pay his cheque conclusively and he has therefore failed in his cross appeal.

On a final analysis this appeal fails and is therefore dismissed. The cross appeal also lacks merit and is dismissed. Each party is to bear its own costs. No order as to costs.

GALADIMA JCA: I have had the privilege of reading before now the lead judgment of my learned brother, Ige JCA. I agree entirely with her reasoning for dismissing both the appeal and the cross-appeal.

I also make no order as to costs.

SANUSI JCA: I have had the advantage of reading before now the judgment of my learned brother, Ige JCA, just delivered. My lord has thoroughly dealt with all the issues canvassed in the appeal. I am in entire agreement with her reasons and conclusions that the appeal has no merit. I also dismiss it too with no order as to costs.

Appeal and cross-appeal dismissed.
Union Bank of Nigeria Plc and another v Sparkling Breweries Limited and another

COURT OF APPEAL, BENIN DIVISION
ROWLAND, AKAAS, AKINTAN JJCA
Date of Judgment: 12 April, 2000

Banking – Bank’s statement of account – Originality of – What determines – Statement typed on bank’s letter headed paper – Whether per se original

Banking – Mortgage – Mortgagee’s power to appoint receiver/manager – When and how exercised – Need to establish the debt – Need to demand payment

Banking – Statement of account – Bank’s statement of account – Classification of – When amounts to primary evidence – When amounts to secondary evidence – Underlying considerations

Facts

Before the Ughelli Judicial Division of the Bendel State High Court, the respondents filed an action against the appellants wherein they sought among other reliefs to challenge the legality of certain instruments which conferred upon the appellants the right to manage the respondents’ business and undertakings in the event of the respondents’ default in repaying certain loan facilities. The respondents thereafter obtained an interim injunction restraining the second appellant from managing the undertakings of the respondents.

After the parties had settled their pleadings the suit was transferred to Warri Judicial Division for trial and determination. The respondents subsequently filed a notice of discontinuance following which their claim was also struck out on 2 December, 1994. The appellants’ counter-claim was also struck out on the same day but was re-listed on 27 March, 1995 upon application by the appellants. The appellants’ counter-claim proceeded to trial with both parties
calling evidence. The appellants’ counter-claim was dismissed in its entirety.

In dismissing the counter-claim the court held inter alia that Exhibits A, B, H, H1, J and J1, the statements of account, were of no probative value and were thereby discounted as they offended against sections 96(1)(h), 96(2)(e) and 37 of the Evidence Act.

Aggrieved with the judgment, the appellants appealed to the Court of Appeal. The respondents also cross appealed with respect to the admission in evidence of the statements of account during the trial.

Held –

1. In law, the only way a statement of account may be described as an original is when all that is sought to be proved is the statement of account as a document in existence. But if what is sought to be proved as in the instant case is the entries in a banker’s book or the contents of the records of a bank then the statement of account is secondary evidence. Consequently, for it to be admitted in evidence the provisions of section 97 of the Evidence Act, 1990 must be met.

2. The position is that a statement of account in so far as it is an extract from the records of a bank is secondary evidence of such records. Consequently, there is nothing original about a statement of account even when, as in this case, it was typed out on the original letter-head of the bank.

3. The appointment of the receiver/manager being made pursuant to Exhibits K and K1 such appointment is liable to be declared invalid when it had not been proved that the payment of money secured had been demanded (see section 125). This is because the appointment was contingent upon there being a debit balance in the account of the mortgagor. The lower court having rightly found that the appellant bank has failed to prove that there was any debit balance outstanding, it follows that,
even on the deed of mortgage, the right to appoint a receiver could not be exercised by the appellant bank.

Appeal dismissed and cross appeal allowed.

Cases referred to in the judgment

Nigerian

A.C.B. v Oba (1993) 7 NWLR (Part 304) 173
Aghajie v Adigun (1993) 1 NWLR (Part 269) 261
Bakare v Apena (1986) 4 NWLR (Part 33) 1
Bala v Bankole (1986) 3 NWLR (Part 27) 141
Hassan v Maiduguri Management Committee (1991) 8 NWLR (Part 212) 738
Kotoye v Central Bank of Nigeria (1981) 1 NWLR (Part 98) 419
Lawal v Dawodu (1972) 1 All NLR (Part 2) 270
Namsoh v State (1993) 5 NWLR (Part 292) 129
National Investment and Properties Co Ltd v Thompson Organisation Ltd (1969) All NLR (Reprint) 134
Nwogo v Njoku (1990) 3 NWLR (Part 140) 570
Oduro v Davis (1952) 14 W.A.C.A. 46
Okonji v Njokanma (1991) 7 NWLR (Part 202) 131
Okulade v Alade (1976) 1 All NLR 67
Soetan v Ogunwo (1975) 6 SC 22
Solanke v Abed (1962) 1 SCNLR 371; (1962) 1 All NLR 230
Yesufu v A.C.B. (1976) 1 All NLR 264

Nigerian statutes referred to in the judgment

Bendel State High Court Law, 1976, sections 35 and 36
Constitution of the Federal Republic of Nigeria, 1979, section 222(a)
a Evidence Act (Cap 112) Laws of the Federation of Nigeria, 1990, sections 37, 76, 92, 96(1)(h), 2(e), 97(1)(g), (2)(e)

Property and Conveyancing Law (Cap 129) Laws of Bendel State, 1976 sections 125, 127, 131

b Book referred to in the judgment

Fisher and Lightwood *Law of Mortgage* (10ed) at 53 and 382–383

c Counsel

For the appellants: Kasumu (Miss)

For the respondents: Nweze

d Judgment

**ROWLAND JCA:** *(Delivering the lead judgment)* This appeal is from a judgment of Narebor J of the Warri High Court in Suit No. W259/89 given on 19 April, 1996, in which the learned trial Judge dismissed the appellants’ counter-claim in its entirety.

The respondents herein as plaintiffs instituted an action against the appellants in Suit No. UCH/77/88 at the Ughelli Judicial Division wherein the respondents sought, *inter alia*, to challenge the legality of certain instruments which conferred upon the appellants the right to manage the respondents’ businesses and undertakings in the event of the respondents’ default in repaying certain loan facilities. The respondents thereafter in 1988 obtained an interim injunction restraining the second appellant from managing the undertakings of the respondents.

On 14 November, 1989, after the appellants had filed their statement of defence and counter-claim, Suit No. UWC/77/88 was transferred under sections 35 and 36 of the Bendel High Court Laws of 1976 from the Ughelli Judicial Division to Warri Judicial Division and given Suit No. UW/259/89.

Thereafter the respondents filed a notice of discontinuance and the respondents’ claim was on 2 December, 1994 struck
out. The appellants’ counter-claim was also on that day struck out but was thereafter, upon an application brought by the appellants, relisted on 27 March, 1995. The appellants’ counter-claim proceeded to trial with both parties calling evidence and as earlier mentioned the appellants’ counter-claim was dismissed in toto. By a notice of appeal dated the 31 May, 1996, the appellants appealed to this Court.

It is pertinent to note that the High Court in dismissing the counter-claim held as follows:

“(1) That Exhibits A, B, H, H1, J and J1, and statements of accounts were of no probative value and were thereby dis-­
countenanced as they offended against sections 96(1)(h), 96(2)(e) and 37 of the Evidence Act (old one).

(2) That the amounts stated in Exhibits M and M1, the letters of demand dated 29 June, 1988 were at variance with the appellants’ counter-claim and that while the amounts stated in these exhibits were neither averred to in the counter-claim, the appellants’ only witness did not in his evidence state the amount demanded in those exhibits and furthermore the amounts stated in the exhibits were not accurately reflected in the statement of account already discountenanced.

(3) That there was no evidence to establish the offer or grant of the said facilities by the appellants.

(4) That Exhibits K and K1 the registered Deeds of Debenture and Exhibit P, letters written by the respondents did not constitute proof of respondents’ indebtedness to any specific sum neither did they constitute admission of indebtedness.

(5) That Exhibits C and C1, notification letters of appointment of the second appellant as receiver are invalid being contrary to section 125 of the Property and Conveyancing Law (Cap 129) Laws of former Bendel State, 1976.

(6) The appellants’ claim for N50 million damages suffered as a result of the injunction granted in 1988 was not sustain-­
able because:

(a) The injunction was granted in Suit No. UHC/77/88 a different suit and therefore the claim should be di-­
rected to the Ughelli High Court.

(b) No enrolled order of the said injunction was in evi-­
dence.
a  

(c) The appellants did not particularise the damages being claimed."

Both parties filed their respective briefs of argument which they adopted at the hearing of this appeal.

b  

From the grounds of appeal, the appellants raised one lone issue for determination. It reads:–

"Whether having regard to the pleadings the appellants have ad-
duced credible evidence to substantiate their counter-claim."

c  

For their part, the respondents formulated four issues for determination as follows:–

(i) Whether in holding that the statements of accounts were of no probative value, the lower court was sitting on appeal over its earlier ruling that the statements of account were relevant and admissible or was only estimating the weight to be attached to the statement of account as part of its duty to appraise the evidence led.

(ii) Whether the learned trial Judge was justified in holding that there was no credible evidence of the amount outstanding on the accounts of the defendants.

(iii) Whether the lower court was right in holding that the appointment of the second appellant as receiver/manager was invalid.

(iv) Whether the lower court was right in dismissing the claim for damages."

At the hearing of the appeal, the learned Counsel for the parties made oral submissions in elaboration of the arguments contained in their briefs. Miss O.T. Kasumu submitted that the learned trial Judge overruled himself that some documents were inadmissible. She contended that the procedure adopted by the learned trial Judge was wrong. Reliance was placed on the case of Lawal v Dawodu and another (1972) 1 All NLR (Part 2) 270. She referred to pages 4–6 of her brief and pages 59, 66 and 67 of the record and also pages 117 and 118.

On the appointment of a receiver she submitted that the learned trial Judge held that it was contrary to law. Reference was made to page 121 of the record and sections 125 and 127 of the Property and Conveyancing Law of Bendel State, 1976. Reference was made to Exhibits K and K1, the
Deed of Legal Mortgage. It is her contention that the learned trial Judge did not consider the relevant section of the Property and Conveyancing Law. She submitted that the parties have the right to contract themselves out of the provisions of the law.

Reference was made to the Law of Mortgage by Fisher and Lightwood (10ed) at 53 and 382–383. She stated that Exhibits M and M1, which are letters of demand, were rejected during the trial. She contended that the learned trial Judge, having expunged the statements of account, the only exhibits left were Exhibits M and M1 but he had also rejected Exhibits M and M1. She submitted that the learned trial Judge was wrong in rejecting Exhibits M and M1. She argued that there were no contradictions between the exhibits tendered in this case. Reference was made to pages 127 and 128 of the records and the letters written by the receiver. She urged this Court to allow the appeal.

Mr Nweze for the respondents posed a question, and that is, what should a court of trial do if evidence was wrongly admitted? He submitted that he referred to a series of cases at page 7 of the respondents’ brief. Did the court as a matter of fact reverse its earlier decision or was it just evaluating evidence? Reference was made to page 3 of the reply brief and page 118 of the records. It was argued that the court was only evaluating evidence and did not reverse itself.

Mr Nweze urged this Court to expunge from the records Exhibits A, B, J, J1, H and H1 in accordance with their cross appeal. It was submitted that the statement of account tendered is secondary evidence even though the appellants called it primary evidence. Reference was made to page 2 of the cross-appellants’ brief. It was also submitted that the essence of the cross appeal was whether or not there was credible evidence of the debt being owed. It was contended that the documents tendered in respect of the debt owed were inconsistent and they should be expunged as being
unreliable. On appointment of a receiver it was submitted that there must be proof of a demand and debt.

Mr Nweze urged us to dismiss the substantive appeal. As for the cross appeal one single issue was identified.

Mr Nweze submitted that the statements of account having been objected to on the ground that they offended section 97 of the Evidence Act they should be expunged by this Court.

Learned Counsel for the respondents urged this Court to allow the cross appeal and expunge all the statements of account from the record.

In reply Miss Kasumu, learned Counsel for the appellants, submitted that the cross-respondents’ brief was filed on 3 December, 1999. The cross-respondents are adopting and relying on it. As for the cross appeal, it was submitted that one has to look at the nature of the objections raised by the cross-appellants in relation to the statement of accounts which were tendered and admitted. Reference was made to page 58 of the records. It was submitted that the court held that since the documents were original there was no need to comply with section 97 of the Evidence Act. Reference was made to the case of Okulade v Alade (1976) 1 All NLR 67 in the cross-respondents’ brief. It was contended that, if a new point is to be canvassed on appeal, leave of this Court was required by the cross-appellant since it was not raised at the lower court. It was argued that if the learned trial Judge had reversed himself the cross-appellant was no longer an aggrieved party or person. Reference was made to the case of A.C.B. v Oba (1993) 7 NWLR (Part 304) 173 at 182. Miss Kasumu then urged this Court to dismiss the cross-appeal.

I now proceed to treat the loan issue raised at page 3 of the appellants’ brief. It should be noted that the learned Counsel for the appellants broke the loan issue into five parts, namely:-

(a) wrongful dismissal of the statement of accounts;
(b) the evidential value of Exhibits M and M1, the letters of demand;
(c) proof of the respondents’ indebtedness;
(d) the validity of second appellant’s appointment;

(e) wrongful dismissal of appellants’ claim for damages.

As for (a) above, that is, wrongful dismissal of the statements of accounts, it was submitted for the appellants that, during the course of the trial, the appellants tendered statements of accounts each in respect of the respondents’ loan and overdraft accounts maintained at the bank. Exhibits A, B, H, H1, J and J1 are the said statements. It was contended that the respondents objected to the admissibility of these documents based on section 97 of the Evidence Act and also on the ground that they are originals which ought to be in the possession of the respondents. It was submitted that the trial court in four separate rulings ruled that the documents were original documents from the first appellants and therefore rank as primary evidence. It further went on to hold that foundation had been sufficiently laid for the documents which were relevant. Reference was made to pages 59, 60, 66 and 67 of the records on the rulings of the lower court. It was stated that in the judgment of the trial court, it held that these exhibits had no probative value and therefore dismissed them. It was submitted that the substantial reason for so holding was because they offended against section 96 of the Evidence Act (old one). It was contended for the appellants that the trial court in dismissing those exhibits, in effect, wrongly reviewed and set aside its earlier rulings. Reference was made to the cases of Lawal v Dawodu and another (1972) 1 All NLR (Part 2) 270 at 282; Bakare v Apena (1986) 4 NWLR (Part 33) 1. It was submitted that the learned trial Judge, whether rightly or wrongly, having held that the exhibits constitute primary evidence, could not again alter same as constituting secondary evidence.

It was contended that non-receipt of statements of account, Exhibits A, B, H, H1, J and J1, is not a basis and has never been a ground known in law for denying liability of a debt.

Part (a) above from issue 1 in appellants’ brief is one and the same thing as issue 1 in the respondents’ brief.
It was submitted for the respondents that in the course of the trial, the first appellant sought to tender the statements of account of the respondents. These statements of account, according to the respondents, were printed or typed on the original letter heads of the appellant bank. The defence counsel objected that the statements of account were inadmissible, being secondary evidence. It was also submitted that the objection was opposed by the plaintiffs’ counsel who pointed out that the statements of account sought to be tendered were not copies of a statement of account but were typed on the original letter head of the bank and were therefore originals. The lower court relied on this argument and admitted the statements of account holding that it has:

“. . . examined the document tendered and find that it is an original copy of statement of account . . .”

It was submitted that in the course of his judgment, however, the learned trial judge held in effect that, even though the statements of account were originals in the sense of being typed on the original letter head of the bank, in so far as they purport to prove the content of an entry in a banker’s book, they were secondary evidence of such entries. It is the respondents’ case that to succeed in the action, the appellants needed to prove the balance outstanding against the account of the defendants in the books of the bank. To prove this balance, it has to tender the books of account by whatever name called on which the transactions were recorded contemporaneously as they took place. This may be a ledger card, a voucher but whatever it is, that is “the account”.

It was contended that the account is primary evidence. The bank may decide, however, not to produce the account and instead produce a statement of account. This is by virtue of section 97 of the Evidence Act. So, whilst the account itself is primary evidence, it was submitted, any reproduction of that account is secondary evidence of the account it was concluded.

I should like to mention that it is trite law that admissibility of a document and the weight to be attached to it are two different things. Indeed the learned trial judge made this
point whilst admitting the statement of accounts. See page 67 lines 15–17 of the records where the learned trial Judge said:—

“I have listened to both learned Counsel on the admissibility of the documents tendered. As I stated earlier in my previous ruling, relevance and admissibility are separate matters in contradistinction from weight. The issue raised by learned Counsel (Mr Nweze), relate to weight which, incidentally would be left for address.”

It seems to me that section 92 of the Evidence Act provides for the things to be considered in estimating the weight to be attached to a statement and this include whether the statement was made contemporaneously with the occurrence or existence of the facts stated.

I hold the view that in answering the question posed by this issue therefore, it is necessary to consider what the learned trial Judge did. At 118 lines 5–17 of the records, the court held as follows:—

“As in Yusuf v A.C.B. (supra) the witness (Ogeh) did not scrutinise or compare Exhibits A and B with the Bank’s Record Book from which they were extracted. Exhibits A and B were objected to by Mr Nweze of Counsel for the defendants to the counter-claim but were admitted by court as being relevant.

I now hold that Exhibits ‘A’ and ‘B’ offend against section 96(i)(h). Section 96(2)(e) and section 37 of the Evidence Act (old one). Accordingly, I discountenance both and dismiss them as having no probative value in this case.

Exhibits ‘J’, ‘J1’, ‘H’ and ‘H1’ are also each tainted with the same evidential defeat as Exhibits ‘A’ and ‘B’. Exhibits ‘J’ (Sales Account), ‘J1’ (Statement of Loan Account), ‘H’ and ‘H1’ are also hereby discountenanced as they lack probative value. They are unreliable.”

It is patently clear from the foregoing that the trial court did not reverse itself by holding that the statements have suddenly become irrelevant or inadmissible, rather, the trial court only decided that no weight should be attached to them because they are of no probative value and are unreliable. This the trial court is perfectly entitled to do.
The appellant has sought to reply on the case of *Lawal v Dawodu* (1972) All NLR 270 (Reprint) but the facts are clearly different. In *Lawal v Dawodu (supra)* the court had admitted evidence of testimony in a previous case having found that the previous case was over the same land. Consequently, on the issue of whether the previous case was over the same subject-matter, the court had given a ruling and was therefore *functus officio*.

In other words, it was not open for the other side to reopen the matter under the doctrine of issue *estoppel*. When, therefore, in the judgment, the court said the previous case was over the same subject-matter it no longer had jurisdiction to pronounce on the same matter as it was *functus officio*. In that case, the court was not considering the weight to be attached to the evidence led by the parties. *Bakare v Apena* (1986) 4 NWLR (Part 33) 1 also relied on by the appellant clearly does not apply in this case as that was a case where the trial Judge after having delivered his judgment invited the Counsel in the matter and amended the judgment after holding that he did not properly appraise the pleadings of the parties.

In the case in hand, I hold the view that the learned trial Judge was not in error when he decided on the weight to be attached to the evidence led before him in respect of some documents tendered in the course of the proceedings of the case.

It should be mentioned that there is a plethora of authorities to the effect that, where evidence has been wrongly admitted, the law is that the evidence must be expunged from the records when the judgment is being considered. The basis of this rule is that the evidence does not go to any issue and, that being so, it cannot be legal evidence upon which the court can make a finding of fact (see *Agbaje v Adigun and others* (1993) 1 NWLR (Part 269) 261; *National Investment and Properties Co Ltd v Thompson Organisation Ltd* (1969) All NLR (reprint) 138; *Okonji v Njokanma* (1991) 7 NWLR (Part 202) 131; *Hassan v Maiduguri*

In A.C.B. v Oba (1993) 7 NWLR (Part 304) 173 at 182, this Court held as follows:–

“The only witness for the appellant did not testify that he personally examined the statement of account and compared it with the entries in the original bank books and found it to be correct. It follows therefore that even though Exhibit ‘E’ was admitted without objection it did not comply with the provisions of section 97(1)(h), (2)(e) of the Evidence Act and the trial Judge rightly expunged it from the record.”

Because of the foregoing authorities one is fortified to say that the learned trial Judge was right when he said that Exhibits A, B, H, H1, J and J1, the statements of account, were of no probative value and should therefore be discountenanced as they offended against sections 96(1)(h), 96(2)(e) and 37 of the Evidence Act (old one).

The next point for my consideration which is part of issue 1 in the appellants’ brief is the evidential value of Exhibits M and M1, the letters of demand.

It was stated for the appellants that it is not in doubt and it cannot be denied that in paragraph 13 of the appellants’ counter-claim, Exhibits M and M1 were pleaded and by the provisions of section 76 of the Evidence Act, oral evidence need not be given of their contents. It was contended that the documents speak for themselves. It was argued that it was not mandatory for the appellants’ witness, PW1, to give oral evidence of the contents or even stating the amounts demanded in those letters. It was also submitted for the appellants that it is immaterial who requested for the facilities even though the evidence on record shows that the respondents requested for same. Reference was made to Exhibit P, pages 138–141, tendered through the respondents’ DW1 under cross-examination. It was submitted that the issues which were material were that there were facilities enjoyed and whether these facilities had been repaid as the respondents seemed to suggest. It was also submitted that the
 learned trial Judge was wrong to hold that there was no other evidence in which the appellants’ counter-claim could be established. Reference was made to Exhibits K, K1, D, E, F, G and G1 which served as evidence of the transactions that the respondents acknowledged taking loans and overdraft from the first appellant to be secured \((\text{Solanke v Abed and another (1962) 1 SCNLR 371; (1962) 1 All NLR 230})\).

It was argued that the burden of proof ordinarily placed on the appellants had therefore shifted to the respondents. It was contended that the respondents on the other hand did not discharge the onus on them by satisfactorily showing that the facilities given them had been repaid.

It seems to me that \((b)\) of issue 1 in the appellants’ brief is tied to issue 2 in the respondents’ brief.

It was submitted for the respondents that in seeking to prove the balance outstanding on the accounts of Sparkling Breweries Ltd, PW1 said at 58 lines 22–30 of the records as follows:–

“In respect of the second plaintiff (Sparkling Breweries Limited), they were granted an initial loan facility to the tune of \(\N{66.056}\) million together with a fluctuating overdraft facility based on cheques presented by second plaintiff and paid by the first defendant. The second plaintiff has not paid the bank facilities. The total amount currently outstanding against the second plaintiff is approximately \(\N{94}\) million (Ninety four million naira). I see the statement of second plaintiff. I can identify it.”

It was submitted that, after the above testimony of PW1, the statement of account, Exhibits A and A1, were admitted in evidence despite objection by the defence Counsel based on section 97 of the Evidence Act.

It was submitted that under cross-examination it became clear that the statements were copied from the record of the bank in 1995 and were not made contemporaneously with the transaction records. For Olo Cold Drinks Limited, PW1 said at 59 lines 23–28 of the records as follows:–

“In respect of the third plaintiff, the first defendant Bank also granted facilities to it. Third plaintiff company was granted loan facility of approximately \(\N{3.89}\) million was initially disbursed to
it. The current balance on the loan account is N6.67 million. In respect of the overdraft, the current balance is approximately N50 million (Fifty Million Naira). First defendant keeps statements of account of the said accounts."

It was submitted that the statement of account were admitted as Exhibit B notwithstanding the objection of the defence based on section 97 of the Evidence Act. Reference was made to the testimony of 20 June, 1995, at 59 of the records.

I would like to point out that on 10 October, 1995, PW1 continued his testimony and the above ritual of tendering the statements of account and objections thereto were repeated as borne out by the records. On that day more statements of account were tendered notwithstanding objection from the defence based on section 97 of the Evidence Act, marked Exhibits H and H1. Exhibits J and J1, being statements of account for Olo Cold Drinks Ltd, were similarly admitted. It would appear that the reason for overruling the objections of the defence to the admissibility was because the court was of the opinion as borne out by the records that the statement of account were originals (see at 65–66 of the records). It seems to me that the statement of account in so far as it is an extract from the records of a bank is secondary evidence of such records (see section 97(1)(g) and (h) of the Evidence Act (Cap 112) Laws of the Federation of Nigeria, 1990). Consequently, there is nothing original about a statement of account even when, as in this case, it was typed out on the original letterhead of the first appellant bank. I have no atom of doubt in my mind that PW1 confirmed this much when he said that Exhibits A, A1, B, B1, H, H1, J and J1 were copies of what they sent to the respondents; furthermore, that they were extracted from the records of the bank. This clearly shows that the exhibits under reference are secondary evidence of those records (see Yesufu v A.C.B. (1976) 1 All NLR 264 at 272). It is pertinent to note that PW1 did not say what these records were but if they were the banker’s books, then the provisions of section 97(2)(e) of the Evidence Act must be satisfied before the statements of account would be ascribed with probative value.
It is also manifest from the records that PW1 did not give evidence that he compared the statements with the original books of the bank and found them to be correct. PW1 did not even give any evidence of the existence of any such books even though they pleaded in paragraph 13 of their statement of claim that they would rely on such books. The effect of a failure to lead evidence in support of an averment in a pleading is that such averment is deemed to have been abandoned (see *Bala v Bankole* (1986) 3 NWLR (Part 27) 141; *Nwogo v Njoku* (1990) 3 NWLR (Part 140) 570).

It seems to me also that even if the records talked about by PW1 are something else other than bankers books, such records are the primary evidence and the statement of account the secondary evidence of the content of such records. The learned trial Judge was therefore right to have regarded the statements of account as unreliable on that ground.

As for the demand letter, Exhibits M and M1, the said exhibits state that the bank facilities were granted at the request of the defendants to the counter-claim. It is, however, manifest from the records that there is no documentary or any evidence to establish that defendants to the counter-claim applied for the said facilities. There is also no documentary evidence to establish any offer or grant of the said facilities by the counter-claimants. It is trite law that he who asserts must prove. I must say therefore without much ado that the indebtedness of the respondents was not sufficiently proved by the appellants before the trial court.

As for the validity of the second appellant’s appointment as a receiver, it was submitted that Exhibits K and K1, the mortgage charge document, specifically exclude sections 125 and 131 of the Property and Conveyancing Law of Bendel State, 1976, which provides for the circumstances when a mortgagee can exercise its power of sale conferred by law. It was stated that when parties contract themselves outside a particular provision of the law, as in this case, they are deemed to have waived their right under that law in the absence of any illegality. Clearly therefore, it was submitted, that the respondents could not now seek refuge under
non-compliance of these sections having expressly contracted themselves out of it. It was argued that in so far as power to appoint a receiver is conferred in Exhibits K and K1, appellants had no obligation to comply with sections 125 and 131 for the receivership appointment to be valid more so as those sections had been mutually ousted by the parties.

Issue 1(D) in the appellants’ brief is akin to issue 3 in the respondents’ brief.

It was submitted for the respondents that the appellants have argued that the lower court was wrong to have invalidated the appointment of the receivership on the ground that it was contrary to sections 125 and 131 of the Property and Conveyancing Law. It was contended that this argument is based on the fact that Exhibits K and K1 specifically exclude sections 125 and 131 of the Property and Conveyancing Law (Cap 129) Laws of Bendel State of Nigeria, 1976. It is the contention of the respondents that Exhibits K and K1 did not entitle the appellant bank to appoint a receiver.

It should be mentioned that section 125 deals with the regulation of the exercise of power of sale whereas section 131 has to do with appointment, powers, remuneration and duties of a receiver.

I have examined carefully Exhibits K and K1 and I am satisfied that the said exhibits did not entitle the appellant bank to appoint a receiver. It seems to me that the power to appoint a receiver was given by contract in the defendant, Exhibits E and F. The appointment of the receiver was made pursuant to Exhibits E and F. Exhibits E and F did not exclude the provisions of sections 125 and 131 of the Property and Conveyancing Law of the then Bendel State, 1976. Consequently, non-compliance with those provisions renders the appointment of the receiver/manager invalid and the lower court to my mind was right to so hold.
I also hold the strong view that if even the appointment of the receiver/manager was made pursuant to Exhibits K and K1 such appointment is liable to be declared invalid when it had not been proved that the payment of money secured had been demanded (see section 125). This is because the appointment was contingent upon there being a debit balance in the account of the mortgagor. The lower court having rightly found that the appellant bank has failed to prove that there was any debit balance outstanding, it follows that, even on the deed of mortgage, the right to appoint a receiver could not be exercised by the appellant bank.

On issue 1(e), which has to do with the allegation of wrongful dismissal of the appellants’ claim for damages, it was stated that Suit No. UCH/77/88 filed at the Ughelli Judicial Division was transferred to the Warri Judicial Division of the same State High Court and given a new suit number to wit, Suit No. W/259/89. It was submitted that the lower court admitted this much at 95 of its judgment, that is, that Suit No. W/259/89 is one and the same suit initially filed at the Ughelli Judicial Division. It was submitted that the court was therefore wrong in dismissing 15(4) of its counter-claim for that reason. It was contended that upon transfer of the suit from Ughelli to Warri, the whole case file was transferred and hence all records of proceedings of the Ughelli court form part of the records of Warri High Court. It is the contention of the appellants that the learned trial Judge was therefore bound to take notice of all orders or rulings contained therein, that is, the proceedings before him. Reference was made to Osafike v Odi (No. 1) (1990) 3 NWLR (Part 137) 130.

It was further submitted that the respondents never denied obtaining an interim injunction at the Ughelli High Court nor did they deny that it was discharged by the Honourable Court. In conclusion, it was submitted that in the event that this Court reverses the lower court’s judgment as it relates to the respondents’ indebtedness, it follows that the lower court’s judgment as it relates to the N50 million claim for general damages ought to be reversed.
Issue 1(e) above is one and the same as issue 4 in the respondents’ brief. It was submitted for the respondents, having regard to the orders of the court below, that the appointment of the receiver/manager was invalid, it follows that the appellant bank cannot claim damages for being restrained from continuing in an unlawful act. The other point, it was submitted, is that the respondents in this case never applied for the order of injunction. It was applied for by one Prince Olori who was not a party to this suit. It was contended that the respondents should therefore not be visited with the sins of a third party.

I agree with the submission of the respondents that having regards to the orders of the court below that the appointment of the receiver/manager was invalid, it follows that the appellant bank cannot claim damages for being restrained from continuing in an unlawful act. It is manifest from the records that the respondents in this case never applied for the order of injunction. It was applied for by one Prince Morrison Olori who was not a party to this suit. I agree and it is in accordance with fairness and equity that the respondents should not be visited with the sins of a third party.

It is also manifest from the records that the only evidence led on this point is contained at 68 lines 27–31 of the records and reads as follows:–

“There was an injunction (interim) in this case previously in 1988. I do not know which High Court granted the said injunction (paragraph 10(4) of the counter-claim) The said injunction prevented the bank from realising our security on the banking facilities granted the defendants to counter-claim and also prevented re-investment.”

It would appear that it is only from Exhibit R that it is shown that the defendants to the counter-claim did not apply for nor obtain the said injunction. Exhibit R, the ruling dated 28 February, 1989 by Onobun J, shows that the order of injunction was made on 27 September, 1988 and was discharged on 28 February, 1989, a period of five months. The question therefore is how the bank came about the sum of ₦50
a million as damages for this period of five months. Is it the interest it would have earned on it or what? If it is the interest, then it is asking for double compensation as it was already charging interest on the balance supposedly outstanding on the respondent’s account since then and until judgment (see Anthony M. Soetan and another v Z. Ade Ogunwo (1975) 6 SC 22 at 28–29).

It must be said that an Appellate Court will reverse on the question of damages only if convinced that the trial Judge acted on a wrong principle of law, or if the amount awarded is so high or low that there was an entirely erroneous estimate of damages (see Oduro v Davis (1952) 14 W.A.C.A. 46). In the case in hand it cannot be said that the trial court acted on a clear wrong principle of law to warrant this Court to reverse its findings on damages.

Again, going by the counter-claim at 9–11 of the records, the total sum claimed against the two respondents was just over ₦27.5 million. It is very obvious that the sum of ₦50 million claimed as damages for the injunction was even more than the sum claimed as due as at 28 February, 1989 when the order of injunction was discharged.

It seems to me therefore that, even if the injunction was wrongly obtained, the claim for damages by the bank is not only grossly exaggerated, but not substantiated at the trial with any evidence whatsoever and therefore was rightly dismissed by the lower court.

The next issue for my consideration is the cross appeal.

The cross-appellants’ brief at page 2 raised two issues for determination. They read as follows:

“(a) Whether the statements of account are primary or secondary evidence; and

(b) If they are secondary evidence whether proper foundation for their admittance were laid in line with the provisions of section 97 of the Evidence Act.”

The respondents in the cross-respondents’ brief raised three
issues for determination as follows:–

“(i) Whether or not the court has jurisdiction to entertain the appeal at all and or on the ground being canvassed by the cross-appellants.

(ii) The second issue is whether or not the trial Judge was right in ruling as he did when he dismissed the objection as to admissibility.

(iii) The third issue is a follow up on issue two i.e. even if the Judge was wrong in admitting the statement in evidence, can the cross-appellants raise the issue of admissibility on appeal.”

The cross-appellants also filed a reply to the cross-respondents’ brief. I must say straight away that there is in fact only one issue for determination in the cross-appellants’ brief and that is whether the statements of account are primary or secondary evidence. It was submitted for the cross-appellants that the lower court clearly misunderstood the objection taken by the defence. It was argued that a statement of account in so far as they are extracts from the entries in books or records of a bank are secondary evidence of such entries in those books or records. Consequently, there is nothing original about a statement of account even where, as in this case, it was typed out on the original letterhead of the cross-respondent bank. This Court is therefore urged to hold that the statement of accounts were wrongly admitted and to expunge them from the records.

On issue (i) in the cross-respondents’ brief it was submitted that the cross appeal was not competent as the cross-appellant has not appealed against the judgment of the lower court which was in its favour. The cross-appellant only cross-appealed against an interlocutory decision given in the course of trial.

Issues (ii) and (iii) were argued together in the cross-respondents’ brief. It was submitted for the cross-respondents that this appeal being against a decision of the trial court can only succeed on the submissions and grounds of objection to admissibility canvassed before that court and not fresh grounds of objection.
a. As I have said above there is a reply to the cross-respondents’ brief and it replied to all the issues raised in the cross-respondents’ brief.

b. I must say straight away that in the course of trial of this case the cross-respondents’ bank as borne out by the several statements of account, on each of those occasions when the statements of account were sought to be tendered, the cross-appellants objected pointing out that they were secondary evidence and that the provisions of the section 97 of the Evidence Act were not satisfied. These statements of account were, however, typed on the original letter-headed papers of the cross-respondent bank. This ostensibly made the court to admit them as original statements of account and as primary evidence. It seems to me that the only way a statement of account may be described as an original is when all that is sought to be proved is the statement of account as a document in existence. But if what is sought to be proved as in this case is the entries in a banker’s book or the contents of the records of a bank then the statement of account is secondary evidence. Consequently, for it to be admitted in evidence the provisions of section 97 of the Evidence Act (Cap 112) Laws of the Federation of Nigeria, 1990 must be met (see Yesufu v A.C.B. (1976) 1 All NLR (Reprint) 328; A.C.B. v Oba (1993) 7 NWLR (Part 304) 173 at 182). The provisions of section 97 that must be complied with are 97(1)(h), (2)(e).

c. In the instant case, at the point when these statements of account were admitted there was no modicum of evidence indicating that:

   (a) the statements of account were copied from entries in any book;

   (b) such book is one of the ordinary books of the bank;

   (c) such entries were made in the normal course of business;

   (d) such books are in the custody of the bank;
(e) the statements of account were examined by anybody comparing it with the original entry and found to be correct.

Thus the proper foundation for the admissibility of the statement of account was not laid as required by (a)–(e) above.

It must be noted that the complaint of the cross-appellants is not embodied in the respondents’ brief but in the cross-appellants’ brief as prescribed in the case of Kotoye v Central Bank of Nigeria (1989) 1 NWLR (Part 98) 419 at 445. It would have been different if there was no cross appeal and the challenge was incorporated in the respondents’ brief.

The cross-respondents said in their brief that the cross appeal is academic. It must be mentioned that at no time did the lower court reverse itself to hold that the statements of account were inadmissible, it only held at 118 of the records that they were of no probative value. The lower court did not revisit the issue of admissibility which is the issue before this Court in the cross appeal.

I am of the view that the appellants/cross-respondents are in the essence contending that having admitted the statements of account, the lower court ought to have ascribed due weight to them. The respondents/cross-appellants on the other hand are contending that the issue of weight is irrelevant as the statements of account are inadmissible. If the respondents/cross-appellants succeed, the contention of the appellants/cross-respondents becomes academic since there will be no evidence upon which the issue of weight will revolve. I therefore do not share the view that the cross appeal is academic.

It is the contention of the appellants/cross-respondents that the respondents/cross-appellants are not aggrieved parties. It is, however, the contention of cross-appellants that the right to appeal is exercisable by parties to a suit and that section 222(a) of the Constitution of the Federal Republic of
Nigeria, 1979 expressly stated that any right of appeal:—

“(a) shall be exercisable in the case of civil proceedings at instance of a party thereto . . .”

It seems to me that there was no restriction to parties aggrieved alone. In any event in so far as the court below treated the statements of account as admissible evidence by failing to expunge them from the records, the respondents/cross-appellants remain a party aggrieved by the decision of the lower court until it is set aside.

On the issue that the cross appeal raises fresh issues on appeal without leave of the court, it is the contention of the cross-appellants that on all the occasions that the statements of account were tendered, they objected that section 97 of the Evidence Act dealing with secondary evidence was not complied with (see page 58 lines 33–34; page 59 lines 33–34; page 65 lines 33–34; page 66 line 34 to page 67 line 4 of the records). Thus, the case of Okulade v Alade (1976) All NLR (Reprint) 56 will not apply as the cross-appellants raised objections to the admissibility of the statements of account at the court below as shown in the above pages of the records. Consequently, it is my view that the cross-appellants are not precluded and should not to be precluded from continuing their protest to this Court that the documents under reference were inadmissible.

In the light of the foregoing this appeal lacks merit and it is accordingly dismissed. I allow the cross appeal as it is meritorious. ₦3,000 costs awarded to the respondents/cross-appellants.

AKINTAN JCA: I had the advantage of reading a copy of the leading judgment prepared by my learned brother, Rowland JCA, which has just been delivered. The facts of the case and all the issues raised in the appeal are well set out and fully discussed therein. I entirely agree with his reasoning and conclusions reached as set out therein. I too dismiss the appeal and allow the cross appeal with ₦3,000 costs in favour of the cross appellants.
AKAAHS JCA: I have read the lead judgment by my learned brother, Rowland JCA. He meticulously set out the facts and dealt exhaustively with all the issues arising in the appeal as well as the cross appeal that I feel it is unnecessary to say anything more. The hub around which the entire appeal and cross appeal revolve is Exhibits A, B, H, H1, J and J1 which were admitted as primary evidence but which could be expunged at any time even on appeal because they were wrongly admitted (see A.C.B. v Oba (1993) 7 NWLR (Part 304) 173 at 182; National Investment and Properties Co Ltd v Thompson Organisation Ltd (1969) All NLR (Reprint) 134). The said exhibits were secondary evidence which did not satisfy section 97(1)(h) and 97(2)(e) of the Evidence Act before they were admitted in evidence. These are the exhibits upon which the liability of the defendants to the counter-claim was to be founded.

For this and the more elaborate reasons given in the lead judgment, I agree that the appeal lacks merit and it is accordingly dismissed. The cross appeal has merit and it is hereby allowed. I too will award N3,000 as costs against the appellants/cross-respondents in favour of the respondents/cross-appellants.

Appeal dismissed and cross appeal allowed.
Co-operative Development Bank Plc v Joe Golday Company Limited and others

COURT OF APPEAL, CALABAR DIVISION
EKPE, EDOZIE, OPENE JJCA
Date of Judgment: 13 APRIL, 2000 Suit No.: CA/C/20/98

Banking – Account – Authorisation to open account for customer – To be in writing and not verbal

Banking – Account – Combination or consolidation of – Principles governing

Banking – Account – Customer having different accounts in his own right – Meaning of

Banking – Director of bank – Interest in loan or credit facility to be granted by bank – Need to declare interest – When required – Section 18(3) of the Banks and Other Financial Institutions Decree No. 25 of 1991

Damages – General damages – Award of – Principles applicable

Jurisdiction – Banker and customer relationship – Federal High Court exercising jurisdiction – Proper – Section 230(1)(d) of the Constitution (Suspension and Modification) Decree No. 107 of 1993

Facts

The appellant is a commercial bank. The first, second, third and fourth respondents were customers of the bank with separate accounts. The fifth respondent was the wife of the sixth respondent. The sixth respondent was the chief executive of the first to fourth respondents and a director and the chairman of the finance committee of the appellant. The fifth respondent and the first respondent were shareholders of the bank with about 16% of the total paid-up share capital of the bank.

According to the respondents, on the basis of certain false and fraudulent misrepresentations made by the bank as to the true state of the accounts of the first and second
respondents alleging that they were heavily indebted, and
demanding repayment thereof (the respondents said that the
bank alleged that the sixth respondent used his position in
the bank to secure illegal credit facilities for the first to
fourth respondents which was put at a little over
₦64,000,000 (Sixty Four Million Naira), the bank threat-
ened to prosecute the sixth respondent under the Failed
Banks Decree No. 18 of 1994), the shares of the first and
fifth respondents in the appellant bank totalling
₦7,958,061 (Seven Million, Nine Hundred and Fifty-Eight Thousand,
Sixty-One Naira) were surrendered to the bank which pro-
cceeded to sell them at an undervalue to other directors of the
appellants. Their dividends which had fallen due were also
forfeited. The sixth respondent was also made to vacate his
seat as a director of the appellant.

It was further the case of the respondents that, when the
Central Bank of Nigeria reconciled the accounts of the re-
spondents and the appellant, the respondents’ indebtedness
to the appellant was put at ₦32,000,000 (Thirty Two Mil-
lion). This made the respondents to employ auditors to ex-
amine the said accounts. Their report, according to the
respondents, reveal that the bank without any authorisation,
consolidated the accounts of the first and third respondents,
fraudulently debited the accounts of the first and second
respondents with fictitious overdrafts, excessive commis-
sions and interest charges.

Against the background of the foregoing, the respondents
sued the appellant claiming inter alia declaration voiding the
consolidation of the first and third respondents’ accounts
and that the appellant was not entitled to debit the accounts
of the respondents and an order directing the appellant to
reverse all false and fraudulent debits. Furthermore, they
claimed the restoration of all the shares and dividends which
they had been made to relinquish; payment to the sixth re-
spondent of the sum of ₦5,000,000 (Five Million Naira)
being the amount realised by the appellant from the sale of
the sixth respondent’s house at Ikoyi, Lagos in further
a reduction of the indebtedness; damages of ₦50,000,000 (Fifty Million Naira), general damages and restoration of the sixth respondent to the board of the appellant.

The case of the appellant was that at all times relevant to this case, the sixth respondent was a director of the appellant’s board of directors and the chairman of its finance committee, that as such, he had the duties of processing and approving credit proposals, reviewing of loans granted and the determination of interest, commissions and penalties. The appellant maintained that the irregularities in the accounts of the first to the fourth respondents were as a result of the unauthorised withdrawals by the sixth respondent as the chairman of the finance committee of the appellant’s board of directors. The appellant stated that the sixth respondent did not disclose his interest in the first to the fourth respondents and therefore ran foul of the provisions of section 18(3) and (9) of the Banks and Other Financial Institutions Decree No. 25 of 1991. The appellant further contended that the sixth respondent used his position to grant all manner of fraudulent advances to his companies, i.e. the first to the fourth respondents. The bank went further to state that as at 31 December, 1995, the indebtedness of the respondents to the appellant bank stood at ₦64,043,389.88 (Sixty-four Million, Forty-three Thousand and Three Hundred and Eighty-nine Naira, Eighty-eight Kobo) out of which the respondents had let the sum of ₦18,249,848.88 (Eighteen Million, Two Hundred and Forty-nine Thousand, Eight Hundred and Forty-eight Naira, Eighty-eight Kobo) unpaid. The appellant therefore counter-claimed in that amount with interest.

During the trial of the case, the sixth respondent admitted that the respondents were owing the appellant bank the sum of ₦12,155,179 (Twelve Million, One Hundred and Fifty-five Thousand, One Hundred and Seventy-nine Naira).

In its judgment, the trial court found for the respondents and ordered, inter alia:

“(a) That the sum of ₦127,623,809.69 (One Hundred and Twenty-seven Million, Six Hundred and Twenty-three
Thousand, Eight Hundred and Nine Naira, Sixty-nine Kobo) representing unauthorised debits of the first respondent’s account be refunded by the appellant bank;

(b) The consolidation of the accounts of the first and third respondents without authorisation is null and void.

(c) That the appellant should restore all the shares and dividends of the first and fifth respondents.

(d) That the appellant should pay to the respondents the sum of N1,000,000 (One Million Naira) as general damages.”

The trial court then proceeded to dismiss the appellant’s counter-claim. The appellant was not satisfied with the judgment of the trial court and it appealed to the Court of Appeal.

Held –

1. By the *ejusdem generis* principles, the interest must be circumscribed within or limited to any advance, loan or credit facility or proposed advance, loan or credit facility from the bank. Indeed, the mere fact that the respondent in the instant case introduced companies to the appellant is not enough to ascribe financial interest in them to the respondent, and to bring him within the confines of section 18(3) of Decree No. 25 of 1991.

2. Opening of new accounts should be authorised in writing and not verbally.

3. The general principle of law as to whether a banker has the right to consolidate or combine a customer’s account is that, unless precluded by agreement, express or implied from the course of business, a banker is entitled to combine current accounts kept by a customer in his own right, even though at different branches of the same bank and to treat the balances, if any, as the only amount standing to the customer’s credit. However, the customer has not the equivalent right and cannot utilise a credit balance at one branch for the purpose of drawing
a. Cheques on another branch where he has no account or where his account is overdrawn.

b. Where, by agreement, express or implied, a customer’s several accounts with the bank are to be kept distinct and separate, the banker has no right to combine them or to transfer assets or liabilities from one account to another, without reasonable notice of intention to do so, or without the assent of the customer.

c. A customer having different accounts “in his own right” means that he has both accounts in his name and that neither account is a trust account.

d. The term “consolidation of accounts” means the same things as “combination of accounts”.

e. Mere consolidation of accounts of a customer by his banker to ascertain the totality of his indebtedness to the bank without his suffering any detriment, loss or damage by so doing, as in the instant case, does not give rise to cause of action against the bank.

f. It is trite law that general damages are such damages as the law will presume to be the natural or a probable consequences of the act complained of.

g. In a claim for general damages, the damages are at large and the trial court even without any figure being claimed can award proper compensation.

h. An award of general damages is a matter for the trial Judge and an appellate court will not interfere with such award unless it is shown that the trial Judge had proceeded upon a wrong principle of law or that his award was clearly an erroneous estimate since the amount was manifestly too much or too small.

i. The Federal High Court has concurrent jurisdiction with that of the State High Court in dispute between a bank and its customer within the proviso to section 230(1)(d) of the Constitution (Suspension and Modification) Decree No. 107 of 1993. The proviso in section 230(1)(d)
of Decree No. 107 of 1993 cannot be interpreted to have the effect of cutting down the jurisdiction conferred on the Federal High Court under the section beyond what compliance with the proviso renders necessary.

12. **Per curiam**

“In the instant case, it is clear that the appellant combined or consolidated the accounts of the first and third respondents in the appellant bank, from which the outstanding debit balance of over ₦64 Million was raised. That the accounts were in the distinct and separate names of the first and third respondents and in their own rights as distinct juristic personalities is not in dispute.

But that is not the end of the matter. One has to look at the particular circumstances of this case leading to the consolidation of the account complained of. The purpose of the consolidation of the accounts was to ascertain or determine the overall indebtedness of the sixth respondent as the alter ego organised and manipulated it to do business with the appellant. As a matter of fact, it was the issue of the amount of indebtedness of the sixth respondent’s companies to the appellant that gave rise to this suit. The case of the respondents is not that they sustained any detriment, loss or damages by reason of the combination or consolidation of their accounts, such as that their cheque drawn on any of the consolidated accounts was dishonoured so as to give rise to cause of action at law. In other words, mere consolidation of the accounts of a customer by his banker to ascertain the totality of his indebtedness to the banker without his suffering any detriment, loss or damage by so doing does not give rise to a case of action against the banker. The case of *British and French Bank Ltd v Opaley* (supra) is clearly distinguished from the facts of the instant case.”

**Cases referred to in the judgment**

*Nigerian*

*Ademola v Sodipo* (1992) 7 SCNJ 417

*Adeyemi v Opeyori* (1976) 9–10 SC 31

*Akinloye v Eyiyola* (1968) NMLR 92 All NLR 305 at 417–418
a Allied Bank (Nigeria) Ltd v Akubueze (1997) 6 NWLR (Part 509) 374
Bakare v The State (1987) 1 NWLR (Part 52) 579
b Balogun v Amubikanhun (1985) 3 NWLR (Part 11) 27
Beecham Group Ltd v Essdee Food Products Nigeria Ltd (1985) 3 NWLR (Part 11) 112
c British and French Bank Ltd v Opaleye (1962) 1 All NLR 26; (1962) 1 SCNLR 60
Ekpenyong v Nyong (1975) 9 NSCC 28; (1975) 2 SC 71
Ezeani v Ejidike (1964) 2 NSCC 306
d Ezeonwu v Onyechi (1996) 3 NWLR (Part 438) 499
Fadlallah v Arewa Mills Ltd (1997) 8 NWLR (Part 518) 346; (1997) 7 SCNJR 202
e FBN Plc v Jimiko Farms Ltd (1997) 5 NWLR (Part 503) 81
George v Dominion Flour Mills Ltd (1963) 1 SCNLR 242; (1963) All NLR 71
Ige v Olumloyo (1984) 1 SCNLR 158 NWLR (Part 166) 136; (1991) 22 NSCC (Part 1)
f Incar v Benson (1975) 3 SC 117
Izenkwe v Nnadozie (1953) 14 W.A.C.A. 361
g Lar v Starling Astaldi Ltd (1977) 11–12 SC 53
Lewis and Peat (Nigeria) Ltd v Akhimien (1976) 7 SC 157
Mattaradona v Ahu (1995) 8 NWLR (Part 412) 225
Mobil Oil Nigeria Ltd v Akinfosile (1969) N.M.L.R. 217
h N.B.N. Ltd v Guthrie Nigeria Ltd (1987) 2 NWLR (Part 56) 255
Nalsa and Team Associates v NNPC (1991) 7 NWLR (Part 212) 652
i NDIC v FMBN (1997) 2 NWLR (Part 490) 735
Nzeribe v Dave Eng. Co Ltd (1994) 8 NWLR (Part 361) 124
Ochoma v Unosi (1965) N.M.L.R. 321
j Odulaja v Haddad (1973) 11 SC 357
Ogbimi v Ololo (1993) 7 NWLR (Part 304) 128; (1993) 7 SCNJ 447
Okoya v Santili (1994) 4 NWLR (Part 338) 256; (1994) 4 SCNJ 333
Olaogun Ent. Ltd v S.J. and M. (1992) 4 NWLR (Part 235) 361
Olurotimi v Ige (1993) 8 NWLR (Part 311) 257; (1993) 10 SCNJ 2
Omonuwa v Wahabi (1976) 4 SC 37
Onwu v Nka (1996) 7 NWLR (Part 458) 1; (1996) 6 SCNJ 240
Ransome-Kuti v A-G of the Federation (1985) 2 NWLR (Part 6) 211
Sobakin v The State (1981) 5 SC 75
Tukur v Govt. of Gongola State (1989) 4 NWLR (Part 117) 517
UBA Ltd v Achoru (1987) 1 NWLR (Part 48) 172
Uba v UBN Plc (1995) 7 NWLR (Part 405) 72
UBN Ltd v Odusote Bookstores Ltd (1995) 9 NWLR (Part 421) 558
Wiri v Wuche (1980) 1–2 SC 5

Nigerian statutes referred to in the judgment
Banks and Other Financial Institutions Decree No. 25 of 1991, section 18(3) and (9)
Constitution (Suspension and Modification) Decree No. 107 of 1993, section 230(1)(d)

Books referred to in the judgment
Ballentine’s Law Dictionary by William S. Anderson (3ed) at 1350
Black’s Law Dictionary (6ed) at 1575
This is an appeal against the judgment of the Honourable Justice G.G. Ezekwe delivered at the Federal High Court, Calabar on 9 December, 1997 in favour of the plaintiffs.

By a writ of summons filed in the Federal High Court, Calabar, the plaintiffs claimed against the defendant six reliefs, but in the statement of claim which superseded the writ of summons the plaintiffs claimed seven reliefs as set out hereunder:

1. A declaration that the consolidation of the accounts of the first and third plaintiffs by the defendant without the prior or any lawful authorisation in that behalf is null and void.
2. A declaration that the defendant was not entitled to debit the accounts of the first and second plaintiffs save as authorised by the said plaintiffs or in the normal and ordinary course of banking and an order directing the defendant to reverse all such false, fraudulent or excessive debits.
3. An order directing the defendant to restore all the shares of the first and fifth plaintiffs surrendered to the defendant as a result of the false representation made by the defendant to the sixth plaintiff as to the real state of the accounts of the first and second plaintiffs and payment to the first and fifth plaintiffs of all the dividend, bonus, shares and all other benefits attaching to the said shares from the time of their purported surrender.
4. Payment over to the first and fifth plaintiffs of the sum of ₦7,162,264.90 and interest being the dividends due to the first and fifth plaintiffs for the year 1995, which amount the defendant withheld in purported part settlement of the debts allegedly owed by the first and third plaintiffs.
5. Payment over to the sixth plaintiff of the sum of N5 million and interest being value of the house at Ikoyi sold and retained by the defendant in purported part settlement of the debt allegedly owed by the first and third plaintiffs.

6. Damages in the sum of N50 million for fraudulent tampering with the accounts of the first and second plaintiffs and for the distress and embarrassment caused to the directors of the first and second plaintiffs as a result of the threat and false representation as made by the defendant as to the true state of the plaintiffs accounts.

7. An order restoring the sixth plaintiff to the board of the defendant with effect from the date of his purported resignation.”

The parties filed and exchanged pleadings. In the statement of defence, the defendant denied the plaintiffs’ claims and counter-claim against the plaintiffs jointly and severally as follows:–

“(i) Judgment for the outstanding sum of N18,249,848.88 with interest at the rate of 21% per annum from 31 December, 1996 until entire liquidation of amount.

(ii) An order that by deposit of their Title Deeds the plaintiffs have created equitable mortgage in favour of the defendant and same to be sold by the defendant.

(iii) A declaration that the resignation of the sixth plaintiff from the Board of the defendant (by their letter dated 26 October, 1995) is proper.”

The plaintiffs in turn filed a reply to the statement of defence and counter-claim and also denied the counter-claim.

The facts of the plaintiffs’ case as set out in their statement of claim which spans across 33 paragraphs can be summarised thus:–

The defendant is a commercial bank. The first, second, third and fourth plaintiffs are companies incorporated in Nigeria and also customers of the defendant maintaining separate accounts with the defendant at some of the various branches of the defendant bank. The fifth plaintiff is the wife of the sixth plaintiff and also a director of the first and second plaintiffs. The sixth plaintiff is the chairman/chief
a. Executive of the first to fourth plaintiffs. Until the events giving rise to this action, the first and the fifth plaintiffs held 4,468,318 shares and 3,489,743 shares respectively in the defendant bank which holding came to about 16% of the total share capital of the defendant. By virtue of this holding the sixth plaintiff became a member of the board of directors of the defendant and chairman of its finance committee. The first and second plaintiffs maintained separate accounts with the defendant at the Broad Street, Lagos branch of the defendant, while the third and fourth plaintiffs maintain separate accounts with the defendant at the Idumota Street, Lagos branch of the defendant. Prior to the events leading to this action, the first plaintiff had on 4 April, 1991 by a deed of legal mortgage obtained an overdraft of ₦2.5 million from the defendant, and by various variations of the deed of legal mortgage the overdraft facility was increased to ₦5 million. There had been a cordial business relationship between the plaintiffs and the defendant until 21 September, 1995 when the chairman, board of directors and the managing director of the defendant invited the sixth plaintiff to Lagos and thereat informed him that the accounts of the first and third plaintiffs were overdrawn without giving any details of the amount involved. Subsequently, a meeting was held on 7 October, 1995 whereat the chairman, some directors of the defendant and the sixth plaintiff discussed the issue of the total unauthorised indebtedness of the first, third and fourth plaintiffs to the defendant amounting to ₦64,043,389.88. The sixth plaintiff was pressured and threatened to make proposals for the repayment of the debt, otherwise he would be reported to the regulatory authorities to take appropriate action to recover the indebtedness including prosecution under Decree No. 18 of 1994. The sixth plaintiff was also pressured to resign his membership of the board of directors of the defendant bank which he did. Believing that the defendant’s claim of indebtedness was correctly justified, the sixth plaintiff authorised the defendant to sell his personal property situate at No. 82 Norman William Street, Ikoyi, Lagos. He also delivered to the defendant the
documents of his title to the said property in order to facilitate the sale of the property by the defendant. Also, the shares of the first and fifth plaintiffs in the defendant bank were surrendered to the defendant for sale and the defendant sold the shares to other directors of the defendant bank at N3.50 per share which was lower than the real value of the shares.

In the interim, the sixth plaintiff engaged the services of a firm of auditors led by one Elder Udo-Mbang to reconcile the accounts of the first to fourth plaintiffs with the defendant bank. The auditors, after close scrutiny of the accounts, found instances of manipulation of the accounts of the first to fourth plaintiffs by the defendant, consolidation of the first and third plaintiffs’ accounts without due authorisation, false and fraudulent debits or charges in the accounts of the first and second plaintiffs with huge sums of money by the defendant without any authorisation thus creating a huge overdraft with attendant excessive commissions and interest. Consequent upon these findings of the auditors and after the parties were unable to reconcile their accounts, the plaintiffs brought this action at the Federal High Court, Calabar, claiming the reliefs already set out in the statement of claim.

At the hearing of the action, the plaintiffs called three witnesses whilst the defendant called two witnesses. After the close of the case of the parties, the learned Counsel on both sides submitted written addresses to the trial court.

In his considered judgment, the learned trial Judge gave judgment in favour of the plaintiffs and dismissed the defendant’s counter-claim. At 163 and 164 of the record of proceedings the learned trial Judge stated thus:

“From the evidence before me, the plaintiffs have proved some of their claims on balance of probability and they are entitled to judgment as follows:

1. I declare that the consolidation of the first and third plaintiffs’ (accounts) by the defendant without the prior or any lawful authorisation in that behalf is null and void.
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2. I hereby make an order directing the defendant to restore all
the shares of the first and fifth plaintiffs surrendered to
the defendant as a result of the false representations made by
the defendant to the sixth plaintiff as to the real state of the
accounts of the first and second plaintiff and payment to the
first and fifth plaintiffs of all dividends, bonus shares and
all other benefits attaching to the said shares from the time
of their purported surrender.

3. Payment over to the first and fifth plaintiffs of the sum of
₦7,162,264 and interest being the dividends due to the first
and fifth plaintiffs for the year 1995 which amount the de-
fendant withheld in purported part settlement of the debts
allegedly owed by the first and third plaintiffs. I declare that
the defendant was not entitled to debit the accounts of the
first and second plaintiffs save as authorised by the said
plaintiffs or in the normal and ordinary course of banking
and an order directing the defendant to reverse all such
false, fraudulent and excessive debits. I award the sum of
₦1 million as general damages in favour of the plaintiffs
against the defendants. The counter-claim is dismissed.”

The court also found as a fact that the sum of ₦127,623,809.69
was withdrawn from the accounts of the first plaintiff and so
ordered that the said sum be credited in the accounts of the
first plaintiff as the action of the defendant was false and
fraudulent in this regard.

Aggrieved by the judgment of the learned trial Judge, the
defendant has appealed to this Court on a total of five
grounds of appeal, the first of which is the original ground
of appeal, while the rest are additional and/or further additional
grounds of appeal filed with the leave of the court. I
shall reproduce the grounds of appeal with their particulars
as follows:–

“GROUND 1: (Original ground)

The learned trial Judge erred in law:–

(a) in granting reliefs claimed in the action when it was glaring
that the plaintiffs failed to prove their claim as pleaded in
the statement of claim.

(b) failure to take into account section 18(3) and (9) of the
Banks and Other Financial Institutions Decree No. 25 of
Particular of Errors

(a) There was no evidence of lodgment of various sums of money amounting to ₦127,623,609.69 in the account of the first plaintiff.

(b) The grant of the said relief that the first plaintiff’s account be credited with the said sum of ₦127,623,809.69 is gratuitous, a role which a trial court is not expected to perform more so that:

(i) There was no evidence that the said account was either lodged by cash, cheque or other instruments.

(ii) The said credits were illegal fund movements instigated by the plaintiffs to hide their indebtedness from the regulatory authorities.

3. There was evidence that the plaintiffs sold their shares to the defendant voluntarily and as such not entitled to them (inclusive of the ancillary benefits) any more.

4. There was evidence that the trial Judge discountenanced the defendant’s reply to the plaintiffs’ address on points of law giving strong indications that the judgment was ready before the submission of the written address.

Ground 5: (Additional grounds)

The trial court erred in law by assuming jurisdiction to adjudicate on the subject matter, when it lacks jurisdiction so to do.

Particulars of Error

(i) The claim of the plaintiffs as constituted arose from a dispute between an individual and his bank in respect of transactions between the individual customer and the bank.

(ii) The Federal High Court jurisdiction under section 230(1)(d) of Decree No. 107 of 1993 by proviso thereto is ousted from entertaining the claims of the plaintiffs in its (sic) entirety.

Ground 6: (Further additional grounds)

The learned trial Judge erred in law in awarding judgment to the plaintiffs despite the disclosures in evidence, establishing offences against the sixth plaintiff under section 18(3) and (9) of the Banks and other Financial Institutions Decree No. 25 of 1991.
Particulars of Error

(a) The admitted/implied failures of the sixth plaintiff to disclose to the defendant/appellant’s Board of Directors his interest in the 21 Companies, the operations of whose Bank accounts with the defendant/appellant Bank formed the foundation of the reliefs sought, constituted offences under section 18(9) of Decree No. 25 of 1991.

(b) The sixth plaintiff in cross-examination admitted his status as a director of the defendant/appellant bank and as chairman of the bank’s finance committee, between 1991–1995. Furthermore the evidence before the court show (sic) that the sixth plaintiff as at 1995 had 4,468,318 shares of N2 each in the defendant/appellant bank, amounting to approximately 9% of the total shareholding in the said bank.

(c) The principle of public policy precludes a plaintiff in such circumstances from reaping any benefits/reliefs or rights arising from the commission of such illegality/offences.

Ground 7: (Further additional grounds)

The learned trial Judge misdirected himself on the evidence and/or failed to evaluate the same properly or at all and thereof came to the wrong conclusion, occasioning thereby a serious miscarriage of justice.

Particulars of Error

(a) None of the findings and/or consequent orders or reliefs granted/made in the suit in favour of the plaintiffs can be sustained on the evidence materials placed before the court.

(b) It was wrong to hold that ‘the 2 accounts were never operated by the first or sixth plaintiffs, but (was) only operated by Mr E.O. Ntui, the Branch Manager of the defendant Bank’, when on the straight evidence of the sixth plaintiff several instances were established identifying him with the operation of all the accounts involved in the proceeding.

(c) It was wrong for the court to reach the conclusion that ‘the defendant operated the said account of the plaintiff from which huge sums of money was (sic) fraudulently removed, amounting to N127,623,809.69 . . . which should now be credited to the plaintiff’.
(d) The same vice(s) affect the findings/conclusions reached by the court on the issues of the transfer/sale of the shares, willingly surrendered by the plaintiffs to the defendant, the matter of (imaginary) consolidation of the accounts and the unwarranted award of N1 million general damages.

Ground 8: (Further additional grounds)

The learned trial Judge erred in law in dismissing the defendant’s (appellant’s) counter-claim for N13 million against the plaintiffs.

Particulars of Error

(a) There were before the court a (surfeit) of irresistible evidence partly through the admissions of the sixth plaintiff and partly by the various Exhibits tendered at the trial including Exhibits A, B, C, F, K, N, Q, Exhibits 10, 11 and Y establishing the indebtedness in favour of the defendant/appellant.

(b) The only reasons (sic) adduced for taking that course was that ‘since the alleged overdraft is still disputed by the plaintiffs and the defendant, what then is the basis of counter claiming for the sum of N18,243,848.88. I also hold that the defendant led no evidence to prove counter-claim’; both of which either beg the issue, instead of deciding it and/or do not in any way flow from the evidence.

(c) The counter-claim was in fact for only N13 million, not N18,249,848.88 as found by the court.”

Henceforth in this judgment, the defendant shall be referred to as the appellant while the plaintiffs shall be referred to as the respondents.

In accordance with the rules of this Court, the parties filed their respective briefs of argument in this appeal. The appellant identified four issues for the determination of the appeal to wit:

“(i) Whether the twin public policy principles of ‘ex turpi causa’ and ‘in pari delicto’, did not operate to disentitle the plaintiffs from the grant of the reliefs sought in the proceedings, in view of the patent disclosures of the sixth plaintiff’s offences against the provisions of section 18(3) and (9) of Decree No. 25 of 1991.
(ii) Whether the conclusions/orders arrived at by the trial court can properly be sustained on the evidence and other material exhibits placed before the court.

(iii) Was the trial court right in dismissing the defendant’s counter-claim.

(iv) If the answers to (i), (ii) and (iii) are in the affirmative; whether the trial court had jurisdiction to entertain and/or adjudicate over the suit as constituted and in the light of the evidence disclosed at the trial.”

The respondents also framed four issues for the determination of the appeal thus:–

1. Whether on the pleadings and the evidence the learned trial Judge was justified to grant the reliefs granted.

2. Whether the sixth respondent violated the provisions of section 18(3) and (9) of Decree No. 25 of 1991 and if so, whether the respondents’ suit in the lower court was vitiated by the public policy principles of ‘ex turpi causa in pari delicto’.

3. Whether the trial court was right when it dismissed the counter-claim of the appellant.

4. Whether the lower court had jurisdiction to entertain the respondents’ suit in view of the provisions of section 230(1)(d) of the Constitution (Suspension and Modification) Decree No. 107 of 1993.”

From the comparison of the issues formulated by the parties in their briefs of argument, I realise that issue (i) in the appellant’s brief corresponds with issue 2 in the respondents’ brief; issue (ii) in the appellant’s brief is similar to issue 1 in the respondents’ brief; issue (iii) in the appellant’s brief is the same as issue 3 in the respondents’ brief and finally issue (iv) in the appellant’s brief corresponds with issue 4 in the respondents’ brief. Therefore, since the issues in the appellant’s brief are replicated in the respondent’s brief as I have indicated above, I will proceed to consider the issues in the appellant’s brief of argument for the determination of this appeal. In this Court both parties adopted their respective briefs of argument and briefly made oral arguments in expatiations of the briefs.

Issue (i) in the appellant’s brief is whether the twin policy principles of *ex turpi causa* and *in pari delicto* did not
operate to disentitle the plaintiffs from the grant of the reliefs sought in the proceedings, in view of the patent disclosures of the sixth plaintiff’s offences against the provisions of section 18(3) and (9) of Decree No. 25 of 1991. It is the contention of the learned Counsel for the appellant that the sixth respondent by virtue of his position as a director and chairman of the finance committee of the appellant bank introduced 21 companies to the appellant bank to which various heavy sums of money were granted by the appellant without any Naira cover for the purposes of obtaining foreign exchange used for various imports and yet the sixth respondent failed to declare his interest in them in contravention of section 18(3) of the Banks and Other Financial Institutions Decree No. 25 of 1991, which failure constitutes an offence under subsection (9) of section 18 of the same Decree. He submitted that it is against the public policy principle *ex turpi causa non oritur actio* for the sixth appellant to reap benefits from his illegality.

The learned Counsel further contended that, despite the pleadings, the evidence led and address submissions made on this issue, the learned trial Judge did not as much as make even a scathing reference thereto throughout the judgment. He therefore submitted that the learned trial Judge ought to have considered this issue but, having failed to do so, this Court can validly intervene by dismissing the suit of the aforesaid principles of public policy. For these submissions learned Counsel referred to the following cases: *Scott v Brown* (1892) 2 Q.B. 724 at 728; *Ogwuru v Co-operative Bank of Eastern Nigeria Ltd* (1994) 8 NWLR (Part 365) 685 at 702; *Salako v Dosumu* (1997) 8 NWLR (Part 517) 371; (1997) SCNJ 278 at 301; *Fashanu v Adekoya* (1974) 1 ANLR (Part 1) 35; *Balogun v Agboola* (1974) 10 SC 111; *Ebba v Ogodo* (1984) 1 SCNLR 372; (1984) 4 SC 84.

The learned Counsel for the respondents in the brief of argument on this issue pointed out that there was no evidence that the sixth respondent had any interest in the 21 companies and that the mere fact that they were introduced by the
sixth respondent is not sufficient interest in those companies to him. The said companies were not granted loans or unauthorised credit as claimed by the learned Senior Counsel for the appellant and moreover there is no evidence to support that contention apart from insinuations by the appellant of what interest or benefit the sixth respondent derived or had in the 21 companies introduced to the appellant. He contended that the introduction of the 21 companies is not an offence under the Banks and other Financial Institutions Decree No. 25 of 1991, but it is the failure to disclose an interest in such companies that is an offence. He posited that the first and sixth respondents have no interest in the 21 companies introduced by the sixth respondent.

Furthermore, the learned Counsel argued that assuming but not conceding that the sixth respondent violated the provisions of section 18(3) and (9) of Decree No. 25 of 1991, such violation does not thereby vitiate the entire suit in respect of the other respondents against the appellant, because the sixth respondent is just one of the respondents in the suit. It is also his argument that the sixth respondent was not being tried in the lower court for offences against Decree No. 25 of 1991. Moreover, he argued that this suit was not predicated on the directorship of the sixth respondent in the appellant bank so as to call in aid his violation of the provisions of section 18(3) and (9) of Decree No. 25 of 1991.

Section 18(3) of the Banks and other Financial Institutions Decree No. 25 of 1991 provides as follows:–

“Every director of a bank, who has any personal interest whether directly or indirectly, in an advance, loan or credit facility or proposed advance, loan or credit facility from that bank, shall as soon as practicable, declare the nature of his interest to the board of directors of the bank, and the secretary of the bank shall cause such declaration to be circulated forthwith to all directors.”

Also subsection (9) of section 18 of the Decree aforesaid provides thus:–

“All director who contravenes subsection (3) or (6) of this section is guilty of an offence under this section and liable on conviction to a fine of ₦100,000 or to imprisonment for a term of 3 years or to both such fine and imprisonment.”
The question that arises is whether the sixth respondent was in breach or contravention of section 18(3) of Decree No. 25 of 1991 for section 18(9) of the said Decree to be invoked against him. I do not think that it is necessary to attempt an interpretation of the provisions of section 18(3) of Decree No. 25 of 1991. This is so because the provisions are so clear and unambiguous that what is only required is to give effect to their ordinary or literal meaning.

In my view therefore, section 18(3) of Decree No. 25 of 1991 means what it says. The nature of personal interest, whether directly or indirectly, that a director of a bank is required to declare, is limited to any advance, loan or credit facility or proposed advance, loan or credit facility from the bank. In my view, there is nothing in the words used in section 18(3) of the Decree to conjure the interest in a wider sense than what is expressed therein. By the *ejusdem generis* principle, the interest must be circumscribed within or limited to any advance, loan or credit facility, or proposed advance, loan or credit facility from the bank. It is not in dispute that the sixth respondent was at the material time a director and chairman of the finance committee of the appellant. It is also not in dispute that the sixth respondent introduced 21 companies to the appellant to do business with the appellant. What is in dispute and indeed the grouse of the appellant is that the sixth respondent introduced those companies to the appellant for the purpose of doing business with the appellant without the sixth respondent declaring his financial interest in them. In his evidence in chief at 9 of Record No. 2 of this appeal from lines 5–9, the sixth respondent testified thus:

“I was the Chairman of the Finance Committee of the defendant. I have no powers to approve loans. I did not approve any loan. I introduce (*sic*) companies to the defendant but not fraudulently. We did not make any loan with the companies (1) introduced to the defendant.”

There are also other instances where the sixth respondent testified that he introduced 21 companies to do business with
the defendant and every business that the companies did were well documented. The companies participated in foreign exchange business with the defendant and benefitted from the bids.

On the other hand DW1 testified in chief at 25 of Record Book No. 2 that the companies were so introduced and participated effectively in most banking transactions including, among others, loans and advances. With this scenario of the evidence, can it be seriously contended that the sixth respondent had any personal financial interest in the 21 companies he introduced to the appellant the nature of which he failed to declare as required by section 18(3) of Decree No. 25 of 1991. I do not think so. There was no evidence before the learned trial Judge that the sixth respondent has any direct or indirect personal interest in any advance, loan or credit facility or proposed ones in any of the 21 companies he introduced to the appellant for business transactions. Indeed, the mere fact that the sixth respondent introduced the companies to the appellant is not enough to ascribe financial interest in them to the sixth respondent. It will be acting within the realm of conjecture or speculation for this Court to hold that the sixth respondent had any financial interest in any of those companies he introduced to the appellant. Even the evidence of DW1 is not convincing enough to establish that those companies received loans and/or advances. Loans and advances are not granted by mere word of mouth. There are procedures and documentations for granting loans and advances and none was tendered in evidence by DW1 to establish beyond any conjecture that any of the companies was granted loans or advances by the appellant. The burden is on him who asserts to establish the positive of his assertion. The mere \textit{ipse dixit} of DW1 is not enough to discharge this burden on the appellant in the absence of credible documentary evidence that those companies or any of the associates was granted any loan or advance or credit facility by the appellant. Therefore, in my candid view, there is no credible evidence adduced by the appellant upon which
to invoke section 18(3) of Decree No. 25 of 1991 against the sixth respondent. This issue must be decided in favour of the respondents.

Issue (ii) in the appellant’s brief is whether the conclusions/orders arrived at by the trial court can properly be sustained on the evidence and other material exhibits placed before the court.

Under this issue the learned Counsel for the appellant alluded to various findings and orders made by the learned trial Judge which were not supported by evidence before the court and contended that such findings and/or orders were unjustified and perverse. He itemised the various complaints under sub-issues as follows:

“(a) Unauthorised opening or creation of 2 accounts No. 100621-001 and No. 100622-001 in the names of Hillman Nig. Ltd and Stellfum Nig. Ltd respectively.

(b) False and fraudulent/unauthorised debit made up of ₦127,623,809.69.

(c) Unauthorised sale of plaintiffs’/respondents’ shares.

(d) Consolidation of Accounts.

(e) Award of general damages.”

I shall now proceed to consider the above sub-issues seria-tim. On issue (ii)(a) above the learned Counsel for the appellant made heavy weather in his brief of argument against the finding of the learned trial Judge that the two accounts in question were never opened/operated by the first or sixth respondent but only by Mr E.O. Ntui, the branch manager of the defendant bank. He submitted that, from the pleadings and evidence, the trial court’s finding on this issue was totally perverse and unjustifiable.

Now, what are the pleadings on this issue of unauthorised opening or creation of the said accounts no. 100621001 and 100622001. In paragraphs 11(59) and 11(60) of the statement of claim the respondents averred as follows:

“11(59) In or about October, 1994 the defendant without authority of the first plaintiff created account No. 100621-001 in the name of Hillman Nig. Ltd with address c/o the
Branch Manager (Mr E.O. Ntui) CDB Plc, P.M.B. 24, Campbell Street, Lagos, instead of debiting the bids to the first plaintiff’s account as was formerly the case and went ahead to transact fraudulent debits as follows: . . .

In or about October, 1994, the defendant, without the prior or any authority of the first plaintiff created an account No. 100621-001 in the name of Stellfurn Nig. Ltd with address c/o the Branch Manager (Mr E.O. Ntui) CDB Plc, P.M.B. 24, Campbell Street, Lagos, instead of debiting foreign exchange bids to the first plaintiff’s account as usual the defendant used this account to transact fraudulent debits as follows: . . .”

In answer to the above averments, the appellant averred in paragraph 16 of the statement of defence and counter-claim thus:–

“Paragraph 11(59–60) is admitted to the extent of creating the said accounts. However, the defendant denies creating those accounts without the authority, since the sixth plaintiff requested this to be done in order to further hide the foreign exchange dealings from the Central Bank of Nigeria officials who make occasional checks on forex accounts of applicants.”

In his evidence at the trial, the sixth respondent who testified as PW1 denied that he authorised the appellant to open such account. He specifically said that he did not authorise Mr E.O. Ntui to open the accounts and that certain amounts were debited in the accounts without the authority of the respondents. Under cross-examination, sixth respondent asserted that they (meaning the defendant and Mr E.O. Ntui) had no mandate to open the account. Of significance is the evidence of DW2 who in his evidence-in-chief after identifying Exhibits 12 and 12A, the statements of account of the two companies in question, had this to say:–

“Those two companies have no account with the bank. I called the sixth plaintiff and intimated him of the CBN impending visit and requirements. He instructed me to open the two accounts since they have already bidded for foreign exchange and to pass all foreign exchange he enjoyed through these accounts. This will enable me to produce a statement of account in respect of the two companies and other companies. The accounts were opened. All that
transaction in foreign exchange were passed with the account . . .
It was duly (sic) authorised to save the situation.”

Under cross-examination, DW2 said that the instruction from the sixth plaintiff was verbal. After the appraisal and evaluation of the evidence thus given the learned trial Judge in his judgment at 160 of the record of proceedings stated as follows:–

“I hold the view that the first plaintiff did not authorise the opening of the said accounts. It is also my view that such authorization should be in writing and not verbally. The two accounts were never operated by the first or the sixth plaintiff but operated by Mr E.O. Ntui, the Branch Manager of the defendant bank.”

For myself, I find it difficult to impeach the above findings of the learned trial Judge in view of the evidence before him. I hold the view that he was entitled to come to the conclusions he reached after his appraisal and evaluation of the evidence before him. Mr E.O. Ntui, DW2, admitted opening and operating the two accounts in question. On the question of authorisation by the sixth plaintiff/respondent which was disputed by the said sixth respondent, the learned trial Judge was of the view that such authorisation should be in writing and not orally, and I totally agree with him having regard to the fact that a matter of that serious magnitude as stated by DW2 which involved the opening of new accounts should be authorised in writing and not verbally. It is the law that unless the finding of fact by a trial court is wrong or perverse or is not supported by the evidence, the Court of Appeal has no right to reverse it (see Sobakin v The State (1981) 5 SC 75 at 78; Okafor v Idigo (1984) 1 SCNLR 481; (1984) 6 SC 1). In Bakare v The State (1987) 1 NWLR (Part 52) 579 the Supreme Court held that the duty or role of the trial court is to try the issue, evaluate the evidence and make findings of fact, come to a conclusion one way or the other dictated by the natural drift of evidence and the probabilities of the case.

In Akinloye and another v Eyiyola and others (1968) NMLR 92 at 95, Coker JSC delivering the judgment of the
a court stated at 95 thus:–
“Where a court of trial unquestionably evaluates the evidence and appraises the facts, it is not the business of a Court of Appeal to substitute its own views for the views of the trial court.”

b Since in my opinion the findings of the learned trial Judge are not perverse or unjustifiable, it is not my business to overrule those findings and substitute my own views for those of the learned trial Judge. This ground of complaint has no merit and it hereby fails.

c On Issue ii(b) above, the complaint is against the finding by the learned trial Judge that the sum of ₦127,623,809.69 was falsely and fraudulently and without any authorisation withdrawn by the appellant from the account of the first respondent and the order of the learned trial Judge that the said sum of ₦127 million be credited in the account of the first respondent. The learned Senior Counsel for the appellant has attacked this finding and order of the learned trial Judge on two main grounds.

d The first attack comes to this:–
That while in paragraph 6 of the statement of claim the respondents averred that various sums of money amounting to ₦127,623,809.69 were, between May, 1995 and December, 1995, falsely and fraudulently and without any prior authorisation of the first respondent debited to the first respondent’s account No. 10044001 by the appellant, yet in paragraph 7 of the said statement of claim the respondents in another breath also averred that the amounts so falsely and fraudulently withdrawn by the appellant consisted of monies paid into account No. 10044001 of the first respondent on various dates amounting to ₦127,623,809.69. The learned Senior Counsel for the appellant therefore submitted that on the pleadings in paragraphs 6 and 7 of the statement of claim, the respondent suffered no loss or damage to necessitate or justify the order of the learned trial Judge that the sum of ₦127 million be credited in the account of the first respondent. He also contended that, even on the evidence of PW1 (the sixth respondent) and that of DW1 and DW2, there is
nothing false and/or fraudulent for a bank to wrongfully debit a customer’s account with a specific sum but later re-credit that account with the same amount previously debited, more so all within the same period. He submitted that the totality of the evidence was that the accounts were moved around but without any loss to either side in respect of the said N127 million.

The second ground of attack by the Senior Counsel is that the reliefs claimed by the respondent in the suit as set out in that statement of claim at 48 and 49 of the record of appeal did not seek any such redress that the sum of N127 million be credited to the account of the first respondent as ordered by the learned trial Judge. It was his submission that a court cannot award to a party a relief such a party has not claimed in the suit and he cited *Fadlallah v Arewa Mills Ltd* (1997) 8 NWLR (Part 518) 546; (1997) 7 SCNJ 202 at 213; *Ekpen-yong and others v Nyong and others* (1975) 9 NSCC 28 at 32–32 or (1975) 2 SC 71 at 80–81.

The learned Counsel for the respondents in his own argument started by attacking paragraph 8 of the statement of defence as being evasive. He contended that the appellant evasively in paragraph 8 of the statement of defence answered the averments in paragraph 6 of the statement of claim, and such a general traverse is not enough to controvert material and essentially important averments in the statement of claim which must be specifically denied. He cited *L.C.C. v Ogunbiyi* (1969) All NLR 297 at 299; *FCDA v Naibi* (1990) 3 NWLR (Part 138) 270 at 272. He also cited the case of *Lewis and Peat Ltd v Akhimien* (1976) 7 SC 157 at 163–164. The learned Counsel asserted that the respondents’ case was that the appellant had operated their accounts without the authorisation, and this was admitted by the appellant’s manager. He therefore submitted that a bank has no right to operate a customer’s account and if the bank does so it is liable in damages and all the debits made in the course of such unlawful operation would be ordered to be
a reversed as was ordered by the learned trial Judge in the instant case. With the greatest respect I am not persuaded by the argument of the learned Counsel for the respondents.

b In law it is both elementary and fundamental that issues before the court are decided on the pleadings of the parties (see Wiri and others v Wuche and others (1980) 12 SC 1 at 5; Ransome-Kuti v A-G of the Federation and others (1985) 2 NWLR (Part 6) 211 at 245). In paragraphs 6 and 7 of the statement of claim the respondents pleaded as follows:

6. On various dates between May, 1995 and December, 1995 without the prior or any authorisation of the first plaintiff the defendant falsely and fraudulently debited Account No. 10044001 of the first plaintiff with various sums of money as follows:

(a) 2/5/95 ..................... ₦17,732,084.28
(b) 2/6/95 ..................... ₦16,407,930.83
(c) 3/7/95 ..................... ₦14,974,222.18
(d) 1/8/95 ..................... ₦14,892,424.95
(e) 9/8/95 ..................... ₦16,000,000.00
(f) 1/9/95 ..................... ₦16,876,161.86
(g) 3/10/95 ................... ₦30,740,985.61

7. The amounts so falsely and fraudulently withdrawn by the defendant consisted of monies paid into account No. 1004001 of the first plaintiff on various dates as follows:

(a) 31/5/95 ..................... ₦17,732,084.28
(b) 31/5/95 ..................... ₦16,407,930.83
(c) 30/6/95 ..................... ₦14,974,222.18
(d) 31/7/95 ..................... ₦14,892,424.95
(e) 8/8/95 ..................... ₦16,000,000.00
(f) 31/8/95 ................... ₦16,876,161.86
(g) 29/9/95 ................... ₦30,740,985.61.”

In paragraph 8 of the statement of defence the appellant denied paragraphs 6 and 7 of the statement of claim and
averred thus:

“Paragraphs 6 and 7 of the statement of claim are denied; and the defendant avers that the acts complained of were acts perpetuated by the sixth plaintiff in his capacity as the Chairman of the Finance Committee where the said Account No. 10044001 of the first plaintiff having been overdrawn as a result of unauthorised withdrawals of money and far above the limit statutorily allowed a director of any bank either in form of overdraft or loan advances. Accounts and Balance Sheets are prepared every month and sent by the defendant to the Central Bank of Nigeria, the sixth plaintiff intimating the then Branch Manager ensured that the account was in credit by illegally moving funds of the bank into his account and reversing same for four (4) and five (5) days later. This continued until discovered by the Management and Board (of Directors) of the defendant.”

After reading paragraph 8 of the statement of defence, I really fail to see the basis of the attack by the Counsel for the respondents that this paragraph evasively answered paragraph 6 of the statement of claim. In my view paragraph 8 of the statement of defence is neither evasive nor ambiguous. It specifically denied the averments in paragraphs 6 and 7 of the statement of claim and went further to set out the details of the appellant’s case which are opposed to the case pleaded by the respondents. Therefore, paragraph 8 of the statement of defence constitutes a sufficient traverse. To constitute a sufficient traverse it is not necessary that every paragraph of the statement of claim should be specifically denied. That may be done. But what is essential is that the case put forward by the defendant conflicts in material particulars with that put forward by the plaintiffs and thus put the different material averments in issue (see Olaogun Ent. Ltd v S.J. and M. (1992) 4 NWLR (Part 235) 361). In my view, the case of Lewis and Peat (Nigeria) Ltd v Akhimien (1976) 7 SC 157 cited by the learned Counsel for the respondents does not apply as it can easily be distinguished. The rule in Lewis and Peat (Nigeria) Ltd v Akhimien (supra) applies only where the pleading of the defendant is ambiguous by merely not denying or admitting without saying
more. But where the defendant as in the instant case after specifically denying the averment in paragraphs 6 and 7 of the statement of claim, the defendant went further to state its case in the statement of defence, the rule does not apply (see Lewis and Peat (Nigeria) Ltd v Akhimien (supra)).

Now the crucial question is whether the order of the learned trial Judge in respect of the said sum of ₦127,623,809.69 can be supported by this Court. The learned trial Judge in his judgment at 161 of the record of appeal ordered thus:

“It is my view which I hold that the said sum of ₦127 million be credited in the account of the first plaintiff. I deem the action of the defendant to be false and fraudulent in this regard.”

It is trite law that issues are tried as settled in the pleadings filed. In this regard I shall once again recall the pleading in paragraphs 6 and 7 of the statement of claim.

In my view, the purport of these two paragraphs is that, while in paragraph 6 of the statement of claim the sum of ₦127,623,809.69 was falsely and fraudulently withdrawn from the first respondent’s account no. 10044001, however in paragraph 7 the said sum of ₦127,623,809.69 so falsely and fraudulently withdrawn by the appellant from the first respondent’s account No. 10044001 was paid back or credited into the said first respondent’s account. It follows from the foregoing that there were corresponding debits and credits respectively of the sum of ₦127,623,809.69 into the first respondent’s account no. 10044001. In other words, while the sum of ₦127,623,809.69 was withdrawn from the first respondent’s said account, the same sum of money was subsequently paid into that account. The result, therefore, is that the corresponding debits and credits cancelled out themselves, thus leaving no outstanding debit or credit. In my opinion, therefore, going by the state of the pleading in paragraphs 6 and 7 of the statement of claim, the respondents cannot be said to have incurred any loss of funds to justify the order of the learned trial Judge that the said sum of ₦127 million be credited in the account of the first plaintiff (respondent).
Even on the evidence, the testimony of PW1 (sixth respondent) supported paragraphs 6 and 7 of the statement of claim on the debit entries and the credit entries, even though he did not know how the debits and credits came about. It was the evidence of DW1 and DW2 who were some of the principal actors in the appellant bank that threw some light into the said debits and credits respectively amounting to ₦127,623,809.69. DW1 was the assistant general manager of the appellant. He testified that those entries of debits and credits amounting to ₦127.6 million were mere fictitious entries which were manipulated to favour the plaintiff by the branch manager of the defendant by hiding the indebtedness from the CBN and NDIC. DW2, the branch manager, Broad Street branch of the appellant, testified that on the issue of the ₦127.6 million he was instructed by the sixth plaintiff not to allow his overdrawn position to get to the Central Bank, and so he should move funds into his (sixth plaintiff) account and reverse same after preparing his returns. He further testified that the subsequent dates were their reversals of all these credit entries.

From the foregoing evidence, I hold that the finding of the learned trial Judge was not borne out by the evidence before him. The finding was perverse as it did not take into account the evidence of the corresponding credits or payments of the sum of ₦127,623,809.69 into the account of the first respondent no. 10044001. As there was no proper evaluation of the evidence, this Court deems it proper to interfere with that finding and re-appraise and re-evaluate the evidence. I therefore hereby find as a fact that on the foregoing evidence there was nothing to be credited into the account of the first respondent, since the debit and the credit entries respectively neutralised themselves. I hold that there was no proof of fraud leading to any financial benefit to the appellant, or loss to the respondents in this exercise. Most importantly also is the question whether the said sum of ₦127,623,809.69 as was ordered by the learned trial Judge to be credited to the account of the first plaintiff/respondent was ever claimed as
a relief by the respondents in their statement of claim. The answer is certainly in the negative. It has been held in a long line of decided cases that there is no power in a court to make an award or grant a relief or remedy except for what is properly claimed by a party and is sufficiently proved to be due to the party (see Ekpenyong and others v Nyong and others (1975) 2 SC 71 at 80–81; Ige v Oluloyo (1984) 1 SCNLR 158 at 168; Hon. Justice Ademola v Sodipo (1992) 7 SCNLR 417). In George and others v Dominion Flour Mills Ltd (1963) 1 SCNLR 242; (1963) 1 All NLR 71 at 77, it was held that it is not the duty of the court to distribute largesse by granting unclaimed relief.

I have endeavoured to construe paragraph 35(2) of the statement of claim and relate it to the award of N127 million made by the learned trial Judge to be credited into the first respondent’s accounts, but I fail to see any such relationship. The relief claimed in paragraph 35(2) of the statement of claim is vague. The law is that a relief claimed by a party in an action must be proper, precise and certain. It is not the duty of the court to go about fishing out the alleged false, fraudulent and excessive debits in order to reverse them. The relief claimed in paragraph 35(2) of the statement of claim is speculative as it is imprecise and not certain to merit any attention. The court below fell into a serious error when it granted the relief. The relief is hereby discountenanced and struck out.

I will adopt the views expressed by Iguh JSC in Okoya and others v Santilli and others (1994) 4 NWLR (Part 338) 256 at 303; (1994) 4 SCNJ 333 at 381, thus:–

“It is not the duty of a court to endeavour by examination of the evidence to deduce what ought to be or might be the true nature of a claim by a party to a dispute and then proceed to make a declaration or finding which such a party has not specifically sought and may not in fact desire. It would be certainly improper for the court so to do unless, of course, it were prepared to order an amendment of the pleadings in which case it would be necessary to give the other party an opportunity of what would be an entirely different case.”
In my candid view, therefore, the learned trial Judge committed a serious error by ordering that the sum of ₦127 million be credited in the account of the first plaintiff/respondent when the amount was not properly claimed. This order or award being improperly made cannot stand and it is hereby set aside. This disposes of this issue.

On issue ii(c) regarding the unauthorised sale of the first and fifth respondents’ shares by the appellant, it is the contention of the learned Senior Counsel for the appellant that the third and sixth respondents voluntarily signed the authority to sell the said shares and he referred to Exhibits K and Q. He also referred to the evidence of the sixth respondent (PW1) at 5 lines 11–15 of the record of appeal (Book No. 2) where the sixth respondent testified that at the board meeting of the appellant which he attended, it was decided that the shares should be sold and he agreed that they should be sold, but he added that it was under the belief that his company was owing ₦64 million. The learned Counsel therefore submitted that the sixth respondent was under no spell or pressure from 7 October, 1995 when the indebtedness of ₦64 million to the appellant was discussed at a meeting up to 26 October, 1995 when the sixth respondent expressly authorised the sale of the shares as per Exhibit Q. He also submitted that the sixth respondent is estopped from contending that there was either misrepresentation or pressure by the appellant. He cited Okoya and others v Santilli (supra) and submitted that a party who is not an illiterate is bound by the contents of any document signed by such a party and the plea of non est factum would not avail him as he is deemed to have understood the contents. The learned Senior Advocate also submitted that it is wrong for the court below to have decreed the sale of the shares null and void ab initio with an order for repayment of the sum of ₦7,162,269 representing the accrued dividends on the shares together with interest thereon to the respondents, when the same had by the voluntary acts of the fifth and sixth respondents been
applied as part payment of their legitimate debts owed to the
appellant.

For the respondents, it was contended by their Counsel that
the sixth respondent was induced to surrender the share-
holding of the first and fifth respondents for sale following
the misrepresentation by the appellant as to the extent of the
indebtedness of the first and third respondent to the appel-
ant to the tune of N64,043,389.88. He argued that, but for
the misrepresentation of the true state of the first and third
respondents’ accounts, the shares would not have been sold.
He also contended that Exhibits K and Q were products of
false inducement and misrepresentation. Referring to the
case of Okoya v Santilli (supra) the learned Counsel submit-
ted that the plea of non est factum was not raised by the
appellant at the lower court and did not form part of the case
for the appellant. He therefore submitted that the appellant’s
Counsel cannot raise the plea for the first time in this Court
without the leave of this Court duly sought and obtained.

I have considered the submissions of Counsel on both
sides in their briefs of the argument. The dominant question
here is whether the sixth respondent, being the alter ego of
the first to fourth respondents, voluntarily surrendered the
shares of the first and fifth respondents in the appellant’s
bank for sale by the appellant. The word “voluntarily”
means “freely” or “of one’s own accord”. When used in its
ordinary sense, the word means “willingly” or “without
compulsion” (see Ballentine’s Law Dictionary by William
S. Anderson (3ed) at 1350). In Black’s Law Dictionary (6ed)
at 1575, “voluntarily” means “intentional and without coer-
cion”. The evidence of the sixth respondent (PW1) at 4 and
5 of the record of appeal no. 2 is that is was at the meeting
of 7 October, 1995 that he was given an unsigned document
(Exhibit G) to the effect that his indebtedness to the appel-
ant was consolidated to over N64 million in the accounts of
the first and third respondents and he was compelled to give
a list of goods as security for the debt which he did. Later he
(the sixth respondent) received Exhibit J, a letter dated 16
October, 1995, from the appellant threatening to report him
to the board of directors of the bank and the regulatory authorities for appropriate action to recover the indebtedness, if by October 23, 1995 he had not reduced the estimated indebtedness of N62.5m to the authorised limit. Then he wrote Exhibit K dated 19 October, 1995.

So far, let me comment on Exhibits J and K. As for Exhibit J, the question is, to what extent did it induce or coerce the sixth respondent to surrender the shares to the appellant for sale. For the purpose of clarity, I have to reproduce Exhibit J hereunder thus:

“CO-OPERATIVE DEVELOPMENT BANK PLC”
SHO/CH/IBE/JGG9/2353
October 16, 1995
Confidential

The Managing Director
Joe Golday Company Ltd
225/227 Odukpani Road,
Calabar.
Attention: Elder Joseph Ikpatt.

Dear Sir,

Unauthorised Loans/Advances to Joe Golday Co Ltd, Parrotwave Communications Ltd, Watertune Nig. Ltd and your other Companies

I refer to your letter reference No. 95/10041 dated October 4, 1995 and to the subsequent discussions during our meeting on Saturday; October 7, 1995. I wish to confirm that your letter reference is unsatisfactory in that no immediate repayment has been made of the unauthorised loans and advances made to your various companies since our discussions on September 21, 1995. Instead you have prevailed on your various Branch Managers to give you additional unauthorised loans and advances.

You have used your position as a Director of the Bank and Chairman of Finance Committee of the Bank to induce various managers to obtain these unauthorised loans and advances. If by October 23, 1995 you have not reduced your estimated indebtedness from N62.5 million as at September 30, 1995 to the authorised limit, I will have no alternative but to report your behaviour to the Board of Directors of the Bank and the regulatory authorities for them to
take appropriate action to recover the indebtedness” (italics mine for emphasis).

The language of Exhibit J is very clear. In my view Exhibit J has to be read as a whole and not disjointedly in order to appreciate whether Exhibit J was meant to induce, pressurise or force the sixth respondent to surrender the shares for sale.

I have read Exhibit J over and over again and I do not believe that the purpose and intendment of Exhibit J was to induce or exert pressure on the sixth respondent to surrender the shares to the appellant for sale. It is obvious that Exhibit J did not make any mention of the shares let alone suggest their surrender for sale. In my considered view Exhibit J was intended not only to stop the sixth respondent from securing further unauthorised loans and advances from the various appellant’s bank managers, but also to make the sixth respondent repay the unauthorised outstanding indebtedness to the appellant. It is not unusual for a bank to pressure its customers to pay their debts. The sixth respondent’s reply to Exhibit J is by a letter, Exhibit K, dated 19 October, 1995; which in part reads:

“I am aware as you are trading that activities in Nigeria is (sic) at its (sic) lowest ebb and that the markets are not moving. To this end, I would not want to make a promise to the effect that I will immediately dispose of the goods and collapse the facilities within the time limit given to me and my companies. The only option I have for now to reduce the pressure on you and other colleague on the Board is to tender the shares of

(1) Joe Golday Co Ltd 4,468,318 shares:
(2) S. Anene, 3,489,743 shares in the Bank for immediate sale to any person you may wish to bring into the company at a competitive price. Should you need my assistance to scout for a buyer, I shall be willing to do so with all pleasure.

Secondly, I surrender my 1993/1994 dividend due from the company towards further reducing the facility” (italics mine for emphasis).

The language of Exhibit K is also clear and unambiguous like in Exhibit J. One should not import or read into these two documents extraneous factors such as of coercion, intimidation or pressure which are not there and not intended by the writers or parties. In my candid opinion the sixth
respondent wrote Exhibit K with all pleasure and voluntarily offered as the only option the surrender and sale of the shares of the first and fifth respondents, in view of the dwindling trading activities at the time.

As a matter of fact, in Exhibit K the sixth respondent did not express any pressure on himself, rather as he stated that the opinion was to reduce the pressure on the appellant’s chairman and other colleagues on the board of the appellant. Again, the question is whether Exhibit K was written under duress so as to invoke the plea of non est factum. The answer is, no. The respondents did not plead it in their statement of claim and no evidence was adduced to that effect. In law the plea of non est factum which is a shield and not a sword must be pleaded by the party who relies on it and if not pleaded the court will not entertain any evidence on it. Also in Exhibit Q, a letter dated 26 October, 1995, and signed by the fifth and sixth respondents, there is that express authority to the appellant to sell the shares of the first and fifth respondents in the appellant bank and whether the shares were sold at N4.50 per share or not, does not in my view invalidate or revoke the authority given by the fifth and sixth respondents. There is no evidence that the authority given in Exhibit Q was withdrawn or revoked at any stage prior to the sale. What was being questioned by the sixth respondent in Exhibit V was the basis for the evaluation of the sale price of the shares at N3.50 per share and not the sale. Exhibit W is an acceptance of the sale.

In my view the question of underselling the shares or their improper transfer after sale is a different kettle of fish altogether. Indeed, the respondents cannot approbate and repugne. After they had voluntarily surrendered the shares for sale in order to knock down their indebtedness to the appellant, they cannot now be heard to assert that they did so under pressure exerted on them by the appellant, without any scintilla of credible evidence. The learned trial Judge did not properly evaluate the evidence on the issue. In my view, therefore, the learned trial Judge was grossly in error
in his judgment when he set aside the sale of the shares as void *ab initio* and thereby ordering the restoration or reversion of the said shares to the first and fifth respondents. Since the orders of the learned trial Judge were made without proper evaluation of the evidence, I have a duty to revoke and set aside the orders and I hereby set the same aside. I confirm as valid the sale of the shares. Consequently, I set aside the order of the learned trial Judge for payment over to the first and fifth respondents the sum of ₦7,162,264.90 and interest being dividends due to the first and fifth respondents for the year 1995. To be entitled to the repayment of the dividends, the respondents must prove that they are not owing the appellant any money in excess of the dividends, but they have failed to do so.

I now come to issue ii(d) on the unilateral or unauthorised consolidation of accounts of the first and third respondents by the appellant in respect of the unauthorised loans/advances to the sixth respondent’s companies amounting to ₦64,043,389.88 as shown in Exhibit G.

In his judgment the learned trial Judge declared as null and void the consolidation of the accounts of the first and third respondents by the appellant without the prior or any lawful authorisation of the respondents. The appellant has complained against this decision, and insisted that there was no consolidation of the accounts. In the view of the appellant’s Counsel consolidation of accounts will only arise where the separate identities of various accounts have been extinguished and merged into one composite account, creating thereby a new and single entity. To him in the instant case, in so far as the accounts are individually still running, there was no consolidation of the accounts. He refereed to the testimony of DW1 and cited *Allied Bank (Nigeria) Ltd v Akhuneze* (1997) 6 NWLR (Part 509) 374 on the right of a banker to consolidate a customer’s account.

In the respondents’ brief of argument, the learned Counsel submitted that the extraction and addition of the balances outstanding on a particular date in all the accounts by the appellant amounted to a consolidation. He contended that it
was not shown that the various accounts from which the outstanding balances were added together were in the name of the first respondent, or were trust accounts on behalf of first respondent. He submitted that the first to fourth respondents are distinct juristic personalities having been registered in accordance with the Companies and Allied Matters Act, 1990 and each of them kept a distinct account in its own name and not in the name of the first respondent. He therefore submitted that the appellant had no authority to combine or sum up the outstanding balances in the other customers’ accounts with the account of the first respondent. He also referred to Allied Bank (Nigeria) Ltd v Akubueze (supra) and submitted that the case is only applicable where such other accounts are kept by such a customer in his own right. He further referred to Uba v U.B.N Plc (1995) 7 NWLR (Part 405) 72 at 80; Halsbury’s Laws of England Volume 2 (3ed) at 172 paragraph 322; British and French Bank Ltd v Opaleye (1962) 1 SCNLR 60; (1962) 1 All NLR 26. The learned Counsel therefore urged this Court to uphold the lower court’s decision that the consolidation or combination of the accounts by the appellant was null and void.

The pertinent question is whether there was consolidation of accounts of the first and third respondents and, if so, whether the said consolidation was proper in law. The general principle of law as to whether a banker has the right to consolidate or combine a customer’s accounts is that, unless precluded by agreement, express or implied, from the course of business, a banker is entitled to combine current accounts kept by a customer in his own right; even though at different branches of the same bank, and to treat the balances, if any, as the only amount standing to the customer’s credit. However, the customer has not the equivalent right, and cannot utilise a credit balance at one branch for the purpose of drawing cheques on another branch where he has no account or where his account is overdrawn (see Halsbury’s Laws of England Volume 2 (3ed) paragraph 322 at 172–173). In
British and French Bank Ltd v Opaleye (1962) 1 All NLR 26 at 28 or (1962) 1 SCNLR 60 at 80 the Federal Supreme Court restated and followed the principle of law enunciated above. In that case, the respondent (Opaleye) had two accounts with the appellant bank, one in his own name and the other, a business account in the name of “Fekemo Brothers” of which he was the sole account holder. The private account was in credit under £2 (₦4) and the business account was overdrawn to the extent of £500 (₦1,000), when a cheque for £350 (₦700) was paid into the private account. The bank thereupon, without notice to or the consent of the respondent, utilised the credit of the private account to reduce the overdraft of the business account, and told the respondent that he could not draw on his private account. The respondent sued the appellant bank in the Magistrate’s Court for damages and obtained judgment. The appellant appealed to the High Court which dismissed the appeal. Thereupon the appellant appealed to the Federal Supreme Court which also dismissed the appeal and held that, where a banker opens two accounts with a customer, one in the customer’s own name and the other in a business name, there is, in the absence of any express agreement to the contrary, an implied agreement that the accounts are to be kept distinct and separate. It also held that where by agreement, express or implied, a customer’s several accounts with the banker are to be kept distinct and separate, the banker has no right to combine them or to transfer assets or liabilities from one account to another, without reasonable notice of the intention so to do, or without the assent of the customer. Since the decision in Opaleye’s case (supra) which is a locus classicus there have been other decisions of the courts to the same tenor and effect (see Uba v Union Bank of Nigeria Plc (1995) NWLR (Part 405) 72; Allied Bank (Nigeria) Ltd v Akubueze (1997) 6 NWLR (Part 509) 374 (SC)).

To my mind the learned Counsel for the appellant has a misconception about the meaning of the term “consolidation of accounts”. The term “consolidation of accounts” means the same thing as combination of accounts. It arises only if a
customer of a bank operates two or more accounts in his own right. In such a situation the bank is entitled to combine the two or more accounts kept by the customers, even though at different branches of the same bank, and to treat the balance, if any, as the only amount really standing in the customer’s credit, unless precluded by agreement, express or implied, from the course of business from so doing. The learned Counsel for the respondents was right when he stated that the extraction and addition of the balances outstanding on a particular date in all the accounts in question by the appellant amounted to consolidation. The meaning of a customer having separate accounts “in his own right” was given by Bairamian FJ.

In British and French Bank Ltd v Opaleyeye (supra) Bairamian FJ gave the meaning of the phrase “in his own right” when he said at 28 of the report thus:

“The point about the customer having different accounts ‘in his own right’ is probably this, namely, that he has both accounts in his name, and that neither account is a trust account.”

In the instant case it is clear that the appellant combined or consolidated the accounts of the first and third respondents in the appellant bank, from which the outstanding debit balance of over N64 million was raised. That the accounts were in the distinct and separate names of the first and third respondents and in their own rights as distinct juristic personalities is not in dispute.

But that is not the end of the matter. One has to look at the particular circumstances of this case leading to the consolidation of the accounts complained of. The purpose of the consolidation of the accounts was to ascertain or determine the overall indebtedness of the sixth respondent’s associated companies to the appellant which the sixth respondent as the alter ego organised and manipulated to do business with the appellant. As a matter of fact, it was the issue of the amount of indebtedness of the sixth respondent’s companies to the appellant that gave rise to this suit. The case of the respondents is not that they sustained any detriment, loss or
damages by reason of the combination or consolidation of their accounts, such as that their cheques drawn on any of the consolidated accounts was dishonoured so as to give rise to a cause of action in law. In other words, mere consolidation of the accounts of a customer by his banker to ascertain the totality of his indebtedness to the banker without his suffering any detriment, loss or damage by so doing does not give rise to a cause of action against the banker. The case of *British and French Bank Ltd v Opaleye* (supra) is clearly distinguished from the facts of the instant case.

In my view therefore, it was erroneous for the learned trial Judge to declare the consolidation of the accounts of the first and third respondents null and void. That declaration is accordingly set aside.

On issue ii the appellant complained against the award of N1 million as general damages in favour of the respondents by the learned trial Judge. The learned Counsel for the appellant has contended in his brief of argument that there was neither allegation of any loss or damage or injury in the respondents’ pleadings nor was there any iota of such evidence led by the respondents in that regard throughout the trial to justify the award of such general damages. He further contended that the learned trial Judge made no attempt in his judgment to indicate the basis for the award. He therefore submitted that it was a serious misconception of the law on the part of the trial Judge to make the award. The learned Counsel further submitted that, having granted the respondents the reliefs the court found proved, the further award of yet another head of redress as general damages amounted to double compensation which is not permissible in law. The learned Counsel cited the following authorities: *Beecham Group Ltd v Essdee Food Products Nigeria Ltd* (1985) 3 NWLR (Part 11) 112; *A-G Oyo State v Fairlakes Hotels Ltd (No. 2)* (1989) 5 NWLR (Part 121) 255 at 278; *Kaycee (Nigeria) Ltd v Prompt Shipping Corps Ltd* (1986) 3 NWLR (Part 23) 458.

For the respondents it was argued by Counsel that they were entitled to be compensated by way of general damages...
as such damages are presumed by law to be the direct, natural or probable consequences of the act of the appellant. He referred to the evidence before the lower court and itemised the issues suffered by the respondents which ought to be compensated by way of general damages, to wit: the first respondent lost its directorship with the appellant when the sixth respondent resigned his directorship, the first and fifth respondents lost their shares which were sold due to fraudulent misrepresentation by the appellant, the sixth respondent lost ownership of his house at No. 82 Norman William Street, Ikoyi, Lagos, as the property was also sold. The learned Counsel referred to *U.B.N. Ltd v Odusote Bookstores Ltd* (1995) 9 NWLR (Part 421) 558 at 566 *ratio* 14; *Ijebu-Ode L.G. v Adebuchi Balogun and Co Ltd* (1991) 1 NWLR (Part 166) 136; (1991) 22 NSCC (Part 1) 1 at 4, *ratio* 7; *A-G Oyo State v Fairlakes Hotel Ltd* (1989) 5 NWLR (Part 121) 255 at 278. The learned Counsel rejected the idea that the award of ₦1 million as general damages amounted to double compensation and urged this Court to uphold the award in favour of the respondents.

It is trite law that general damages are such damages as the law will presume to be the natural or probable consequences of the act complained of (see *Beecham Group Ltd v Essdee Food Products Nigeria Ltd* (1985) 3 NWLR (Part 11) 112; *Mobil Oil Nigeria Ltd v Akinfosile* (1969) N.M.L.R. 217). In a claim for general damages, the damages are at large and the trial court even without any figure being claimed can award proper compensation (see *Balogun v Amubikanhun* (1985) 3 NWLR (Part 11) 27). The general principle of law established by a long line of decided cases is that an award of general damages is a matter for the trial Judge and an Appellate Court will not interfere with such award unless it is shown that the trial Judge had proceeded upon a wrong principle of law or that his award was clearly an erroneous estimate since the amount was manifestly too much or too small (see *U.B.A. Ltd and another v Achoru* (1987) 1 NWLR (Part 48) 172; *Nzeribe v Dave Eng. Co Ltd* (1994) 8 NWLR.
Now, after a careful consideration of the submissions of Counsel on both sides, I am of the strong view that this Court will interfere with the award of general damages by the learned trial Judge, having regard to the fact that in this Court the respondents have virtually lost all their claims before the lower court. Therefore, the respondents have not suffered any damages which the law would presume to flow in their favour and deserving of compensation. In the circumstances, therefore, I hereby set aside the award of the sum of N1 million as general damages, to the respondents.

Issue (iii) is in respect of the counter-claim by the appellant. I have earlier in this judgment set out the counter-claim. At 162 of the record of appeal (Record Book No. 1) the learned trial Judge dismissed the counter-claim on the ground that, “since the alleged overdraft is still disputed by the plaintiffs and the defendant what is the basis of counter-claiming for the sum of N18,249,848.88, I hold that the defendant led no evidence to prove the counter-claim”. In his testimony, DW1 at 25 of the Supplementary Record of Appeal No. 2 counter-claimed for about N18 million against the respondents. He identified Exhibit 3 and pinned down the counter-claim to N13 million and not N18 million as previously claimed. (The figure of N18 million at 25, line 23 is a typographical error for N13 million (see Record of Appeal No. 1 at 135 lines 5 and 6)). Exhibit 3 is a letter dated 9 December, 1996 from the appellant to the sixth respondent stating the indebtedness of the first respondent and associated companies as at 30 September, 1996 to be N17,155,179 and requested for the sixth respondent’s cheque in full settlement of the amount.

In Exhibit 3 the appellant stated clearly that the sale of the sixth respondent’s property at Norman William Street, Lagos, had not been reflected in Exhibit 3. It will be recalled that the sixth respondent as PW1 in his evidence at 7 lines 27–31 of Record of Appeal Book No. 1 stated that the said...
property was sold for N8 million and that the appellant retained N5 million, while N3 million went to agency and transfer of title documents. When, therefore, this sum of N5 million retained by the appellant is taken into account and deducted from the sum of N17,155,179 in Exhibit 3 claimed by the appellant, the outstanding balance of the respondents indebtedness to the appellant is reduced to N12,155,179. The sixth respondent, in my opinion betrayed himself when in his evidence at 13 lines 33–34 of Record Book No. 2 he stated that, “there is no doubt that we are owing the amount. The Central Bank said that we were owing N34 million”, only to turn round in his evidence at 14 of Record Book No. 2 to say that, “it is not correct that I am owing bank”. The sixth respondent cannot approbate and reprobate. The fact remains that the latter statement is an afterthought and therefore false. It is argued by the learned Counsel for the respondents in his brief that the appellant could not alter the amount claimed without amending the statement of defence and counter-claim with the leave of the trial court. I do not agree. An amendment of the counter-claim was not necessary for the court below to grant the appellant the sum of N12,155,179 proved as the counter-claim.

In law a court has power to give to a plaintiff judgment for whatever part of his claim which he proves or is admitted (see National Bank of Nigeria Ltd v Guthrie Nigeria Ltd and another (1987) 2 NWLR (Part 56) 255). Therefore, the learned trial Judge was in serious error when he dismissed this arm of the counter-claim as not proved. That decision is hereby set aside. The counter-claim hereby succeeds to the extent of N12,155,179 borne out by the evidence. It is hereby adjudged that the respondent shall pay to appellant the sum of N12,155,179 as counter-claim in settlement of the outstanding indebtedness to the appellant.

The last issue for the determination of this appeal is the issue of the jurisdiction of the lower court to entertain the suit, which is argued under Issue iv. This issue is derived...
from ground 5 of the additional grounds of appeal. The main thrust of the argument of the learned Senior Advocate in the appellant’s brief of argument is that the Federal High Court, Calabar, had no jurisdiction to entertain the suit. He submitted that by paragraphs 1–5 of the statement of claim, the respondents sued the appellant in their capacities as customers maintaining various accounts with the appellant, which accounts were falsely and fraudulently operated without their authority by the appellant. He also referred to the cause of action and the reliefs sought in the suit. He contended that the reliefs sought show that all the respondents including the sixth respondent conceived their suit attacking the appellant from outside its composition and operations as a limited liability company duly registered under the provisions of the Companies and Allied Matters Act, 1990. In essence, the argument of the learned Counsel is that the claim of the respondents as constituted arose from a dispute between individual customers (irrespective of whether it is a limited liability company or a living person) and their bank (the appellant) and in respect of transactions between those individual customers and their bank (the appellant) and by the proviso under section 230(1)(d) of the Constitution (Suspension and Modification) Decree No. 107 of 1993, the Federal High Court lacked jurisdiction to entertain or adjudicate over the suit as constituted. He contended that once it is established that the Federal High Court has no jurisdiction to entertain reliefs nos. 1–6, the court was bound to decline jurisdiction to adjudicate on relief no. 7 which is only peripheral to the main reliefs namely nos. 1–6. He referred to Egbuonu v Bornu Radio Tel. Corp. (1997) 12 NWLR (Part 531) 29 where the Supreme Court held that, where a court lacks jurisdiction to entertain the main claim but has jurisdiction over the ancillary or incidental claim, the court ought in such circumstances to decline jurisdiction to hear the suit. The learned Counsel submitted that the prohibition in the proviso to section 230(1) of Decree No. 107 of 1993 prevails, the effect of which is to oust the court’s jurisdiction to adjudicate over the complaints raised in the suit and cited First Bank of Nigeria Plc v Jimiko Farms Ltd (1997) 5
NWLR (Part 503) 81. Finally the learned Senior Counsel submitted that, although the objection to jurisdiction was not raised at the trial, but on the authorities that trial court on the evidence before it ought to have struck out the suit for lack of jurisdiction.

On the other hand the learned Counsel for the respondents submitted that the meaning of the proviso in section 230(1)(d) of the Constitution (Suspension and Modification) Decree No. 107 of 1993 is that the jurisdiction of the Federal High Court to entertain suits between an individual customer and his bank is not exclusive but concurrent with other courts, however, in respect of all other matters specified in the section the Federal High Court has exclusive jurisdiction to entertain such matters. He opined that the lower court had jurisdiction to entertain the claim of the respondents and cited *Yalaju Amaye v A.R.E. Contractors Ltd* (1990) 4 NWLR (Part 145) 422 at 430 *ratio* 20. The learned Counsel contended that the case of *First Bank of Nigeria Plc v Jimiko Farms* (*supra*) cited by the learned Counsel for the appellant did not apply because the issues in that case bordered on whether the State High Court had jurisdiction to entertain a claim under the provisions of section 230(1)(e) of Decree No. 107 of 1993. Finally the learned Counsel for the respondents said that assuming but not conceding that the lower court had no jurisdiction to entertain some of the claims (ie reliefs nos. 1, 2 and 5) the option open to it in the circumstances was to strike out those reliefs and proceed to determine those for which it had jurisdiction and cited *Williams v Nwosu* (1994) 3 NWLR (Part 331) 156 at 164 *ratio* 8. This issue of jurisdiction was raised for the first time in this Court and the learned Counsel for the respondents rightly in my view did not object to it. It is settled law that jurisdiction which is the power of the court to adjudicate over an action can be raised at any stage of the proceedings even at an appeal stage in the Court of Appeal or in the Supreme Court.

Section 230(1)(d) of the Constitution (Suspension and
Modification) Decree No. 107 of 1993 provides as follows:—

“Notwithstanding anything to the contrary contained in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly or a Decree, the Federal High Court shall have and exercise jurisdiction to the exclusion to (sic) any other court in civil cause and matters arising from:—

(a) . . .
(b) . . .
(c) . . .
(d) Banking, banks, other financial institutions, including any action between one bank and other, any action by or against the Central Bank of Nigeria arising from banking, foreign exchange, coinage, legal tender, bill of exchange, letter of credit, promissory note and other fiscal measures;

Provided that this paragraph shall not apply to any dispute between an individual customer and his bank in respect of transactions between the individual customer and the bank.”

It is settled law that in order to ascertain whether or not a court has jurisdiction to entertain a case, one only needs to look at the plaintiff’s claim. This is because it is a fundamental principle of law that it is the claim of the plaintiff that determines the jurisdiction of the court entertaining the suit (see Izenkwe v Nnadozie (1953) 14 WACA 361; Adeyemi v Opeyori (1976) 9–10 SC 31; Tukur v Govt. of Gongola State (1989) 4 NWLR (Part 117) 517; Mattaradona v Ahu (1995) 8 NWLR (Part 412) 225; First Bank of Nigeria Plc v Jimiko Farms Ltd and another (1997) 5 NWLR (Part 503) 81). It is not disputed in this case that the first to fourth respondents are individual customers of the appellant. The first respondent also doubled as shareholder with 4,468,318 shares in the appellant bank. The fifth respondent was also a shareholder with 3,489,743 shares in the appellant bank. The sixth respondent was a director cum chairman of the finance committee of the appellant bank. The reliefs claimed in the statement of claim pertain to matters relating to false and fraudulent keeping of the accounts of the first to fourth respondents by the appellant; the restoration of the shares of the first and fifth respondents sold by the appellant; and payment of the dividends and interest accruing from those
shares in 1995, and the restoration of the sixth plaintiff as a director in the appellant bank.

Undoubtedly the claims relating to the shares and dividends and restoration of the sixth respondent as a director are matters within the jurisdiction of the Federal High Court by virtue of the provisions of the Companies and Allied Matters Act, 1990. As regards the claim relating to the accounts of the first to fourth respondents, I am of the view that it is a dispute between the first and fourth respondents as customers of the appellant bank and the appellant in respect of transactions within the proviso to section 230(1)(d) of Decree No. 107 of 1993. In this respect, it is my view that the jurisdiction of the Federal High Court is not exclusive but is concurrent with that of the State High Court. The proviso in section 230(1)(d) of the Constitution (Suspension and Modification) Decree No. 107 of 1993 cannot be interpreted to have the effect of cutting down the jurisdiction conferred on the Federal High Court under the section beyond what compliance with the proviso renders necessary (see \textit{NDIC v FMBN} (1997) 2 NWLR (Part 490) 735).

In that case the Court of Appeal was construing the proviso in section 230(1)(d) of the 1979 Constitution as amended by Decree No. 107 of 1993 which is applicable to the instant case and held that the proviso has the following four-fold ramifications:

(a) That the State High Court shall have jurisdiction in the circumstances indicated in the proviso;

(b) that the Federal High Court shall not have exclusive jurisdiction, as given to it under the main section, when it comes to matters falling within the circumstances of the proviso;

(c) that the fact the Federal High Court’s exclusive jurisdiction in section 230(1)(d) shall not apply to matters falling within the circumstances of the proviso does not entirely remove jurisdiction therein from the Federal High Court; and
a) that both the Federal High Court and the State High Court have and can exercise concurrent jurisdiction in such circumstances.

b) In the circumstances, therefore, the contention on jurisdiction by the learned Counsel for the appellant is misconceived. The issue hereby fails.

c) In the final result therefore, the appeal is partly allowed and partly dismissed. Accordingly, for the allowed part of the appeal, the following orders of the trial court are hereby set aside:

1. The order crediting the sum of N127 million in the account of the first respondent is set aside.
2. The order setting aside the sale of the shares of the first and fifth respondents and the order for their restoration or reversion to the first and fifth respondents are set aside.
3. The order for the payment over to the first and fifth respondents the sum of N7,162,246.90 and interest being dividends due to the first and fifth respondents for the year 1995 is set aside.
4. The award of N1 million general damages is set aside.
5. The order dismissing the counter-claim is set aside. In its place the counter claim for N12,155,179 is hereby allowed.
6. The order declaring the consolidation of the first and second respondents null and void is set aside.

On the other hand appeal is dismissed in the following issues:

1. The allegation against the sixth respondent of breach of the provisions of section 18(3) and (9) of Decree No. 25 of 1991;
2. unauthorised opening of two new accounts in the names of Hillman (Nigeria) Ltd and Stellfurn (Nigeria) Ltd.
(3) the issue of jurisdiction of the Federal High Court, Calabar.

There shall be costs of this appeal which I assess at N5,000 to the appellant.

EDOZIE JCA: This appeal arose from disputes over banking transactions. The six respondents on the one hand and the appellant on the other were respectively plaintiffs and defendant before the Federal High Court, Calabar, in Suit No. FHC/CA/7/79 filed on 24 February, 1997.

The appellant is a commercial bank. This first, second, third and fourth respondents were customers of the bank with separate accounts. The fifth respondent is the wife of the sixth respondent. She, the fifth respondent, and the first respondent were shareholders of the bank with about 16% of the total paid-up share capital of the bank. The sixth respondent was the chief executive of the first to fourth respondents and a director and chairman of the finance committee of the bank. The respondents’ case was that, on the basis of certain false and fraudulent misrepresentations made by the bank as to the true state of the accounts of the first and second respondents alleging that they were heavily indebted, and demanding repayment thereof, the shares of the first and fifth respondents in the bank then totalling N7,958,061 of N2 each were surrendered to the appellant bank which proceeded to sell them at undervalue to the other directors of the appellant. Their dividends which had fallen due were also forfeited. In addition, the sixth respondent was made to vacate his seat as a director of the appellant and to surrender to the bank for sale of his property at Ikoyi, Lagos.

On realising through the Central Bank which put the indebtedness at N32,000,000 that the accounts of the first and second respondents might not have been indebted as represented by the bank, the respondents appointed auditors to examine the said accounts. Their report revealed that the bank, without any authorisation, consolidated the accounts of the first and third respondents, fraudulently debited the
accounts of first and second respondents with fictitious over-
drafts, excessive commissions and interest charges. In con-
sequence, the respondents in paragraph 35 of their joint
statement of claim sought reliefs, summarised as follows:–

1. A declaration that the consolidation of the account of first
and third respondents without authority was null and void.
2. A declaration that the appellant was not entitled to debit the
account of the respondents and an order directing the de-
fendant to reverse all such false, fraudulent debits.
3. Restoration of all the shares which the first and fifth re-
spondents had been fraudulently induced to surrender to the
appellant.
4. Payment over to the first and fifth respondents of all divi-
dends which had been withheld or confiscated totalling
₦7,162,264.90.
5. Payment over to the sixth respondent of the sum of
₦5 million with interest being the amount realised by the
appellant from the sale of the sixth respondent’s house at
Ikoyi, Lagos.
6. Damages in the sum of ₦50 million for fraudulent tamper-
ing with the accounts of the first and second respondents
and for distress and embarrassment arising from threat and
false representations made by the appellant as to the true
state of the respondents’ accounts.
7. An order re-instating the sixth respondent to the Board of
the appellant with effect from the date of his purported res-
ignation.”

In its statement of defence and counter-claim, the appellant
bank denied the respondent’s claim confirming that the
sixth respondent was a director of the appellant’s board of
directors and the chairman of its finance committee with
responsibilities of processing and approving credit proposals,
reviewing of loans granted and the determination of interest,
commissions and penalties paid on loans/advances. It is
the appellant’s case that apart from the sixth respondent being
the chairman/chief executive of the first to fourth
respondents, he, for purposes of deceit introduced into
the appellant bank 20 other named companies which through
the instrumentality of the sixth respondent participated
actively in foreign exchange (Forex) transactions and over-
draft/loan facilities. These companies, apart from not having
accounts with the appellant, had no money to bid for the foreign exchange they demanded. Consequently, their liabilities were transferred into the first and second respondents’ accounts at the instance of the sixth respondent. It is the further contention of the bank that the unauthorised debits complained of were as a result of the unauthorised withdrawals of the sixth respondent in his capacity as the chairman of the finance committee of the appellant board of directors.

The bank alleged that it granted the first respondent loan advances to the tune of N5,000,000, an amount the first respondent subsequently exceeded by more than N17,586,213.67 and that by various other transactions the first respondent became indebted to the appellant bank to the tune of N41,457,176.21. As at 31 December, 1995, the total indebtedness of the respondent to the appellant bank stood at N64,043,389.88. The respondent repaid the sum of N45,393,541 leaving a balance of N18,249,848.88. As a result the appellant in paragraph 48 of its statement of defence and counter-claim, counter-claimed against the respondent jointly and severally as follows:

“(i) Judgment for the outstanding sum of N18,249,848.88 with interest at the rate of 21% per annum from 31 December, 1996 until entire liquidation of amount.

(ii) An order that by deposit of their Title Deeds the plaintiffs have created equitable mortgage in favour of the defendant and same to be sold by the defendant.

(iii) A Declaration that the resignation of the sixth plaintiff from the Board of the defendant (by their letter dated 26 October, 1995) is proper.”

The respondents filed a reply to the statement of defence and counter-claim in which they denied the counter-claim.

In the ensuing trial, the respondents presented their case through the sixth respondent and two other witnesses while the appellant fielded two witnesses. In a reserved judgment delivered on 9 December, 1997, the learned trial Judge, Ezekwe J, dismissed the appellant’s counter-claim and up
a held the respondents’ case by granting substantially the
reliefs they prayed for.

Dissatisfied by the judgment, the appellant filed the instant
appeal predicated same on eight composite grounds of
appeal, viz., original additional and further grounds of ap-
peal. There are two records of appeal namely, the main
record (Record No. 1) containing the pleadings and copies
of documentary exhibits and the supplementary record com-
piled by appellant’s Counsel bearing the viva voce evidence
of witnesses at the trial. Parties by their Counsel filed and
exchanged briefs of argument in which they formulated four
issues for determination identical in content. The issues are
reproduced in the lead judgment. The central issue that I
wish to comment briefly on is the second and third issues in
the appellant’s brief which coincide with the first and third
issues formulated by the respondents. The dismissal of the
appellant’s counter-claim by the court below. From the
judgment, the more pertinent reliefs may be summarised as
follows:–

1. That the total sum of₦127,623,809.69 representing unau-
thorized debits of the first respondent’s account be refunded
by the appellant bank.

2. A declaration that the consolidation of the first and third
respondents’ accounts by the appellant bank without au-
thorisation is null and void.

3. An order that the appellant should restore all the shares of
the first and fifth respondents surrendered to the appellant
as a result of false representations made by the appellant to
the sixth respondent as to the real state of the accounts of
the first and second respondents.

4. Order directing appellant to pay over to the first and fifth
respondents the sum of₦7,162,264.90 with interest being
the dividends due to the first and fifth respondents for the
year 1995 which amount the appellant withheld in part set-
tlement of the debts allegedly owed by the first and third re-
pondents.

5. ₦1m (One Million Naira) general damages to the respon-
dents.

6. Dismissal of the appellant’s counter-claim.”
On the refund of the sum of ₦127,623,809.69 found by the court to be false and fraudulent/unauthorised debits made by the bank against the first respondent’s account, the relevant averments are contained in paragraphs 6 and 7 of the statement of claim and paragraph 8 of the statement of defence which in part read as follows:–

Statement of claim

“6. On various dates between May, 1995 and December, 1995 without the prior or any authorisation of the first plaintiff the defendant falsely and fraudulently debited account No. 10044001 of the first plaintiff with various sums of money as follows:–

(a) 2/5/95 .................... ₦17,732,084.28
(b) 2/6/95 .................... ₦16,407,930.83
(c) 3/7/95 .................... ₦14,974,222.18
(d) 1/8/95 .................... ₦14,892,424.95
(e) 9/8/95 .................... ₦16,000,000.00
(f) 1/9/95 .................... ₦16,876,161.86
(g) 3/10/95 .................... ₦30,740,985.61

₦127,623,809.69

7. The amounts so falsely and fraudulently withdrawn by the defendant consisted of monies paid into account No. 10044001 of the first plaintiff on various dates as follows:–

(a) 31/5/95 .................... ₦17,732,084.28
(b) 1/5/95 .................... ₦16,407,930.83
(c) 30/6/95 .................... ₦14,974,222.18
(d) 31/7/95 .................... ₦14,892,424.95
(e) 8/8/95 .................... ₦16,000,000.00
(f) 31/8/95 .................... ₦16,876,161.86
(g) 29/9/95 .................... ₦30,740,985.61

₦127,623,809.69”

Statement of defence

“8. Paragraphs 6 and 7 of the statement of claim are denied, and the defendant avers that the acts complained of were acts perpetuated by the sixth plaintiff in his capacity as the Chairman of the Finance Committee where the said account No. 10044001 of the first plaintiff having been overdrawn as a result of unauthorised withdrawals of money and far
above the limit statutorily allowed a Director of any Bank either in form of overdraft or loan advances. Account and Balance Sheets are prepared every month end and by the defendant to the Central Bank of Nigeria, the sixth plaintiff intimating the then Branch Manager ensured that the account was in credit by illegally moving funds of the Bank into his account and reversing same four (4) and five (5) days later. This continued until discovered by the management and Board of Directors of the defendant.”

Commenting on the above averment, learned Counsel for the respondents submitted that every allegation of fact which is not specifically denied or stated not to be admitted shall be taken as established. Counsel called in aid the cases of Akin-tola v Solano (1986) 2 NWLR (Part 24) 598; (1986) All NLR 305 at 417, 418; Economides v Thomopulos and Co Ltd (1956) SCNLR 40; (1956) 1 FSC 7 at 10. By implication learned Counsel was of the view that the allegation in paragraphs 6 and 7 of the statement of claim were deemed admitted in paragraph 8 of the statement of defence. Assuming that were so, the crucial point to consider is whether the respondent had as per paragraphs 6 and 7 of their statement of claim reproduced above established any loss. It is patent that while paragraph 6 alleges a total debit of ₦127,623,809.60, paragraph 7 states that various sums of money totalling an equivalent sum of ₦127,623,809.69 were on the dates stated paid back into the same account by the appellant. As the pleading therefore stands, no case of any loss was established by the respondents. There is no cause of action and nothing false and/or fraudulent even if a bank for whatever reason wrongfully debits a customer’s account with a specific sum but later re-credits that account with the same amount previously debited all within the same period. Moreover, from the prayers sought by the respondents in paragraph 35 of their joint statement of claim as earlier set out, no specific relief for the refund of ₦127,623,809.69 was prayed for. A court is without jurisdiction to grant to any party a relief not prayed for (Ekpenyong v Nyong (1975) 9 NSCC 28, 32; Ochoma v Unosi (1965) N.M.L.R. 321; Nalsa and Team Associates v NNPC (1991) 8 NWLR (Part 212)
Finally, it is obvious from the totality of the evidence on both sides that accounts were moved around without any loss to either side in respect of the sum of N127.6 million. I am therefore in agreement with learned Counsel for the appellant that the relief under consideration granted by the court below is unjustified.

With respect to the consolidation of the account of first and third respondents the evidence revealed that the balance outstanding on a particular date in all the accounts were extracted and added together (page 25 lines 11–14 of records No. 2). In my view, that in banking parlance amounts to consolidation or combination of accounts. The opinion of learned Counsel for the appellant to the contrary is misconceived (see Law of Banking by Lord Charley (6ed) at 218). The position of the law on combination of a customer’s accounts is that, unless precluded by agreement, express or implied from the course of business, the banker is entitled to combine different accounts kept by the customer in his own right even though at different branches of the same bank and to treat the balance, if any, as the only amount standing to his credit (see Halsbury’s Laws of England Volume 2 (3ed) at 172 paragraph 322; Uba v UBN Plc (1995) 7 NWLR (Part 405) 72 at 80; Allied Bank (Nigeria) Ltd v Akubueze (1997) 6 NWLR (Part 509) 374 at 389). Learned Counsel for the respondents referred to the case of British and French Bank Ltd v Opaleye (1962) 1 All NLR 28; (1962) 1 SCNLR at 62 where the court was quoted as saying:—

“The point about the customer having different accounts ‘in his own right’ is probably this, namely, that he has both accounts in his name, and neither account is a trust account.”

He then submitted that as the accounts in question were held in different names consolidation was not legally feasible. It seems to me obvious from the circumstances of this case that, although the first to fourth respondents are limited liability companies, it is in fact the sixth respondent who was masquerading in the names of those companies and directing their affairs. It also seems to me that whatever right
the respondent had to object to the combination of the accounts in question had been waived when all of them filed a joint action against the appellant the effect of which was to determine the overall indebtedness of the respondents on the one hand and the appellant on the other. It is not the case of the respondents that by reason of the consolidation they sustained any detriment such as their cheque drawn on any of the accounts in question being dishonoured. With all the accounts of the respondents having been merged in this joint action to determine which party owes the other, the complaint under consideration appears otiose more so as will be demonstrated later, the respondents are indebted to the appellant.

With respect to the dismissal of the appellant’s counter-claim, I had noted earlier that the appellant bank counter-claimed against the respondents for the sum of N18,249,848.80. This was denied by the respondents in their reply to the counter-claim. At the trial, it was obvious from the cross-examination of PW1 (sixth respondent) that they were actually owing the appellant. Part of his evidence at 13 of Record No. 2 reads:–

“I was enjoying facilities in the defendant. The limit was N5 million. He refers to 19 April, 1995 in Exhibit A. It was N6,909,379.26 (debit). On 24 April, 1995 he bidded for 1,000 U.S. dollars. This brought the account to N14,909,376.26. There is need to redress the indebtedness. Between 20 April, 1995 to 29 September, 1995 the amount has risen to N34,129,583.89 . . .

There is no doubt that we are owing the said amount. The Central Bank said that we are owing N34 million.”

Where a party admits a debt, the onus is on him to prove repayment. The respondents gave no evidence of repayment of the debits they had acknowledged owing.

The appellant, however, laboured to prove the counter-claim through DW1 who testified at 25 of record no. 2 thus:–

“In my statement of defence, I counter-claimed against the plaintiff of about N18 million. I see Exhibit 3. We are now claiming N13 million from the plaintiffs.”
Exhibit 3 referred to in the extract was a letter by the appellant to the respondent stating the latter’s indebtedness to be ₦17,155,178. It was emphasised in the said letter, Exhibit 3, that the proceeds from the sale of PW1’s property had not been taken into account. Part of the proceeds with the appellant was ₦5 million. When this amount is subtracted from the debit balance of ₦17,155,179 as reflected in Exhibit 3, the indebtedness is reduced to ₦12,155,179. When, therefore, DW1 testified that he was now claiming ₦13 million, he was loosely referring to the sum of ₦12,155,179 which he approximated to ₦13 million. Learned Counsel for the respondents had contended that as he did not amend the amount counter-claimed, the court below was right in dismissing the counter-claim. It is settled law that a court has no power to grant to a party any relief that he has not specifically claimed. While it cannot award more than what is claimed, even if it is proved, it certainly can award less of the lesser amount as established (Felix Okolo Ezeonwu v Charles A. Onyechi and others (1996) 3 NWLR (Part 438) 499; Ekpenyong and others v Nyong and others (1975) 2 S.C. 71). In the instant case, although, the appellant counter-claimed for ₦18,249,848.88, the evidence tendered established that the respondents’ indebtedness was ₦12,155,179. The court below was therefore in error to have dismissed the appellant’s counter-claim. No argument was advanced in this appeal with respect to reliefs (ii) and (iii) of the counter-claim. We therefore decline any comment on them.

The court below also ordered the restoration of the shares to the respondents and payment over to them of accrued dividends on the shares. To my mind, the respondents can only be entitled to such reliefs if they are able to establish that they were not at all indebted to the appellant bank or that the total value of the assets they surrendered to the bank was far in excess of the indebtedness. They proved neither. On the contrary, there was overwhelming evidence that the respondents were indebted to the appellant. I had in the
preceding paragraphs dealing with the appellant’s counter-claim quoted extensively extracts from the evidence of PW1 (sixth respondent) to show he admitted indebtedness to the bank without proof of repayment. By the respondent’s letter, Exhibit K, they voluntarily surrendered their shares and accrued dividends for the liquidation of the outstanding debts. The appellant bank realised their assets and appropriated the proceeds to reduce the indebtedness still leaving the sum of ₦12,155,179 unpaid. No credible evidence was led to show that the shares were sold at undervalue nor was the allegation of excessive interest charges made out. I also hold the view that the orders in question made by the court below were unjustified.

I now turn to the award of ₦1 million general damages to the respondents. It is trite law that general damages are the kind of damage which the law presumes to flow from the wrong complained of. They are such as the court will award in the circumstances of a case in the absence of any yardstick with which to assess the award except by presuming the ordinary expectation of a reasonable man (Lar v Starling Astaldi Ltd (1977) 11/12 SC 53; Omonuwa v Wahabi (1976) 4 SC 37). General damages may be awarded to assuage such a loss which flows naturally from the defendant’s act. It need not be specifically pleaded. It arises from inference of law and need not be proved by evidence. It suffices if it is generally averred (see Incar v Benson (1975) 3 SC 117). They are presumed by law to be the direct and possible consequence of the act complained of. Unlike special damages they are incapable of exact calculation (see Odulaja v Haddad (1973) 11 SC 357). In the case of Ezeani v Ejidike (1964) 3 NSCC 306 the Supreme Court cautioned that, where specific items of damages are followed by a claim for general damages, the claim, whether in contract or tort, should be carefully scrutinised to see whether plaintiff is asking for compensation more than once for the same cause of action. In the instant case, from an analysis of the various reliefs sought by the respondents no wrong was done to them. They were therefore not entitled to general damages.
Even if they sustained losses, it is my view that the court below, having redressed those losses on the specific items of the claim, the award of general damages amounted to double compensation which is not allowed by law.

The award is also unjustified.

It is for the above reasons as amplified in the lead judgment of my learned brother, Ekpe JCA, that I agree with him that the appeal partially succeeds. I also agree with him that the Federal High Court has jurisdiction to adjudicate over the suit and that the sixth respondent was not in breach of the provisions of section 18(3) and (9) of Decree No. 25 of 1991. I enter judgment on the counter-claim for the sum of ₦12,155,179 in favour of the appellant with costs against the respondents as assessed in the lead judgment.

OPENE JCA: I have been privileged to read in advance the judgment just delivered by my learned brother, Ekpe JCA. I agree with the reasoning and the conclusion reached therein.

However, I will like to add some few words of my own for the purposes of emphasis. In the statement of claim at 48 and 49 of the record of proceedings, the plaintiffs/respondents stated as follows:

“NOW THEREFORE THE PLAINTIFFS CLAIM AS FOLLOWS:–

1. A declaration that the consolidation of the accounts of the first and third plaintiffs by the defendant without the prior or any lawful authorization in that behalf is null and void.

2. A declaration that the defendant was not entitled to debit the accounts of the first and second plaintiffs save as authorised by the said plaintiffs or in the normal and ordinary course of banking and an order directing the defendant to reverse all such false, fraudulent or excessive debits.

3. An order directing the defendant to restore all the shares of the first and fifth plaintiffs surrendered to the defendant as a result of the false representation made by the defendant to the sixth plaintiff as to the real state of the accounts of the first and second plaintiffs and payment to the first and fifth plaintiffs of all the dividend, bonus, shares and all other...
benefits attaching to the said shares from the time of their purported surrender.

4. Payment over to the first and fifth plaintiffs of the sum of N7,162,264.90 and interest being the dividends due to the first and fifth plaintiffs for the year 1995 which amount the defendant withheld in purported part settlement of the debts allegedly owed by the first and third plaintiffs.

5. Payment over to the sixth plaintiff of the sum of N5 million and interest being value of the house at Ikoyi sold and retained by the defendant in purported part settlement of the debt allegedly owed by the first and third plaintiffs.

6. Damages in the sum of N50 million for fraudulent tampering with the accounts of the first and second plaintiffs and for the distress and embarrassment caused to the directors of the first and second plaintiffs as a result of the threat and false representation as made by the defendant as to the true state of the plaintiffs accounts.

7. An order restoring the sixth plaintiff to the Board of the defendant with effect from the date of his purported resignation.”

In respect of the first claim which seeks a declaration that the consolidation of the accounts of the first and third plaintiffs/respondents by the appellant without prior or any lawful authorisation is null and void. I must observe that when a customer pays money into his account in a bank that money automatically belongs to the bank and that the bank’s obligation is only to pay the customer the money on his request or demand and if the bank fails to do so it is then that a cause of action arises.

In this regard, PW1 at 4 of the second record testified as follows:–

“On 7 October, 1995, they invited me to the chairman’s house in his village at Ikot Ntuen, Awka Ibom State. It was at that meeting that they gave unsigned claim that my indebtedness to the defendant was consolidated over N64 million.”

At page 10, he stated: “I want the court to nullify the consolidation.”

Exhibit 3 at page 264 of the record no. 1, is a letter from
the appellant to the first plaintiff/respondent and it states:—

“We refer to the series of meetings . . . and confirm that the consolidated position of indebtedness of Joe Golday Co Ltd and associated Companies is summarised here under . . . We should be grateful if you would forward your cheque in full settlement of the outstanding payment.”

In Exhibit 3, the individual accounts involved were set out as well as the debt. DW1 in his evidence also stated that the accounts were not consolidated and that up till the present moment that those individual accounts are still running.

The whole exercise shows it was the total indebtedness of Joe Golday and Co Ltd and associated companies that were summarised and, if there were no summary of the total indebtedness, I wonder how the total indebtedness of the first plaintiff and his companies would be known. Even if it is established that the accounts of the first and third plaintiffs/respondents were consolidated, the respondents will still not have any cause of action unless they can prove that it resulted in any loss or damage to them and this they did not allege in their claim. It therefore follows that a declaration that the consolidation of the accounts was unauthorised and therefore null and void is merely an academic exercise as the respondents will not derive any benefit from that.

In respect of the second relief which reads:—

“A declaration that the defendant was not entitled to debit the accounts of the first and second plaintiffs save as authorised by the said plaintiffs or in the normal and ordinary course of banking and an Order directing the defendant to reverse all such false, fraudulent or excessive debits.”

I must first of all observe that the plaintiffs/respondents did not state the amount of money debited to the accounts of the first and second plaintiffs/respondents which are false, fraudulent and excessive and also the amount of money to be reversed or credited to the respondents’ accounts. They also did not say when their accounts were debited with those amounts of money.
The claim is not only vague but also does not disclose any cause of action (see Smart Gabari Ogbimi v Beauty Ololo and others (1993) 7 NWLR (Part 304) 128; (1993) 7 SCNJ 447). It was in respect of this claim that the respondents were awarded a colossal sum of ₦127,623,809.69 which amount it was ordered should be refunded to the respondents. I will again observe that there was nowhere that the respondents claimed this amount in their writ of summons or statement of claim. There is also no evidence from the printed record to show that the respondents paid in such amount of money into their account and if they did not pay in such an amount of money, how can such an amount of money be ordered to be refunded to them?

At the trial, it was shown their various sums of money were at various dates debited to account no. 10044001 and thereafter the said various sums of the money were also credited to the same account.

In fact, the respondents in paragraphs 6 and 7 of their statement of claim set out the various sums of money and the dates that they were debited to that account and the dates that they were also credited to the same account. If the said various amount of money were debited to the account and later they were also credited to the same account, what are the respondents complaining about? They did not sustain any loss or damages and they therefore are not entitled to an award of a colossal sum of ₦127,623,809.69 which they did not claim or prove that they were entitled to.

In awarding such an amount of money to the respondents, the trial court no doubt had constituted itself to a Father Christmas and in fact a Father Christmas would not have been so generous to have awarded such a colossal sum of money that was not claimed (see Victor Olurotimi v Mrs Felicia Ige (1993) 8 NWLR (Part 311) 257; (1993) 10 SCNJ 1; Fadlallah v Arewa Mills Ltd (1997) 8 NWLR (Part 518) 546, (1997) 7 SCNJ 202).

In respect of the sale of shares, the sixth plaintiff’s/respondent’s letter, Exhibit K at 225 of the Record No. 1,
shows clearly that he offered to surrender those shares for sale and he wrote:

“The only option I have now to reduce the pressure on you and other colleague on the Board is to tender the shares of:

1. Joe Golday Co Ltd – 4,468,318 shares
2. S. Anene – 3,849,743 shares in the bank for immediate sale to any person you may wish to bring into the company at a competitive price.”

In the appellant’s brief of argument, Mr Okolo, S.A.N., had argued that a party who is not an illiterate is bound by the contents of any document signed by such a party and that the plea of non est factum would not avail him as the maker is deemed or presumed to understand the contents, I entirely agree with him. Exhibit K and other documents tendered clearly show that it was the sixth plaintiff/respondent that voluntarily offered the shares for sale in order to reduce the pressure on the chairman and his colleagues on the board.

If one goes through the whole length and breadth of this matter, the whole exercise does not portray the sixth respondent as a prudent businessman or even reasonable in his dealings. At the time of the incident that resulted in this action, he was the chairman of the finance committee of the appellant bank and it is mostly surprising that he had taken so many overdrafts or loans from the bank that he does not even now know whether he is owing the bank and if so how much? This no doubt has been reflected in his actions.

He said in his evidence that in the meeting they told him that their accounts were overdrawn but they did not tell him how much and later they told him that it was N64 million, that he should resign and he resigned and that they compelled him to give a list of his goods as security and he did so. He did not even attempt to seek any legal advice or resist the advance of his fellow board members.

He had complained of threats, inducements and misrepresentation, but he has not been able to establish any of them. It was also alleged that there was a threat to report the matter to the Central Bank of Nigeria and possibly taking the
a matter to the Failed Banks Tribunal, but there is nothing wrong with that if he committed no offence because taking that cause of action is within the due process of the law.

If the sixth plaintiff/respondent had surrendered his properties and shares and also resigned his directorship because of such a “threat”, he will only have himself to blame and not the appellants.

For these and the fuller reasons given in the lead judgment, I am of the view that there is merit in the appeal and I am also of the view that the appeal partly succeeds and also the counter-claim for the sum of N12,155,179 million. There will be N5,500 costs in the appellant’s favour.

*Appeal allowed in part.*
Edilco Nigeria Limited v United Bank of Africa Plc

COURT OF APPEAL, JOS DIVISION

MANGAJI, MUHAMMAD, UMOREN JJCA

Date of Judgment: 13 APRIL, 2000  
Suit No.: CA/J/24/97

Banking – Central Bank of Nigeria – Power of to fix and regulate prime lending rate – Bindingness of on all commercial banks

Banking – Mortgage – Legal mortgage – Execution thereof as security for an overdraft facility – Legal mortgage later upstamped as security for a later overdraft facility – Whether the terms of the legal mortgage will perforce apply to the later overdraft facility

Banking – Mortgage – Legal mortgage – Power conferred therein to vary applicable rate of interest from time to time – UBN Plc v Ozigi (1994) 3 NWLR (Part 333) 385 considered and compared with instant case

Banking – Prime lending rate – Fixing and regulating of – Power of Central Bank of Nigeria in respect thereof

Judgments and orders – Award of interest – Pre-judgment interest – Claim for – Need to plead and prove

Mortgage – Legal mortgage – Execution thereof as security for an overdraft facility – Legal mortgage later upstamped as security for a later overdraft facility – Whether the terms of the legal mortgage will perforce apply to the later overdraft facility

Mortgage – Legal mortgage – Power conferred therein on bank to vary applicable rate of interest from time to time – UBN Plc v Ozigi (1994) 3 NWLR (Part 333) 385 considered and compared with instant case

Practice and procedure – Pleadings – Interest – Pre-judgment interest – Claim for – Need to plead and prove
Practice and procedure – Judgments and orders – Judgment debt – Award of interest thereon – Rules of Court providing regulations thereof – Court ignoring Rules of Court and exercising discretion thereon – Whether proper

Facts

Sometime in 1985, the appellant applied to the respondent bank for an overdraft facility in the sum of N400,000 to enable it to execute a contract it had with the University of Jos. The respondent approved the application and forwarded to the plaintiff a letter of offer containing the conditions to be fulfilled before the facility would be released and the terms upon which it was granted. The plaintiff accepted all the conditions, including a chargeable interest of 13% on the overdraft, the upstamping of two deeds of legal mortgage, as well as executing another deed of legal mortgage over a landed property, situate at Bisichi Jantar in Barkin Ladi Local Government of Plateau State.

After the plaintiff perfected the conditions required of it, it applied for and was granted some amount out of the overdraft in order to purchase materials needed for the due execution of its contract, including some iron pipes. The University of Jos also paid a mobilisation fee to the plaintiff, which utilised part of it together with the money it withdrew from the overdraft facility, in purchasing the materials. The plaintiff’s contract with the University of Jos related to the infrastructural facilities on the university campus. The iron pipes purchased by the plaintiff were to be utilised in the construction of the sewage main line on the university campus. But, as economic circumstances would have it, things became so difficult that the university decided to suspend the contract on the sewage main line for which purpose the iron pipes were earlier on purchased. This was one of the austerity measures employed by the university. In the meantime, the plaintiff’s overdraft facility became due for payment and the plaintiff could not offset it.

The plaintiff and the university, along with the defendant, therefore, agreed after some meetings to sell the iron pipes,
which were no longer required for the contract and whose value had by then risen tremendously. The iron pipes were accordingly sold off in four deals and the money forwarded to the defendant bank. Disagreement visibly set in on the mode of sharing the money, the proceeds of the sale of the pipes. The defendant wanted the share of the plaintiff paid into its account from which it could offset the overdraft it granted. The defendant said as a result of a series of meetings, it was agreed between it, the plaintiff, and the university that the latter and the plaintiff would share the proceeds of the sale of the pipes in the ratio of 55% and 45% respectively. (This the court below found as a fact.) As a result, the defendant, after the receipt of the proceeds of the sale of the pipes forwarded to the university its 55% and credited the balance into the plaintiff’s account from which it applied in recovering its overdraft and the interest that accrued thereto. The stand of the plaintiff, on the other hand, is that it never agreed on any sharing formula and that the whole proceeds was to be paid into its account.

At the end of it all, the plaintiff claimed that the proceeds of the sale of the iron pipes, which amounted to ₦780,813.57, which it presumed had been credited to its own account had effectively settled its indebtedness to the defendant, leaving a credit balance of ₦240,611.74 in its favour after the deduction of the money it owed the defendant on the overdraft. The defendant, on its part, contended that the plaintiff’s share, being 45% of the proceeds of the sale of the pipes, had been credited to its account and used in reducing the overdraft loan the plaintiff had, such that the balance of the overdraft due and unpaid continued to attract interest, which as at the date the statement of defence incorporating a counter-claim was filed, the plaintiff’s indebtedness to the defendant stood at ₦1,418,076.10. Because of the sharp differences the parties had, the plaintiff, on 12 July, 1991, took out a writ of summons against the defendant, claiming the following reliefs as can be found in the
concluding paragraph of its statement of claim thus:–

“(a) The entire sum of ₦240,641.74 due to the plaintiff, being balance credited in favour of the plaintiff after the overdraft is deducted from the amount credited and 21% compound interest.

(b) The plaintiff also claims the sum of ₦150,000, being damages for conversion of the plaintiff’s aforesaid amount, being money had and received but the defendant converted same to its personal use.

(c) That the plaintiff also claims the sum of ₦455,000, being damages for defamation, as the defendant has instructed the sale of the entire properties mortgaged by the plaintiff.

(d) Perpetual injunction restraining the defendant, its servants, agents or privies from selling the following properties.

(1) Yakubu Gowon Way, Anglo Jos, Plateau State.
(2) No. 1, Madaki Street Bukuru, Plateau State.

The defendant on its part counter-claimed. The concluding paragraph of the counter-claim reads as follows:–

“WHEREUPON the defendant claims against the plaintiff as follows:–

(a) ₦1,418,076.10 DR, being loan and interest.

(b) Interest at bank rate of 34% from 1 October, 1993 until judgment and, thereafter at 34% until full payment.”

After a full trial, the learned trial Judge dismissed the plaintiff’s claims and entered judgment in favour of the defendant on its counter-claim. He, however, granted 21% post-judgment interest until final liquidation of the entire debt.

The plaintiff was dissatisfied with the decision of the trial court and appealed to the Court of Appeal. Parties filed and exchanged briefs.

Held –

1. Where a legal mortgage was executed over a property as security for a facility, the upstamping of that legal mortgage as further security for another facility granted later in time would not operate to make the terms contained in the legal mortgage applicable to that later facility except the same is made so applicable by the terms of the later
facility. In other words, the mortgagee merely agreeing to the application of the property, the subject-matter of the legal mortgage, as security for the later facility, did not thereby contract that the terms of the earlier facility, as contained in the legal mortgage, should become applicable to the later facility. In the instant case, the court held that Exhibit 30 (deed of legal mortgage executed in 1983) containing a provision empowering the respondent to charge flexible interest rates and by which it claimed 34% interest cannot form the basis of such claim simply because the legal mortgage was upstamped as further security for the facility, the subject-matter of this suit, granted in 1985 and regulated by Exhibit 13.

Per curiam

"In Exhibit 13, the offer made for the advance of the overdraft is on condition that the interest chargeable on it shall be computed at 13% bank rate. Exhibit 30, just like Exhibit 31, has as its first clause a condition requiring the respondent to vary the rate of interest from time to time on the money secured as overdraft or the balance of it in the appellant’s accounts either before or after any judgment is obtained in respect of the balance due and unpaid of the overdraft. That clause reads thus:–

‘The borrower hereby covenants with the bank to pay to the bank on demand the sums secured by this Deed of Mortgage and also as well after any judgment to pay interest on the balance of the said current account and or any other account and on all months whatsoever at any time owing to the bank at the rate of interest per annum from time to time stipulated by the bank and payable monthly or at such other rates and at such other times as the bank may from time to time determine PROVIDED ALWAYS that if the interest or any interest payable on any arrears of interest capitalised under this present proviso shall remain unpaid for two weeks after the day on which the same ought to have been paid then and in every such case the interest so in arrear shall as from the day on which the same ought to have been paid be added for all purposes to the balance of moneys hereby secured (unless the bank shall otherwise by writing expressly elect) and shall thenceforth bear interest payable at the
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a. rate and on the day aforesaid and all the covenants and provisos contained in these presents and rules of law or equity in relation to interest on the said balance shall equally apply to interest on such arrears.’

b. The appellant did agree to this term. However Exhibit 30 was only upstamped to cover the ₦400,000 secured and the property so upstamped was earlier on 3 November, 1983 used as security to secure another loan/overdraft. That deed of legal mortgage was duly executed on 3 November, 1983 and only upstamped on 22 January, 1988 in fulfilment of condition 4(a) and (b) contained in Exhibit 13. Can it, therefore, be really contended that by upstamping Exhibit 30, the appellant is presumed to have bound itself with the term contained in clause 1 therein, bearing in mind that that clause was made applicable in 1983 in respect of a different contract entered into between the appellant and the respondent? It seems to me clear that to apply the rate of interest determined by the respondent in reliance on clause 1 of Exhibit 30 is to simply recall a clause in retrospect and apply it as binding between the parties. The contract between the appellant and the respondent only came into effect on 1 August, 1985. To bring in a term agreed upon on 3 November, 1983 and make it applicable to the contract at hand, therefore, is a complete novation since what was required to be done in respect of Exhibit 30 was to have it upstamped to cover the sum of ₦400,000, which was accordingly done. It is my view, therefore, that the first clause of Exhibit 30 cannot by any shred of the imagination be made applicable to the present contract since the appellant, in signing the deed of legal mortgage on 3 November, 1983, did not contemplate that the terms therein contained would be made applicable to any contract that was never contemplated by the parties. In any event, both parties did not, upon signing Exhibit 13, recall Exhibit 30 for further fresh execution with the view of incorporating the clauses therein contained as part of the conditions for the granting of the overdraft. My conclusion is that clause 1 of Exhibit 30 is inapplicable as an integral part of Exhibit 13 to justify the respondent’s claim for 34% interest on the overdraft it granted the appellant.”

c. Per curiam

“Be that as it may, Exhibit 31 was also executed by the appellant as a condition that must be fulfilled in order that the contract contained in Exhibit 13 becomes binding on the
parties. Exhibit 31 is a deed of legal mortgage executed by the appellant on 10 December, 1985 and it contains the same clause as clause 1 of Exhibit 30 in its corresponding clause 1. Clause 1, as I earlier on said, allows the respondent to determine the applicable interest rate on the overdraft in spite of the interest rate of 13% stipulated in Exhibit 13. The respondent herein claimed an interest rate of 34% in its counter-claim. The claim of the respondent is, therefore, one of the two claims a party to a contract could make, the other being a claim for interest based on statute and conferred on the court to exercise at its discretion (see Ekwunife v Wayne (West Africa) Ltd (1989) 5 NWLR (Part 122) 422 at 445, 452 and 455). A claim of interest which antedates judgment, being a claim as of right as pleaded by the respondent, can be awarded where it is proved (see Berliet (Nigeria) Ltd v Kachalla (1995) 9 NWLR (Part 420) 478 at 500; Himma Merchant Ltd v Aliyu (1994) 5 NWLR (Part 347) 667 at 676–677).

Exhibit 31 was, with respect to learned Counsel for the appellant, an integral part of Exhibit 13. It cannot be a new document introduced by the respondent in support of and giving effect to the rights created under the contract entered into and contained in Exhibit 13 as contended by learned Counsel for the appellant. It is by no means such a document contemplated by the Supreme Court at 306 in Sapara v University College Hospital Board of Management (referred to supra). Exhibit 31 was executed as part and parcel of Exhibit 13 and must be read conclusively. The appellant, when executing Exhibit 31, knew or read clause 1 thereof. In it, the 13% interest rate fixed and chargeable on the overdraft contained in Exhibit 13 is made subject to variation from time to time, as the respondent would determine. Exhibit 31 is not a new document. It is a document specifically mentioned in Exhibit 13 and in respect of which the appellant, having no reason to differ on the clauses contained therein (including the clause on the power of the respondent to determine from time to time the rate of interest chargeable on the overdraft), executed same. Thus, Exhibit 13 remained extant since, by executing Exhibit 31, the appellant was thereby bound by the terms and conditions stipulated therein (see Allied Bank Nigeria Ltd v Akubueze (1997) 6 NWLR (Part 509) 374 at 403–404; Ezeugo v Ohanevere (1978) 6–7 SC 171). It should be borne in mind that the appellant, without compulsion and clearly under no
mistake or misrepresentation, signed Exhibit 31. It gave its full backing and agreement to be bound by the contents of the Exhibit. It cannot now be heard to resile from the contents and the court below was clearly right in giving full weight to Exhibit 31 in arriving at its decision.

The clear implication of clause 1 of Exhibit 31 is that the interest rate fixed at 13% is not static or constant. Thus, the determination of the applicable or reigning interest rate from time to time was left at the discretion of the respondent.”

3. The clause interpreted by the Supreme Court in the case of UBN Plc v Ozigi is in substance the same as clause 1 of Exhibit 31 in this case in that both gave the banks involved unfettered discretion to vary the interest rate from time to time without recourse to the lender, notwithstanding that the initial interest rate was fixed. The only difference, which is only a matter of form, is that, whilst in the Ozigi case, the initially fixed interest rate and the power to vary same are contained in a single document (deed of legal mortgage), in this case, each of these is contained in different documents, i.e. Exhibit 13 (letter of offer of facility) and Exhibit 31 (deed of legal mortgage) respectively.

Per curiam

“The term obtained in clause 1 of Exhibit 31 is similar to the terms construed by the Supreme Court in UBN Plc v Ozigi (1994) 3 NWLR (Part 333) 385. I am not persuaded by the argument of learned Counsel for the respondent that the Ozigi case is distinguishable from this case in that, in the former case, both the interest rate fixed and the power to vary it were contained in the same deed of legal mortgage. True, in this case the interest rate fixed at 13% is contained in Exhibit 13 while the discretion conferred on the appellant to vary the rate of interest from time to time obviously, as circumstances dictate, is incorporated in Exhibit 31. The difference of this case and the Ozigi case in my view lies not in the substance but the form. Although Exhibit 31 fixed the rate of interest, nevertheless, the appellant had sufficient time and did study Exhibit 31. It arrived at a decision to execute Exhibit 31 out of its own volition. It saw clause 1 and accepted to be bound by it. It will, therefore, be wrong
for the appellant, after accepting to be bound by the terms in Exhibit 31, to turn round and reject clause 1 obviously after having enjoyed the overdraft. Thus, whether the fixed interest rate and the discretion to vary the applicable interest rate are contained in different documents as in this appeal, or in one document, as in the Ozigi case, makes no difference since what is of paramount importance is the manifestation of parties to be bound by the terms and conditions agreed upon.”

4. *Per curiam*

“The respondent has pleaded in its paragraph 2 of the counter-claim the reigning interest rate of 34%. Exhibits 30 and 31 were tendered in evidence. As well, Exhibits 23 and 25, being the statements of account of the appellant, were tendered. In Exhibit 25, the changing applicable rates of interest were reflected at the bottom of some of the pages at the right side thereof. This shows clearly that notice of the determination of the reigning interest rate was always communicated to the appellant (see *UBN Plc v Sax (Nigeria) Ltd* (1994) 9 SCNJ 1 at 15). Having regard to what I have said above, I am of the view that the learned trial Judge was right in awarding interest at the rate of 34% on the sum claimed by the respondent from 1 October, 1993 to the date of judgment.”

5. A claim for interest could be as of right where based on the contract between the parties or at the discretion of the court where power to award same is conferred by statute.

6. A claim for pre-judgment interest, being one as of right, must be pleaded and proved.

7. Exhibit 17A, being the minutes of a meeting attended by the appellant where the sharing ratio between the appellant and the University of Jos was agreed at 32.5% and 67.5% respectively, is automatically binding on the appellant. However, Exhibit 18, the minutes of a meeting where the respondent, although without the appellant’s authority, was able to secure an increase in the appellant’s share to 45% as against the university’s share of 55% and which meeting was not attended by the
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The appellant, would not ordinarily bind the appellant. It is, however, binding on it by reason of its subsequent conduct and letters, Exhibits 19, 20 and 21, which point to the fact that it recognised and accepted the further concession granted to it at the meeting represented by Exhibit 18. In other words, it must be taken to have ratified the act of the respondent in winning greater concession for it, quite apart from the fact that Exhibit 18 was not prejudicial to his interest.

Per curiam

"The appellant was undoubtedly not a party to Exhibit 18. But the question is, did it ratify the contents of the Exhibit? Or put differently, can Exhibit 17A and a fortiori Exhibit 18 bind the appellant? As a result of the need to sell the unused iron pipes and to find acceptable formula such that the University of Jos and the appellant would recover what is due to them, a series of meetings were held. The respondent too was desirous of recovering the overdraft it granted the appellant together with its attendant generated interest, barring exercising its powers under the mortgage deeds executed between it and the appellant. From Exhibit 17A, the appellant agreed that its share of the proceeds of the iron pipes should be deposited in the respondent bank and the court below found so. In the second paragraph of Exhibit 17A, the last paragraph therein, the minutes are reflected thus:–"

‘At this juncture, Edilco (the appellant) expressed the desire to have her share paid directly to the Bank . . .’

The share alluded to above is its 32.5% as agreed between the appellant and the university. It appears, therefore, clear that it is in consequence of the above sharing formula that the appellant wrote Exhibits 19, 20 and 21 to the respondent (note that Exhibit 21 is same with Exhibit II). In Exhibit 19, the appellant directed the respondent as follows:–

‘The above payment is to go into EDILCO account and out of this, thirty five thousand naira (₦35,000) should be deducted for the commission and other commitments as agreed with the former manager. Therefore, we are applying as agreed to the branch manager to give us ₦35,000 out of ₦182,812.50. The balance of ₦147,812.50 should be paid to EDILCO account and the university as per agreement.’

In paragraph 2 of Exhibit 20, the appellant drew the attention of the respondent to the previous meetings they held with the University of Jos. The paragraph read thus:

‘We also wish to draw your attention during our previous meetings, with university authority and the former bank manager, that EDILCO NIG. LTD will be given some percentage for the transportation, handling charges and payment of watchmen and others. But to our surprise, this verbal agreement was not fully implemented; because the money given by the bank was not in any way sufficient to solve the problems.’

After the total proceeds of ₦785,823.57 was realised from the sale of the iron pipes, and in order to ascertain the state of its account and the share collected by the university, the appellant wrote the respondent, seeking, inter alia the following clarification as contained in paragraph 2 of Exhibit 21:

‘That out of the aforesaid amount, the sum of ₦40,000 was paid to the company to enable it to settle salaries of watchmen who took care of the pipes; that the balance of ₦745,000 was lodged in favour of Edilco and Jos University. That since the aforesaid lodgment about 2 years ago, we have not been made aware of the amount paid to EDILCO’S account and also the University.’

8. Where a party complains about the admissibility of a document, the position he takes thereby is that the document lacks the legal components that would confer jurisdiction on the court to accept it as forming part of its record in the proceedings. In other words, as far as the proceedings in question are concerned, the document, though physically existing, is legally non-existent. On the other hand, where the complaint is as to the evidential value of the document, the document is legally acceptable in evidence and would form part of the records of the court. What is in issue is the extent to which it can be relied upon by the court as the basis for its decision. In the instant case, and contrary to the contention of the respondent’s Counsel, the appellant’s complaint was that the learned trial Judge ought not to have accorded Exhibits 16, 16A, 17 and 17A any weight at all given the
a background that they were not only unsigned but were
documents whose certification will in no way enhance
their status of being worthless in law. His grouse was
not, therefore, a challenge to the admission of the docu-
ments in evidence.

9. The uncertified photocopies of minutes of a meet-
ing are secondary evidence of what they represent. For them to
be legally admissible in evidence, a proper foundation
for failure to tender the original or certified copies must
be laid. Where tendered without proper foundation and
admitted in evidence by the court, even without objec-
tion by the adversary, they nonetheless lack any eviden-
tial value and a court is not entitled to accord any
probative value to them. In the instant case, although
Exhibits 16 and 17 being uncertified copies of the min-
utes of a meeting between officials of the appellant, re-
spondent and the University of Jos and some consultants
were admitted in evidence, they lacked the legal status
that would confer on them any probative value and the
trial court did not rely on them in arriving at its decision.

10. Where a document, in the instant case, the minutes of a
meeting, is a certified true copy of the original but the
same is not signed by its author or, where its author is a
corporate body, the officer who made it on its behalf,
that document will not be conferred with any evidential
value.

Per curiam

"Exhibit 16A, though a certified true copy of its original, it
nevertheless is a document that has not been signed by
either the chairman of the meeting or its secretary. I should
think that learned Counsel for the appellant is correct that
the mere fact that the document has been certified does not
confer it with any evidential value. I am of the firm view
that the law is trite that the validity of a certified true copy
of an original document does not lie solely on the fact of its
certification but also on the appearance of the signature of
the person who is said to be its author or, as the case may
be, the officer who made it for and on behalf of the person
whom he represents in the case of a corporate body.
Clearly, Exhibit 16A, though a certified document, nevertheless contains no signature of either Prof Adekunle (who chaired the meeting) or I.I. Modobbo (who was the secretary during the meeting). Evidently, therefore, and barring what I shall say later in this judgment relating to the Exhibit, the learned trial Judge was obviously in error when he ascribed some weight to Exhibit 16A.”

11. Where a document, in the instant case, the minutes of a meeting, is duly signed by an authorised person, the document is entitled to be accorded legality and, where relevant, some weight as the court may deem fit. In the instant case, the Court of Appeal found that Exhibit 17A, which was the minutes of a meeting, which was a follow-up to the meeting represented by Exhibit 16A, was complete as a legal document, the same having been signed by the chairman of the meeting and that the trial court was justified in according it some probative value.

Per curiam

“Exhibit 17A is the minutes of the meeting attended, inter alia, by the appellant and the University of Jos as a follow-up of the meeting reflected in Exhibit 16A. In it, the modalities for the disposal of the iron pipes and the anticipated cost of the pipes were discussed. As well, the meeting deliberated on the method of sharing the proceeds of the sale of the iron pipes and arrived at an agreed formula of 67.5% and 32.5% for the university and the appellant respectively. The minutes, unlike those contained in Exhibit 16A, had been signed by an Andrzejak, as the chairman of the meeting. Although, the secretary of the meeting did not sign, nevertheless, the chairman did sign the document. I am of the strong view that the signature of the chairman is sufficient to render it complete as a legal document. In the event, the court below was justified in according some weight to the document. Looking at it from another angle, it is not the contention of the appellant that it never attended the meeting or that the meeting was never convened at all. Its contention is that the minutes were not signed at all, and, therefore, would carry no weight. I must recall that, contrary to what the appellant contended, the minutes were indeed signed by the chairman as clearly reflected at the last page of Exhibit 17A.”
12. Where a party acts in a matter purportedly on behalf of another and the latter party obtains a better bargain by the act of the former, even though the former did not have the latter’s instruction to act on his behalf in that regard, the latter party cannot be taken to have incurred any disadvantage thereby. Where a court, therefore, decides a matter on the basis of facts represented by the unsolicited advantage derived under the circumstances, the party who has gained such an advantage cannot be said to have been prejudiced or that miscarriage of justice has been occasioned thereby.

Per curiam

“In Exhibit 17A, the appellant is to get 32.5% out of the proceeds of the sale of the iron pipes. Exhibit 18 is the minutes of the meeting convened by the University of Jos as a result of the rejection of the sharing formula arrived at in Exhibit 17A by the respondent in which the university and the appellant are to receive 67.5% and 32.5 respectively. The stand of the respondent was that the share of the appellant will not offset the overdraft and the interest that accrued thereto which the appellant obtained from it. That at any rate, the university stands to lose nothing if the share of the appellant is raised upwards as the cost of the iron pipes had risen by far higher than what they cost when they were purchased. At the end of deliberations, the university conceded and reduced the percentage it had, thus arriving at a new formula of 55% to the university and 45% to the appellant. To the above, the respondent said it acted as an agent of appellant. The latter disputed that assertion.

I should think that the surest answer to the disagreement in the stand of the parties lies not so much in whether the appellant ratified the act of the respondent in striking a deal in its favour as its agent but in whether the appellant had suffered any disadvantage by the new formula. I can see no disadvantage at all; if anything, the formula ensured for the appellant tremendous financial advantage by raising its share by 12.50%. Therefore, the use to which the learned trial Judge put Exhibit 18 has occasioned no miscarriage of justice to the appellant.

As I said earlier on, Exhibit 18 gave the appellant more share than it otherwise would have had if the formula in Exhibit 17A was strictly followed. Although strictly
speaking, the respondent could not have been acting as an agent of the appellant, it nevertheless got more favourable terms to the advantage of the appellant. It was by no means prejudicial to the appellant. Therefore, the contention of the learned Senior Counsel for the respondent that the latter acted as agent for the appellant in entering into the agreement contained in Exhibit 18 cannot be correct. But it can be justified on the ground that the appellant gained tremendously finance wise from the agreement which worked no injustice at all on the appellant. There was in the circumstance no miscarriage of justice and if Exhibits 19, 20 and 21 were referring to the formula for the sharing worked out in Exhibit 17A, the appellant in fact got a fairer bargain by the application of Exhibit 18.”

13. A judgment debt comprises the sum and accrued interest adjudged as due to the judgment creditor up till the time of judgment.

14. The power of a court to award interest on a judgment debt rests on a number of principles which could be any of the following:

(i) the discretion of the court;
(ii) the agreement of the parties;
(iii) the Rules of Court, where there are provisions on the subject.

In the instant case, the Court of Appeal held that the award of 21% interest on the judgment debt was neither based on the agreement of the parties nor the rules of court but rather on the discretion of the court and that the trial court did not indicate the premise upon which its discretion was based.

Per curiam

“It is now settled law that the power to award interest on judgment debt rests on a different principle. It is awarded at the discretion of the court upon pronouncing the judgment and with effect from that date. See Wayne (West Africa) Ltd v Ekwunife (cited supra) at 119. Interest on judgment debt is provided for in various rules of court and may vary depending on which rules of court are applicable. Of course, parties may agree to enter into contract and bind themselves
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to pay an agreed interest rate. However, the circumstances under which the learned trial Judge granted the 21% interest on the judgment debt is made otherwise than as an interest rate agreed upon by parties. The interest rate the respondent claimed in its counter-claim is 34%. However, the learned trial Judge did not grant the respondent the interest rate it claimed. He equally did not say why he did not grant to the respondent the interest rate it claimed. He simply granted ‘21% interest (rate) from the date of judgment until the whole debt is liquidated’. I am convinced beyond doubt that the learned trial Judge granted the 21% interest rate on the judgment debt in his own discretion. I should stress that the 21% interest rate on the judgment debt granted by the learned trial Judge was not claimed by the respondent. Learned trial Judge did not also say why he granted the interest rate lesser than what the respondent claimed. Evidently, therefore, the learned trial Judge was acting under his discretion in making the award.”

15. There was no doubt that the appellant was indebted to the respondent by reason of the overdraft facility granted to it, however it contended that the respondent had no authority to share the proceeds of the sale of iron pipes between it and the University of Jos and that, if the entire proceeds of the sale had been applied by the respondent towards the liquidation of the indebtedness, its account would have been brought to a credit. This contention was, however, rejected by the Court of Appeal, which confirmed the trial court’s findings that (i) there was, indeed, an agreement to share the proceeds at a ratio of 45% and 55% respectively; (ii) that the respondent was authorised to effect the sharing; (iii) that the appellant’s share was transferred to its current account towards the liquidation of its indebtedness and that, after the transfer, there was still a debit balance on the same. The trial court was, therefore, in order to have entered judgment in favour of the respondent on its counter-claim against the appellant.

Per curiam

“After a thorough consideration of issue 1, my unequivocal answer was that the appellant agreed to a sharing formula of 32.5% and 67% between it and the University of Jos in
sharing the proceeds from the sale of the iron pipes as is clearly reflected in Exhibit 17A. The respondent, though not expressly mandated by the appellant, worked out a more favourable sharing formula, ensuring therein that the appellant got a higher percentage. That formula gave the appellant an enhanced ratio of 45% (see Exhibit 18). The appellant in Exhibits 19 and 20 referred to the payment that was to be made in its account and that of the university ‘as per agreement’. It also drew the attention of the respondent to the ‘previous meetings with university authority and the former bank manager’, who represented the respondent. The appellant equally wrote to the respondent, seeking to know how much of the total proceeds from the sale of the iron pipes was made, ‘to Edilco’s account and also the University of Jos’. Implicit in the above is that a sharing formula was agreed upon. That formula is 67.5% and 32.5%, as reflected in Exhibit 17A. If, instead of receiving 32.5%, the appellant got 45% as a result of the benevolence of the respondent, I cannot see any injustice that enures to the appellant even if the respondent was not acting as the agent of the appellant. No miscarriage of justice was subsequently occasioned when the learned trial Judge accepted as a fact that the appellant’s share is 45%.

Furthermore, Exhibit 25 did show the debit balance of the appellant standing at ₦1,418,076.10 as at 27 September, 1993 after the appellant’s share of 45% was credited to its account and accordingly utilised in reducing its outstanding indebtedness in relation to the overdraft. The finding of the learned trial Judge at page 90 lines 8–13 appears to be well founded, given the state of the pleadings and the evidence led. The finding is as follows:–

‘On the counter-claim, I find, from the evidence of DW2, that as at 20 September, 1993, the plaintiff was owing the defendant the sum of ₦1,418,076.10 and this is supported by Exhibit 25 page 66. The plaintiff, who is the defendant to the counter-claim did not challenge Exhibit 25 to show that it was not true or the amount stated is not correct.’

The learned trial Judge was, therefore, right, in my view, in his finding that the appellant was indebted to the respondent and he was equally correct in entering judgment for the respondent on its counter claim.”

*Appeal dismissed except as to post-judgment interest rate.*
Cases referred to in the judgment

Nigerian

Allied Bank Nigeria Ltd v Akubueze (1997) 6 NWLR (Part 509) 374

Awajugbagbe Light Ind. Ltd v Chinukwe (1995) 4 NWLR (Part 390) 379

Berliet (Nig.) Ltd v Kachalla (1995) 9 NWLR (Part 420) 478

Biku Investment and Property Co Ltd v Light Machine Industry Nigeria Ltd (1986) 7 NWLR (Part 11) 29

Egbunike v A.C.B. Ltd (1995) 2 NWLR (Part 375) 34

Ekwunife v Wayne (West Africa) Ltd (1989) 5 NWLR (Part 122) 422

Emegokwue v Okadigbo (1973) 4 SC 113

Ezeugo v Ohaneyere (1978) 6–7 SC 171

Federal Capital Development Authority v Naibi (1990) 3 NWLR (Part 138) 270

Hallco Ltd v Owoniboys Tech. Service Ltd (1995) 4 SCNJ 256

Hinma Merchant Ltd v Aliyu (1994) 5 NWLR (Part 347) 667

Koiki v First Bank Plc (1994) 8 NWLR (Part 365) 665

National Employers Mutual General Insurance Ass. Ltd v Martins (1969) 1 N.M.L.R. 236

Sapara v University College Hospital Board of Management (1988) 4 NWLR (Part 86) 58

U.B.N. Plc v Ozigi (1994) 3 NWLR (Part 333) 385

U.B.N. Plc v Sax (Nigeria) Ltd (1994) 8 NWLR (Part 361) 150; (1994) 9 SCNJ 1

Wayne (West Africa) Ltd v Ekwunife (1989) 12 SCNJ 99

Nigerian statutes referred to in the judgment

Banking Act (Cap 28) Laws of the Federation of Nigeria, 1990, section 15

Evidence Act (Cap 112) Laws of the Federation of Nigeria, 1990, sections 94, 97(2)(c)
Nigerian rules of court referred to in the judgment
High Court of Plateau State (Civil Procedure) Rules 1987, Order 40 rule 7

Books referred to in the judgment
Black’s Law Dictionary (5ed)
Black’s Law Dictionary (6ed)

Counsel
For the appellant: Ugwuala (with him Erege)
For the respondent: Oyawole (with him Akpacio)

Judgment
MANGAJI JCA: (Delivering the lead judgment) This is an appeal against the judgment of Ahinche J (of blessed memory), sitting in the High Court of Plateau State, Jos Judicial Division, wherein the claims of the appellant as plaintiff in Suit No. PLD/317/91 were dismissed in their entirety and judgment entered for the defendant on its counter-claim but reducing this claim of 34% interest on the judgment debt to 21%, “until the whole debt is liquidated”. Dissatisfied with the decision, the plaintiff filed this appeal as can be seen from page 92 of the record of appeal in which the date of filing the notice and grounds of appeal is conspicuously not stated. On 6 November, 1997, however, the appellant moved a motion on notice, seeking for the leave of this Court to “amend and file an amended notice of appeal, incorporating the proposed additional grounds of appeal”, which was accordingly granted. In compliance with the leave granted, therefore, the appellant on 10 November, 1997 filed seven grounds of appeal. Thus in all, the appellant had seven grounds of appeal, as the only ground of appeal contained in the original notice and grounds of appeal was the omnibus ground, which was made the first ground in the amended notice and grounds of appeal.
Let me give a resume of the facts giving rise to the case before the court below. Sometime in the year 1985, the plaintiff applied to the defendant bank for an overdraft facility in the sum of N400,000 to enable it to execute a contract it had with the University of Jos. The defendant approved the application and forwarded to the plaintiff a letter of offer containing the conditions to be fulfilled before the facility could be released and the terms upon which it was granted.

The plaintiff accepted all the conditions, including a chargeable interest of 13% on the overdraft, the upstamping of two deeds of legal mortgage as well as executing another deed of legal mortgage over a landed property, situate at Bisichi Jantar in Barkin Ladi Local Government of Plateau State.

After the plaintiff perfected the conditions required of it, it applied for and was granted some amount out of the overdraft in order to purchase materials needed for the due execution of its contract, including some iron pipes. The University of Jos also paid a mobilisation fee to the plaintiff, who utilised part of it together with the money it withdrew from the overdraft facility, in purchasing the material. The plaintiff’s contract with the University of Jos related to the infrastructural facilities on the university campus. The iron pipes purchased by the plaintiff were to be utilised in the construction of the sewage main line on the university campus. But as economic circumstances would have it, things became so difficult that the university decided to suspend the contract on the sewage main line, for which purpose the iron pipes were earlier on purchased. This was one of the austerity measures employed by the university. In the meantime, the plaintiff’s overdraft facility became due for payment and the plaintiff could not offset it.

The plaintiff and the university, along with the defendant, therefore, agreed after some meetings to sell the iron pipes, which were no longer required for the contract and whose value had by then risen tremendously. The iron pipes were accordingly sold off in four deals and the money forwarded to the defendant bank. Disagreement visibly set in on the mode of sharing the money, the proceeds of the sale of the
pipes. The defendant wanted the share of the plaintiff paid into its account from which it could offset the overdraft it granted. The defendant said that as a result of a series of meetings, it was agreed between it, the plaintiff and the university that the latter and the plaintiff would share the proceeds of the sale of the pipes in the ratio of 55% and 45% respectively. (This the court below found as a fact.) As a result, the defendant, after the receipt of the proceeds of the sale of the pipes, forwarded to the university its 55% and credited the balance into the plaintiff’s account from which it applied in recovering its overdraft and the interest that accrued thereto. The stand of the plaintiff, on the other hand, is that it never agreed on any sharing formula and that the whole proceeds was to be paid into its account.

At the end of it all, the plaintiff claimed that the proceeds of the sale of the iron pipes, which amounted to \( N\_{780,813.57} \), which it presumed had been credited to its own account, had effectively settled its indebtedness to the defendant, leaving a credit balance of \( N\_{240,611.74} \) in its favour after the deduction of the money it owed the defendant on the overdraft. The defendant on its part contended that the plaintiff’s share, being 45% of the proceeds of the sale of the pipes, had been credited to its account and used in reducing the overdraft loan the plaintiff had, such that the balance of the overdraft due and unpaid continued to attract interest, which as at the date the statement of defence incorporating a counter-claim was filed, the plaintiff’s indebtedness to the defendant stood at \( N\_{1,418,076.10} \). Because of the sharp differences parties have, the plaintiff, on 12 July, 1991, took out a writ of summons against the defendant claiming the following reliefs as can be found in the concluding paragraph of its statement of claim thus:

“(a) The entire sum of \( N\_{240,641.74} \) due to the plaintiff, being balance credited in favour of the plaintiff after the overdraft is deducted from the amount credited and 21% compound interest.

(b) The plaintiff also claims the sum of \( N\_{150,000} \), being damages for conversion of the plaintiff’s aforesaid amount,
being money had and received but the defendant converted same to its personal use.

(c) That the plaintiff also claims the sum of ₦455,000, being damages for defamation, as the defendant has instructed the sale of the entire properties mortgaged by the plaintiff.

(d) Perpetual injunction restraining the defendant, its servants, agents or privies from selling the following properties:

2. No. 1, Madaki Street Bukuru, Plateau State.

The defendant on its part, counter-claimed. The concluding paragraph of the counter-claim reads as follows:

“WHEREUPON the defendant claim against the plaintiff as follows:

(a) ₦1,418,076.10DR being loan and interest.
(b) Interest at bank rate of 34% from 1 October, 1993 until judgment and, thereafter at 34% until full payment” (see page 32 of the record of appeal).

It was after full trial that the learned trial Judge dismissed the plaintiff’s claims and entered judgment for the defendant on its counter-claim but granting 21% post-judgment interest until the whole of the judgment debt was fully and totally liquidated. I shall from now onwards refer to the plaintiff as “the appellant” while the defendant shall be referred to as “the respondent”.

Parties filed and exchanged briefs of argument which saw the appellant file a reply brief. The appellant moved this Court for leave to file the appellant’s brief out of time and to deem the brief so exhibited as properly filed and served. This Court granted the appellant’s application, for which reason the brief he filed on 9 March, 1998, the day the application was moved, became a legally filed brief in reaction to which the respondent filed his brief of argument on 22 June, 1998. As I indicated earlier on, the appellant filed a reply brief on 8 July, 1998.
From his brief of argument the appellant identified five issues as arising for determination from the grounds of appeal. On its part, the respondent identified three issues. The five issues identified by the appellant are the following:

“Whether on the evidence before the trial court, there was a binding agreement between the appellant, the respondent, and the University of Jos as to the sharing of the money lodged by the appellant into its account with the respondent bank and as to the manner the respondent bank was to apply the money upon lodgment?

Whether, having regard to the answer to (i) above, the law and the entire circumstances of the case, the respondent was right to have disbursed the sums of money lodged by the appellant into its account between itself (respondent) and the University of Jos without further assurance or authority from the appellant?

Whether the learned trial Judge was right in awarding interest at the rate of 34% on the sum claimed by respondent from 1 October, 1993 to the date of his judgment?

Whether the learned trial Judge had jurisdiction to award 21% interest on the judgment debt until same is liquidated?

Whether, having regards to the facts and circumstances of this case and the law, the trial court was right in entering judgment for the respondent on the counter-claim and dismissing the plaintiff’s claim?”

On its part, the respondent identified three issues for determination as follows:

“Whether there is a binding agreement between the parties to share the proceeds from the sale of iron pipes in the ratio of 55% to the University of Jos and 45% to the appellant and if the answer is in the affirmative, whether the respondent was justified in applying the appellant’s share of 45% in reducing the amount outstanding in the loan overdraft granted to the appellant by the respondent.

Whether the award of 34% and 21% interest to the respondent by the trial court is valid and sustainable in law.

Whether the appellant is indebted to the respondent and if the answer is in the affirmative, whether the respondent is entitled to judgment on its counter-claim to the tune of N1,418,076.10.”
The first issue identified in both briefs of argument are the same. However, it is better couched in the respondent’s brief.

The third and fourth issues identified by the appellant can conveniently be discussed in the second issue identified by the respondent. Also, issue 3 in the respondent’s brief and issue 5 in the appellant’s brief are similar. I prefer the issue identified by the respondent for the simple reason that it is broader in context and obviously covers the question posed by the appellant. Consequently, I shall adopt the issues identified by the respondent in the consideration of this appeal. In considering the first issue, however, I intend to cover the second issue identified by the appellant as well because they are so interrelated and interconnected that the consideration of one must necessarily call for the determination of the other.

Both Counsel adopted their respective briefs of argument but proffered no oral submissions in amplification of their respective cases, save that learned Counsel for the appellant referred us to the case of Attorney-General of Abia State and 7 others v Agharanya and 3 others (1999) 6 NWLR (Part 607) 362 at 371 on the weight the court below gave to Exhibits 16, 16A, 17 and 17A, as an additional authority. On the first issue for determination, Mr Ugwuala, Counsel for the appellant, submitted that there was no binding agreement between the appellant, respondent and the University of Jos as to the share of the money lodged into the appellant’s account with the respondent and, indeed, on the manner the respondent was to apply same upon lodgment. He stressed that PW1 disputed the existence of any sharing formula of 55:45 in the favour of the University of Jos and appellant respectively. Learned Counsel said the respondent was not a party to Exhibits 16 and 16A, since its representative was excused and, therefore, walked out of the meeting and that, in any case, no sharing formula was proposed during the meeting.

Learned Counsel further submitted that Exhibits 16, 16A, 17 and 17A are all unsigned documents, which in law have
no evidential value. Subsequent certification of the documents will not in the circumstance take the place of signature or the proper execution of them so as to validate them. He referred to *Ojibah v Ojibah* (1991) 6 SCNJ 156 at 164 in support. He said, apart from the above, the respondent had not been a party to the meeting recorded in Exhibits 17 and 17A. While referring to Exhibit 18, learned Counsel submitted that neither appellant nor respondent had been a party to the Exhibit in which event it could not be a binding agreement to either of them. He referred to the definition of “agreement” contained in Black’s *Law Dictionary* (5ed) and contended that Exhibit 18, being minutes of an internal meeting of the University of Jos, cannot suffice as an agreement, having the effect of binding the parties herein.

Continuing, learned Counsel submitted that the respondent was in breach of its duties as banker to the appellant when it disbursed the sums of money realised from the sale of the iron pipes without assurance or authority from the appellant. He said the appellant neither drew cheques in the favour of the University of Jos nor gave authority in any other manner to the respondent regarding the proceeds of the sale of the iron pipes. He stressed that, even from Exhibit 18, it was clear that the respondent had to obtain a letter of authority from the appellant, mandating the respondent to act on its behalf, which learned Counsel said was never given. He urged this to allow the appeal on the above premises.

On his part, Ofodile Okafor (S.A.N.), Counsel for the respondent, started by proffering the definition of the word, “agreement” as contained in the Black’s *Law Dictionary* (6ed) and reasoned that “agreement” is a broader term than “contract”. He related the definition to the case at hand and submitted that the modalities for the distribution of the proceeds of the sale of the iron pipes could be inferred from the tenor of Exhibits 16, 16A, 17, 17A, 18, 19, 20 and 21. He noted that Exhibit 16A heralded the series of meetings convened to work out modalities for the sale of the iron pipes as can be seen in the exhibits. He submitted that in Exhibit 17A...
a the formula for the sharing of the proceeds of the sale of the iron pipes had been agreed upon and as well that the respondent was to distribute the proceeds. He further submitted that Exhibit 18 indicated a new sharing formula as a result of the rejection of the earlier formula for the sharing by the respondent, thus raising the share of the appellant to 45% from 32.5%. Learned Senior Counsel, therefore, submitted that from Exhibits 9, 19, 20 and 21, the appellant impliedly ratified the agreement contained in Exhibit 19. Learned Senior Counsel referred to some paragraphs in Exhibits 11, 19 and 20 and submitted that reference to previous meetings alluded to by the appellant could not be any meetings other than those contained in the minutes reflected in Exhibits 16A, 17A and 18 as there was no meeting between the parties and the University of Jos prior or subsequent to those meetings relating to the proceeds of the sale of the iron pipes.

b As to the issue of signing of the minutes in Exhibits 16A and 18A, learned Senior Counsel is of the firm view that there was really no need for all parties to append their signatures on them because they were simply formal meetings. He referred to sections 94 and 97(2)(c) of the Evidence Act and said that a production of the document or its certified true copy would suffice to evidence transactions relating to a corporate body such as the University of Jos.

c Learned Senior Counsel dwelt so extensively on whether a document which had been admitted without objection can attract an objection on its admission by the lower court on appeal. Learned Counsel for the appellant, in his reply brief, pointed out that what he complained of and which he eventually argued in his brief was not on the admission of Exhibits 16, 16A, 17 and 17A but on the weight the learned trial Judge gave to them. I think I should dispose of this controversy straight ahead. Learned Counsel for the respondent is right in that his complaint was not on the admission of the exhibits but on the weight given to them by the learned trial Judge. One can see clearly from the appellant’s brief of
argument that the complaint of the appellant regarding these documents centred around their evidential value. He complained so bitterly that the learned trial Judge ought not to have accorded Exhibits 16, 16A, 17 and 17A any weight at all, given the background that they were not only unsigned but were documents whose certification would in no way enhance their status of being worthless in law. For the foregoing reasons, therefore, I feel it inexpedient to recapitulate the argument of the learned Senior Advocate on the line he towed in arguing this question.

Continuing in argument, the learned Senior Advocate defined the word “ratification”, as contained in Black’s *Law Dictionary* (6ed) and submitted that, when the respondent struck a deal in increasing the appellant’s share of the proceeds of the sale of the iron pipes, as contained in Exhibit 18, it was doing so as an agent of the appellant. That the subsequent acceptance of it as manifested in Exhibits 19 and 20 only showed clearly that the respondent ratified it. He said the request of the university to have a letter from the appellant mandating the respondent to act on its behalf was merely a desire of the university to protect its interest, and, therefore, no effect on the contents of Exhibit 18. He stressed that the subsequent conduct of the appellant rendered the required step unnecessary.

On the vexed issue that the whole of the proceeds of the sale of the iron pipes was agreed to be paid into the appellant’s account with the respondent, learned Counsel argued that the proceeds were credited into the suspense account of the bank from where the share of the appellant was taken and credited to its account. He said the respondent did not disburse the funds from the appellant’s account directly as contended by the appellant. He urged us to answer this issue in the affirmative.

In the reply brief, learned Counsel contended that the appellant’s stand on Exhibit 18 is that it is only an internal
a matter of the university, which is not capable of ratification by the appellant as an agreement.

On Exhibit 19, learned Counsel stressed that it could not be termed “ratification” of the agreement reached in Exhibit 18 because it only related to the lodgment of the sum of ₦182,812.50, being proceeds from the sale of some of the iron pipes. That since it did not affect the entire lodgment of ₦780,813.57, it would not pass the test of ratification of the agreement in Exhibit 18 since an agreement cannot be ratified in part or repudiated in part. He referred to *Union Bond of Australia v McClintock* (1922) 1 A.C. 240 (P.C.). He said the above argument also holds true in relation to Exhibits 9 and 20.

Continuing, learned Counsel submitted that the respondent was not correct when it contended that it was acting as an agent of the appellant when it negotiated the terms in Exhibit 18, given the reality that the parties to this appeal and the University of Jos were each acting to protect its interest for which neither party would have been capable of acting as an agent of any other party.

The nitty-gritty of this issue is whether there is a binding agreement to share the proceeds from the sale of the iron pipes between the appellant and the University of Jos in the ratio of 45%/55% respectively, and whether the respondent was right to have disbursed the proceeds as he did without authority from the appellant to do so. I should perhaps first examine the status of Exhibits 16 and 17. These two exhibits are uncertified photocopies of minutes of meetings between officials of the appellant, respondent and the University of Jos and the officials of the appellant, University of Jos and consultants respectively. The two exhibits are not certified and being photocopies of the primary evidence they represent, they obviously have no probative value at all. Being secondary documents in respect of which nothing has been said about their original copies, their admission in evidence without objection alone will not clothe them with any weight as to make their contents relevant. Happily, even the court
below did not rely on them in arriving at the judgment as it did since, realising the worthless nature of the documents, the appellant had certified true copies of them tendered and admitted as Exhibits 16A and 17A respectively.

Exhibit 16A, though a certified true copy of its original, it nevertheless is a document that has not been signed by either the chairman of the meeting or its secretary. I should think that learned Counsel for the appellant is correct that the mere fact that the document has been certified does not confer it with any evidential value. I am of the firm view that the law is trite that the validity of a certified true copy of an original document does not lie solely on the fact of its certification but also on the appearance of the signature of the person who is said to be its author or as the case may be the officer who made it for and on behalf of the person whom he represents in the case of a corporate body. Clearly, Exhibit 16A, though a certified document, nevertheless contains no signature of either Prof. Adekunle (who chaired the meeting) or I.I. Modobbo (who was the secretary during the meeting). Evidently, therefore, and barring what I shall say later in this judgment relating to the Exhibit, the learned trial Judge was obviously in error when he ascribed some weight to Exhibit 16A.

Exhibit 17A is the minutes of the meeting attended, *inter alia*, by the appellant and the University of Jos as a follow-up to the meeting reflected in Exhibit 16A. In it, the modalities for the disposal of the iron pipes and the anticipated cost of the pipes were discussed. As well, the meeting deliberated on the method of sharing the proceeds of the sale of the iron pipes and arrived at an agreed formula of 67.5% and 32.5% for the university and the appellant respectively. The minutes, unlike those contained in Exhibit 16A, had been signed by an Andrzejak, as the chairman of the meeting. Although, the secretary of the meeting did not sign, nevertheless, the chairman did sign the document. I am of the strong view that the signature of the chairman is sufficient to render it...
complete as a legal document. In the event, the court below was justified in according some weight to the document, looking at it from another angle, it is not the contention of the appellant that it never attended the meeting or that the meeting was never convened at all. Its contention is that the minutes were not signed at all, and, therefore, would carry no weight. I must recall that, contrary to what the appellant contended, the minutes were, indeed, signed by the chairman as clearly reflected at the last page of Exhibit 17A.

In Exhibit 17A, the appellant is to get 32.5% out of the proceeds of the sale of the iron pipes. Exhibit 18 is the minutes of the meeting convened by the University of Jos as a result of the rejection of the sharing formula arrived at in Exhibit 17A by the respondent, in which the university and the appellant are to receive 67.5% and 32.5% respectively. The stand of the respondent was that the share of the appellant will not offset the overdraft and the interest that accrued thereto, which the appellant obtained from it. That at any rate the university stands to lose nothing if the share of the appellant is raised upwards as the cost of the iron pipes had risen by far more than what they had cost when they were purchased. At the end of deliberations, the university conceded and reduced the percentage it had, thus arriving at a new formula of 55% to the university and 45% to the appellant. To the above, the respondent said it acted as an agent of appellant. The latter disputed that assertion.

I should think that the surest answer to the disagreement in the stand of the parties lies not so much in whether the appellant ratified the act of the respondent in striking a deal in its favour as its agent but in whether the appellant had suffered any disadvantage by the new formula. I can see no disadvantage at all. If anything, the formula ensured for the appellant tremendous financial advantage by raising its share by 12.50%. Therefore, the use to which the learned trial Judge put Exhibit 18 has occasioned no miscarriage of justice to the appellant.

The appellant was undoubtedly not a party to Exhibit 18.
But the question is, did it ratify the contents of the Exhibit? Or, put differently, can Exhibit 17A and *a fortiori* Exhibit 18 bind the appellant? As a result of the need to sell the unused iron pipes and to find an acceptable formula such that the University of Jos and the appellant would recover what is due to them, a series of meetings were held. The respondent too was desirous of recovering the overdraft it granted the appellant, together with its attendant generated interest, barring exercising its powers under the mortgage deeds executed between it and the appellant. From Exhibit 17A, the appellant agreed that its share of the proceeds of the iron pipes should be deposited in the respondent bank and the court below found so. In the second paragraph of Exhibit 17A, the last paragraph therein, the minutes are reflected thus:–

“At this juncture Edilcon (the appellant) expressed the desire to have her share paid directly to the Bank.”

The share alluded to above is its 32.5%, as agreed between the appellant and the university. It appears, therefore, clear that it is in consequence of the above sharing formula that the appellant wrote Exhibits 19, 20 and 21 to the respondent (note that Exhibit 21 is the same as Exhibit 11). In Exhibit 19, the appellant directed the respondent as follows:–

“The above payment is to go into Edilcon’s account and out of this, thirty five thousand naira (₦35,000) should be deducted for the commission and other commitments, as agreed with the former manager. Therefore, we are applying as agreed to the branch manager to give us ₦35,000 out of ₦182,812.50. The balance of ₦147,812.50 should be paid to Edilcon account and the university as per agreement.”

In paragraph 2 of Exhibit 20, the appellant drew the attention of the respondent to the previous meetings they held with the University of Jos. The paragraph read thus:–

“We also wish to draw your attention during our previous meeting with university authority and the former bank manager that Edilcon Nig. Ltd will be given some percentage for the transportation, handling charges and payment of watchmen and others. But to our
a surprise, this verbal agreement was not fully implemented; because the money given by the bank was not in any way sufficient to solve the problems.”

After the total proceeds of ₦785,823.57 was realised from the sale of the iron pipes and, in order to ascertain the state of its account and the share collected by the university, the appellant wrote the respondent, seeking, inter alia, the following clarification as contained in paragraph 2 of Exhibit 21:

“That out of the aforesaid amount, the sum of ₦40,000 was paid to the company to enable it [to] settle salaries of watchmen who took care of the pipes; that the balance of ₦745,000 was lodged in favour of Edilcon and Jos University.

That since the aforesaid lodgment about 2 years ago, we have not been made aware of the amount paid to EDILCON’S account and also the University.”

From the above, five things stand clear and they are:

(a) that the proceeds of the sale of the iron pipes were to be shared between the appellant and the University of Jos;

(b) that there had been an agreed sharing formula between the appellant and the University of Jos;

(c) the formula for sharing the proceeds was to be applied by the respondent since the money would be collected by it for distribution;

(d) that the respondent was to credit the appellant’s account and to also pay the university.

(e) that there had been previous meetings about the sharing of the proceeds and settling handling charges by the appellant, which should be paid from the proceeds.

Having regard to Exhibits 19, 20 and 21, therefore, the conclusion of the learned trial Judge that there was a sharing formula agreed upon between the appellant and the University of Jos cannot be faulted. If, indeed, as disclosed in Exhibit 17A, the 32.5% share of the proceeds of the sale of the iron pipes which accrued to the appellant was to be paid directly into the respondent bank and that was done, one
wonders why the hue and cry about it. Obviously, from the evidence before the court below, there is no running away from the conclusion of the court that the proceeds were to be shared between the university and the appellant in the agreed ratio of 67.5% and 32.5% respectively and it was the respondent who was vested with the responsibility of effecting the sharing. If it was not the respondent who was to share it then why should the appellant ask how much “amount” was, “paid to Edicon’s account and also the university”? It stands to reason that if the whole of the proceeds were to be paid directly into the appellant’s account, then there would have been nothing to share as expressly indicated in Exhibits 17A, 19 and 21.

The appellant, in Exhibits 19 and 20, referred to previous meetings it held with the University of Jos and the respondent. I have so meticulously gone through the entire evidence before the court below but I am unable to find any previous meetings on record, except those contained in Exhibits 16A, 17A and 18. The meeting, as reflected in Exhibit 16A, heralded negotiations, resulting in the sharing of the proceeds of the sale of the iron pipes between the appellant and the University of Jos in the ratio of 45% and 55% respectively. The appellant said no weight should be attached to Exhibit 16A because it was an unsigned document. Mind you, it is not the contention of the appellant that no such meeting ever took place. DW1 gave evidence about the meeting convened as reflected in Exhibit 16A although his account of it was given in a rather unsatisfactory manner. However, that the meeting was held and discussions made about the disposal of the iron pipes is beyond doubt. To that extent, the use to which the learned trial Judge made of Exhibit 16A could be justified on a different ground and his conclusion about the convening of the meeting in which appellant was present in my view is correct, given the evidence of DW1.

As I said earlier on, Exhibit 18 gave the appellant a bigger share than it otherwise would have had if the formula in
Exhibit 17A had been strictly followed. Although strictly speaking, the respondent could not have been acting as an agent of the appellant, it nevertheless got more favourable terms to the advantage of the appellant. It was by no means prejudicial to the appellant. Therefore, the contention of the learned Senior Counsel for the respondent that the latter acted as agent for the appellant in entering into the agreement contained in Exhibit 18 cannot be correct. But it can be justified on the ground that the appellant gained tremendously finance wise from the agreement which worked no injustice at all on the appellant. There was in the circumstance no miscarriage of justice and if Exhibits 19, 20 and 21 were referring to the formula for the sharing worked out in Exhibit 17A, the appellant in fact got a fairer bargain by the application of Exhibit 18.

The only evidence on record is that the total sum of ₦780,823.57 was credited into the respondent’s suspense account before it was eventually shared between the appellant and the University of Jos. The appellant contended that the amount was lodged into its account from where the respondent unlawfully withdrew the university’s share. There is nothing on record to show any such lodgment into the appellant’s account. The evidence of DW1 that the money was in fact lodged into the respondent’s suspense account from where it was shared stood uncontroverted and uncontradicted. The finding of the learned trial Judge that the respondent shared the proceeds in the agreed ratio, therefore, should be seen in the light of such sharing from the suspense account and not out of the appellant’s account as submitted by learned Counsel for the appellant and as found by the learned trial Judge.

Learned Counsel for the appellant made heavy weather about the letter of authority the university said its legal officer should obtain from the appellant to certify that the respondent was acting on behalf of the appellant in matters of the sharing of the proceeds. That paragraph of Exhibit 18 read thus:

“The Legal Officer was directed to take up with the Contractor,
Messrs. Edilco (Nigeria) Limited, the issue of the letter of authority to the bank to certify that the bank was acting on behalf of the company. This would ensure that the University was legally covered to deal directly with the bank on behalf of Messrs. Edilco (Nigeria) Limited.”

With due respect to learned Counsel, the requirement of the letter of authority was between the appellant and the university only. It has nothing to do with the respondent, who needed no letter of authority from anyone. It would have been a different matter altogether if the university were a party and the question of a letter of authority directed to it. As for the respondent, in the face of Exhibits 19, 20 and 21, it has no reason to believe that the appellant did not mandate it to deal with the sharing of the proceeds on its behalf or that it had to Exhibit any authority to either the appellant or the university before any sharing was done.

The appellant is of the view that Exhibits 19 and 20, being reference to only two instalment payments out of the total proceeds of N780,823.57, they cannot be authority for the sharing of the whole amount. Given the background of the sales conducted and the evidence on record, the appellant cannot be correct. It should be realised that their own pipes were sold to four different persons and on different dates. Sharing was done upon the receipt of the amounts from the appellant, who used to collect the proceeds. The sharing was not done after all the proceeds were received and that accounted for Exhibits 22, 23, 28 and 29, being payments of the university’s share. Indeed, in Exhibit 19, the appellant said unequivocally thus:—

“... The balance of N147,812.50 should be paid to EDILCO (sic) account and the University as per agreement.”

From the above there cannot be any tinkering about the whole of the proceeds being added up before sharing was effected. It seems clear, therefore, that the sharing formula in which the appellant and the respondent received 45% and 55% respectively of the proceeds from the sale of the iron
pipes was agreed upon by the parties herein and the University of Jos and was thus binding on the parties and the respondent was right when it disbursed the money realised in accordance with the formula. At any rate, there is no disagreement whatsoever about the application of the appellant’s share in reducing the amount outstanding from the overdraft the respondent granted appellant. The disagreement only related to whether the whole of the proceeds of the sale of the iron pipes should have been credited into the appellant’s account. Issue 1 in the respondent’s brief (which is similar to issue 1 in the appellant’s brief) and issue ii in the appellant’s brief are answered in the affirmative.

On the second issue for determination, as framed by learned Counsel for the respondent, it was submitted by learned Counsel for the appellant that the learned trial Judge was wrong in awarding 34% interest on the sum claimed by the respondent in its counter-claim. Learned Counsel stressed that in the letter of offer of the overdraft contained in Exhibit 13, the interest rate proposed is 13%. That by Exhibit 14, the appellant agreed and accepted the overdraft on the basis of the 13% interest rate and on the terms proposed without any variation. He contended that by Exhibits 13 and 14, a binding contract had existed between the parties. He relied on Bioku Investment and Property Co Ltd v Light Machine Industry Nigeria Ltd and another (1986) 7 C.A. (Part 11) 29 at 39 and Council of Yaba Tech v Nigerlec Contractors Ltd (1989) 1 NWLR (Part 95) 99 at 107.

Further in his submissions, learned Counsel said that the agreement evidenced by Exhibits 13 and 14, being commercial in nature, both appellant and respondent are presumed to intend the exhibits to create legal relations between them. He cited in support the case of Sapara v University College Hospital Board of Management (1988) 4 NWLR (Part 86) 58 at 72. He reasoned that the respondent cannot seek for better terms outside Exhibits 13 and 14. He referred to Calabar Cement Co Ltd v Daniel (1991) 4 NWLR (Part 188) 740 at 760. He submitted that the respondent cannot unilaterally
increase the rate of interest of 13% agreed upon. He cited in support the case of O.A.U. v Onabanjo (1991) 5 NWLR (Part 139) 549. He stressed that, even in the face of Exhibits 30 and 31, the situation cannot be any different since Exhibit 30 was only upstamped and that the document was only a fulfilment of conditions 4(a) and (b) stipulated in Exhibit 13. That, as well, Exhibit 31 was simply executed in fulfilment of condition 4(c) of Exhibit 13. He submitted that Exhibits 30 and 31 were not meant to introduce a new contract or new terms and conditions into the existing contract contained in Exhibits 13 and 14.

On the interest rate of 21% on the judgment debt awarded by the learned trial Judge, learned Counsel submitted that it is untenable. He reasoned that the award of interest on the judgment debt is not as of right either under contract or mercantile custom or principles of equity. He submitted that, upon entering judgment in the sum of ₦1,418,076.10 and there is no accrued interest, it becomes a judgment debt as a result of which Order 40 rule 7 of the Plateau State High Court (Civil Procedure) Rules, 1987 comes to aid.

Further, learned Counsel submitted that the learned trial Judge had no power under Order 40 rule 7 aforesaid to order interest on the judgment debt when he did not direct the time when the judgment debt was to be paid. He was of the firm view that the court below had no jurisdiction to award the interest of 21% as it did on the judgment debt far in excess of the statutory 10% provided for under Order 40 rule 7. He relied on a number of decided cases to back up his submission. He said the award made by the learned trial Judge was in the circumstance a nullity. He urged us to allow the appeal on the above premises.

While being heard in submissions, learned Senior Counsel for the respondent stressed that, even though the appellant filed a defence to the counter-claim, he nevertheless led no evidence against the counter-claim. He, therefore, submitted that the respondent shall be deemed to have abandoned the defence. While referring to the principles on award of
interest, learned Senior Counsel said it is awarded under two
distinct circumstances, namely where interest is claimed as
of right and where there is power conferred by statute on the
court to exercise its discretion in awarding interest. He
pointed out that in the instant appeal, the claim of interest
was not disputed by the appellant, either in its defence to the
counter-claim or evidence in court. Learned Senior Counsel
referred to Exhibits 13, 14, 30 and 31 and submitted that the
interest ratio specified therein was never below 13% but was
as high as 34%. He pointed out that by Exhibits 30 and 31,
the appellant agreed to pay interest as adjusted by the re-
spondent from time to time.

Continuing, learned Senior Counsel said the interest
claimed by the respondent was as of right pursuant to the
overdraft agreement executed between the respondent and
the appellant and as contained in Exhibits 13, 30 and 31. He
submitted that the appellant was bound by the terms and
conditions contained in the deeds of legal mortgage it freely
executed. He referred to Allied Bank v Akubueze (1997) 6
NWLR (Part 509) 374 at 403–404 and Ezeugo v Ohaneyere
(1978) 6–7 SC 171. Learned Senior Counsel was emphatic
that the interest rate to be applied was to be determined by
the respondent and only subject to section 15 of the Banking
Act, 1990, which empowers the Central Bank of Nigeria to
fix the limits of prime lending rates and that all commercial
banks would be bound by it. He quoted in support Koiki v
First Bank Plc (1994) 8 NWLR (Part 365) 665 at 671 and
U.B.A. v Sax Nigeria Ltd (1994) 8 NWLR (Part 361) 150 at
163–164.

Still in argument, learned Senior Counsel submitted that,
even where there is no express agreement, a bank is entitled
to charge compound interest on the basis of custom and
implied consent of the customer. He relied on Barclays Bank
of Nigeria v Alh. Diweda Abubakar (1977) 10 SC 13 at 23
and 25. He, therefore, contended that the award of 34%
interest on the principal sum was right, having regard to the
counter-claim and the evidence led in proof of it.
On the 21% interest on the judgment debt, learned Senior Counsel submitted that it was rightly done since clause 1 of Exhibits 30 and 31 did authorise the respondent to continue to determine the interest rate payable on the loan “well after any judgment”. He is of the view that Order 40 rule 7 of the Plateau State High Court (Civil Procedure) Rules, 1987 is inapplicable since it is not the discretion of the court below that was prayed for. Learned Senior Counsel finally submitted that the non-fixing of a date for payment of the judgment sum did not vitiate the interest awarded thereon. He urged us to answer the issue in the affirmative.

In his reply brief learned Counsel for the respondent submitted that the respondent was wrong in relying on Exhibits 30 and 31 to justify awarding 34% pre-judgment interest. He stressed that Exhibit 30 was executed on 31 November, 1983 in respect of a different transaction and that it was merely upstamped as security for the present transaction.

As for Exhibit 31, learned Counsel submitted that its execution on 10 December, 1985 was merely a subsequent fulfilment of one of the terms of the agreement reached on 1 August, 1985. He said where there is an existing contract between parties and a new document which gives effect to the existing agreement/contract comes into life, the contractual rights of the parties will be determined in accordance with the existing contract. He relied on Sapara v University College Board of Management (cited supra). He submitted that the wide powers given to the respondent in Exhibit 31 to fix can only be effective to vary Exhibit 13 if it conveys a new benefit in the favour of the appellant. He said U.B.N. v Ozigi and U.B.N. v Sax (Nigeria) (both cited supra) are distinguishable from the case at hand since in those two cases, the basis for the computation of the interest rates were the two deeds of legal mortgage in contention and had no agreement the like of Exhibits 13 and 14.

On post-judgment interest, learned Counsel submitted that it could not be a matter of contract but rested squarely at the
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Undoubtedly, the appellant had filed a reply to the counter-claim as can be seen at 33–34 of the record of appeal. However, PW1, who gave evidence for the appellant in the court below, led no evidence regarding the reply to the counter-claim. Indeed, he did not advert his mind nor was his attention called to the reply. The result is that no evidence was led at all, relating to the counter-claim. The law is that where a party fails to or does not lead evidence in support of the averments in his pleadings, the averments will be taken as having been abandoned (see Federal Capital Development Authority v Naibi (1990) 3 NWLR (Part 138) 270; Awojugbagbe Light Ind. Ltd v Chinukwe (1995) 4 NWLR (Part 390) 379 at 427; Emegokwue v Okadigbo (1973) 4 SC 113 at 117–118; Egbunike v A.C.B. Ltd (1995) 2 NWLR (Part 375) 34 at 55). The reply to the counter-claim, having no evidence led in proof of it, is deemed abandoned.

Exhibit 13 is the letter of offer subscribed to by the appellant, who conveyed its acceptance of the conditions proposed by the respondent before the overdraft of ₦400,000 would be granted. The acceptance of the offer is contained in Exhibit 14. Exhibit 13 clearly spelt out five conditions required before the facility is granted. These conditions are as follows:–

1. Loan/Overdraft O/D ₦400,000
2. Interest will be charged at the rate of 13%
3. Repayable...
4. L.M. over property covered by C of O. No. 218 valued at ₦140,000 stamped for ₦100,000 to be upstamped for ₦140,000.

L.M. over property of Bisichi Jentar B/Ladi Local Government valued at ₦122,000 to be stamped for ₦130,000 (to be obtained).

5. All legal charges incurred by the bank in the course of perfecting the Securities related to the above mentioned lendings will be borne by the customer and debited into your current account without prior recourse.”
Although the repayment period is not mentioned, parties have no dispute about it and it is, therefore, non-contentious. Conditions 4(a) and (b) require the upstamping of the legal mortgage over the property covered by the Certificate of Occupancy No. 14068, which was executed on 3 November, 1983 to cover N400,000, being the amount of the overdraft granted the appellant. The other condition required the appellant to execute a deed of legal mortgage over the property at Bisichi Jantar in Barkin Ladi Local Government, which said property is plot No. 569 and to stamp same property for the value of N13,000. The appellant complied with both conditions.

I should make the point that the transaction in issue, being a contract, there is always an offer made by one party and an acceptance by the other. A contract comes into existence when consideration is provided on the offer and the acceptance of it (see Bioku Investment and Property Co Ltd and another v Light Machine Industry Nigeria Ltd (1986) 7 C.A. (Part 11) 29 at 39). With the above, a definite agreement exists, with very certain terms that are final in concept. The offer made by the respondent herein was certainly an expression of willingness to enter into a contract based on the terms contained in Exhibit 13 and it became binding on the appellant after it signified its acceptance of the terms as contained in Exhibit 15. One can safely say that the conditions contained in Exhibit 13 are but an integral part of the legal relationship created in the contract, which becomes binding on the parties (Sapara v University College Hospital Board of Management (1988) 4 NWLR (Part 86) 58 at 72). In Exhibit 13, the offer made for the advance of the overdraft is on condition that the interest chargeable on it shall be computed at 13% bank rate. Exhibit 30, just like Exhibit 31, has as its first clause a condition requiring the respondent to vary the rate of interest from time to time on the money secured as overdraft or the balance of it in the appellant’s account, either before or after any judgment is obtained in respect of the balance due and unpaid of the...
overdraft. That clause reads thus:

“The borrower hereby covenants with the bank to pay to the bank on demand the sums secured by this Deed of Mortgage and also as well after any judgment to pay interest on the balance of the said current account and or any other account and on all monies whatsoever at any time owing to the bank at the rate of interest per annum from time to time stipulated by the bank and payable monthly or at such other rates and at such other times as the bank may from time to time determine PROVIDED ALWAYS that if the interest or any interest payable on any arrears of interest capitalised under this present proviso shall remain unpaid for two weeks after the day on which the same ought to have been paid then and in every such case the interest so in arrear shall as from the day on which the same ought to have been paid be added for all purposes to the balance of moneys hereby secured (unless the bank shall otherwise by writing expressly elect) and shall thenceforth bear interest payable at the rate and on the day aforesaid and all the covenants and provisos contained in these presents and rules of law or equity in relation to interest on the said balance shall equally apply to interest on such arrears.”

The appellant did agree to this term. However, Exhibit 30 was only upstamped to cover the N400,000 secured and the property so upstamped was earlier on 3 November, 1983 used as security to secure another loan/overdraft. That deed of legal mortgage was duly executed on 3 November, 1983 and only upstamped on 22 January, 1988 in fulfilment of condition 4(a) and (b) contained in Exhibit 13. Can it, therefore, be really contended that by upstamping Exhibit 30, the appellant is presumed to have bound itself with the term contained in clause 1 therein, bearing in mind that that clause was made applicable in 1983 in respect of a different contract entered into between the appellant and the respondent? It seems to me clear that to apply the rate of interest determined by the respondent in reliance on clause 1 of Exhibit 30 is to simply recall a clause in retrospect and apply it as binding between the parties. The contract between the appellant and the respondent only came into effect on 1 August, 1985. To bring in a term agreed upon on 3 November, 1983 and make it applicable to the contract at hand, therefore, is a complete novation since what was required to be done in respect of Exhibit 30 was to have it upstamped to
cover the sum of N400,000, which was accordingly done. It is my view, therefore, that the first clause of Exhibit 30 cannot by any shred of the imagination be made applicable to the present contract since the appellant, in signing the deed of legal mortgage on 3 November, 1983, did not contemplate that the terms therein contained would be made applicable to any contract that was never contemplated by the parties. In any event, both parties did not, upon signing Exhibit 13, recall Exhibit 30 for further fresh execution with the view of incorporating the clauses therein, contained as part of the conditions for the granting of the overdraft. My conclusion is that clause 1 of Exhibit 30 is inapplicable as an integral part of Exhibit 13 to justify the respondent’s claim for 34% interest on the overdraft it granted.

Be that as it may, Exhibit 31 was also executed by the appellant as a condition that must be fulfilled in order that the contract contained in Exhibit 13 becomes binding on the parties. Exhibit 31 is a deed of legal mortgage executed by the appellant on 10 December, 1985 and it contains the same clause as clause 1 of Exhibit 30 in its corresponding clause 1. Clause 1, as I earlier on said, allows the respondent to determine the applicable interest rate on the overdraft in spite of the interest rate of 13% stipulated in Exhibit 13. The respondent herein claimed an interest rate of 34% in its counter-claim. The claim of the respondent is, therefore, one of the two claims a party to a contract could make, the other being a claim for interest based on statute and conferred on the court to exercise at its discretion (see Ekwunife v Wayne (West Africa) Ltd (1989) 5 NWLR (Part 122) 422 at 445, 452 and 455). A claim of interest which antedates judgment, being a claim as of right as pleaded by the respondent, can be awarded where it is proved (see Berliet (Nigeria) Ltd v Kachalla (1995) 9 NWLR (Part 420) 478 at 500; Hinma Merchant Ltd v Aliyu (1994) 5 NWLR (Part 347) 667 at 676-677).

Exhibit 31 was, with respect to learned Counsel for the appellant, an integral part of Exhibit 13. It cannot be a new
a document introduced by the respondent in support of and giving effect to the rights created under the contract entered into and contained in Exhibit 13 as contended by learned Counsel for the appellant. It is by no means such a document contemplated by the Supreme Court at 306 in Sapara v University College Hospital Board of Management (referred to supra). Exhibit 31 was executed as part and parcel of Exhibit 13 and must be read conclusively. The appellant, when executing Exhibit 31, knew or read clause I thereof. In it, the 13% interest rate fixed and chargeable on the overdraft contained in Exhibit 13 is made subject to variation from time to time, as the respondent would determine. Exhibit 31 is not a new document. It is a document specifically mentioned in Exhibit 13 and in respect of which the appellant, having no reason to differ on the clauses contained therein (including the clause on the power of the respondent to determine from time to time the rate of interest chargeable on the overdraft), executed same. Thus, Exhibit 13 remained extant since, by executing Exhibit 31, the appellant was thereby bound by the terms and conditions stipulated therein (see Allied Bank Nigeria Ltd v Akubeze (1997) 6 NWLR (Part 509) 374 at 403–404; Ezeugo v Ohaneyere (1978) 6–7 SC 171). It should be borne in mind that the appellant, without compulsion and clearly under no mistake or misrepresentation, signed Exhibit 31. It gave its full backing and agreement to be bound by the contents of the Exhibit. It cannot now be heard to resile from the contents and the court below was clearly right in giving full weight to Exhibit 31 in arriving at its decision.

The clear implication of clause 1 of Exhibit 31 is that the interest rate fixed at 13% is not static or constant. Thus, the determination of the applicable or reigning interest rate from time to time was left at the discretion of the respondent. The term obtained in clause 1 of Exhibit 31 is similar to the terms construed by the Supreme Court in U.B.N. Plc v Ozigi (1994) 3 NWLR (Part 333) 385. I am not persuaded by the argument of learned Counsel for the respondent that the Ozigi case is distinguishable from this case in that, in the
former case, both the interest rate fixed and the power to vary it were contained in the same deed of legal mortgage. True, in this case the interest rate fixed at 13% is contained in Exhibit 13 while the discretion conferred on the appellant to vary the rate of interest from time to time obviously, as circumstances dictate, is incorporated in Exhibit 31. The difference of this case and the Ozigi case in my view lies not in the substance but the form. Although Exhibit 31 fixed the rate of interest, nevertheless, the appellant had sufficient time and did study Exhibit 31. It arrived at a decision to execute Exhibit 31 out of its volition. It saw clause 1 and accepted to be bound by it. It will, therefore, be wrong for the appellant, after accepting to be bound by the terms in Exhibit 31, to turn round and reject clause 1 obviously after having enjoyed the overdraft. Thus, whether the fixed interest rate and the discretion to vary the applicable interest rate are contained in different documents as in this appeal, or in one document, as in the Ozigi case, makes no difference since what is of paramount importance is the manifestation of parties to be bound by the terms and conditions agreed upon.

I should perhaps point out that in Nigeria the power to fix the prime lending rates is statutorily vested in the Central Bank of Nigeria. Section 15 of the Banking Act now Cap 28 of the Laws of the Federation of Nigeria, 1990, empowers the Central Bank to determine from time to time prime lending rates, which all commercial banks are bound to comply with and fix their respective interest rates within the range determined by the Central Bank (see Koiki v First Bank Plc (1994) 8 NWLR (Part 365) 665 at 671).

The respondent has pleaded in its paragraph 2 of the counter-claim the reigning interest rate of 34%. Exhibits 30 and 31 were tendered in evidence. As well, Exhibits 23 and 25, being the statements of account of the appellant were tendered. In Exhibit 25, the changing applicable rates of interest were reflected at the bottom of some of the pages at the right side thereof. This shows clearly that notice of the
determination of the reigning interest rate was always communicated to the appellant (see *U.B.N. Plc v Sax (Nigeria) Ltd* (1994) 9 SCNJ 1 at 15). Having regard to what I have said above, I am of the view that the learned trial Judge was right in awarding interest at the rate of 34% on the sum claimed by the respondent from 1 October, 1993 to the date of judgment.

On the post-judgment interest rate of 21%, the learned trial Judge found as follows:

“On the counter-claim, I find, from the evidence of DW2, that as at 20 September, 1993, the plaintiff was owing the defendant the sum of N1,418,076.10 and this is supported by Exhibit 25 page 66. The plaintiff, who is the defendant to the counter-claim, did not challenge Exhibit 25 to show that it was not true, or the amount stated is not correct. Nor did he challenge or contradict the evidence of DW2. I, therefore, accept the evidence of DW2 as true and Exhibit 25 as the correct amount owed to the plaintiff in the counter-claim. Therefore, judgment is entered in favour of the counter-claim in the sum of N1,418,076.10, with the interest at bank rate of 34% from 1 October, 1993 to the date of judgment, and 21% interest from the date of judgment until the whole debt is liquidated.”

With the finding of the learned trial Judge in the sum of N1,418,076.10, the said sum, together with its accrued interest, becomes a judgment debt (see *Wayne (West Africa) Ltd v Ekwunife* (1989) 12 SCNJ 99 at 118). It is now settled law that the power to award interest on a judgment debt rests on a different principle. It is awarded at the discretion of the court upon pronouncing the judgment and with effect from that date (see *Wayne (West Africa) Ltd v Ekwunife* (cited supra) at 119). Interest on a judgment debt is provided for in various rules of court and may vary depending on which rules of court are applicable. Of course, parties may agree to enter into contract and bind themselves to pay an agreed interest rate. However, the circumstances under which the learned trial Judge granted the 21% interest on the judgment debt is made otherwise than as an interest rate agreed upon by parties. The interest rate the respondent claimed in its counter-claim is 34%. However, the learned trial Judge did not grant the respondent the interest rate it claimed. He
equally did not say why he did not grant to the respondent
the interest rate it claimed. He simply granted “21% interest
(rate) from the date of judgment until the whole debt is
liquidated”. I am convinced beyond doubt that the learned
trial Judge granted the 21% interest rate on the judgment
debt in his own discretion. I should stress that the 21% inter-
est rate on the judgment debt granted by the learned trial
Judge was not claimed by the respondent. Learned trial
Judge did not also say why he granted a lesser interest rate
than what the respondent claimed. Evidently, therefore, the
learned trial Judge was acting under his discretion in making
the award. In Plateau State, the power of a trial Judge to
award interest rate on a judgment debt is regulated by Order
40 rule 7 of the Plateau State High Court (Civil Procedure)
Rules, 1987. That rule provides:–

“The court at the time of making any judgment or order, or at any
time afterwards, may direct the time within which the payment or
other act is to be made or done, reckoned from the date of the
judgment or order, or from some other point of time, as the court
thinks fit, and may order interest at a rate not exceeding ten per
centum per annum to be paid upon any judgment, commencing
from the date thereof or afterwards, as the case may be.”

I hardly need to emphasise that the above rule has not been
complied with. The learned trial Judge has no power to
award 21% interest rate on judgment debt (see National
Employers Mutual General Insurance Ass. Ltd v Martins
(1969) 1 N.M.L.R. 236 at 241; Hallco Ltd and another v
The award of 21% interest rate on the judgment sum, having
been done far in excess of the rate provided for by Order 40
rule 7 aforesaid, cannot be sustained. Consequently, the
award of 21% interest is not valid as it is not sustainable in
law. Issue (iii) in the appellant’s brief is answered in the
affirmative while issue (iv) is answered in the negative.
Which is to say that in issue 2 identified by the respondents,
the answer is that, whereas the award of 34% pre-judgment
interest rate is valid and justified, the award of 21% interest
rate on the judgment debt, in the circumstances it was
awarded by the learned trial Judge is illegal and therefore void.

The third and last issue posed the question whether the appellant is indebted to the respondent and whether the respondent was entitled to judgment on the counter-claim. On this issue, it was submitted for the appellant in his brief of argument that the court below was in error in entering judgment for the respondent and in dismissing the appellant’s claim. That there was no binding agreement on the sharing of the money realised from the sale of the iron pipes between the appellant and the University of Jos in the ratio of 45% and 55% respectively. It was argued that, short of an authority from the appellant to respondent, mandating it to so share the proceeds, the latter had no power to do so. It was submitted that the respondent, having arrived at the sum it claimed by computing its entitlement on a wrong interest rate, the claim of the respondent so formulated was wrong and unfounded. We were urged to allow the appeal on this ground.

On the side of the respondent, it was submitted that the claim of ₦1,418,076.10 was substantiated. Exhibits 1 and 25 were relied upon to establish that the appellant’s account was in debit to the amount claimed as at 27 September, 1993 and that the exhibits were not impugned at all. A good narration of the facts which gave rise to the sharing was admirably presented. It was submitted that, having regard to the evidence before the court below, that court was right in dismissing the appellant’s claim and entering judgment for the respondent on its counter-claim. We were, therefore, urged upon to answer issue 3 in the affirmative.

The answer I arrived at in the consideration of the first issue for determination has effectively answered this issue. It was a panorama which gave a complete answer to this issue. After a thorough consideration of issue 1, my unequivocal answer was that the appellant agreed to a sharing formula of 32.5% and 67.5% between it and the University of Jos in sharing the proceeds from the sale of the iron pipes as is
clearly reflected in Exhibit 17A. The respondent, though not expressly mandated by the appellant, worked out a more favourable sharing formula ensuring therein that the appellant got a higher percentage. That formula gave the appellant an enhanced ratio of 45% (see Exhibit 18). The appellant in Exhibits 19 and 20 referred to the payment that was to be made in its account and that of the university “as per agreement”. It also drew the attention of the respondent to the “previous meetings with university authority and the former bank manager”, who represented the respondent. The appellant equally wrote to the respondent, seeking to know how much of the total proceeds from the sale of the iron pipes was made, “to Edilco’s account and also the University of Jos”. Implicit in the above is that a sharing formula was agreed upon. That formula is 67.5% and 32.5%, as reflected in Exhibit 17A. If, instead of receiving 32.5%, the appellant got 45% as a result of the benevolence of the respondent, I cannot see any injustice that enures to the appellant even if the respondent was not acting as the agent of the appellant. No miscarriage of justice was subsequently occasioned when the learned trial Judge accepted as a fact that the appellant’s share is 45%.

Furthermore, Exhibit 25 did show the debit balance of the appellant standing at ₦1,418,076.10 as at 27 September, 1993 after the appellant’s share of 45% was credited to its account and accordingly utilised in reducing its outstanding indebtedness in relation to the overdraft. The finding of the learned trial Judge at 90 lines 8–13 appears to be well founded, given the state of the pleadings and the evidence led. The finding is as follows:–

“On the counter-claim, I find, from the evidence of DW2, that as at 20 September, 1993, the plaintiff was owing the defendant the sum of ₦1,418,076.10 and this is supported by Exhibit 25 page 66. The plaintiff who is the defendant to the counter-claim did not challenge Exhibit 25 to show that it was not true or the amount stated is not correct.”

The learned trial Judge was, therefore, right in my view in his finding that the appellant was indebted to the respondent.
and he was equally correct in entering judgment for the respondent on its counter-claim. This is answered in the affirmative.

Having reached my decisions on the issues as reflected in this judgment, the appellant herein has succeeded on the fourth issue for determination appearing in his brief of argument. Consequently, the award of 21% interest rate on the judgment debt, having been made contrary to Order 40 of the Plateau State High Court (Civil Procedure) Rules, 1987, is hereby set aside. All other issues are resolved against the appellant. The judgment of Ahinche J in Suit No. PLD/317/91 dated 30 January, 1996 is hereby affirmed, except as it affects the payment of 21% interest rate on the judgment debt, which is accordingly set aside.

Having regard to the fact that the appellant has succeeded in part, I feel it is expedient not to make any order as to costs. Consequently, I make no order as to costs.

MUHAMMAD JCA: I have had the opportunity of reading before now the lead judgment just delivered by my learned brother, Mangaji JCA. I agree with his reasoning and conclusion. I abide by the consequential orders made in the lead judgment, including the order as to costs.

UMOREN JCA: I have read in draft the judgment of my learned brother, I.A. Mangaji JCA, just delivered. I agree with his reasoning and conclusion. I abide by the consequential orders made by him, including the order as to costs.

Appeal allowed in part.
Union Bank of Nigeria Plc and another v Ayodare and Sons Nigeria Limited and another

COURT OF APPEAL, ABUJA DIVISION
MUSDAPHER, BULKACHUWA, ODUYEMI JJCA
Date of Judgment: 13 APRIL, 2000

Banking – Loan and overdraft facilities – Mortgage as security for – Consent to mortgage obtained by debtor – Consent not obtained from appropriate authority – Effect

Land Use Act – Principle of ex turpi causa non oritur actio – Wrongdoer obtaining benefit from same and resiling from agreement – Whether permissible – Section 26 of the Land Use Act

Land Use Act – Right of occupancy – Alienation of – Consent not issued by appropriate authority – Consent given by a person who cannot show that the authority has been delegated to him – Delegatus non potest delegare

Mortgage – Alienation of land – Conditional agreement prior to receipt of Governor’s consent – Whether efficacious

Mortgage – Alienation of land – Principle of ex turpi causa non oritur actio – Whether applicable under Land Use Act

Mortgage – Right of occupancy – Alienation of – Consent signed by Lands Officer instead of Governor – No evidence of delegation – Effect

Facts

The plaintiffs, as per paragraph 21 of their amended statement of claim, claimed the following reliefs jointly and severally against the defendants:

“(i) A declaration that the plaintiffs could not be indebted to the first defendant to the sum of ₦307,880.25 or any sum at all, when the plaintiffs should have outstanding credit balance as a result of several payments which are in excess of the limited ₦45,000 covered by the purported two deeds of legal mortgage.
(ii) A declaration that the purported deed of legal mortgage dated 2 September, 1980 and 7 July, 1981, registered as No. 78 at Page 78 in Vol. XII (misc) and No. 81 or Page 81 in Vol. XB (misc) at the Lands Registry Ilorin in respect of plaintiffs’ landed property in Lokoja and Kabba respectively be declared null and void and of no effect in that:

a. It was not duly executed as required by law.

b. No consent was sought and obtained from the appropriate authority and Oyi Local Government Council (or B.I.K.I.G.A.) before the purported deeds of legal mortgage were executed.

c. That the purported consents dated 9 July, 1980, 8 August, 1980 and 2 August, 1989 contained in the two deeds of legal mortgage were not granted by the Governor or appropriate authority or the Local Government as required by law.

(iii) A declaration that the purported two deeds of legal mortgage dated 2 September, 1980 and 7 July, 1981 first above described on which the first defendant sought reliance to compute or charge her interest and arrived at $307,680.25 as at 1989, be declared null and void in that there was no stipulated interest or any interest rate contained therein as basis for the computation of other subsequent interest of charges.

(iv) A declaration that the first defendant cannot unilaterally and arbitrarily increase the banking interest payable on any loan, overdraft or banking facilities granted the plaintiffs without the knowledge and consent of the plaintiffs.

(v) An order of perpetual injunction restraining the first defendant by itself, its servants, agents including the second defendant or otherwise howsoever from auctioning, selling, disposing or otherwise dealing with any rights, title or interest or advertising for sale the plaintiffs’ two landed property situate and lying at Odo-Ero Quarter, Kabba and at Lokoja covered by Customary Right of Occupancy No. 0058 dated 13/4/1977 and Statutory Right of Occupancy No. 1087 dated 7/12/1972 respectively.”

The first and second plaintiffs are customers of the first defendant, a bank. The first plaintiff is a limited liability company via the second plaintiff, its managing director and its alter ego who approached the first defendant for loan facilities. An agreement was reached and deeds of legal
mortgage were agreed to be executed as security for the loan and overdraft facility. Accounts were opened and operated by the plaintiffs. The plaintiffs took other loans in the course of operating the account. In 1989, the appellants claimed that the respondents were in default of payment and were indebted to it to the tune of ₦307,680.25 and therefore advertised in the *New Nigerian Newspapers* of 6 November, 1989, the two landed properties covered by the purported deeds of legal mortgage for auction in the purported exercise of its power of sale contained in two deeds of legal mortgages.

The respondents in response instituted this action at the lower court against the appellant and one Alhaji Mohammed Momoh (two auctioneers) seeking the above recited reliefs.

In the course of the trial after the settlement of pleadings, the second respondent testified on behalf of all the respondents. For the defence only one witness testified. Both Counsel filed written addresses. In his judgment delivered on 21 September, 1995, the learned trial Judge gave judgment in favour of the respondents against the appellants, particularly he granted declaration (ii), (iii) and (iv) and also granted injunctive reliefs sought by the respondent against the appellants. This is an appeal by the bank against the decision. appellant’s Counsel hinged his argument on the principle of *ex turpi causa non oritur actio*. That is that the respondents having obtained a benefit could not turn round and say the transaction leading to the obtaining of the benefit was void because the consent which he procured was not from the appropriate authority, so much so when the consents were obtained by the respondents. He argued that the decision in *Ajilo’s* case had been overruled by the Full Supreme Court in *Awojugbagbe Light Industries Ltd v Chinekwe* (1995) 4 NWLR (Part 390) 379.

It was further submitted that the Land Use Act was not meant for a party after obtaining a benefit to turn round and say the transaction leading to the obtaining of the benefit
was void because the consent which he procured was not from the appropriate authority. In the instant case, it was the respondent who produced the “consents” to mortgage his properties as security for the loans. It is submitted that the respondent cannot turn round and claim that the transaction was void by invoking the provisions of the Land Use Act. It was argued further that the maxim *nullus commodum capere potest de injuria sua propria* applied.

The learned Counsel for the respondents on the other hand argued that the “consent” upon which the deeds were purportedly executed were not obtained from the relevant appropriate authority as demanded under the Land Use Act. It is mandatory under the Land Use Act for the consent of the appropriate authority, that of the Governor or the Local Government Council must first be obtained before a holder of a right of occupancy can properly convey the land in question. The trial Judge was therefore fully justified in applying *Ajilo*’s case. It was further argued that by section 22 of the Land Use Act, it is mandatory for the consent of the Governor to be first sought and obtained before any holder of a statutory right of occupancy can alienate the land in question by mortgage or by any other instrument howsoever. In the case of Exhibit D1, the consent was signed by the Lands Officer and there was no evidence of any instrument signed by the Governor authorising him.

He further argued that the maxim *ex turpi causa non oritur actio* was a common-law maxim and could not override statutory provisions as was clearly demonstrated in *Ajilo*’s case.

**Held** –

1. By the provision of the Land Use Act, a holder of a right of occupancy, statutory or non-statutory, is prevented from alienating his right of occupancy or any part thereof by assignment, mortgage, transfer of possession, sub-lease or otherwise without the consent of the appropriate authority first had and obtained. Section 26 of the
Land Use Act expressly provides that any transaction which purports to confer or vest in any person any interest or rights over land other than in accordance with the provisions of section 22(1) shall be null and void.

2. Consent not issued by the appropriate authorities as stipulated under the provisions of the Land Use Act is invalid as the provision of the Act are mandatory and must be strictly complied with. In the instant case the consent to mortgage was signed by a Lands Officer for the Permanent Secretary for the Honourable Commissioner, an outright contravention of section 26 of the Land Use Act, which renders the whole transaction void.

3. A conditional agreement executed by the parties prior to the receipt of the Governor’s consent is efficacious. In other words, it is not illegal to execute documents in preparation of the transaction before the receipt of the consent.

4. Though it is despicable and morally wrong for a party who had initiated wrongdoing and after obtaining benefit to resile from the same, yet the law under the Land Use Act must be applied. In the instant case the trial Judge was right to have held that he was bound by the decision in Ajilo’s case to the effect that the maxim *ex turpi causa non oritur actio* cannot apply.

*Appeal dismissed.*

**Cases referred to in the judgment**

- Adedeji *v* N.B.N. Ltd (1989) 1 NWLR (Part 96) 212
- Adetuyi *v* Agbojo (1997) 1 NWLR (Part 484) 705
- Bucknor-Maclean *v* Inlaks Nig. Ltd (1980) 8–11 SC 1
- F.M.B.N. *v* Babatunde (1999) 12 NWLR (Part 632) 683
- Iragunima *v* Uchendu (1996) 2 NWLR (Part 428) 30
a  *Oil Field Supply Centre Ltd v Johnson* (1986) 5 SC 310; (1987) 2 NWLR (Part 58) 625  
*Savannah Bank Ltd v Ajilo* (1989) 1 NWLR (Part 97) 305  
b  *Solanke v Abed* (1962) 1 All NLR (Part 1) 230; (1962) NRNLR 92  
*Ugochukwu v C.C.B. (Nig.) Ltd* (1996) 6 NWLR (Part 456) 524  
c  *Foreign*  
*Buswell v Godwin* (1971) 1 All ER 418  
*Denning v Edward* (1961) AC 245  
d  *Nigerian statute referred to in the judgment*  
Land Use Act, 1978, sections 22(1), 26  
e  *Counsel*  
For the appellants: Awomolo, S.A.N. (with him Mohammed)  
For the respondents: Izinyon, S.A.N. (with him Ogbeide (Miss) and Obateru)  
f  *Judgment*  
**MUSDAPHER JCA:** *(Delivering the lead judgment)* This is an appeal from Kogi State High Court in Suit No. KWS/53/89 holden at Lokoja. The plaintiffs, as per paragraph 21 of their amended statement of claim, claimed the following reliefs jointly and severally against the defendants:—  
g  “(i) A declaration that the plaintiffs could not be indebted to the first defendant to the sum of N307,880.25 or any sum at all, when the plaintiffs should have outstanding credit balance as a result of several payments which are in excess of the limited N45,000 covered by the purported two deeds of legal mortgage.  
(ii) A declaration that the purported deed of legal mortgage dated 2 September, 1980 and 7 July, 1981, registered as No. 78 at Page 78 in Vol. XII (misc) and No. 81 or Page 81 in Vol. XB (misc) at the Lands Registry Ilorin in respect of
plaintiffs’ landed property in Lokoja and Kabba respectively be declared null and void and of no effect in that:

- a. It was not duly executed as required by law.
- b. No consent was sought and obtained from the appropriate authority and Oyi Local Government Council (or B.I.K.I.G.A.) before the purported deeds of legal mortgage were executed.
- c. That the purported consents dated 9 July, 1980, 8 August, 1980 and 2 August, 1989 contained in the two deeds of legal mortgage were not granted by the Governor or appropriate authority or the Local Government as required by law.

(iii) A declaration that the purported two deeds of legal mortgage dated 2 September, 1980 and 7 July, 1981 first above described on which the first defendant sought reliance to compute or charge her interest and arrived at N307,680.25 as at 1989, be declared null and void in that there was no stipulated interest or any interest rate contained therein as basis for the computation of other subsequent interest of charges.

(iv) A declaration that the first defendant cannot unilaterally and arbitrarily increase the banking interest payable on any loan, overdraft or banking facilities granted the plaintiffs without the knowledge and consent of the plaintiffs.

(v) An order of perpetual injunction restraining the first defendant by itself, its servants, agents including the second defendant or otherwise howsoever from auctioning, selling, disposing or otherwise dealing with any rights, title or interest or advertising for sale the plaintiff’s two landed property situate and lying at Odo-Ero Quarter, Kabba and at Lokoja covered by Customary Right of Occupancy No. 0058 dated 13 April, 1977 and Statutory Right of Occupancy No. 1087 dated 7 December, 1972 respectively.”

The brief facts of the case as can be gleaned from the pleadings and evidence are not seriously disputed. The first and second plaintiffs are customers of the first defendant, a bank. The first plaintiff is a limited liability company via the second plaintiff, its managing director and its alter ego, who approached the first defendant for loan facilities. An agreement was reached and deeds of legal mortgage were agreed to be executed as security for the loan and overdraft facility.
Accounts were opened and operated by the plaintiffs. The plaintiffs took other loans in the course of operating the account. In 1989, the appellants claimed that the respondents were in default of payment and were indebted to it to the tune of N307,680.25 and therefore advertised in the New Nigerian Newspapers of 6 November, 1989, the two landed properties covered by the purported deeds of legal mortgage for auction in the purported exercise of its power of sale contained in two deeds of legal mortgages.

The respondents in response instituted this action at the lower court against the appellant and one Alhaji Mohammed Momoh (two auctioneers) seeking the above recited reliefs.

In the course of the trial after the settlement of pleadings, the second respondent testified on behalf of all the respondents. For the defence only one witness testified. Both Counsel filed written addresses. In his judgment delivered on 21 September, 1995, the learned trial Judge gave judgment in favour of the respondents against the appellants, particularly he granted declaration (ii), (iii) and (iv) and also granted injunctive reliefs sought by the respondent against the appellants. This is an appeal by the bank against the decision. In the notice of appeal, six grounds of appeal were filed and from the grounds of the appeal aforesaid, the learned Counsel for the appellant has formulated and submitted two issues for the determination of the appeal. These are:

1. Whether the decision of the Supreme Court as contained in the case of Savannah Bank Ltd and another v Ajilo and another (1989) 1 SCNJ 213 or (1989) 1 NWLR (Part 97) 305 at 307 relating to the interpretation of the Land Use Act and non-invocation of the maxim *ex turpi causa non oritur actio* on a plaintiff who fails to comply with the law and wants to use the same law in his favour as a defence is still a good law in Nigeria today and ought to have been followed by the trial Judge.

2. Whether or not it is correct for the trial court on the peculiar facts of this case to declare the deeds of legal mortgage (Exhibits 1 and D1) null and void.
The respondent also submitted similar issues for the determination of the appeal.

It is evident from the record of proceedings that it was the first respondent who was eager to take the loans that obtained the necessary “consents” for the deeds of legal mortgage in the two properties aforesaid. The learned trial Judge said in his judgment:

“I feel tempted to invoke the maxim (ex turpi causa non oritur actio) against the plaintiff in this case. He obtained consents which turned out to be non-events. But I am bound by the authority in Ajilo’s case. It appears as if equity must remain silent on the reserve bench while the Land Use Act is actively at play.”

It must also be emphasised that the learned trial Judge did not determine whether the respondents were indebted to the appellants or not. He held in particular:

“. . . I cannot say that the plaintiffs are not indebted to the first defendant. Having said this much, I should go further to say that the first defendant has a duty to show the amount for which the plaintiffs are indebted to her. The first defendant has to show that right of foreclosure by way of sale has accrued to her. See section 20 of the Conveyancing Act, 1981. The first defendant has to show that it has given notice of sale to plaintiffs before the date of the advertised sale. These, the first defendant has not done. The sum that is outstanding against the plaintiffs remains in the air. The first defendant did not deem it wise to tender the statement of account(s) of the plaintiffs.

The plaintiffs, whose two houses must be sold in the circumstances desires by the first defendant ought to know the real outlay against them before sale. This should be so after the admitted ‘exportation’ of the sum of N75,000 in the second plaintiff’s fixed deposit account to pay off the loan and overdraft as admitted by the first defendant on page of Exhibit 4 . . .”

I must point out at this juncture that there is no appeal against the findings of the learned trial Judge as contained in the last preceding paragraph. Accordingly, this appeal will be considered on the basis that the findings are correct and binding. The appeal will accordingly be discussed only on the issues legitimately distilled from the grounds of appeal.
and concerned the validity of the deeds of the legal mortgage.

I shall now discuss the first issue.

It is submitted by the appellant’s Counsel that there is no dispute whatever that the respondents took loans from the appellant bank and, as security for the loans, the respondent tendered two landed properties and executed deeds of legal mortgages after obtaining the consent. However, the respondents claimed that the deeds were not executed as required by the law and that the consents secured by the respondents were not granted by the appropriate authority as envisaged by the Land Use Act. The learned trial Judge agreed with the respondents that the deeds were void by relying on Adedeji v N.B.N. Ltd (1989) 1 NWLR (Part 96) 212; Savannah Bank Ltd v Ajilo (1989) 1 NWLR (Part 97) 305 at 324.

It is submitted that the decision in Ajilo’s case was overruled by the full court in Awojugbagbe Light Industries Ltd v Chinukwe (1995) 4 NWLR (Part 390) 379 (see also Adedeji v N.B.N. Ltd and another (1989) 1 NWLR (Part 96) 212 at 226).

It is further submitted that the Land Use Act was not meant for a party after obtaining a benefit to turn round and say the transaction leading to the obtaining of the benefit was void because the consent which he procured was not from the appropriate authority. In the instant case, it was the respondent who produced the “consents” to mortgage his properties as security for the loans. It is submitted that the respondent cannot turn round and claim that the transaction was void by invoking the provisions of the Land Use Act. It is argued further that the maxim *nullus commodum capere potest de injuria sua propria* applied (*vide* Buswell v Godwin (1971) 1 All ER 418 at 421; Oil Field Supply Centre Ltd v Joseph Lloyd Johnson (1986) 5 SC 310 at 339–340; (1987) 2 NWLR (Part 58) 625).

It is further submitted that it will be inequitable to allow the respondent who personally applied for the “consent” and tendered them to the appellants which the learned trial Judge
found to be a “non-event” to now turn round and use their illegality to their own advantage (vide Adedeji’s case (supra)). See also Solanke v Abed (1962) 1 All NLR (Part 1) 230; (1962) NRNLR 92).

The learned Counsel for the respondents on the other hand argued that the “consent” upon which the deeds were purportedly executed were not obtained from the relevant appropriate authority as demanded under the Land Use Act. It is mandatory under the Land Use Act for the consent of the appropriate authority, that of the Governor or the Local Government Council must first be obtained before a holder of a right of occupancy can properly convey the land in question (see Adedeji v N.B.N. Ltd (1989) 1 NWLR (Part 96) 212). The trial Judge was therefore fully justified in applying Ajilo’s case. It is further argued that by section 22 of the Land Use Act, it is mandatory for the consent of the Governor to be first sought and obtained before any holder of a statutory right of occupancy can alienate the land in question by mortgage or by any other instrument howsoever. In the case of Exhibit D1, the consent was signed by the Lands Officer and there was no evidence of any instrument signed by the Governor authorising him (see Adedeji’s case (supra)).

It is further argued that the decision in Ajilo’s case is still good law since it has not been overruled. The decision in Awojugbagbe’s case is distinguishable from the Ajilo’s case.

It is further argued that the maxim ex turpi causa non oritur actio and commodum capere potest de injuria sua propria are common-law maxims and cannot override statutory provisions as the Supreme Court clearly demonstrated in Ajilo’s case. It is further argued that the learned trial Judge was right in rejecting the “consent” signed by the Lands Officer in relation to the statutory right of occupancy in that delegatus non potest delegare. In the absence of any instrument authorising the Lands Officer to issue the consent by the Governor, the Lands Officer cannot issue a valid consent (vide Adedeji v N.B.N. Ltd (supra)).
It is finally submitted that there was no valid consent to alienate the properties since there was no consent from the appropriate authority, the Governor or the Chairman of the Local Government Council (see *Adetuyi v Agbojo* (1997) 1 NWLR (Part 484) 705).

Now the question to be discussed is whether upon the peculiar facts of the case, the purported deeds of legal mortgage are invalid on the ground that the “consents” sought and obtained by the respondent to alienate the properties were not sought and obtained from the appropriate authority. By the provisions of the Land Use Act, a holder of a right of occupancy, statutory or non-statutory, is prevented from alienating his right of occupancy or any part thereof by assignment, mortgage, transfer of possession, sub-lease or otherwise without the consent of the appropriate authority first had and obtained. Section 26 of the Land Use Act expressly provides that any transaction which purports to confer on or vest in any person any interest or rights over land other than in accordance with the provisions of section 22(1) shall be null and void (see *Iragunima v Uchendu* (1996) 2 NWLR (Part 428) 30 at 52).

In his judgment, the learned trial Judge found as follows:–

“The next issue is whether the two deeds of legal mortgage – Exhibits 1 and D1 – are null and void. Exhibit 1 is a deed of legal mortgage on the second plaintiff’s property at Odo-Ero quarters, Kabba under a Certificate of Occupancy No. 005581 signed by the Kabba Local Government Authority on 13 April, 1997.

Section 21(b) of the Land Use Act, 1978, stipulated that approval to alienation shall be by the Local Government. The requisite consents in letters dated 8 August, 1980 and 2 August, 1989 attached to Exhibit ‘1’ were signed by Ag. Chief Lands Officer for Permanent Secretary and Director General respectively.

It appears that they have no nexus with Kabba Local Government or at least their nexus has not been shown. They cannot take over the functions of the Local Government as enjoined by section 21(b) of the Land Use Act 1978.

As for Exhibit D1, the property in question is at Lokoja covered by Statutory Right of Occupancy No. 1083. Section 22 of the Land
Use Act mandates that the consent of the Governor must be obtained to alienate or mortgage the same. . . . In the consent letter dated 9 July, 1980 attached to the deed, one Ola Dada, Ag. Chief Lands Officer signed for Permanent Secretary who acted for the Permanent Secretary who acted for the Honourable Commissioner.”

The learned trial Judge held that in both cases the maxim delegatus non potest delegare applied. He further opined that the consent was not issued by the appropriate authorities as stipulated under the provisions of the Land Use Act. I agree with him; the provisions of the Act are mandatory and must be strictly complied with (see Adedeji v N.B.N. Ltd (1989) 1 NWLR (Part 96) 212; Ugochukwu v C.C.B. (Nigeria) Ltd (1996) 6 NWLR (Part 456) 524; F.M.B.N. v Babatunde (1999) 12 NWLR (Part 632) 683).

This means in my view that the deeds are clearly caught by the provisions of section 26 of the Land Use Act. It reads:–

“Any transaction or any instrument which purports to confer on or vest in any person any interest or right over land other than in accordance with the provisions of this Act shall be null and void.”

This now brings me to Ajilo’s case; it is almost on all fours with the present case. There is no doubt that section 22 of the Land Use Act forbids a holder of a right of occupancy from alienating his right of occupancy or any part thereof without first obtaining the consent of the appropriate authority mandated under the Act, the Governor in respect of a statutory right of occupancy and the Local Government Council in respect of a customary right of occupancy. Section 26, as shown above, expressly declares null and void any transaction which does not conform with the provisions of section 22 of the Land Use Act. This was the decision in Ajilo’s case and, with respect to the learned Counsel for the appellant, the decision has not been overruled by the Supreme Court.

What the Supreme Court decided in Awojugbaghe’s case is that a conditional agreement executed by the parties prior to the receipt of the Governor’s consent is efficacious. In other
words, it is not illegal to execute documents in preparation of the transaction before the receipt of the consent (see Denning v Edward (1961) A.C. 245; Solanke v Abed (1962) NRNLR 92; (1962) 1 All NLR (Part 1) 230).

The learned Counsel for the appellants made heavy weather of these decisions. It seems to me that these decisions are clearly distinguishable from the facts of this case. In this case, there was no consent from the appropriate authority. There was no intention to obtain the consents. The deeds have been executed and delivered. It is of no moment that it was the respondent who obtained and tendered the consent.

Though it is despicable and morally wrong for a party who had initiated wrongdoing and after obtaining benefit to resile from the same, yet the law under the peculiar fact of the case must be applied. The learned trial Judge is accordingly right in my view to have held that he was bound by the decision in Ajilo’s case. I accordingly answer the first issue in the affirmative.

On issue 2, the learned Counsel for the respondents has raised a preliminary objection as to the competence of the issue. It is submitted that the matter did not feature in the judgment at all. The issue canvassed is to do with the designation of urban or non-urban and in relation to the landed properties. It seems to me that there is no dispute whatever, that Exhibit 1 was a Customary Right of Occupancy No. 005581 issued by Kabba Local Government Authority on 13 April, 1977, the approval to alienate the land was purportedly given by Ag. Chief Lands Officer for the Permanent Secretary. Exhibit D is a Statutory Right of Occupancy No. 1083 and the consent to alienate it was not signed or issued by the Governor. The question whether the properties were located in urban or non-urban areas did not arise in the judgment and therefore the consideration of the issue raised under this head is clearly irrelevant. I hold that the second issue is incompetent. I need not discuss any further the complaints under this head.
Before I part with this judgment, I may mention briefly though it is despicable and morally wrong for the respondent to raise the issue of the “consents” which he had obtained. The appellants ought to know that those consents were not from the respective appropriate authority as directed by the Land Use Act. The appellants should have checked before executing the deeds and parting with their money. I agree with the learned Counsel for the respondents that the maxim ex turpi causa non oritur actio cannot apply. Vide Ajilo’s case where the Supreme Court per Karibi-Whyte JSC stated that the express provisions of the Land Use Act make it undesirable to invoke the maxim and the equitable principle enshrined (Bucknor Maclean v Inlaks Nigeria Ltd (1980) 8–11 SC 1. See also the Adetuyi case (supra)).

As a matter of fact, I have alluded and reproduced part of the judgment in which the trial Judge held that the amount owed by the respondents was not certain. He also held that, since no notice of sale was issued to the respondents, the appellants’ desire to foreclose was premature. There is no appeal against these crucial findings, this appeal will be decided on the basis that these findings are correct and binding. From the above alone, the appellants cannot legitimately sell the properties of the respondents.

In the end the single valid issue submitted by the appellants, to wit whether Ajilo’s case has been overruled by the Supreme Court, must be answered against the appellants. I accordingly dismiss the appeal and affirm the decision of the trial court. The respondents is entitled to costs which I assess at ₦5,000 (Five Thousand Naira).

**BULKACHUWA JCA:** I agree with the reasons and conclusion reached in the lead judgment of my learned brother, Musdapher JCA, just delivered which I had the privilege of reading before now, and adopt them as mine.

I will only add by way of emphasis that the provisions of...
section 26 of the Land Use Act, which provides:–
“Any transaction or any instrument which purports to confer on or
vest in any person any interest or right over land other than in ac-
cordance with the provisions of the Act shall be null and void”

are clear and unambiguous. A holder of a right of occupancy
must obtain the consent of the appropriate authority, in this
instance, the Governor, before he can mortgage his property.
If he does so without the said consent the whole transaction
becomes null and void (Adedeji v N.B.N. Ltd (1989) 1
NWLR (Part 96) 212).

In the instant case, the consent to mortgage was signed by
a Lands Officer for the Permanent Secretary for the Hon.
Commissioner, an outright contravention of the above provi-
sions which renders the whole transaction void.

For the above and the reason given in the lead judgment I
find no reason to disturb the findings of the trial court. I
hereby affirm it, dismissing the appeal which lacks in merit
with cost of ₦5,000 (Five Thousand Naira) to the respon-
dent as assessed in the lead judgment.

ODUYEMI JCA: I have had the privilege of reading before
now the judgment of my learned Lord, Dahiru Musdapher
JCA, just delivered.

His Lordship, in his usually meticulous manner, has con-
sidered and dealt with the issues raised for determination in
this appeal.

I am in full agreement with the reasoning and conclusions
therein and I adopt them as mine. I dismiss the appeal.

I also abide by the consequential order as to costs.

Appeal dismissed.
Emmanuel Agbanelo v Union Bank of Nigeria Limited

SUPREME COURT OF NIGERIA

AYOOLA, KARIBI-WHYTE, KATSINA-ALU, KUTIGI, MOHAMMED JJSC

Date of Judgment: 14 April, 2000

Banking – Banker and customer relationship – Banker’s duty to exercise reasonable care and skill – Scope of duty – Need to effect customer’s instruction diligently

Banking – Bankers’ draft – Implications of – Obligations of the bank

Facts

Before the High Court of Bendel State, holden at Warri, the appellant claimed against the respondent general and special damages for a dishonoured cheque and damages for libel. The appellant, a businessman who was appointed a sole distributor of a biscuit manufacturing company, was a customer of the respondent. The appellant operated a current account with the respondent at its Warri branch in the name of EPACO (Nigeria) Marketing Company.

At the instance of the appellant, the respondent in April, 1986 issued a bank draft in favour of the manufacturers payable at the respondent’s branch in Surulere, Lagos. Upon presentation of the draft by the manufacturers for payment it was returned unpaid, endorsed “first signature irregular”. The appellant maintained that these words endorsed on the draft were defamatory of him and that the draft was negligently issued.

The respondent’s case was that the endorsement on the draft was not defamatory of the appellant, and that the issuance of the draft was not negligently done. However, the respondent’s sole witness testified that the refusal of Surulere branch of the respondent to honour the draft embarrassed the Warri branch of the respondent, and that the paying bank
The learned trial Judge, after merely restating the evidence in the case and arguments of Counsel, came to the conclusion that from the evidence the claim for libel had not been proved. Also, that the appellant’s case against the respondent had not been proved. He advanced no detailed reason why the claim for libel should be dismissed. However, with respect to the claim for negligence, his reason for dismissing the action were that the defendant was the Union Bank Nigeria Limited (Surulere Branch) not Union Bank Nigeria Limited. He concluded that there was no evidence that Union Bank Nigeria Limited (Warri Branch), the defendant, was negligent.

Aggrieved, the appellant appealed to the Court of Appeal which in a unanimous decision dismissed this appeal. Still dissatisfied, the appellant appealed to the Supreme Court.

Held –

1. The law is that a bank has a duty under its contract with its customer to exercise reasonable care and skill in carrying out its part with regard to operations within its contracts with its customers. The duty to exercise reasonable care and skill extends over the whole range of banking business within the contract with the customer. Thus, the duty applied to interpreting, ascertaining and acting in accordance with the instructions of the customer.

2. By its nature, a banker’s draft is a draft drawn by a bank upon itself. It contains an undertaking to pay the amount of the draft. Quite apart from the banker-customer relationship, a bank has a duty to a person on whose request it has agreed to issue a draft. In the discharge of that duty it must show care to ensure that the banker’s draft is properly issued and honoured.

Appeal allowed in part.
Cases referred to in the judgment

**Nigerian**

*Agbonmagbe Bank v C.F.A.O.* (1966) 1 All NLR 140
*Ajibade v Mayowa* (1978) 9–10 SC 1
*Akraine v Eshiett* (1977) 1 SC 89
*Balogun v N.B.N.* (1978) 3 SC 155
*Benson v Otubor* (1975) 3 SC 9
*Dumboe v Idugboe* (1983) 1 SCNLR 29
*Eghuna v Amalgamated Press* (1967) 1 All NLR 25
*Jammal Engineering v Wrought Iront* (1970) NCLR 295
*James v Mid-Motors Nigeria Co Ltd* (1978) 11–12 SC 31; (1978) 11 NSCC 536
*Kerewi v Bisiriyu Odugbesan* (1965) 1 All NLR 95
*L.C.C. v Unachukwu* (1978) 3 SC 199
*Okafor v Ikeanyi* (1979) Vol. 12 NSCC 43
*Okolo v Midwest Newspaper Corporation* (1977) NSCC 11
*Omonuwa v Wahabi* (1976) 4 SC 37
*Swiss-Nigeria Wood Industries Ltd v Bogo* (1970) 6 NSC 235
*Taiwo v Princewill* (1961) All NLR 240

**Foreign**

*Hadley v Baxendale* 9 Exch. 341; (1843–60) All ER Rep. 461
*H.L. Bolton (Engineering) Co. Ltd. v T.J. Graham and Sons Ltd.* (1956) 3 All ER 625
*Lennards Carrying Co. Ltd. v Asiatic Petroleum Co. Ltd* (1915) AC 705
*Lewis v Daily Telegraph Ltd* (1964) AC 234
*Liesbosch Dredger v SS Edison* (1933) AC 449
Selangor United Rubber Estates Ltd v Cradock (No. 3) (1968) 2 All ER 1073

Books referred to in the judgment

Crosswell et al Encyclopaedia of Banking Law at 21

McGregor on Damages (16ed) 1997

Judgment

AYOOLA JSC: (Delivering the lead judgment) This is an appeal from the decision of the Court of Appeal (Akintan Nsofor and Ige JJCA) dismissing the appellant’s appeal from a decision of the High Court of what was then known as Bendel State. The appellant, Mr Emmanuel Agbanelo, is referred to as “plaintiff” in this judgment. The respondent, Union Bank of Nigeria Limited, is also referred to as “the defendant” in this judgment.

In the High Court of Bendel State (as it then was) holden at Warri (now in the Delta State), the plaintiff sued the defendant claiming as contained in the further amended statement of claim which superseded his writ of summons “general and special damages for (the) dishonoured cheque” and damages for libel. The plaintiff in paragraph 32 of the further amended statement of claim itemised the losses he suffered as loss of profit and loss of trade as distributor. However, these are not by themselves causes of action. Having regard to paragraph 29 of the statement of claim in which negligence was averred and paragraphs 16 and 17 in which libel was averred, it would appear that the two causes of action in respect of which damages were claimed were defamation and negligence. Inelegantly drafted as the further amended statement of claim was, the High Court and the court below both proceeded on the footing that the plaintiff’s claims were for damages for negligence and libel.

The facts which gave rise to the plaintiff’s action were not much in dispute. The plaintiff, a businessman who was appointed a sole distributor of a biscuit manufacture company, was a customer of the defendant who were at all material
times bankers carrying on business of banking throughout the Federal Republic of Nigeria. At all material times the defendant had one of its branches in Warri at No. 8 Warri/Sapele Road, Warri, where the plaintiff operated a current account in the name and style of EPACO (Nigeria) Marketing Company.

At the request of the plaintiff, the defendant sometime in April, 1986, issued a bank draft in favour of the manufacturers payable at the defendant’s branch in Surulere. Upon presentation of the draft by the manufacturers for payment it was returned unpaid, endorsed “first signature irregular”. Claiming that these words endorsed on the draft were defamatory of him and that the draft was negligently issued, the plaintiff claimed damages.

Bazunu J, who heard the suit at the High Court, after merely rehearsing the evidence in the case and arguments of Counsel came to the following conclusions: In regard to the claim for libel, that from the evidence the claims for libel had not been proved and, in regard to the claim for negligence, that the plaintiff’s case against the defendant for negligence had not been proved.

Beyond stating that on the evidence the claim for libel has not been proved, the learned Judge did not proffer any detailed reasons in law why the claim for libel should be dismissed. However, in regard to the claim for negligence his reasons for dismissing the action, put in a nutshell, were that the defendant was “the Union Bank Nigeria Limited (Warri Branch)” and not “the Union Bank Nigeria Limited (Surulere Branch) nor the Union Bank Nigeria Limited”. The learned Judge reasoned thus:

“Thus for the plaintiff to succeed, he must prove that the defendant as stated in the claim was negligent. In other words that the act complained of was perpetrated by the Union Bank Nigeria Ltd, Warri Branch and that that act amounted to negligence on its part.”

Having so reasoned he reverted to his earlier finding that:

“There is no evidence that the defendant, that is Union Bank Nigeria Limited, Warri branch was negligent”
and dismissed the claim.

The plaintiff’s appeal to the Court of Appeal was dismissed on the following grounds: first, that the trial Judge was right in the conclusion that libel had not been proved; and, secondly, that in regard to the claim for negligence since there was no evidence that the Warri branch of the bank had been negligent, the trial Judge rightly dismissed the action. Nsofor JCA, who delivered the lead judgment of the Court of Appeal, went further to consider whether the action was properly constituted. He was of the view that because Union Bank of Nigeria Limited (Warri Branch) was put as the name of the defendant, Union Bank of Nigeria Limited was not sued, and the defendant sued was not a legal person. He held that the suit was not properly constituted. Nevertheless, he dismissed the suit. Akintan and Ige JJCA concurred.

On this further appeal four questions have arisen for determination, albeit with varying degrees of decisive importance, namely:–

(i) whether the words were in the circumstances of the case defamatory;

(ii) whether the High Court and the court below were right in treating branches of the Union Bank Nigeria Limited as separate entities and regarding the Warri branch of the bank, rather than the bank itself, as the defendant in the case;

(iii) whether the court below was right in determining whether the action was properly constituted when no such issue arose either at the trial or on the appeal, and

(iv) whether the dismissal by the High Court of the claim for negligence was rightly upheld by the court below.

As earlier stated, the trial Judge merely rehearsed the evidence in the case and concluded that the claim for libel was not established. The court below did a little better by setting out some principles of law relating to libel but, at the end of
the day without expressly stating how they have applied the principles to the facts of the case, merely concluded that the trial Judge’s conclusion was correct.

Learned Counsel for the plaintiff criticised the judgment of both courts on the ground that they failed to demonstrate adequate consideration of the evidence or of the submission of Counsel before the claim for libel was rejected.

What amounts to adequate consideration of the evidence in a case should depend on the nature of the issues raised. Where the facts are largely not in dispute, it cannot be regarded as an essential part of a judgment to do more than take note of the evidence given. It is where there is conflict in the evidence on material issues of fact that the Judge is expected to review and evaluate the evidence before making a finding. Where there are issues of law or of mixed fact and law it is desirable that the Judge should take note of those issues and make pronouncements on them. His failure to do so may in some cases be indicative of failure of the adjudicatory process.

In this case, the trial Judge said in regard to the claim for libel:—

“Without any hesitation whatsoever, I have no difficulty in coming to the conclusion from the evidence before me that the claim for libel has not been proved.”

The Court of Appeal confirmed that opinion.

It is clear that the judgment of the trial Judge was deficient in regard to the claim for libel. That claim did not depend merely on the oral evidence but on inferences to be drawn from the established facts and the law. The Judge did not express any opinion on the questions whether the words complained of were capable of defamatory imputation and, if they were, whether they were in fact defamatory of the plaintiff. The former is a question of law, the latter, one of fact. Although the Court of Appeal (per Nsofor JCA) discussed extensively principles of law applicable in matters
such as this, at the end of the day they did not show what bearing those principles had on the case.

A tribunal charged with the performance of judicial functions should normally state reasons for its conclusions. This becomes more important where appeals lie from its decisions. Even without the likelihood of appeal, it makes for open and even-handed justice for reasons to be given. To decide without reasons leaves room for arbitrariness and leaves the parties in the dark as to how the decision of the tribunal is arrived at. In the context of the present case, merely to say that from the evidence the claim for libel has not been proved, in a case which is not solely on primary facts is grossly inadequate as reason for the conclusion.

However, the judgment would not be set aside merely for failure of the trial court to state reasons where the primary facts are not in dispute and the Appellate Court is in as good a position as the trial court to draw inferences from the established facts and apply the law. In such case, the Appellate Court is in a position to determine whether the decision of the trial court is valid or not.

There was no question in this case of resolving the conflict of evidence as far as the issue of liability for libel was concerned. The case turned on the question whether the words “first signature irregular” endorsed on the draft carried a defamatory imputation in the circumstances in which it was made and published. Those circumstances were not in dispute. What was left for the Judge was to draw inferences from the established facts.

The real question, addressed by Counsel on this appeal, is whether, having regard to the context in which the statement was made and published, defamatory imputation should have been found. Learned Counsel for the plaintiff argued trenchantly, both in the appellant’s brief and in the course of oral argument, that, although the words complained of may not bear any libellous meaning, the way and manner in which they were written coupled with the conduct and subsequent acts of the defendant were facts from which an
imputation of libel could be made. It was argued that, since the defendant was a single entity, the effect of a branch of the defendant writing on the draft that the first signature was irregular was similar to a situation where a person, after he has signed on his cheque, disowns his signature. It was further argued that, from the totality of the defendant’s acts, the inference to be drawn was that the draft did not emanate from its branch in Warri and that it was forged by the plaintiff and therefore dishonoured. Learned Counsel for the defendant argued that from the facts no inference of forgery could be made.

It is an established principle of the law of defamation that the first step in the determination of the question whether a statement is defamatory or not is to consider what meaning the words would convey to the ordinary person (see Okolo v Midwest Newspaper Corporation (1977) NSCC 11). Having ascertained that, the next step is to consider the circumstances in which the words were published, and determine whether in those circumstances the reasonable person would be likely to understand them in a defamatory sense. Where the words used, taken in isolation, in their literal meaning are not defamatory, it is still open to the plaintiff to allege that inference of defamatory imputation should be made from the circumstances. The relevant principles have been sufficiently stated in cases such as Okolo v Midwest Newspaper Corporation and others (supra) and Okafor v Ikeanyi (1979) Vol. 12 NSCC 43 to mention but a few. They need no restatement.

The plaintiff’s case at the trial was that in the context in which the words were published they were understood in their ordinary meaning to mean:

“(1) the Bank draft did not emanate (sic) from the defendant,
(2) plaintiff forged the bank draft and the signature on it,
(3) plaintiff is a man of dubious character,
(4) plaintiff is a thief and wanted to steal the bank’s money,
(5) plaintiff wanted to dupe the manufacturers by giving them a false bank draft.”
It is evident that all these imputations could only be the invention of an imagination that has been given free rein in an effort to found a cause of action. When it is alleged that defamatory meaning should be inferred beyond the literal meaning of words, there is no room for fanciful imagination. If the draft had not emanated from the defendant, or had been forged, or had been presented with intent to steal the bank’s money or was a false bank draft, the defendant, rather than merely returning the draft, would have set criminal investigation in motion, at least by referring the matters to the police. A reasonable person would consider it improbable that the draft on which one of the signatures, not declared irregular, was of the bank’s accountant, would have been regarded as false or forged without the bank charging the co-signing accountant with complicity. When a tribunal is urged to draw inference from facts, such inference must be such as a reasonable person would draw having regard to the totality of the circumstances, including the ordinary course both personal and corporate. In this case, the inference which the plaintiff invited the court to draw are both far-fetched and fanciful. The trial Judge and the court below were both right in concluding that from the totality of the evidence, libel was not proved.

I now turn to the question of negligence. The plaintiff’s case at the trial was that the defendant was negligent because:

(a) the defendant’s servant signed irregular signature on the draft; and

(b) the defendant returned the draft unpaid when it could have investigated the genuineness.

It is not quite clear from the pleadings whether the plaintiff’s case was one of breach of contract occasioned by negligence in the performance of a contract or one purely of negligence as a tort. Whichever it was, the trial Judge proceeded on a totally erroneous footing that the defendant in this case was not the Union Bank of Nigeria Ltd but its Warri branch. He found that Union Bank (Warri Branch) was not negligent
because it complied with the “usual practice” of the bank that “where the substantive manager was not available the relief manager, the accountant, and two officers sign the reverse side of a draft . . .” He held that “there was no suggestion that the signature of the relief manager was forged nor that he ought not to have signed Exhibit E in the circumstance”. It may well be added that he summarised the plaintiffs case thus:–

“The grouse of the plaintiff as revealed by the evidence is against the Union Bank Surulere Branch for failing to act in accordance with banking practice or Central Bank directives as averred in paragraph 13 of the further amended statement of claim by endorsing Exhibit E ‘first signature irregular’.”

In the result, he held that, since the allegation of negligence was against Surulere branch, whereas Warri branch was sued, liability against Warri branch had not been established.

The Court of Appeal endorsed this view. Nsofor JCA, who delivered the lead judgment, went out of his way to embark on an extensive discourse of what juridical personality consists of. On an assumption that the defendant in the case was “Union Bank of Nigeria Limited (Warri Branch)” he held that “Union Bank of Nigeria Limited (Warri Branch)” was not a legal person and could not be sued.

There is no need to follow their Lordships of the Court of Appeal into error by considering the question of the constitution of the suit. The issue of constitution of the suit and of legal personality did not arise either at the trial or on the appeal before them. In paragraph 2 of the amended statement of claim the plaintiff averred:–

“The defendant is a company incorporated under the Companies Decree of 1968 and carries on business of banking throughout the Federal Republic of Nigeria and has one of its branches in Warri. Within the jurisdiction of this Honourable Court” (emphasis mine).

This was admitted in paragraph 2 of the statement of defence. It is trite law that what is admitted need not be proved and that parties are bound by their pleading. It was thus common ground that the defendant was Union Bank of
Nigeria Ltd and that it is an incorporated company. “Warri Branch” was put, apparently, for the purpose of showing that the defendant was carrying on business within the jurisdiction of the court.

Both the trial Judge and their Lordships of the Court of Appeal were in error in the view they held that Union Bank of Nigeria Ltd was not the defendant.

The acts of negligence alleged was against the defendant as an entity and not against its branches which are merely outlets for transacting business. Where an allegation of negligent acts is made against a corporate body, such as the defendant, doing business through several branches, it is inconsequential to the question of liability whether the acts were done through one of the branches or another, what is material is whether the negligent act alleged against the corporate body has been proved. There is no doubt that the act of a branch is the act of the company, just as the act of an employee of the company done in the course of his employment makes the company vicariously liable regardless of the branch from which he operates.

Regarding a branch as a separate entity from the corporate body is a fundamental flaw in the reasoning of the trial Judge and of the Court of Appeal. However, the trial Judge went further to hold that there was no negligence in the steps taken by the defendant in its Warri branch. The negligent act alleged, as was stated in paragraph 29 of the further amended statement of claim, was that the defendant issued a draft with an irregular signature or that it dishonoured its own draft without taking proper steps to have its authenticity confirmed. It was either:

(i) that the defendant by the act of its officers in Warri branch was negligent in the issue of the draft; or

(ii) it was negligent by the act of its officers in Surulere branch by dishonouring it.

By the evidence of its only witness, the defendant elected that there was no negligence in the issue of the cheque. The
witness acknowledged that: “We (that is in the defendants’ Warri branch) were embarrassed when the draft was returned for the reason for which it was returned.” Then he went on to say under cross-examination:–

“The paying bank has a discretion to confirm from us (i.e. in the defendants’ Warri branch) whether or not the draft was issued by us. The signature of the sub-manager was not regularly signed.”

In the face of this evidence, an act of negligence was clearly established. It is evident that the defendant found itself hoisted on the horns of a dilemma. If it admitted that there was some irregularity in the issue of the draft, it would have committed a breach of duty to the plaintiff. If it denied that there was an irregularity in the issue of the draft, failure to pay it was a breach of duty owed to the plaintiff. Either way, it could not deny that an act of negligence had been committed.

The defendant’s duty to exercise reasonable care and skill in regard to its customer’s affairs is undoubted. The law is stated thus:–

“A bank has a duty under its contract with its customer to exercise reasonable care and skill in carrying out its part with regard to operations within its contracts with its customers. The duty to exercise reasonable care and skill extends over the whole range of banking business within the contract with the customer. Thus the duty applies to interpreting, ascertaining and acting in accordance with the instructions of the customer” (see Crosswell et al Encyclopaedia of Banking Law chapter 21; Selangor United Rubber Estates Ltd v Cradock (No. 3) (1968) 2 All ER 1073).

In this case, the plaintiff was a customer of the defendant. In the ordinary course of business he requested for bank drafts with cheques drawn on the current account which he operated with the defendant. The transaction which led to this action was one such request. It is evident from these facts, not seriously disputed, that the defendant owed a duty to the plaintiff to carry out his instructions to issue a draft which would be honoured and to honour a draft properly issued by the defendant at his request. By its nature, a banker’s draft is
a. a draft drawn by a bank upon itself. It contains an undertaking to pay the amount of the draft. Quite apart from the banker-customer relationship, a bank has a duty to a person on whose request it has agreed to issue a draft to issue and honour such draft. In the discharge of that duty it must show care to ensure that the banker’s draft is properly issued and honoured.

b. From the facts which have been narrated, it is clear that the defendant was in breach of the duty of reasonable care and skill it owed to the plaintiff. It is surprising that the defendant, which was itself embarrassed by its own default, nevertheless continued to deny that it had failed to show sufficient care and skill as would reasonably be expected of it. The trial court should have so found. The court below was in error in affirming the decision of the trial court.

c. What, then, is the consequence that should follow from the finding now made, of absence of sufficient care and skill? There is considerable confusion in this aspect of the case. The plaintiff in paragraph 29 of the further amended statement of claim averred acts of negligence whereby the defendant “breached defendant (sic) contractual duty to the plaintiff as a customer of the bank”. The trial Judge (at 62 of the record) was of the view that:

“The case of the plaintiff was that the defendant (Union Bank, Warri Branch) was negligent because the Union Bank, Surulere branch returned the draft unpaid with the endorsement ‘first signature irregular’” (emphasis mine).

The Court of Appeal (per Nsofor JCA) (at 111 of the record), for their part, stated that:

“The heart and soul of the issue now being argued, is the alleged negligence of the respondent in the making of the bank draft (Exhibit EY)” (emphasis mine).

In his appellant’s brief in the court below, the learned Counsel for the plaintiff referred to the claim as a “claim for breach of contract arising for (sic, from) the negligence of the defendant” (see paragraph 39 of the record).

d. There was some degree of vacillation on the plaintiff’s part. The plaintiff would seem to have vacillated between a
claim based on breach of contract occasioned by a negligent performance of the contract and a claim in negligence as a tort. The trial court and the Court of Appeal were themselves unable to agree as to what formed the basis of the claim.

Before a court can commence a meaningful assessment of damages, it must be sure of the nature of the claim, that is to say, whether the claim is in contract or in tort, and, if in tort, the nature of the wrong alleged. I adopt the definition of the term “damages” contained in MacGregor on *Damages* (16ed) 1997 as follows (at paragraph 1):

“Damages are pecuniary compensation, obtainable by success in an action for a wrong which is either a tort or a breach of contract, the compensation being in the form of a lump sum awarded at the time, unconditionally and generally . . .”

In an action for breach of contract, the measure of damages is the loss flowing naturally from the breach and is incurred in direct consequence of the violation (see *Swiss-Nigeria Wood Industries Ltd v Bogo* (1970) 6 N.S.C. 235). The principles guiding the award of damages in tort are different from those guiding the award of damages in contract (see *James v Mid-Motors Nigeria Co. Ltd.* (1978) 11–12 SC 31; (1978) 11 NSCC 536). The object of tort damages is to put the plaintiff in the position he would have been in if the tort had not been committed, whereas, the object of contract damages is to put the plaintiff in the position he would have been in if the contract had been satisfactorily performed.

Even if it had been clear that the claim is in the tort of negligence, there may be need for a further inquiry, whether the tortuous conduct found has occasioned only economic loss and, if so, if it is within the variety of tortuous conduct for which the court will award compensation for economic loss.

The upshot of what has been said is that, despite an initial inclination to remit this aspect of the case to the High Court for assessment of damages, it is better to remit the issue of compensation arising from the negligent conduct found to the High Court for it to deal with the question of damages after ascertaining the nature of the claim.
In the result, for the reasons which I have given I would dismiss the appeal in regard to the claim for libel. I would allow it in regard to the rest of the plaintiff’s claim and set aside the judgment of the High Court dismissing that aspect of his claim and that of the Court of Appeal confirming it. I order, upon the finding, now made, that the defendant acted without due care, that this case be remitted to the High Court for the issues (i) whether the damages claimed by the plaintiff is exact; and (ii) if it is, the quantum of such damages, to be determined after ascertaining the recoverable nature of the plaintiff’s claim.

KARIBI-WHYTE JSC: I have read in draft the leading judgment in this appeal of my learned brother, E.O. Ayoola JSC. I agree with his conclusion and reasoning. My contribution to the much fuller judgment is limited to the determination of the liability of the defendant for libel and negligence in the acts of the defendant bank in the issuance and payment of the bank draft, the subject-matter of this action.

This action is by the plaintiff/appellant, against the defendant/respondent in the Warri High Court, claiming general and special damages for a dishonoured cheque and damages for libel. The salient aspects of the facts which resulted in the plaintiff bringing this action are not really in dispute. The plaintiff, a businessman and a sole distributor of a biscuit manufacturing company (i.e. Temitope Bakeries and Catering Services Ltd), was a customer of the defendant bank. The defendant bank was, at all times material to the facts of this case, carrying on the business of banking. They had a branch at No. 8 Warri/Sapele Road, Warri, where the plaintiff opened and operated a current account in his trade name of EPACO (Nigeria) Marketing Company.

The plaintiff applied to the defendant some time in April, 1986 for the issuance of a bank draft in favour of the biscuit manufacturing company, payable at the defendant’s branch in Surulere.

The defendant bank in compliance with plaintiff’s instructions issued the bank draft to Temitope Bakeries and
Catering Services Ltd. Upon presentation by Temitope Bakeries and Catering Services Ltd for payment, the bank draft was returned to the company with the endorsement “first signature irregular”. The defendant bank did not honour payment of the draft.

The plaintiff thereupon brought this action claiming damages that the words endorsed on the draft were defamatory of him and that the draft was negligently issued by the defendant. In the High Court, the trial Judge dismissed the claims in their entirety because he held the claim for libel and for negligence were not proved.

It is important to observe that the learned trial Judge did not give reasons for dismissing the claim for libel. With respect to the claim for negligence his reasoning was concisely that:

“The defendant was the Union Bank of Nigeria Limited (Warri Branch) and not Warri Bank Nigeria Limited (Surulere Branch) nor the Union Bank Nigeria Limited.”

In his own words, he held:

“Thus for the plaintiff to succeed, he must prove that the defendant as stated in the claim was negligent. In other words that the act complained of was perpetrated by the Union Bank of Nigeria Ltd Warri Branch and that that act amounted to negligence on its part.”

The plaintiff appealed to the Court of Appeal. The Court of Appeal also endorsed the dismissal of the appeal on the grounds that the trial Judge was right in his conclusion that the alleged libel had not been proved, and that the claim for negligence was rightly dismissed because there was no evidence that the Warri branch of the defendant bank had been negligent. In the leading judgment of the court below, Nsofor JCA, who wrote the judgment, raised the issue whether the action was properly constituted. He held the action was against the Union Bank of Nigeria Ltd (Warri Branch) and not Union Bank of Nigeria Limited; the latter was not sued and the defendant sued was not a legal person. Accordingly the suit was not properly constituted. He dismissed the suit. Akintan and Ige JJCA agreed.
The plaintiff has appealed against the judgment of the Court of Appeal. The following grounds of appeal have been filed against the judgment of the court.

**Grounds of Appeal:**

The Learned Justices of the Court of Appeal erred in law and on the facts in affirming the findings of the trial Judge that appellant did not prove the claim for libel when the trial Judge did not state any reason for coming to that conclusion and thereby occasioned substantial miscarriage of justice.

**Particulars of Error**

(a) From the evidence before the trial Court the word written on the Bank Draft ‘first signature irregular’ and the subsequent act of returning the draft to a third party for onward delivery to the appellant who has no power to correct the irregular signature by the very nature of what a bank draft is, were all capable in law of drawing an inference that the bank draft did not emanate from the respondent and/or that appellant forged the bank draft.

(b) From the nature of a bank draft being an instrument or the respondent itself, all that is required before payment, is for the paying bank to make sure that the draft actually emanated from the issuing bank. By not confirming from the issuing bank before returning the draft to the company the only possible inference that could be drawn is that the draft was not issued from Warri branch of the respondent.

(c) The inference that the paying bank was convinced beyond doubt that the draft did not issue from the Warri branch of the defendant is further strengthened by the fact despite all other additional precaution allegedly taken the Warri branch of the defendant to ensure payment. The draft was nonetheless returned unpaid even though respondent’s branch at Sulelere knew that the defect at all can only be corrected by the Warri branch of respondent and not the appellant.

**Further Particulars**

(a) The Justices of the Court of Appeal like the trial court did not properly evaluate the evidence led on the issue *vis-à-vis* the principle of law of libel and slander.

(b) The Justices of the Court of Appeal accepted the trial Judge’s finding on the issue as flawless when there was no basis to come to that conclusion from the judgment of the trial court.
(c) The Learned Justices of the Court of Appeal misdirected themselves in law in holding that the respondent sued is not a juristic person and thereby came to a wrong decision.

*Particulars of Error*

(a) This finding by the Court of Appeal was raised *suo motu* as the same was not covered by any of the grounds of appeal filed before the court.

(b) The respondent did not cross appeal to raise the issue since it is the respondent that can raise the issue of jurisdiction to defeat the claim of appellant.

(c) From paragraph 2 of the further amended statement of claim the appellant pleaded that the respondent is a company incorporated under the Companies Decree which said paragraph was admitted by the respondent in paragraph 2 of the statement of defence.

(d) The evidence led during the trial based on the pleadings also showed that the respondent sued, as accepted by both parties to the suit is a juristic person.

(e) The decision of the trial Judge against which the appeal was filed did not hold that the respondent sued is not a juristic person.

(f) Counsel to the respondent did not also put forward argument to the effect that respondent sued is not a juristic person both in his brief in the Court of Appeal and his argument at the trial court.

(g) From the state of the pleadings and evidence led in support it is beyond doubt that the respondent sued is a juristic person as accepted by respondent to be Union Bank Nigeria Limited.

(h) The word Warri Branch is only descriptive of where the transaction took place the same having been written the bracket after the legal entity that was sued.

(i) The act of the branch of the respondent sued binds the respondent.

3. The Learned Trial Justices of the Court of Appeal erred in law in not awarding damages for negligence in favour of the appellant based on the unchallenged evidence of appellant.

4. The Justices of the Court of Appeal erred in law in not giving any decision on the several issues raised by the appellant arising from the grounds of appeal filed.
Particulars of Error

(a) The court did not resolve the issue whether or not the act of the branches of a bank are binding on the bank or that the individual branches are to be held liable for such negligent acts as contended by the respondent in the brief of argument to support the judgment of the trial court.

(b) The lower court refused to resolve the issue as to which the branches of the bank, Warri or Surulere, could be held liable for negligence in the special circumstances of this case particularly when the commission for the transaction was paid to Warri branch of the bank.

(c) From the evidence led both the trial court and Court of Appeal refused to make any pronouncement on the banking practice of confirming from the issuing branch when a signature is irregular to be mandatory or obligatory as contended respectively by the parties during the trial.

5. The judgment is against the weight of evidence.”

Learned Counsel for the appellant has formulated five issues as arising from the grounds of appeal for determination in this appeal.

“Issues Arising for Determination

1. Did the Court of Appeal correctly look at the complaint of the appellant from his grounds of appeal to wit; that the learned trial Judge did give any reason in the judgment when he dismissed appellant’s claim for libel?

2. Having regard to peculiar facts of this case did the appellant prove his claim for libel?

3. Was the Court of Appeal right to have decided the issue of jurisdiction *suo motu* when there was no appeal on the issue and no opportunity was given to the parties to properly address the court on same.

4. Is it correct as found by the learned Justices of the Court of Appeal that the defendant sued is not a juristic person having, regard to the state of the pleadings of the parties and the fact that it was not made an issue for determination at the Lower Court.

5. Did appellant prove that respondent was liable in damages for negligence and did the Lower Court give any decision on several issues raised by appellant which would have enabled the Court come to a right decision.”
On his part respondent formulated three issues for determination:

"Issues for Determination"

The issues arising for determination of this appeal are as follows:

1. Whether from the evidence before the trial court, the Honourable Court of Appeal was right in dismissing plaintiff’s claim for libel.
2. Whether from the evidence before the trial court, the Honourable Court of Appeal was right in dismissing plaintiff’s claim for negligence.
3. Whether the dismissal of plaintiff’s claim in its entirety by the Honourable Court of Appeal was justified or right.

The issues may be concisely formulated as follows:

(i) Whether the words in the endorsement of the bank draft were in the circumstances of the case defamatory.
(ii) Whether the High Court and the court below were right in treating the branches of the Union Bank of Nigeria Ltd as separate entities and in regarding the Warri branch of the bank, rather than the bank itself as the defendant in the case.
(iii) Whether the court below was right in determining whether the action was properly constituted when no such issue arose either at the trial or on appeal.
(iv) Whether the dismissal by the High Court of the claim for negligence was rightly upheld by the court below.

In considering the contentions of Counsel in this case, I wish to be guided by the formulation of the issues for determination. However, I think it is helpful to begin with a consideration of the criticism of the judgments of the courts below by learned Counsel for the appellant. In his brief of argument and in his oral expatiation thereof learned Counsel contended that the two judgments failed to demonstrate adequate consideration of the evidence or of the submissions of Counsel in rejecting the claim for libel.

I refer to the judgments of the courts below criticised where the trial Judge had dismissed the claim for libel. All he said before doing so was as follows:

"Without any hesitation whatsoever, I have no difficulty in coming to the conclusion from the evidence before me that the claim for
This opinion was confirmed by the court below (see at 95 lines 10–13). It seems to me obvious from the above *dictum* of the trial Judge that he did not demonstrate how easily he came to his conclusion that there was no evidence to establish the claim for libel. There is no doubt that the claim for libel being founded on issues of facts and law did not depend merely on the oral evidence and the words alleged to be defamatory, but also on inferences which could be drawn from the facts established and the law.

Conspicuously absent and lacking in the judgment of the trial Judge were expressions of opinion on the questions whether the words complained of were capable of defamatory meaning and, if they were, whether they were defamatory of the plaintiff or not. It is, however, fair to observe that the judgment of the court below contains extensive discussions of applicable principles of law.

Learned Counsel for the appellant has criticised the judgments for failing to demonstrate adequate consideration of the evidence.

This is a sweeping generalisation in terms of consideration of the facts of the case. It is well settled that what amounts to adequate consideration of the evidence in a case would necessarily depend on the facts established and the nature of the issues raised. Of course, where the facts are not in dispute or substantially agreed, there will be no need for the resolution of conflicts and evaluation of facts do not arise. It is an elementary and fundamental principle of the law that what is admitted or not disputed is not subject-matter of proof. It is only where there is conflicting evidence on material issues of fact is the Judge required and expected to review such fact and evaluate the evidence for their resolution before making specific findings thereto.

Also, where the issues involved are those of law or of mixed facts and law, the Judge is expected to take note of
such issues and make pronouncements on them. A failure to advert to these salient and pertinent principles of law is capable of resulting in a miscarriage of justice in the process of adjudication.

The strength of the strictures against the judgments of the courts below lie in the criticism that they have arrived at conclusions rejecting the claim without giving reasons. It is an elementary and essential ingredient of the judicial function that reasons are to be given for decisions. It is the more important where appeals lie from the decisions. In any case the reasons for decisions enable the determination on appeal whether the decision was merely intuitive and arbitrary or whether it is consistent with established applicable principles. If judgments were to be delivered without supporting reasons, it will be an invitation to arbitrariness, a rule of merely tossing the coin and likelihood to result in juridical anarchy. However, a judgment will not be set aside merely because the reasons given were bad if the judgment itself is right.

I shall now consider the issues for determination in this appeal.

Issue 1 is whether the words complained of in the endorsement of the bank draft were in the circumstances of the case defamatory.

The offending endorsement claimed to be defamatory of the plaintiff are the words “first signature irregular” which were in the circumstances made and published to Temitope Bakeries and Catering Services Ltd, the beneficiary of the draft. The circumstances are not in dispute. There was no question of resolving conflicting evidence as there was none. The facts having been established the trial Judge was left to draw the appropriate inferences. The real question to which Counsel addressed us in this appeal is whether having regard to the context and circumstances in which the endorsement was made and published, the trial Judge should have found defamatory imputation?
It was the contention of learned Counsel for the appellant that, even though the words complained of may not ordinarily bear any defamatory connotation, the way and manner in which they were written, coupled with the conduct and acts of the defendant thereafter were facts from which libellous imputation could be inferred. It was argued that, since the defendant was a single entity, the effect of one of its branches writing on the draft that the “first signature was irregular” was similar to a situation where a person disowns his own signature after signing.

It was also submitted that, from the totality of the acts of the defendant, the inference to be drawn was not that the draft did not emanate from its branch in Warri, and that it was forged by plaintiff/appellant and therefore dishonoured. It was the contention of the defendant/respondent that forgery could not be inferred from the endorsement and circumstances surrounding it.

In establishing liability in an action for defamation, it is the established principle of law that the question whether a statement is defamatory or not is to consider what the meaning of the words would convey to the ordinary person (see *Okolo v Midwest Newspaper Corporation* (1977) NSCC 11; *Dumboe v Idugboe* (1983) 1 SCNLR 29).

The next consideration is the circumstances in which the words were published, and whether in those circumstances a reasonable person would be likely to understand them in a defamatory sense. Where the words or expression used are in their literal meaning capable of defamatory meaning, plaintiff may still so allege that defamatory inference should be made from the circumstances (see *Okolo v Midwest Newspaper Corporation* (1977) NSCC 11; *Egbuna v Amalgamated Press* (1967) 1 All N.L.R. 25).

The plaintiff’s case before the trial Judge was that the endorsement in their ordinary meaning was capable of various defamatory interpretations. The following were suggested:—

“(1) The bank draft did not emanated (*sic*) from the defendant;
(2) plaintiff forged the bank draft and the signature on it; 
(3) plaintiff is a man of dubious character; 
(4) plaintiff is a thief and wanted to steal the bank’s money; 
(5) plaintiff wanted to dupe the manufacturers by giving them a false Bank draft.”

The above imputations suggested by the plaintiff as inferable from the endorsement on the bank draft in the circumstances of the case hardly represent the legal position. Our defamation law is based on the English common law. We still rely on the principles of the English common law to govern liability. In the English case of *Lewis v Daily Telegraph Ltd* (1964) A.C. 234, Lord Reid stated the position of the law when he said:

“There is no doubt that in actions for libel the question is what the words would convey to the ordinary man; it is not one of construction in the legal sense.”

After stating the position of the ordinary man and the truism that he can also read between the lines in the light of the general knowledge and experience it was pointed out that the “sting is not so much in the words themselves as in what the ordinary man will infer from them, and that is also regarded as part of their natural and ordinary meaning”.

In our adjudicatory procedure where the Judge functions both as the Judge to determine, whether the words complained of are capable of defamatory meaning, he also functions as the jury in the English common-law procedure to decide whether the words are defamatory of the plaintiff. In this case the test according to the well-settled authorities is whether, under the circumstances in which the publication of the endorsement was made, reasonable men to whom the publication was made would be likely to understand it as defamatory of the plaintiff (see *Egbuna v Amalgamated Press* (1967) 1 All N.L.R. 25).

It is pertinent and important to observe that the endorsement on the bank draft questioned the authenticity of the co-signatory on the bank draft. The plaintiff is not one of the signatories of the bank draft and has no responsibility in the
issuance and presentation of the bank draft before the defendant bank. A reasonable man in the entire scenario will be most unlikely to link the plaintiff who has only paid for the issuance of the bank draft with the defamatory imputations suggested by the plaintiff. The imputation of defamatory conduct inferred by plaintiff is not only far-fetched but also unreasonable. The learned trial Judge and the court below rightly rejected them by holding that libel was not proved. I accordingly resolve the first issue against the appellant.

I shall consider the second and fourth issues together. These issues concern the allegation of negligence against the defendant/respondent. The plaintiff’s/appellant’s case is that the defendant/respondent bank was negligent. The grounds relied upon are that (i) the defendant’s servant signed an irregular signature on the bank draft in issue; (ii) the defendant returned the bank draft unpaid instead of investigating and correcting the irregular signature which emanated from its own sources.

In determining this issue, the learned trial Judge found that the defendant in this case was the Warri branch of the Union Bank of Nigeria Limited, and not the Union Bank of Nigeria Limited. He found that the Warri branch was not negligent, having complied with the usual practice of the bank, that “where the substantive manager was not available the relief manager, the accountant and two officers sign the reverse side of a draft . . .” and held that: “There was no suggestion that the signature of the relief manager was forged that he ought not to have signed Exhibit E in the circumstance.” In the view of the learned trial Judge which was upheld by the court below, since the allegation of negligence was against the Surulere branch in an action against Warri branch, liability has not been established against Warri branch.

This erroneous view was compounded by the Court of Appeal which assumed that the defendant in the case was Union Bank of Nigeria Limited (Warri Branch) and went on to hold that Union Bank of Nigeria Limited (Warri Branch) was not a legal person and could not be sued. The court
below also discussed the constitution of the action. It is relevant to observe these are issues which did not arise either at the trial court or on appeal before them. It is conceded an issue of jurisdiction could be raised \textit{suo motu} by the court even on appeal.

But the parties would be invited to argue such novel point of law before the court would be entitled to express its views and come to its ruling. The court below did not give the parties an opportunity to argue the point of law.

It is necessary to point out the well-settled law of pleading that what is admitted need not be proved and that parties are bound by their pleadings. Paragraph 2 of the amended statement of claim of the plaintiff averred:

\begin{quote}
“The defendant is a company incorporated under the Companies Decree of 1968 and carries on business of banking throughout the Federal Republic of Nigeria and has one of its branches in Warri . . . within the jurisdiction of this Honourable Court.”
\end{quote}

It is settled law that the statement of claim supersedes the writ and amends the endorsement on the writ of summons. Paragraph 2 of the statement of claim having been admitted, it was common ground that the defendant was Union Bank of Nigeria Ltd and that it is an incorporated company, with branches throughout Nigeria. There is no doubt “Warri Branch” was inserted to show where the defendant was carrying on business and for the purposes of the jurisdiction of court.

It appears on a reading together of the writ of summons and statement of claim that the defendant is Union Bank of Nigeria Limited, and the act of negligence alleged is against the defendant as an entity, and not merely against its branches. It is well settled law of the principle of corporate personality that, where an allegation of a negligent act is made against a corporate body doing business through several branches, the question of liability can be determined through any one of its several branches. What is material is whether the act of negligence alleged against the corporate
a body has been established. A corporation is answerable on the ordinary principle of vicarious responsibility.

In *Lennards Carrying Co Ltd v Asiatic Petroleum Co Ltd* (1915) AC 705 at 713, Viscount Haldane has enunciated what has now become the *locus classicus* of responsibility of a company:

“In such a case as the present one the fault or privity of somebody who is not merely a servant or agent for whom the company is liable on the footing of respondent superior, but somebody for whom the company is liable because his action is the very action of the company itself.”

This doctrine has been explained by Denning LJ (MR) in *H.L. Bolton (Engineering) Co Ltd v T.J. Graham and Sons Ltd* (1956) 3 All ER 625 at 630:

“A company may in many ways be likened to a human body. They have a brain and a nerve centre which controls what they do. They also have hands which holds the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what they do. The state of mind of these managers is the state of mind of the company and is treated by the law as such. So you will find in cases where the law requires personal fault as a condition of liability in tort, the fault of the manager will be the personal fault of the company.”

There is no doubt that on the basis of this theory, so in the instant case, the act of a branch is the act of the company. Hence the act of the employee of the company done in the course of his employment renders the company vicariously liable irrespective of the branch from which the action emanated.

The error of the learned trial Judge and the court below arose from the reasoning that the branch of the defendant bank was different and a separate entity from the parent body. This is a fundamental error which permeated the entire reasoning and faulted it.

The question of negligence
The negligence alleged by the plaintiff against the defendant bank in paragraph 29 of the further amended statement of claim averred as follows:–

“Plaintiff avers that defendant was negligent if indeed the signature on the draft was irregular since it is their own instrument and cannot dishonour their instrument except on the bases (sic) of fraud or forgery and thereby breached defendant’s contractual duty to the plaintiff as a customer of the Bank.

Particulars of Negligence

(a) defendant’s servant signed irregular signature on the draft.
(b) defendant ought not to have returned the draft unpaid but to investigate the genuineness of the draft.
(c) Irregular signature on a draft is an internal affair of the bank and the customer should not be visited with it.
(d) The defendant felt the draft was an evil machination of the plaintiff.”

Summarily stated, the defendant issued a bank draft with an irregular signature or it dishonoured its own draft negligently without taking proper care to confirm whether it was authentic. Accordingly, the negligence was either by (i) the act of its officers in Warri branch in the issue of the draft; or (ii) the act of its officers in Surulere branch by dishonouring it.

It is interesting to refer to the defence of the defendant bank of the allegation of negligence by the plaintiff. The defendant in paragraph 16 of the statement of defence denied the averment of negligence in paragraph 29 of the amended statement of claim. In the evidence of the only witness again it denied any negligence in the issue of the bank draft, but went unwittingly to state as follows:–

“We (that is in the defendant’s Warri branch) were embarrassed when the draft was returned for the reason for which it was returned.”

Under cross-examination, the witness said:–

“The paying bank has a discretion to confirm from us (ie in the defendant’s Warri branch) whether or not the draft was issued by us. The signature of the sub-manager was not regularly signed.”

On the totality of this evidence, there is no doubt that an act of negligence was clearly established against the defendant.
bank. The question of the establishment of irregularity in the issue of the draft does not lie merely on the denial of the defendant bank. The evidence of the issue of the draft itself with the irregular signature of its own officer is self-evident.

Again failure to pay the draft is a breach of a duty owed to the plaintiff with whom existed a contract to pay. The defendant is under a duty to exercise reasonable care and skill in regard to the affairs of its customers. The plaintiff being its customer, the defendant bank was expected to exercise reasonable care and skill in the issue and payment of the bank draft, the subject-matter of this litigation (see Agbonmagbe Bank v C.F.A.O. (1966) 1 All NLR 116). On the facts of this case which are not in dispute it is clear that defendant was in breach of its duty of reasonable care and skill owed to the plaintiff. The defendant bank through the evidence of its only witness has admitted its embarrassment for its own error and failure to discharge its duty to the plaintiff. Such admission was sufficient evidence of failure to exercise the requisite care and skill (see Benson v Otubor (1975) 3 SC 9; Ajibade v Mayowa (1978) 9–10 SC 1). The trial Judge should have inexorably so found. The court below was therefore in error to have affirmed the decision of the trial Judge.

I therefore resolve issues 2 and 4 in favour of the appellant.

This is not the end of the matter. The confusion which has arisen in the ambivalence of the claims of the plaintiff/appellant between a claim based on breach of contract arising from a negligent performance of the contract, and a claim in the tort of negligence.

It is consistent with well-settled principles of law that assessment of damages in an action must be predicated on the nature of the claim. The appellant in his brief of argument before this Court has referred to the claim as one “for breach of contract arising for (sic) from the negligence of the defendant”. This is consistent with the averment of the plaintiff in paragraph 29 of the further amended statement of claim already cited and reproduced supra in this judgment. It does not appear that both the trial Judge and the Court of Appeal
were ad idem. The plaintiff would appear unsure whether his claim was based on breach of contract arising from a negligent performance of the contract, and a claim in negligence as a tort. There is no doubt that the principles for determining the measure of damages differs as to whether the claim is in contract or in tort. Whereas the measure of damages in contract is determined on the principles enunciated in the rule in Hadley v Baxendale 9 Exch. 341; (1843–60) All ER Rep. 461 (see Jammal Engineering v Wrought Iron (1970) NCLR 295; Omonuwa v Wahabi (1976) 4 SC 37; Alraine v Eshiett (1977) 1 SC 89; Taiwo v Princewill (1961) All NLR 240). This is the loss flowing from the breach and is incurred in direct consequence of the violation.

The measure of damages in an action for the tort of negligence is founded on the principle of restitutio in integrum which was re-echoed in Liesbosch Dredger v SS Edison (1933) AC 449 at 459. In Balogun v N.B.N. (1978) 3 SC 155, the Supreme Court observed that the rule in Hadley v Baxendale (ibid) is usually difficult to apply in cases of wrongful dishonour of cheques. The principle applicable in the measure of damages in an action for negligence is that the plaintiff is only entitled to such sum as will put him in the position in which he would have been, if the act constituting the negligence never occurred (see Thomas Kerewi v Bisiriyu Odugbesan (1965) 1 All NLR 95; L.C.C. v Unachukwu (1978) 3 SC 199).

As it is not clear whether the claim is in tort of negligence or negligent breach of contract, it becomes necessary for further inquiry whether the conduct complained of and found by the court has only caused economic loss, and if it is within the category of tortuous conduct for which the court will award compensation for economic loss. In the circumstance it is desirable to remit this case back to the High Court for the issue of compensation arising from the negligent conduct with a direction to deal with the question of damages after ascertaining the nature of the claim.
For the reasons given in this judgment, I dismiss the claim for libel. I allow the rest of the plaintiff’s claim, setting aside the judgment of the courts below. This is because the defendant/respondent acted without due care. The case is accordingly remitted to the High Court to ascertain the exact nature of plaintiff’s claim and determine the issues:

(i) whether the damages claimed by plaintiff is recoverable; and

(ii) the quantum of damages recoverable.

Each party is to bear his or its costs of this appeal.

**KUTIGI JSC:** I read in advance the judgment just rendered by my learned brother, Ayoola JSC. I agree with his reasoning and conclusions and endorse the orders made in the said judgment.

**MOHAMMED JSC:** I agree that the claim for libel is without merit at all and for the reasons given in the lead judgment written by my learned brother, Ayoola JSC, I too would dismiss that aspect of the appellant’s claim before the High Court. However, it is clear from the facts that the respondent was negligent in handling the draft cheque of the appellant.

The draft cheque could not be honoured when presented at Surulere branch of Union Bank due to the endorsement of an irregular signature on the draft by the respondent’s manager.

This obviously is a negligent act by the respondent. I therefore agree that the claim for damages for negligence has succeeded. I will also order for the claim for negligence to be remitted back to the High Court for the assessment of damages after ascertaining the nature of the claim.

Consequently, I dismiss the appeal based on the claim for libel and allow the appeal on the claim for damages for the negligence of the respondent in handling the draft cheque of the appellant. I make no order as to costs.

**KATSINA-ALU JSC:** I have had the advantage of reading in advance the judgment of my learned brother, Ayoola JSC, in this appeal. I agree with it. There is nothing that I can usefully add.

**Appeal dismissed on claim for libel.**
Nigerian Deposit Insurance Corporation v Vitabiotics Nigeria Limited

FEDERAL HIGH COURT, LAGOS DIVISION

KASIM J

Date of Judgment: 15 MAY, 2000

Banking – Interest – Waiver of interest – Whether forbidden under sections 19(1) and 20(1) of the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree No. 18 of 1994 (as amended) – When grant thereof reckless – Principles governing

Banking – Interest – Waiver of interest – Whether the grant of contravenes or constitutes an offence under section 19(1)(e) of the Failed Banks Decree No. 18 of 1994 (as amended)

Facts

The respondent in this case applied for a term loan of ₦5.5 million and was granted ₦5 million. The said loan was to attract interest of 2.5% higher than the prevailing interest rate, the conditions of which were accepted by them.

When the respondent defaulted in the repayment of the said loan, the outstanding debt stood at ₦17,506,123.86k. In order to recover the said loan the applicant sued the respondent at the Lagos State High Court, but the case was struck out on the coming into force of Decree No. 18 of 1994, whereupon the applicant set up a task force to recover the loan.

The respondent alleged that consequent upon the representation made to the applicant, he was granted a waiver of 25% of the interest due subject to payment of the principal debt and remaining interest within a stipulated time. This meant that the respondent should pay a total sum of ₦14,373,502k in all. This the respondent did.
It was after the payment of this sum that the applicant wrote the respondent demanding for the balance of ₦3,555,466.47k being the balance of the interest which the respondent alleged had been waived. The applicant said that it would be illegal for them to grant a waiver of interest to a viable organisation that had the means to repay a loan, and relied on sections 19(1) and 20(1)(b) of Decree No. 18 of 1994.

The applicant brought this action to recover this sum.

Held –

1. A bank is not forbidden by section 19(1) of the Failed Banks Decree No. 18 of 1994 (as amended) from granting interest waivers, but the grant of such waiver must not be reckless. To decide whether or not the waiver of interest is reckless, the court is obliged to look at the facts and circumstances of the particular case. In the instant case, the fact that the respondent issued two post-dated cheques in favour of the applicant showed that it could not pay its debt at the time the cheques were issued. The grant of interest waiver was therefore not reckless.

2. Where it is proved to the satisfaction of the court that the alleged grant of interest waiver is in contravention of the provision of section 19(1)(e), the court will not hesitate to declare such a waiver illegal and void and not voidable since there is a punishment for breach under section 20(1)(b). The provisions of section 19(1)(e) and section 20(1)(b) of the Decree render the official who contravenes same liable on conviction to an imprisonment of three years without the option of a fine. The legal implication of a conviction under section 20(1)(b) of the Decree is to render any contract or transaction in relation to the breach of section 19(1)(e) void.

In the instant case, there is no evidence that any of the officials of the bank had been charged with the offence
of recklessly granting a 25% or any interest waiver to the respondent in connection with the loan herein under section 19(1)(e) of the Failed Banks Decree No. 18 of 1994 (as amended), the waiver is therefore proper.

Action dismissed.

Cases referred to in the judgment

Nigerian

A.C.B. Ltd v Domingo Builders (1992) 2 NWLR (Part 223) 296

Hi-Flow Farm Ind. v Unibadan (1993) 4 NWLR (Part 209) 719

N.D.I.C. v Geobi Nigeria Ltd Suit No. FBFMT/L/2V/96

Oilfield Supply Centre v Johnson (1987) 2 NWLR (Part 58) 625

Sodipo v Lemminkaine (1986) 1 N.S.C. 79; (1985) 2 NWLR (Part 8) 547

Nigerian statute referred to in the judgment

Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree No. 18 of 1994 (as amended), sections 19(1), 20(1)(b)

Counsel

For the applicant: Adekunle

For the respondent: Ahonaruogho

Judgment

KASIM J: The applicant, as manager/liquidator of ABC Merchant Bank Nigeria Limited, claims the sum of ₦4,106,849.72, as per paragraph C, of the amended application for recovery of debt, as at 31 December, 1996, at the interest rate of 21% per annum from 1 January, 1997 and 30% per annum from 1 March, 1997 until full and final
settlement. This amount forms a portion of an amount of ₦17,506,123.96, which the applicant had earlier claimed against the respondent, as at 30 September, 1995.

It is pertinent to give a brief statement of how the said ₦17,506,123.96 became due to the applicant from the respondent. The respondent requested for a term loan of ₦5.5 million and an overdraft facility of ₦1.5 million from the failed ABC Merchant Bank Nigeria Limited, now in liquidation. The term loan and overdraft facility were granted to the respondent by the said bank on the terms and conditions dictated by the bank, which the respondent accepted. The said sums were disbursed to the respondent by the bank. According to the applicant, which later became the liquidator of the said bank, the respondent, after drawing the loan and overdraft facility, refused and neglected to repay the said loan despite repeated demands by the bank. And, as at 30 September, 1995, the total indebtedness of the respondent to the bank, in relation to the said loan, was ₦17,506,123.96, inclusive of interest. The bank sued the respondent in the High Court of Lagos State for the recovery of the outstanding debt. The said suit was struck out, apparently, on the coming into force of the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree No. 18 of 1994. Thereafter, the bank set up a task force for the main purpose of recovering outstanding debts to it. Negotiations were entered into between the task force and the respondent which resulted in the payment of ₦5 million by the respondent to the task force. The said ₦5 million represented the principal. Further negotiations continued on the payment of the accrued interest which stood at ₦12,928,969.03. The respondent applied for a waiver of 80% of the accrued interest. Nonetheless, the respondent later paid the sum of ₦9,373,502, leaving a balance of ₦3,555,466.47 due on the accrued interest. There is no evidence that the task force or the board of directors of the bank actually granted a waiver of accrued interest to the respondent. To my mind, Exhibit S–D, written to the respondent on 20 November, 1995, by
one Mr B.O. Amakiri (Senior Manager, Corporate Banking and described as Head of the Task Force) threw a net of confusion into the entire matter. That Exhibit gave the impression that the total accrued interest was N9,373,502.55k, out of which N5 million was paid by the respondent on 24 November, 1995, whereas both parties agreed that the total indebtedness of the respondent to the bank was N17,506,123.96k, out of which N5 million, which represented principal, was paid. In this regard, a balance of N12,506,123.86 would be outstanding as representing accrued interest. Consequently, the said confusion led to the writing of Exhibit P–D, which also gave the impression that, after payment of the sum of N4,373,502.55, demanded in Exhibit S–D, the loan to the respondent by the bank had been totally liquidated. And that what remained was the payment of legal costs incurred for the recovery of the debt. The legal costs was stated to be N1.4 million. It is observed that the respondent repaid a total of N14,373,502 out of the amount of N17,506,123.86, alleged to be outstanding against the respondent, leaving a balance of N3,132,621.86, which the respondent regarded as the amount of the waiver of the accrued interest.

It is this aspect of the matter that led the applicant to go to the Tribunal for the recovery of the sum of N4,106,849.72. To my mind, the only core issue in this case, is whether, by Exhibits SD and PD, the applicant is estopped from making any more claims for accrued interest, from the respondents, after the latter had made repayments of N14,373,502, to the former in liquidation of its indebtedness to the applicant arising from the term loan and overdraft granted by the bank to the respondent.

Counsel for the respondent contended that Exhibit S–D was an offer from the bank to the respondent, the offer which was accepted by the respondent through Exhibit O–D. To him, at that point in time, the parties were in consensus ad idem. Counsel further contended that Exhibit P–D was a
a follow-up of the agreement. He said that Exhibit P–D made a demand which was met by the respondent in Exhibit Q–D and acknowledged by the applicant. Consequently, the bank no longer had any claim on the respondent in respect of the loan, Counsel added, and submitted that the combined effect of Exhibits S–D, O–D, P–D and Q–D is that the term loan and overdraft granted by the bank to the respondent, had been fully and finally liquidated. Counsel said that the respondent had acted on the above stated Exhibits SD and PD and that the applicant cannot resile from such an agreement. The parties are bound by the agreement. Counsel also said that the licence of the bank was withdrawn on 16 January, 1998 and negotiations as regards the waiver were undertaken by the bank and the respondent before the bank was acquired on 16 January, 1998. He submitted that all the negotiations had been done by the principal officers of the bank, who had authority to bind the bank. Counsel contended that there is nothing illegal on the face of Exhibits SD and OD and that Exhibit H, which came after the formation of the contract, cannot vitiate the contract. To Counsel, there is nothing in Decree No. 18 of 1994, which forbid the bank from granting a waiver of interest and that section 19 of the said Decree is intended against the officers of the bank. There is no evidence before the court to show that any of the officers of the bank had been prosecuted under section 19(1)(e) of the Decree in respect of the said waiver. He referred to the case of Obimami Brick and Stone (Nigeria) Ltd v A.C.B. Ltd (1992) 3 NWLR (Part 229) 260 at 264, ratio 2. Reference is also made to the definition of “waiver” at 1580 and 1581 of Black’s Law Dictionary (6ed). Counsel also stated that there is no evidence of illegality in this case. Exhibit H will not affect the contract already made between the parties. There is no evidence of vibrancy of the respondent before the court. The fact that the respondent gave post-dated cheques shows that it was not viable. Counsel further submitted that no weight should be attached to Exhibit H, and that in N.D.I.C. v Geobi Nigeria Ltd Suit No. FBFMT/L/2V/96 negotiations were done with the task force,
and whereas, in this case on hand, they negotiated with the management/task force.

In conclusion, Counsel submitted that the fact that no officer of the bank has been charged to court in connection with the grant of the waiver shows that the waiver is valid.

Counsel for the applicant submitted that Exhibit S–D should be read subject to Exhibit H, which is to the effect that the board of the directors had not considered the issue of waiver of accrued interest. He further submitted that Exhibit H was written on 7 December, 1995, a day prior to the clearance of the cheques in Exhibit O–D. Counsel also submitted that Exhibit E advised the respondents that their total indebtedness to the bank stood at N17,506,123.86 inclusive of interest, as at 30 September, 1995. And that the respondent thereafter paid N5 million which represented the principal. It is his contention that it is the issue of payment of the accrued interest that led to the dispute now being litigated in this Court. He referred to pages 21–23 of the applicant’s written address, the cases of NDIC v Geobi Nigeria Ltd (supra), where judgment was delivered on 14 April, 1997, particularly pages 18–20 thereof. Counsel also referred to the case Obaseki v A.C.B. (1965) ANLR 358 and paragraph 17 of the amended application for recovery of debt and sections 19(1)(a) and 20 of Decree No. 18 of 1994.

Counsel also submitted that the grant of waiver to the respondents, which is a going and viable concern, is illegal. It is the contention of Counsel that Exhibit X2–D, a letter written by the managing director of the respondent to the Central Bank, is an admission of viability of the respondent. Counsel stated that estoppel cannot aid illegality; he cited the case of Onamade v A.C.B. (1997) 1 NWLR (Part 480) 123 at 144. The respondent had not denied the existence of Exhibit H.

That marks the summary of submissions of Counsel for the parties.
It is, however, observed from the pleadings of the parties and submissions of their Counsel that the following facts appear not to be in dispute:–

1. That the respondent applied for a term loan of N5.5 million and was granted N5 million only.

2. That the said loan was to attract interest of 2.5% higher than the prevailing interest rate, which by then, was 30%.

3. That the respondent, upon acceptance of the terms and conditions of the loan, drew on the facility.

4. That, thereafter, the respondent defaulted in the repayment of the said loan and that, as at 30 September, 1995, the outstanding debt stood at N17,506,123.86k.

5. That, in order to recover the said loans the applicant sued the respondent at the Lagos State High Court and that, on the coming into force of the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree No. 18 of 1994, the case was struck out.

6. That, thereafter, the applicant set up a task force for the purpose of recovering outstanding debts owed to the bank.

7. That, as a result of the efforts of the said task force, the respondent paid to the applicant the sum of N5 million in the first place as principal sum and later the sum of N9,373,502, making a total of N14,373,502k.

8. That the balance of N3,555,466.47k is the unhappy cause of the present dispute between the parties, which the court is now called upon to decide.

It is common knowledge that courts and other tribunals are established to settle or decide issues which are in dispute between contestants. For this purpose, the parties are under a duty to state precisely their respective cases by means of pleadings in which the parties are expected to join issues which the court will decide. Therefore, where facts are not
in dispute or in controversy, there is nothing on which par-
ties can join issue, hence nothing for the court to determine. Similarly, facts which have been admitted, need no proof. Consequently, the court is only concerned in this case with issues over which the parties differ. In this regard, the main issue which call for determination in this case appear to be as stated below:–

(1) Whether the sum of N3,555,466.47k, which repre-
sents about 25% of the total accrued interest (N9,373,502) is covered by the interest waiver allegedly granted by the applicant to the respondent; or

(2) Whether the said balance of N3,555,466.47k, is still outstanding against the respondent which it is liable to pay to the applicant? In other words, that the applicant had not granted 25% or any interest waiver to the respondent, at all?

It is pertinent to discover whether or not the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree No. 18 of 1994 permits the grant of interest waiver. In this regard, an examination of the relevant provisions of sections 19(1) and 20(1) of the Decree is desirable. The provisions of both sections are reproduced hereunder:–

“Section 19(1) Any director, manager or employee of a bank, who:

(e) recklessly grants or approves a loan or an interest waiver where the borrower is known to have the ability to repay the loan and interest, is guilty of an offence under this Decree.”

Section 20(1)(b) of the Decree prescribes punishment for the contravention of the provisions of section 19(1)(e), thus:–

“Section 20(1) Any person who commits an offence under section 19 of this Decree, is liable, on conviction, subject to subsection (4) of this section, in the case of an offence;
From the above reproduced sections of the Decree, it is clear that the bank is not forbidden from granting interest waiver, but the grant of such waiver must not be done in a reckless manner. Therefore, to decide whether or not the grant of interest waiver is reckless, the court is obliged to look at the facts and circumstances of the particular case. I now examine the facts relevant to the grant or alleged or presumed grant of 25% of the accrued interest waiver in this case. The respondent claimed that it applied to the task force set up by the applicant for an interest waiver of 80% of an accrued interest of ₦12,928,969.03k. The task force only granted 25% waiver of the total accrued interest. The respondent said that it thereafter paid the balance of the accrued interest in full and final liquidation of its debt to the applicant, reliance is placed on Exhibits S–D and P–D on one hand and Exhibits O–D, Q–D and X2–D respectively. And because of their importance, I copied them hereunder:

"Exhibit S–D:–
We acknowledge the receipt of your Commercial Bank (Credit Lyonnais Nigeria) Ltd Cheque No. 529497 of 24 November, 1995, for ₦5,000,000 (Five Million Naira) only representing part payment of the accrued interest of ₦9,373,502.55K.

We are expecting the balance of ₦4,373,502.55, which will represent the Full and Final Settlement of your indebtedness as agreed during our meeting of 16 November, 1995.

We trust you will invigorate your efforts further to fully settle this debt within the specified period earlier notified."

The said Exhibit was dated 20 November, 1995 and addressed to the managing director of the respondent by one B.O. Amakiri, Senior Manager, Corporate Banking.

"Exhibit P–D:–
We hereby acknowledge the receipt of your Commercial Bank (Credit Lyonnais Nigeria Ltd, post dated cheques No. 529501 for ₦2,000,000 and 529502 for ₦2,373,502.55.

According to the covenants of this facility duly accepted by you, you will bear legal costs incurred to date in recovering
the outstanding amount. These costs stands at ₦1.4 million
(which is 10% of the amount recurred).

Please, bring in your cheque for this amount and thereafter,
we will discharge you fully from further obligations to us.”

The Exhibit was written and dated on 21 November, 1995,
by one BO Amakiri, Senior Manager, Corporate Banking
and addressed to the managing director of the respondent.

Exhibits O–D, Q–D and X2–D were written by the respon-
dents on 21 November, 1995 and 28 February, 1996,
whereby two post-dated cheques totalling ₦4,373,502.55,
were forwarded to the applicant in response to the demands
in Exhibits S–D and P–D. While Exhibit X2–D was a peti-
tion which the managing director of the respondent wrote to
the Central Bank, paragraph 5 of which read:–

“To pay up this high sum of money, we held meeting with the ap-
proved ‘ABC Merchant Bank’, Loan Recovery Task Force where-
by our appeal for waiver on the interest was granted at 25%.”

The Exhibit was dated 22 August, 1996.

As stated above, as at 30 September, 1995, the total in-
debtedness of the respondent to the applicant was ₦17,506,123.86, out of which the sum of ₦14,373,502 was
paid. That amount is made up of ₦5,000,000 as principal
and ₦9,373,502, as accrued interest. And with the payment
of the said ₦14,373,502, the respondent claimed to have
fully and finally liquidated its debts to the applicant in rela-
tion to the loan of ₦5 million granted to it by the applicant.
On the other hand, though the applicant acknowledged the
receipt of the sum of ₦14,373,502 from the respondent out
of the total sum of ₦17,506,123.86k owed to it by the re-
spondent, yet it contended that the respondent is still in-
debted to it in the sum of ₦3,555,466.47k. In other words,
the applicant denied granting 25% or any interest waiver to
the respondent. The denial is predicated on Exhibit H. Altem-
atively, “the applicant contended that, even if any interest
waiver was granted to the respondent by the Task Force,
such a waiver was illegal in view of the prevailing legal
order” as stated in Exhibit G, a portion of which is reproduced below:

“Exhibit G:

We, however, respectfully are unable to accept the Terms, by virtue of the prevailing legal order. The Terms appear to be predicated on a presumed waiver of interest, which issue was once tentatively broached by the two of us. We have been strongly advised and we verily believe that, in view of the prevailing legal order, this Bank would not be in a position to justifiably grant or defend any waiver of interest, as your organisation is considered a strong and viable concern, otherwise, we may be acting in contravention of the law and liable to be penalised accordingly.”

The Exhibit was written on 5 June, 1996 by the applicant bank to the managing director of the respondent. The strong point of the applicant in declining to grant a waiver of interest to the respondent, is that the latter is a strong and viable going concern, the reason being that the respondent paid the sum of ₦14,373,502, to the applicant within 21 days. It is also the contention of the applicant that paragraph 6 of Exhibit X2–D, which is a petition forwarded to the Central Bank by the managing director of the respondent, amounts to an admission that the respondent is viable.

Perhaps, I may add here that there is no evidence before the court that any of the officials of the bank had been charged with the offence of recklessly granting a 25% or any waiver at all to the respondent in connection with the loan under section 19(1)(e). It is also observed that there is nothing in Decree No. 18 of 1994 (as amended), which makes the grant of a loan or interest waiver, the exclusive preserve of the board of directors of the respondent. On the provisions of sections 19(1)(e) and 20(1)(b) of the Decree, any contravention of the provision of section 19(1)(e) of the Decree renders the official who contravened, liable, on conviction, to imprisonment of three years without the option of a fine, under section 20(1)(b). The legal implication of a conviction under section 20(1)(b) is to render any contract or transaction in relation to the breach of section 19(1)(e) void.

The position will be otherwise where no punishment is
prescribed for the breach of the relevant provision. See *Oilfield Supply Centre v Johnson* (1986) 2 NWLR (Part 25) 681 *ratio* 4, where no punishment is prescribed for a breach. A transaction made in contravention of the law is voidable and not void (see also *Oilfield Supply Centre v Johnson* (*supra*) *ratio* 4). Breach of the provisions of the law amounts to an illegality, whether or not punishment is prescribed for such breach. Courts are forbidden from aiding, condoning or encouraging illegality of any sort, it does not matter whether such illegality is pleaded or not. The court can raise the issue of illegality *suo motu* (see *Sodipo v Lemminkaine and Another* (1986) 1 NSCC 79 *ratio* 2 and 4 and *Sodipo v Lemminkaine* (1985) 2 NWLR (Part 8) 547 (S.C.)). See also *Oilfield Supply Centre v Johnson* (1987) 2 NWLR (Part 58) 625, *ratio* 10, where the Supreme Court held that a party who has committed an illegality cannot seek to benefit therefrom. Therefore, where it is proved to the satisfaction of the court that the alleged grant of interest waiver is in contravention of the provisions of section 19(1)(e), this Court will not hesitate to declare such a waiver as illegal and void and not voidable since there is a punishment for breach under section 20(1)(b).

This leads me to the consideration of whether the grant of the alleged interest waiver to the respondent contravenes the provisions of section 19(1)(e) of the Decree, that is, whether the waiver was reckless. As stated above, the applicant predicated its refusal to grant an interest waiver to the respondent on the ground that the latter is a strong and viable going concern (see paragraph 3 of Exhibit Y–D). Whether or not the respondent is a going concern, is a matter of fact and not law, and as such, there must be evidence upon which the court is obliged to take a decision. As stated above, the applicant claimed that, because the respondent made payment of over ₦14 million within 21 days, it is a viable and going concern and as such not qualified for a grant of an interest waiver under section 19(1)(e) of the Decree. The applicant also stated that Exhibit X2–D is a confirmation of the fact...
that the respondent is a going and viable concern. To my mind, the fact that the respondent made payment of over ₦14 million within 21 days is not conclusive of the fact that it is a viable company under section 19(1)(e) of the Decree. For the issuance of two separate post-dated cheques by the respondent in favour of the applicant on 21 November, 1995, is evidence of the fact that the drawee is not able to pay its debts to which the cheques relate at the time the cheques were issued. This act cannot be regarded as synonymous with the ability to pay its debts. The payment of the said over ₦14 million by the respondent is an isolated occasion, which cannot, in my view, be regarded as reflecting the true financial position of the respondent as a company incorporated under the provisions of the Companies and Allied Matters Act, 1990. In actual fact, to prove viability or otherwise of the respondent, its audited accounts for at least one year must be tendered, in accordance with the provisions of the Companies and Allied Matters Act (see A.C.B. Ltd v Domingo Builders (1992) 2 NWLR (Part 223) 296 ratio 1). Before I am done with this issue, I am of the opinion that the contents of paragraph 6 of Exhibit X2–D (reproduced above) should be read subject to the contents of Exhibit O–D.

I now proceed to consider whether or not an interest waiver was, in fact, actually granted to the respondent (albeit 25%) by the applicant through the task force? It is observed that there is no evidence before the court of any formal written grant of interest waiver in favour of the respondent. The next question is whether such a grant may be inferred from the facts of the case, including exhibits therein. The respondent relied on Exhibit S–D, which, according to the respondent, conveyed to it the grant of 25% interest waiver by the applicant. The applicant asserted that it granted no interest waiver to the respondent. It relied on Exhibits H and G. It is observed that Exhibit S–D was predicated on the meeting held between the officials of the applicant and the respondent on 16 November, 1995, and it is rather unfortunate that the minutes of the said meeting or its copy, is not tendered as an Exhibit by either party to this suit. I am of the view
that if the minutes had been made an Exhibit in this case, it will, no doubt, assist the court tremendously to know whether or not an interest waiver was granted or ever discussed. However, Exhibits H and G seem to suggest that an interest waiver was granted, albeit erroneously, and that the applicant, having been advised (the adviser not stated) that such a waiver may contravene the law, decided to change its mind on the grant. See Exhibit G, which was written on 5 June, 1996, whilst Exhibits S–D and P–D, were written on 20 and 21 November, 1995. Exhibit H was written on 7 December, 1995, and Exhibit O–D, was written on 21 November, 1995 and under which the two post-dated cheques for ₦4,373,502 were forwarded to the applicant by the respondent. It is observed that the respondent had acted on Exhibit S–D before Exhibit H was sent to it. Exhibit G came much about four months after Exhibit H. It has not been alleged by the applicant that the writer of Exhibits S–D and P–D had no authority to so write in order to bind the applicant. To my mind, since the alleged grant of interest waiver has been declared above not to be reckless, Exhibits S–D and P–D are sufficient evidence of the fact that the applicant intended to and actually granted to the respondent 25% interest waiver. By way of observation, the Central Bank of Nigeria forwarded Exhibit X2–D to the applicant on 15 January, 1997, through Exhibit X1–D with a demand to know the reasons why the applicant failed to honour the terms of the agreement negotiated between the Bank’s Loan Recovery Task Force and the respondent. I am of the firm view that, if the alleged grant of interest waiver had contravened the provisions of section 19(1)(e) of the Decree or any law, for that matter, the Apex Bank would not have demanded to know the reasons why the applicant failed to honour the agreement. For sure, Central Bank of Nigeria would not condone illegality of any sort.

It is also observed that the applicant replied on Exhibit X1–D, on 3 February, 1997 and it is not known what was
the reaction of Central Bank of Nigeria to the Exhibit Y–D.
Certainly the reaction of Central Bank of Nigeria to Exhibit Y–D, would be in favour of one of the parties to this case, but none of the parties bothered to tender same. However, since the applicant alleged that the grant of the alleged interest waiver would contravene the law on the ground of public policy, one would have expected it to endeavour to tender the reaction of Central Bank of Nigeria to Exhibit Y–D in order to buttress its case. Perhaps, I may add that the situation in this case on hand, is quite different from the case in NDIC v Geobi (Nigeria) Ltd (supra), where there was no document from where the alleged grant of an interest waiver could be inferred.

In the same vein, this case on hand is distinguishable from the case of NDIC v Geobi (supra). In the latter, the transaction about the alleged grant of interest waiver was conceived and hatched orally; that is, no written application for a waiver of interest. The discussions which led to the alleged grant of interest waiver were not recorded either, talk less of the alleged grant. Whereas in the case on hand respondent did apply in writing for 80% grant of interest waiver. There was a meeting held on the issue and Exhibit S–D was the outcome of the said meeting, whereby the applicant, by the tone of the said Exhibit, agreed and actually granted the respondent 25% of the accrued interest.

Similarly, it is pertinent to add that the discussions or transaction which led to the alleged grant of 25% interest waiver, were concluded long before the bank went under. It would be observed that the respondent, through Exhibit O–D, paid the sum of ₦4,373,502 being the balance of the total accrued interest, on 20 November, 1995, in full and final liquidation of its indebtedness to the applicant. In actual fact, Exhibit Q–D confirmed the liquidation of such indebtedness, whereby the respondent was requested to pay legal costs. All these events happened before the banking licence of the bank was withdrawn on 18 January, 1998 and N.D.I.C appointed the manager/liquidator of the bank.
In as much as a grant of 25% interest waiver to the respondent can be inferred from Exhibit S–D and there is evidence that the respondent acted on the said waiver by paying the outstanding sum on the total accrued interest, the applicant cannot be allowed to assert otherwise (see Exhibits O–D and Q–D. See also *Hi-Flow Farm Ind. v Unibadan* (1993) 4 NWLR (Part 209) 719). The applicant is estopped from asserting through Exhibits H and G that it is not in a position to grant an interest waiver to the respondent. Therefore, if the applicant is allowed to assert otherwise, the respondent would have suffered a detriment, in that it had paid a specified sum of money within the period prescribed by the applicant (see paragraph 3 of Exhibit S–D) in the promise that such payment would be in full and final liquidation of the total indebtedness of the respondent to the applicant. There is no doubt that the respondent is liable to pay the amount if no waiver is granted but the respondent paid the outstanding debt on the accrued interest within 21 days on the promise made to it by the applicant.

In view of the foregoing, I hold that the applicant granted to the respondent 25% interest waiver and cannot resile therefrom.

Consequently, the respondent, having paid the sum of ₦14,373,502k to the applicant in respect of the loan of ₦5,000,000 granted to the respondent, the respondent has fully and finally liquidated the said loan.

Consequently, the applicant is ordered to return to the respondent its (respondent title/security document), a copy of which is shown in Exhibit W–D.

No order as to costs.
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**FEDERAL HIGH COURT, LAGOS DIVISION**

**ABUTU J**

Date of Judgment: 23 MAY, 2000

Suit No.: FHC/L/FBCR/20/99

Banking – Banking offences – Under section 3(1) of the Failed Banks Decree No. 18 of 1994 (as amended) – Whether the recovery of debt from a customer of a bank relieves the customer from criminal prosecution

Company law – Pre-incorporation contract – Legality of Criminal law and procedure – Banking offence under the Failed Banks Decree No. 18 of 1994 (as amended) – Authority to prosecute – Delegation to private legal practitioner – Scope of section 24(2) of the Failed Banks Decree No. 18 of 1994 (as amended)

**Facts**

The accused persons herein complained in the main that the proof of evidence filed by the prosecution did not disclose any offence committed by them, and that the prosecutor lacked the competence to prosecute them because the authority to institute the criminal proceedings herein granted under section 24(2) of the Failed Banks Decree No. 18 of 1994 (as amended) to the prosecutor who is a private legal practitioner before the repeal of the said section 24 by the Tribunals (Certain Consequential Amendments etc) Decree No. 62 of 1999 and which was not utilised before the repeal cannot be exercised thereafter.

The accused persons contended that the debt having been repaid, they were relieved from further criminal prosecution.

**Held** –

1. Two main types of actions are cognisable under the Failed Banks (Recovery of Debts) and Financial
Malpractices in Banks Decree No. 18 of 1994. Under the Act an action can be brought to recover a debt owed to the bank and, if in the transaction between the customer and the bank, there is evidence to show that an offence defined in the Act or in any other law was committed by the customer, a charge can be brought against the customer in accordance with section 3(1) of the Act. It follows that the fact that the debt has been recovered from a customer does not make a subsequent criminal proceeding against the customer an abuse of court process.

2. By the provision of section 24(2) of Decree No. 18 of 1994, the Attorney-General of the Federation was empowered to authorise any legal practitioner in Nigeria to undertake the prosecution of any of the offences under the Decree. At the time the authority was given, on 6 May, 1998, the provision of section 24 of Decree No. 18 of 1994 was in force, and the power so conferred by virtue of that authority cannot be questioned by any person other than the Attorney-General of the Federation himself. The repeal of section 24 of Decree No. 18 of 1994 does not affect the authority given to the prosecutor to undertake the prosecution of the case.

3. By the provision of section 72 of the Companies and Allied Matters Act, 1990, it is not illegal for promoters of a company to enter into a contract in the name of a company yet to be incorporated. The provision admits of pre-incorporation contracts. The fact that the contract is a pre-incorporation contract is not evidence of criminality, or the existence of a criminal intention.

Charge quashed.

Cases referred to in the judgment

Nigerian

Egbe v The State (1980) 1 NCR 341

Ikomi v The State (1986) 5 SC 314
Three applications are to be considered in this ruling. The first accused by a motion on notice dated 8 March, 2000 is seeking:–

1. an order quashing the charge as it relates to the first accused on the grounds:–

   a. that the offences alleged in counts 2 and 3 of the information against the first accused person is not supported by proof of evidence before this Court;
that there is no link between the first accused/applicant and the offence with which he is charged.

2. An order striking out the charge on the ground that the prosecutor has no authority to institute the criminal proceedings against the first accused.

3. An order directing the complainant’s officers and agents not to arrest or harass the first accused pending the determination of this application.

The motion which was brought pursuant to sections 337, 341 and 353 of the Criminal Procedure Act and the inherent jurisdiction of the court is supported by an affidavit of seven paragraphs. The complainant, in opposition to the application, filed on the 21 March, 2000 a counter-affidavit of three paragraphs with paragraph 3 thereof having six subparagraphs. Five documents marked Exhibits A–El were annexed to the counter-affidavit.

The second accused person, also by a motion on notice dated 25 February, 2000, is seeking an order quashing the charge as it relates to the second accused on the grounds that:

1. There is no information before this Court as required by law upon which the applicant can be tried for the alleged offence.

2. The processes before the court including the purported information are not initiated by due process of law.

3. The complainant herein having entered into a consent judgment with the applicant, through its agent, the Nigeria Deposit Insurance Corporation (NDIC) as contained in the judgment of the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Tribunal presided over by the Honourable Justice MA Ope-Agbe dated 23 July, 1998 in Suit No. FBFMT/L/ZII/87/97 Commercial Bank of Africa
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4. The alleged offence therein as against the applicant is not disclosed by the statements and/or proof of evidence before the court.

c. The motion on notice which has been brought pursuant to sections 337, 338, 340, 341 and 353 of the Criminal Procedure Act and the inherent jurisdiction of the court is supported by an affidavit of 12 paragraphs to which 16 sets of documents marked Exhibit 1–16 were annexed. In opposition to the motion the complainant filed on the 8 March, 2000 a counter-affidavit of four paragraphs with paragraph 3 thereof having ten sub-paragraphs.

d. The third and fourth accused persons by a motion on notice dated 15 February, 2000 brought pursuant to sections 340, 353, 363, 338 and 341 of the Criminal Procedure Act, section 52 of the Federal High Court Act, 1990 and the inherent jurisdiction of the court are seeking:

1. An order quashing the charge against the third and fourth accused on the ground that:
   a. The offence alleged therein as against the third and fourth accused persons is not disclosed by the statements and/or proof of evidence before the court.
   b. There is no link between the offence and the third and fourth accused persons.
   c. The information preferred against the third and fourth accused persons/applicants is an abuse of the process of this Court.

2. An order directing the complainant/respondent and/or Mr A.U. Essiet A.C.P. to produce before this Court the written investigation report of the proposed ninth witness for the prosecution. A.C.P. A.U. Essiet attached to third and fourth accused persons of any

Ltd (under the management of NDIC) v His Royal Highness Eze Kelly N Nkeli ought not to have preferred the purported information against the applicant before this Court.
criminal wrongdoing but which the prosecution failed to Exhibit in its proof of evidence.

3. An order directing the complainant/respondent and/or Mr A.U. Essiet A.C.P. to forthwith produce before this Court the legal advice of the Director of Public Prosecutions of the Federation acting for the Attorney-General of the Federation which report did not indicate that a *prima facie* case had been made out against the third and fourth accused persons and that they be charged with the offence herewith charged.

4. An order that:
   
   i. That the information preferred against the third and fourth accused persons was not supported by the proof of evidence of the ninth witness for the prosecution and that there was no reasonable suspicion of the third and fourth accused persons/applicants having committed an offence as provided by section 35(1)(c) of the 1999 Constitution.
   
   ii. That to allow the prosecution to suppress such a report which clearly exonerates the third and fourth accused persons and to proceed to institute criminal proceedings against the accused persons would violate their rights protected by section 35(1)(c) of the 1999 Constitution and amount to an abuse of the process of this Court.
   
   iii. That it is a condition precedent to the filing of the information and preferring a charge against the accused persons that there must have been an investigation which raises a reasonable suspicion of the commission of an offence grounding the charge before the court.

5. An order striking out the information/charge on the ground that the prosecutor does not have the power to institute and or prosecute these criminal proceedings against the third and fourth accused persons.
6. An order directing the complainant, its officers and agents not to arrest or harass the third and fourth accused persons/applicants pending the final determination of this application.

The motion on notice is supported by an affidavit of six paragraphs with paragraph 5 thereof having nine sub-paragraphs. In opposition to the motion the complainant on 1 March, 2000 filed a counter-affidavit of four paragraphs with paragraph 3 thereof having ten sub-paragraphs. Four documents marked Exhibits A, B, C and D were annexed to the counter-affidavit.

In arguing the motion dated 15 February, 2000, the learned Counsel for the third and fourth accused placed reliance on the affidavit in support. He drew the attention of the court to the reliefs of the application. He submitted that the proof of evidence did not disclose a *prima facie* case against the third and fourth accused persons and that therefore the condition precedent to the exercise of the court’s jurisdiction to entertain the matter had not been complied with. He contended that a *prima facie* case of obtaining goods by false pretence under section 419 of the Criminal Code had not, having regard to the absence from the proof of evidence of the telex message and the pro forma invoice referred to in the charge, been established.

Learned Counsel drew the attention of the court to page 15 of the investigation report annexed to the original charge wherein it was stated that only customers of the bank were to be charged. He submitted that there was no allegation in the charge or in the proof of evidence to the effect that the third and fourth accused persons were customers of the bank, the third and fourth accused ought not to have been charged for an offence punishable under section 419 of the Criminal Code.

Learned Counsel submitted, relying on section 338 of the Criminal Procedure Act and the view of the learned author Aguda on *Criminal Law and Procedure* at 204, that the proof of evidence annexed to the charge in this case was not
proof of evidence in that the summary of the statements made by the witnesses was not incorporated therein.

Learned Counsel drew the attention of the court to item 3 on the document titled, “Saidi Group Tabulated”. He submitted that the money referred to in the said item 3 having been recovered after the sale of the property there is no basis for the charge in count 5 against the third and fourth accused persons. Learned Counsel drew the attention of the court to Exhibits B and C annexed to the counter-affidavit. He submitted, relying on section 72(1) of the Companies and Allied Matters Act, 1990, that trading or carrying on business in the name of a company before its registration is not illegal. He also cited *Egbe v The State* (1980) 1 N.C.R. 341 at 345 and *Fawehinmi v Akilu* (1994) 6 NWLR (Part 351) 387 at 395 in support of his submission.

In arguing the second ground of the application learned Counsel submitted referring to the investigation report submitted by A.U. Essiet wherein it is, according to him, stated that the third and fourth accused persons have no case to answer that the report being a public document ought to have been produced for inspection by the court.

The learned Counsel further submitted that the prosecutor who instituted the criminal proceedings had no authority to institute the action. He cited section 174 of the 1999 Constitution in support of his submission. The fiat in Exhibit D annexed to the counter-affidavit, learned Counsel contended being one issued, after section 24 of Decree No. 18 of 1994 had been deleted, in the exercise of the power conferred by the provision of section 6(1)(b) of the Interpretation Act, 1990 is defective, null and void. He cited *Ibrahim v The State* (1986) 1 NWLR (Part 184) 650 and *The State v Ai-bangbe* (1988) 3 NWLR (Part 84) 545 in support of his submission. He urged finally that the charge be quashed.

The learned Counsel for the second accused person in moving the motion dated 25 February, 2000 placed reliance on the affidavit in support. He drew the attention of the court...
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(a) to the grounds of the application set out in the motion. He adopted the submissions of the learned Counsel for the third and fourth accused persons. He submitted that the charge is defective having regard to the provisions of sections 337 and 338 of the Criminal Procedure Act wherein the format of all information is described. The date of the charge stated at the bottom of the charge sheet, he contended, ought to have been stated at the top of the charge sheet. He cited *Attah v The State* (1993) 7 NWLR (Part 305) 257 at 266 to buttress his contention that the word “shall” used in provisions of sections 337 and 338 of the Criminal Procedure Act has a mandatory connotation and that any information not in the form prescribed in sections 337 and 338 of the Criminal Procedure Act is incurably defective. He urged the court, relying on *Odofin v Agu* (1992) 3 NWLR (Part 229) 350 at 354, to hold that the charge being defective the court had no jurisdiction to entertain the matter.

(b) Learned Counsel drew the attention of the court to pages 39 and 40 of Exhibit A, wherein it is shown that the matter between the second accused and Commercial Bank of Africa was settled and that the second accused was discharged from all further liabilities to the bank. He submitted that the present criminal proceedings instituted after the matter had been settled was not maintainable. He cited *Obeniami v African Continental Bank Ltd* (1992) 3 NWLR (Part 229) 260 at 264 in support of his submission. The criminal proceeding, learned Counsel submitted is an abuse of the court process. He cited *Aribo v Aileru* (1993) 3 NWLR (Part 280) 1 at 130 in support of his submission. He submitted that the summaries of the statements made by the witnesses not being embodied in the proof of evidence the proof of evidence is incomplete. He drew the attention of the court to Exhibits C and D annexed to the counter-affidavit which, according to him, show that the second accused person’s account is in credit. He urged the court finally to quash the charge.

The learned Counsel for the first accused in arguing the motion dated 8 March, 2000 placed reliance on the affidavit
in support. He also adopted the submissions of the learned Counsel for the third and fourth accused persons and the submissions of the learned Counsel for the second accused person. He drew the attention of the court to Exhibit E annexed to the counter-affidavit filed on 21 March, 2000 and Exhibit D annexed to the counter-affidavit filed on 1 March, 2000. He submitted that Exhibit D which purports to renew Exhibit E is irregular. He submitted that the facts stated in the proof of evidence do not support the charge against the first accused person and that there is no *prima facie* case against the first accused. He urged the court referring to Exhibits B, C and D to hold that there is no allegation in the proof of evidence linking the first accused person to the charge. He submitted that mere suspicion does not amount to a *prima facie* case. He cited *Ikomi v The State* (1986) 5 SC 313 at 342 in support of his submission. He urged the court to quash the charge.

It is the learned Counsel’s further submission that the authority given to the prosecutor by virtue of the fiat issued pursuant to the provision of section 24 of the Failed Banks (Recovery of Debts) and Financial Malpractices in Bank Decree No. 18 of 1994 to prosecute cases under the Failed Banks Decree does not extend to the institution of the criminal proceedings. He cited *The State v Aibangbe* (1988) 3 NWLR (Part 84) 548 at 551; *DPP v Akozor* (1962) 1 NLR 235 in support of his submission. For the meaning of the word “undertake” used in section 24(2) of Decree No. 18 of 1994 learned Counsel cited page 1526 of Black’s *Law Dictionary* (6ed). He contended that the word “undertake” means to accept responsibility while the word “institute” means to commence.

Learned Counsel further drew the attention of the court to Decree No. 62 of 1999 wherein there is provision to the effect that section 24 of Decree No. 18 of 1994 has been suspended. He submitted that the power conferred on the prosecutor by virtue of the fiat issued pursuant to the provision of the suspended section 24 of Decree No. 18 of 1994
no longer subsists after the suspension of section 24 of the
Decree. He urged the court finally to quash the charge
against the first accused.

The three applications were opposed by the learned prose-
cutor. He placed reliance on the three counter-affidavits filed
respectively in opposition to the motions. He submitted that
there is no provision in the Criminal Procedure Act requiring
him to file proof of evidence in this case, which is being
tried summarily.

The learned prosecutor drew the attention of the court to
Exhibits B and C annexed to the counter-affidavit filed on 1
March, 2000 and paragraphs F and J of the affidavit in sup-
port of the motion filed by the third and fourth accused per-
sons. He also drew the attention of the court to Annexure 1
to the proof of evidence. He submitted that the proof of
evidence has disclosed a *prima facie* case against the third
and fourth accused persons. Exhibits B and C he contended
show that at the time the transaction was done the company
in whose name the third and fourth accused persons operated
had not been incorporated. He drew the attention of the court
to section 72(2) of the Companies and Allied Matters Act,
1990 which requires that pre-incorporation contracts be
ratified.

It is the learned Counsel’s further submission that the
charge in this case filed on 28 May, 1999 is competent.

He drew the attention of the court to Exhibit D annexed to
the first counter-affidavit, Exhibit E annexed to the second
counter-affidavit and Exhibit A annexed to the third counter-
affidavit. He submitted that, having regard to Exhibits D, E
and A annexed to the counter-affidavits, he had authority to
institute the criminal proceedings against the accused per-
sons. The fiat given to him by virtue of Exhibits D and E, he
contended, empowered him to institute the criminal proceed-
ings and to prosecute the accused persons. He cited page
1526 of Black’s *Law Dictionary* for the word “undertake”
and the case of *DPP v Akozor (supra)* at 236 to buttress his
contention that he had authority to institute the instant
criminal proceeding. He urged the court relying on the
ruling of this Court in *Federal Republic of Nigeria v Adekanye and 2 others* (2000) 2 N.B.L.R. 74 and the case of *Nafiu Rabiu v Kano State* (1980) SC 130 to dismiss the motion filed by the third and fourth accused persons.

In reply to the submissions of the learned Counsel for the second accused person, learned prosecutor adopted his earlier submissions in this case. He placed reliance on the affidavit filed in opposition to the motion. He submitted that the settlement of the claim as shown in Exhibits B and C does not preclude the complainant from instituting the present criminal proceedings to prosecute the second accused for the offence of obtaining by false pretences. He urged the court to dismiss the motion of the second accused person.

In reply to the submissions of the learned Counsel for the first accused the learned prosecutor also adopted his earlier submissions in this case. He drew the attention of the court to Exhibits A and B annexed to the counter-affidavit filed on 21 March, 2000. He submitted that, by the use of the phrase “immediate credit” in Exhibit B, exhibit B became a document by which a loan was granted to Maximum Plastics Ltd. He submitted that the charge against the first accused person is competent. He urged finally that the motion of the first accused person be dismissed.

In reply the learned Counsel for the third and fourth accused persons submitted that the proof of evidence was incomplete in that it did not contain a summary of the statements made to the police by the witnesses to be called as well as other relevant facts to show that there was a prima facie case against the third and fourth accused persons. He cited *N.A.A. v Okoro* (1995) 6 NWLR (Part 403) 510 at 513 in support of his submission.

Learned Counsel drew the attention of the court to the provision of section 72 of the Companies and Allied Matters Act, 1990 which is to the effect that the promoters are personally liable for pre-incorporation contracts if the company is not incorporated. He submitted that there is no element of
It is the learned Counsel’s further submission that the two counter-affidavits filed in opposition to the motions filed by the first and second accused after the motion filed by the third and fourth accused had been moved which were not served on the third and fourth accused cannot be relied on by the prosecutor in the motion filed by the third and fourth accused. He contended that leave of the court had to be sought and obtained before any counter-affidavit could be filed and used in the application filed by the third and fourth accused. He contended that leave of the court had to be sought and obtained before any counter-affidavit could be filed and used in the application filed by the third and fourth accused. After he had argued the motion. He cited in support of his contention *Ikenna v Board* (1997) 3 NWLR (Part 494) 439 at 444; *Majoroh v Fassasi* (1986) 5 NWLR (Part 40) 243 at 245 and *Ramon v Jinadu* (1986) 5 NWLR (Part 39) 100 at 102. He urged the court to discountenance the counter-affidavit filed after he had concluded his arguments in the motion dated 15 February, 2000.

Learned Counsel drew the attention of the court to the provision of section 24(2) of Decree No. 18 of 1994. He submitted that the words “institute” and “undertake” could not be used interchangeably since they were not synonymous. He cited *The State v Aibangbe (supra)* at 551 in support of his submission. He urged the court finally to quash the charge.

The learned Counsel for the second accused in reply submitted that after 28 May, 1999 all matters under the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree No. 18 of 1994 were to be instituted in accordance with the Rules of the Federal High Court.

He submitted that the power to institute the criminal proceedings granted before the suspension of section 24(2) of Decree No. 18 of 1994 which was not exercised by the prosecutor before the suspension of the provision of the section could not be exercised after the suspension of the provision. He urged finally that the charge against the second accused be quashed.
The learned Counsel for the first accused in reply observed that Decree No. 62 of 1999 was signed on 26 May, 1999 to come into effect on 28 May, 1999. He submitted that the Decree took effect one second after midnight on 28 May, 1999. He submitted that at the time the instant criminal proceeding was instituted the tribunal had been abolished and that the present criminal proceeding sought to have been instituted in accordance with the provision of the Rules of this Court. He urged the court to quash the charge.

The foregoing is a summary of the submissions made by Counsel on both sides in the three applications.

The issue whether or not the prosecutor has authority to institute the criminal proceeding has been raised in the three applications. The Counsel for the third and fourth accused, the Counsel for the second accused and the Counsel for the first accused submitted that Exhibit D annexed to the counter-affidavit filed on 1 March, 2000 and Exhibit E annexed to the counter-affidavit filed on 21 March, 2000 did not vest in the prosecutor the authority to institute the criminal proceeding. Exhibit E was issued by the then Attorney-General of the Federation on 6 May, 1998 while Exhibit D was issued by the incumbent Attorney-General of the Federation on 20 September, 1999.

The body of Exhibit E is in the following terms:

1. By virtue of the powers conferred upon me pursuant to section 24(2)(6) of the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree No. 18 of 1994, I hereby authorise you to undertake prosecution on my behalf in the above mentioned Tribunal.

2. You are expected to report back to me periodically on all the cases referred to you for prosecution.

3. Accept my warm congratulations."

The body of Exhibit D is in the following terms:

1. “By virtue of the provisions of section 6(1)(6) of the Interpretation Act, I hereby authorise you to continue to undertake prosecution on my behalf under the above mentioned Decree.
You are expected to report back to me periodically on all the cases referred to you for prosecution.

Accept my warm congratulations.”

Exhibit E was issued pursuant to the power conferred on the Attorney-General of the Federation by the provision of section 24(2) and (3) of the Decree No. 18 of 1994 which is in the following terms:–

“Section 24(2) Prosecution for offences under this Decree shall be instituted before the Tribunal in the name of the Federal Republic of Nigeria by the Attorney-General of the Federation or such officer in the Federal Ministry of Justice as he may authorize so to do, and in addition thereto, he may:–

(a) after consultation with the Attorney-General of any State in the Federation, authorise the Attorney-General or any officer in the Ministry of Justice of that State; or

(b) if a Tribunal so directs or if the Central Bank of Nigeria or the Nigerian Deposit Insurance Corporation so requests, authorize any other legal practitioner in Nigeria, to undertake any such prosecution directly or assist therein.

(3) The question whether any or what authority has been given in pursuance of subsection (2) of this section shall not be inquired into by any person other than the Attorney-General of the Federation.”

The Attorney-General of the Federation was empowered by the provision of section 24(2) of the Decree above reproduced to authorise any legal practitioner in Nigeria to undertake the prosecution of any of the offences under the Decree. Exhibit E was issued on 6 May, 1998 when the provision of section 24 of Decree No. 18 of 1994 was in force. By the provision of subsection (3) of 24 of the Decree the authority so conferred by virtue of Exhibit E in this case cannot be questioned by any person other than the Attorney-General of the Federation himself. That being the case it is my firm view that the accused persons in this case cannot question
the authority of the prosecutor to institute the instant crimi-
al proceeding. The repeal of Decree No. 18 of 1994 by which the provision of section 24 of the Decree has been suspended does not affect the authority given to the prosecu-
tor to undertake the prosecution of the case. See section 6(1)(b) and (c) of the Interpretation Act, 1990 which is in the following terms:–

“6(1) The repeal of an enactment shall not:–

(a) . . .

(b) affect the previous operation of the enactment or anything duly done or suffered under the enactment.

(c) affect any right, privilege, obligation or liability accrued or incurred under the enactment.”

See also His Highness Erejuwa II, the Olu of Warri v Kparegbayi and others (1994) 4 NWLR (Part 339) 416 at 438–479. Exhibit D certainly is not a letter of authority to the prosecutor to undertake the criminal proceeding. I think it is meant to draw the attention of the prosecutor to the provision of section 6(1)(b) of the Interpretation Act. At the time Exhibit D was written the Attorney-General of the Federation no longer had power, having regard to the sus-
pension of section 24 of the Decree, to appoint a private legal practitioner to undertake the prosecution of offences under Decree No. 18 of 1994. I hold that the prosecutor has authority to undertake the prosecution of this case.

The question whether authority to undertake the prosecu-
tion extends to authority to institute the criminal proceeding has also been canvassed by the Counsel for the accused. Attempt was made by them to show that the word “under-
take” is different in meaning from the word “institute”. The crucial word in this case having regard to the manner Ex-
hbit E is worded and the provision of section 24(1)(b) of Decree No. 18 of 1994 is the word “prosecute”. The prose-
cutor has been authorised to prosecute the case. On page 1221 of Black’s Law Dictionary (6ed) the word “prosecute”
is defined to mean to carry on an action; explaining the word “prosecute” said:–

“To prosecute an action is not merely to commence it, but include following it to an ultimate conclusion.”

I am of the firm view that the authority to undertake the prosecution of a matter is authority to commence the action and to follow it up to conclusion.

One interesting point raised by the learned Counsel for the first accused is that the action was commenced on 28 May, 1999 after the Tribunal had been dissolved. The action was headed in the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Tribunal.

By the provision of section 2(3) of Decree No. 62 of 1999 any charge filed before the Tribunal shall be deemed to have been duly filed before the Federal High Court. It seems to me that the fact that the charge is headed in the Failed Banks Tribunal notwithstanding, the charge in this case is one filed before the Federal High Court.

I hold in the final analysis that the prosecutor has authority to institute the criminal proceeding and to undertake the prosecution of this case.

The third and fourth accused persons as per the amended charge filed on 18 February, 2000 have been arraigned for an offence contrary to and punishable under section 419 of the Criminal Code. The charge is as follows:–

“Count 5

That you Nabil Abou Hassan and Sami Abou Hassan sometime in 1991 did obtain from Commercial Bank of Africa Limited and First Abuja Finance and Investments Ltd the sum of U.S.$350,000.00 (Three Hundred and Fifty Thousand U.S. Dollars) property of the bank under the false pretences that you will supply First Abuja Finance and Investments Limited through Meadgrove Export Limited, U.K. 350 M.T. LDPE Film Grade M. 1. 5 4 which said supply you never did after collecting the said U.S. $350,000.00 from the bank contrary to section 419 of the Criminal Code Act Cap 77 Laws of the Federation of Nigeria, 1990 punishable under section 419 of the same law.”
The prosecutor filed along with the maiden charge filed on a *prima facie* case against the accused persons who were then ten in number. The first point of the objection in this application filed by the third and fourth accused is that none of the documents filed along with the charge show *prima facie* that the offence charged was committed by the third and fourth accused persons.

The law as settled by the authorities is that in a trial by information or where as in this summary trial there is requirement for the filing of proof of evidence and the proof of evidence filed does not contain depositions and statements which show *prima facie* that the offence charged was committed by the accused, the charge stands to be quashed (see *Egbe v The State* (1980) 1 N.C.R. 341). In that case Uthman Mohammed JCA, as he then was, put it at 345 thus:–

“I entirely agree with the reasoning put forward by the appellant and I am of the view that the proof of evidence which has been considered in this appeal, without more, is not sufficient to establish a case of obtaining money by false pretences contrary to section 419 of the Criminal Code. What I found lacking in the proof are statements from Maiyegun Estate Limited, which is a registered company, or any incriminating statement from American International Insurance Company (Nigeria) Limited, complaining about parting with their money through the appellant’s trick or fraud.”

See also *Reg. v London County Quarter Sessions Chairman Ex parte Downes* (1954) 1 Q.B. 1 wherein it is re-stated that, when the motion to quash is on the ground that the offence is not disclosed by the depositions or statements, the Judge can look beyond the indictment to the depositions or statements to see if the offence charged is disclosed by the depositions or statements (see also *R. v Jones* (1974) 1 C.R. 320).

This Court, having regard to the authorities is in this case, enjoined to look beyond the charge to the deposition or statements. The learned prosecutor in reply to the submissions of the learned Counsel for the third and fourth accused on the issue whether or not the offence charged is disclosed by the deposition and the statements or documents filed
along with the charge placed reliance on Exhibits B and C annexed to the counter-affidavit filed in opposition to the motion. He contended that Exhibits B and C show that at the time the transaction was entered into by the third and fourth accused persons in the name of Meadgrove Exports Limited, the company, Meadgrove Exports Limited, had not been incorporated. He contended that the act of doing business in the name of a company not already registered is an element of criminality and that there is therefore disclosed in Exhibits B and C that the offence charged had been committed by the third and fourth accused persons. The learned prosecutor curiously did not refer to any of the documents filed along with the charge to buttress his contention that there was a *prima facie* case against the third and fourth accused persons. Certainly the failure of the learned prosecutor to draw the court’s attention to any of the documents filed along with the charge to buttress his contention that there was a *prima facie* case against the third and fourth accused is tantamount to conceding the point raised by the learned Counsel for the accused to the effect that none of the documents support the charge. The learned prosecutor has in his reply relied on Exhibits B and C annexed to the counter-affidavit filed in opposition to the motion.

Exhibits B and C are letters written by solicitors wherein it was confirmed that, as at 1991 when the transaction was done, Meadgrove Exports Limited had not been incorporated. Meadgrove Exports Limited was, however, incorporated in 1993. The contract between First Abuja Finance Investments and Meadgrove Exports Limited in 1991 is therefore a pre-incorporation contract. The view of the solicitor who wrote Exhibit C is that, in the circumstance, the proper cause is to sue the Hassans who are directors of Meadgrove Exports Limited personally. By the provision of section 72 of the Companies and Allied Matters Act, 1990, it is not illegal for promoters of a company to enter into a contract in the name of a company yet to be incorporated. The provision admits of pre-incorporation contracts. The fact that the contract is a pre-incorporation contract is no
evidence of criminality, or the existence of a criminal intention. Suspicion alone cannot be the ground of an indictment (see Ikomi v The State (1986) 5 SC 314 at 342).

My careful examination of the documents filed along with the charge in this case reveals that none of the documents show prima facie that the offence charged in count 5 was committed by the third and fourth accused persons. Exhibits B and C annexed to the counter-affidavit filed in opposition to the motion do not also show prima facie that the offence charged was committed by the third and fourth accused persons. In the result I hold that the charge against the third and fourth accused persons ought to be and it is hereby quashed. The third and fourth accused are hereby discharged.

The application of the second accused is predicated on four grounds set out earlier on in this ruling. The first point of the objection argued by the learned Counsel for the second accused is predicated on the provision of sections 337 and 338 of the Criminal Procedure Act relating to the contents of information. It is his submission that the failure of the prosecutor to state the date of the charge at the top of the charge sheet has the effect of rendering the charge incurably defective. He cited Attah v The State (supra) and section 337 of the Criminal Procedure Act, 1990 in support of his submission.

The prosecutor in this case has not filed any information. He has filed a charge and the trial is a summary trial (see sections 277 and 278 of the Criminal Procedure Act). The provisions of sections 337 and 338 of the Criminal Procedure Act relating to the form and contents of an information or indictment do not therefore apply to this case. I am of the view that the contention of the learned Counsel for the accused on this point is misconceived.

The second point canvassed by the learned Counsel for the second accused is predicated on Exhibits 13 and 14 annexed to the affidavit in support of the application which show that
there was a court action brought by Commercial Bank of Africa Ltd against the second accused and that the case was settled and judgment entered as per the terms of settlement. His contention is that this criminal proceeding brought after the matter had been settled in court and the judgment debt paid is not maintainable; there is a clause in the terms of settlement filed to the effect that the respondent in that case who is the second accused in the instant case is fully discharged from all further liabilities to the bank. Learned Counsel contended that the second accused being a customer of the bank who has already paid the debt owed to the bank is not liable to be prosecuted for the offence charged in this case. The present criminal proceeding, learned Counsel contended, is an abuse of court process.

Two main types of actions are cognisable under the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree No. 18 of 1994. Under the Decree an action can be brought to recover a debt owed to the bank and, if in the transaction between the customer and the bank there is evidence to show that an offence defined in the Decree or in any other law was committed by the customer, a charge can be brought against the customer (see section 3(1) of the Decree). It follows that the fact that the debt has been recovered from a customer does not make a subsequent criminal proceeding brought against the customer an abuse of court process. I am of the firm view that the present criminal proceeding against the second accused is maintainable. It is not an abuse of court process.

The third point of the objection is that the depositions and the statements or documents filed along with the charge do not disclose the offence charged in count 4 which is in the following terms:–

"Count 4

That you Kelly Nkeli Kelly between 1991 and 1994 being a customer of Commercial Bank of Africa Ltd, Ikeja Branch, Lagos, with current Account No. 1112001136 did at various times obtain the total sum of ₦6,000,000 (Six Million Naira) property of the bank under the false pretence of foreign exchange expectation into the bank’s foreign account
in your favour contrary to section 419 of the Criminal Code Act Cap 77 Laws of the Federation of Nigeria, 1990 punishable under section 419 of the same law.”

The learned Counsel for the accused in his submission in respect of this ground of the objection drew the attention of the court to Exhibits C and D annexed to the counter-affidavit filed in opposition to the motion which, according to him, show that the debt was paid by the second accused to the bank. He submitted that there are no statements or depositions embodied in the proof of evidence to show *prima facie* that the offence charged in count 4 was committed.

The depositions and the statements made by persons to be called as witnesses in this case are not embodied in the proof of evidence. The prosecutor has merely filed a bundle of documents along with the charge. There are therefore no statements or depositions contained in the proof of evidence to show *prima facie* that the offence charged was committed by the second accused. The investigation report and the copies of the bank’s books of account filed along with the charge do not constitute depositions and statements which are required to be included in the proof of evidence. There being no facts which show *prima facie* that the offence charged has been committed I think the charge against the second accused ought to be and it is hereby quashed. The second accused is hereby discharged.

The first accused has been arraigned on a three-count charge for an offence contrary to section 18(1)(b) of the Banks and Other Financial Institutions Decree No. 25 of 1991 and punishable under section 18(2) of the same Decree.

In this application it has been contended on behalf of the first accused that there being no depositions and statements contained in the proof of evidence to show that the offence charged was committed by the first accused, the charge should be quashed. In reply learned prosecutor placed reliance on Exhibits A and B annexed to the counter-affidavit filed in opposition to show that there is disclosed *prima facie*
a facie that the offence charge was committed by the first accused.

Exhibits A and B are also in the bundle of documents filed along with the charge. Exhibit A shows that the sum of ₦6,500,000 was paid to Progress Bank of Nigeria Limited while Exhibit B shows that the payment was made based on the directive of the first accused to the branch manager of the bank. There is, however, no statement of any witness which shows that the credit was given without security or that the amount given is above the limit of the accused. There is therefore no deposition or statement contained in the proof of evidence to show prima facie that the offence charged was committed by the first accused. I think having regard to the authorities that the charge against the first accused ought also to be quashed. The charge is hereby quashed. The first accused is discharged.

d On the whole the three motions succeed and the entire charge is quashed.
Chima Akwara v International Bank for West Africa Limited

COURT OF APPEAL, PORT HARCOURT DIVISION
PAT'S-ACHOLONU, AKPIROROH, OGEBE JJCA
Date of Judgment: 25 MAY, 2000        Suit No.: CA/PH/170/92

Banking – Banker and customer relationship – Bank making false statement in respect of credit worthiness of customer – Breach of duty – Libellous – Measure of damages

Evidence – Admission against interest – Attitude of court

Facts
The plaintiff’s/appellant’s case as made out in his pleadings is that in 1981 he negotiated and obtained credit with Newby Iron Foundry Limited in England for the supply of iron pipe. He nominated the defendant/respondent as his bank for the purposes of the transaction. In December, 1981 the overseas company shipped iron water pipe fittings to the appellant worth £17,647 on credit. In July, 1982, the plaintiff paid for the supply in local currency to be remitted to the supplier at the prevailing exchange rate. In August, 1982, the respondent on behalf of the appellant applied to the Central Bank for foreign exchange allocation for the Bill 1406/81AB. On 17 February, 1983, the defendant/respondent confirmed this in the application for the transfer of that letter. When the money to be paid to the overseas customer was for a while not paid, the appellant complained of the delay. Up till the end of 1983 the money was not transferred. After the military takeover in 1984, the Central Bank embarked on refinancing all outstanding applications. The Central Bank then issued the report known as G.RUN5 on the status of the plaintiff’s/appellant’s application as per Bill No. 1406/81/AB. The defendant/respondent issued a “No Naira Available” answer. This means that the plaintiff made no Naira deposit and did not have sufficient funds with the defendant’s bank when according to him he had settled that
On enquiries from the Central Bank about the refusal to release foreign exchange, the Central Bank gave its reasons. The plaintiff suffered considerable loss and damages by this as plaintiff’s account was published to the plaintiff’s Newby Hiltop Foundry Limited. That publication injured the plaintiff in his credit as he had hitherto been enjoying credit facilities from his overseas companies and he lost all his overseas customers who no longer granted him credit. The plaintiff averred that, before the incident, there was bimonthly shipment of goods valued at £20,000 from a company known as John Williams Steel Services Limited and £17,000 from Newby Hiltop Foundry Limited. Since the incident, he has not transacted any business with these companies. The plaintiff averred that he had made several demands for his money but the respondents had refused to pay. The plaintiff demanded as follows:

“(a) An order of this Honourable Court directing the defendant to transfer to the plaintiff’s Overseas Customer as contained in Bill Number BC 1406/81 AB namely Newby Hiltop Foundry Limited or West Midlands the sum of £17,647.00 (Seventeen thousand, Six hundred and Forty Seven Pounds Sterling) as contracted between them.

(b) 20% (twenty per cent) interest on the said sum of £17,647.00 from July till judgment is delivered.

(c) 4% (four per cent) interest on the said sum from the date of judgment until completely liquidated.

(d) ₦4.0M (Four Million Naira) damages for libel.

(e) ₦6.0M (Six Million Naira) Special and General Damages for negligence.

PARTICULARS OF SPECIAL DAMAGES

(i) 252,000 pieces of Water Pipe Fittings at ₦17 (Seventeen Naira) loss pipe Fittings; ₦ 4,284,000.00
(ii) 1,400 tonnes of Mild Steel sections from John Williams Steel Services Ltd at ₦490 loss Per tonne ₦1,316,000.00

(iii) Air Tickets/Transportation ₦30,000.00

(iv) Hotel Bills/Accommodation ₦144,000.00

(v) Telex Messages/Telephone Calls ₦5,000.00

(vi) General Damages ₦221,000.00

Total ₦6,000,000.00

GRAND TOTAL ₦10,000,000.00  

The defendant’s/respondent’s case was that it accepted a documentary bill dated 30 November, 1981 which showed that the appellant was to deposit a sum of ₦21,492.50 which was due for settlement on 7 January, 1982 and the appellant was written two letters to come and make the deposit. The bill was provisionally paid and the appellant’s account was accordingly debited. Payment was made on 23 July, 1982. On 5 August, 1982 the respondent’s Aba office applied for foreign exchange which was forwarded to the Central Bank by the respondent’s head office who accepted the bill on 3 March, 1983. It denied that the appellant made any complaint of delay. It stated that the acceptance of the bill by the Central Bank was mainly provisional in the sense that the allocation of foreign exchange is dependent on its availability. It averred that at the inception of the Military Administration in 1984, the Central Bank commenced re-financing of outstanding applications. It maintained that any delay was occasioned by the failure of the plaintiff/appellant in meeting with the shortfall of ₦13,331.18 notwithstanding the letter to the plaintiff of 22 September, 1986. When the shortfall was not made available, the defendant/respondent was forced to inform the Central Bank that there was no money available particularly there was no funds in the plaintiff’s/appellant’s account after the initial deposit. In 1987, the receiving bank, Chase Manhattan U.K., classified the plaintiff’s bill as previously paid in their creditor’s report but the defendant protested and requested Central Bank to advise Chase Manhattan to issue a
promissory note on the pending application. The defendant/respondent protested to the Central Bank in categorising the bill as having been previously paid. It denied making any publication to Newby Hilltop Foundry Limited. After the failure of the whole effort to secure foreign exchange, the plaintiff as a prudent business man did not request for his money. It therefore denied all liabilities.

On hearing the evidence and address of Counsel, the trial court dismissed the case save for making an order of refund of the sum of N21,492.25 which was the initial deposit made by the appellant. The plaintiff appealed.

Held –

1. Where a party to a case had made an oral or written statement adverse to its contention, it is admissible in evidence in subsequent proceedings as facts against his interest.

2. In terms of a banker and customer relationship where the bank made a false statement in respect of the creditworthiness of the customer it has been in breach of duty of care as by this relationship it should exercise due care in giving out information which must not be detrimental to the interest of the customer.

3. Where a bank which in this connection is also an agent of the customer is required to give a report which is important for the effectuation of a certain business transaction and any adverse report could be fatal or jeopardise the interest of the customer, the bank owes it as a duty of care to exercise utmost care in making a report. Where in making such a report evidence shows that there was manifest negligence, the duty of care has been broken.

4. In this case, there is the special relationship as has been adumbrated between the appellant and the respondent. There are both a contractual and fiduciary relationship between the appellant and the respondent in this matter. In such a case, the respondent as a nominated bank in relation to the appellant which is a trading company that has applied for foreign exchange has a duty of care to
ensure that by reporting what is not true the appellant’s application will fail.

5. If someone who was not a customer of a bank made a formal approach to the bank with a definite request that the bank would give him deliberated advice as to certain financial matters of a nature with which the bank ordinarily dealt, the bank would be under no obligation to accede to the request; if, however, they undertook though gratuitously to give deliberate advice they would be under a duty to exercise reasonable care in giving this. They would be liable if they were negligent although there being no consideration, no enforceable contractual relationship was created.

6. Where a bank is requested by the Central Bank to give it information relating to the creditworthiness of a customer as regards an application for foreign exchange and to the knowledge of the bank there was money in the account or lodged for such an application, if it gives an adverse information, it is total breach of care and it is liable for negligence as well as breach of contract.

7. Where a bank gives an answer by way of “No Naira Available” or “No Naira” and there is evidence that there are sufficient funds to meet the requirement, it is libellous as it can be discerned from such representation that the bank intentionally decided to cast a slur on the character/creditworthiness of the customer. By falsely and negligently representing the appellant as impecunious, when the contrary is the case, the bank dealt an incalculable harm to the credit of the appellant.

8. Where a bank expressly contracted to sustain a trader’s financial credit, and it fails to do so, substantial damages can be recovered on proof of actual damage. In the instant case, there is proof of actual damage sustained which is heavy and weighty.

Appeal allowed.
Cases referred to in the judgment

**Nigerian**

*Bello v Eweka* (1981) 1 SC 101

*Benue Printing and Publishing Corp. v Gwagwada* (1989) 4 NWLR (Part 116) 459

*Motumwase v Sorungbe* (1988) 5 NWLR (Part 92) 90

*Re Felix v Egware* (1974) 6 SC 103

*Seismograph Service (Nig.) Ltd v Eyuafe* (1976) 9–10 SC 135

**Foreign**

*Banbury v Bank Montreal* (1918) AC 629

*Davidson v Barclays Bank Ltd* (1940) 1 All ER 316

*Hedley Byrne and Co Ltd v Heller and Partners Ltd* (1964) AC 465

*Lewis v Daily Telegraph* (1964) AC 234

*Robinson v National Bank of Scotland* (1916) 53 SCLR 390

*Slim v Strech* (1936) TLR 669

*Wilson v United Counties Bank* (1920) AC 102

**Counsel**

For the appellant: *Egwu* (with him *Obinezo*)

For the respondent: *Nwadi*

**Judgment**

**PATS-ACHOLONU JCA:** *(Delivering the lead judgment)* The plaintiff’s/appellant’s case as made out in his pleadings is that in 1981 he negotiated and obtained credit with Newby Iron Foundry Limited in England for the supply of iron pipe. He nominated the defendant/respondent as his bank for the purposes of the transaction. In December, 1981 the overseas company shipped iron water pipe fittings to the appellant worth £17,647 on credit. In July, 1982 the plaintiff paid for the supply in local currency to be remitted to the supplier at the prevailing exchange rate. In August, 1982 the respondent
on behalf of the appellant applied to the Central Bank for foreign exchange allocation for the transfer of the Bill BC 1406/81/AB. On 17 February, 1983 the defendant/respondent confirmed this in the application for the transfer of that letter. When the money to be paid to the overseas customer was for a while not paid, the appellant complained of the delay. Up till the end of 1983 the money was not transferred. After the military takeover in 1984, the Central Bank embarked on refinancing all outstanding applications. The Central Bank then issued the report known as G. RUN 5 on the status of the plaintiff’s/appellant’s application as per Bill No. 1406/81/AB. The defendant/respondent issued a “No Naira Available” answer. This means that the plaintiff made no Naira deposit and did not sufficient funds with the defendant bank when according to him he had settled that bill. It was on this information that the Central Bank relied to reject the release of a foreign exchange allocation. On enquiries from the Central Bank about the refusal to release foreign exchange, the Central Bank gave its reasons. The plaintiff suffered considerable loss and damages by this as plaintiff’s account was published to the plaintiff’s Newby Hilltop Foundry Limited. That publication injured the plaintiff in his credit as he had hitherto been enjoying credit facilities from his overseas companies and he lost all his overseas customers who no longer granted him credit. The plaintiff averred that, before the incident, there was bi-monthly shipment of goods valued at £20,000 from a company known as John Williams Steel Services Limited and £17,000 from Newby Hilltop Foundry Limited. Since the incident, he has not transacted any business with these companies. The plaintiff averred that he had made several demands of his money but the respondents had refused to pay. The plaintiff demands as follows:–

“(a) An order of this Honourable Court directing the defendant to transfer to the plaintiff’s overseas customer as contained in Bill Number BC 1406/81 AB namely Newby Hilltop Foundry Limited or West Midlands the sum of £17,647.00
(Seventeen thousand, Six hundred and Forty Seven Pounds Sterling) as contracted between them.

(b) 20% (twenty per cent) interest on the said sum of £17,647.00 from July till judgment is delivered.

(c) 4% (four per cent) interest on the said sum from the date of judgment until completely liquidated.

(d) N\textbf{4.0m} (Four Million Naira) damages for libel.

(e) N\textbf{6.0m} (Six Million Naira) Special and General Damages for negligence.

PARTICULARS OF SPECIAL DAMAGES

(i) 252,000 pieces of Water Pipe Fittings at N\textbf{17} (Seventeen Naira) loss Pipe Fittings; N\textbf{4,284,000.00}

(ii) 1,400 tonnes of Mild Steel sections from John Williams Steel Services Ltd at N\textbf{490.00} loss Per tonne N\textbf{1,316,000.00}

(iii) Air Tickets/Transportation N\textbf{30,000.00}

(iv) Hotel Bills/Accommodation N\textbf{144,000.00}

(v) Telex Messages/Telephone Calls N\textbf{5,000.00}

(vi) General Damages N\textbf{221,000.00}

Total N\textbf{6,000,000.00}

GRAND TOTAL N\textbf{10,000,000.00}

The defendant’s/respondent’s case was that it accepted a documentary bill dated 30 November, 1981 which showed that the appellant was to deposit a sum of N\textbf{21,492.50} which was due for settlement on 7 January, 1982 and the appellant was written two letters to come and make the deposit. The bill was provisionally paid and the appellant’s account was accordingly debited. Payment was made on 23 July, 1982. On August 5, 1982 the respondent’s Aba office applied for foreign exchange which was forwarded to the Central Bank by the respondent’s head office who accepted the bill on 3 March, 1983. It denied that the appellant made any complaint of delay. It stated that the acceptance of the bill by the Central Bank was mainly provisional in the sense that the
allocation of foreign exchange is dependent on its availability. It averred that at the inception of the Military Administration in 1984 the Central Bank commenced re-financing of outstanding applications. It maintained that any delay was occasioned by the failure of the plaintiff/appellant in meeting with the shortfall of \( \text{₦}13,331.18 \) notwithstanding the letter to the plaintiff of 22 September, 1986. When the shortfall was not made available, the defendant/respondent was forced to inform the Central Bank that there was no money available particularly there was no funds in the plaintiff’s/appellant’s account after the initial deposit. In 1987, the receiving bank, Chase Manhattan U.K., classified the plaintiff’s bill as previously paid in their creditor’s report but the defendant protested and requested the Central Bank to advise Chase Manhattan to issue a promissory note on the pending application. The defendant/respondent protested to the Central Bank in categorising the bill as having been previously paid. It denied making any publication to Newby Hilltop Foundry Limited. After the failure of the whole effort to secure foreign exchange, the plaintiff as a prudent business man did not request for his money. It therefore denied all liabilities.

On hearing the evidence and address of Counsel, the trial court dismissed the case save for making an order of refund of the sum of \( \text{₦}21,492.25 \) which was the initial deposit made by the appellant. The plaintiff appealed and framed four issues:

“Issues for determination

(i) Having represented to the Central Bank of Nigeria that appellant’s application for foreign exchange cover ‘was O.K. for further processing’ was the respondent not estopped from changing its position in that regard?

(ii) Given the circumstances of the case was the learned trial Judge justified in coming to the conclusion which he did that appellant had no Naira equivalent to support the transaction.

(iii) Did the learned trial Judge place a proper construction on
the contents of Exhibit 4 which was the basis of the respective obligations of the parties to this suit.

(iv) Considering that a customer/banker relationship existed between the appellant and respondent, was the respondent’s response that appellant made no Naira available for the transaction not libellous of the appellant as a businessman?”

The respondent also distilled four issues which it made unattractive due to verboseness but they are almost on all fours with the issues formulated by the appellant.

The issues that can really be made out from the various questions for determination raised are, to my mind, as follows:

(1) Which party was responsible for the payment in foreign currency not transmitted by the Central Bank to the appellant’s creditors; the plaintiff/appellant alleged failure to make good the shortfall or the defendant’s/respondent’s alleged report that there was no Naira made available by the appellant hence the “N” report.

(2) Whether the issuance of the “N” report was circulated and published to third parties including the foreign creditors as to constitute defamatory action.

The appellant, while acknowledging that the bill was to mature on 7 January, 1982 and there was a reminder letter on 13 April, 1982, submitted that the impression from the respondent’s letter was that the time when the payment was finally made which was on 23 July, 1982 was not late. In other words, there has not been an inordinate delay. The appellant further submitted that applying for the foreign exchange in August, 1982 the inference is that everything was in order as far as the transaction is concerned. Now when the issue of shortfall of ₦13,331.18 was discovered so as to make up for the money hitherto deposited, as Naira value had fallen slightly the appellant denied any knowledge of the message to him of this fact. The respondent, on the other hand, insisted that two letters were written to the appellant to this effect. The respondent submitted that, when
the shortfall was not made good, it had no alternative but to issue a No Naira report to the Central Bank on its request. Apparently nothing was done by the Central Bank between August, 1982 and 1983 when the military struck again and this resulted in a change of the policy in the Central Bank which embarked on refinancing. The issue is a simple one: Did the respondent write to the appellant intimating him and informing him that he had to make good the shortfall occasioned by the devaluation of the Naira to meet his obligation to the bank? I say this because as DW1 who works in the Central Bank testified that from 1981 Naira was depreciating in value it goes without saying that, if indeed there was a shortfall due to the depreciation, if the respondent informed the appellant and he was silent or failed to make good that shortfall, then he may contribute to his trouble or be solely responsible for it. In his evidence the respondent testified as follows:—

“At the time of the refinancing exercise there was a shortfall in the rate of exchange which gave rise to additional amount of N13,331.18 on the plaintiff’s bill. Plaintiff was intimated about the shortfall when he called on us. He promised to make up the amount. On waiting for him to augment the amount we wrote to him and notified him about the shortfall. He did not respond to the notification. This is one of the letters of notification dated 22 September, 1986. Nwadi tenders it. No objection. Letter admitted as defendant’s Exhibit No. 3. We did not take further action because plaintiff failed to make up the shortfall. The Central Bank sent us a form G-5 in which they asked us to confirm if Naira was available for the transaction. We advised Central Bank that there was no fund because plaintiff did not make up the shortfall.”

Now, according to the respondent, the Central Bank accepted the bill on 3 March, 1983. However, defendant’s/respondent’s Exhibit 3 was written on 22 September, 1986 – four years after the lodgment of money by the appellant and three years after the Central Bank accepted the bill. Curiously, the defendant’s/respondent’s star witness testified thus:—

“Due to the pressure plaintiff mounted on us and to maintain good relationship with the plaintiff we decided to advise the Central
Bank that Naira was available for the Bills after plaintiff promised to make up the difference. The advice is contained in defendant’s Exhibit No. 1. It is normal for the bank to write such a letter. We made special appeal to the Central Bank to release the money as Naira was available in support of the Bill.”

What type of pressure was brought on the respondent who issued a No Naira report to turn round to state that Naira was available. Was there an understanding to make good the alleged shortfall and later debit the appellant?

On 11 October, 1989 the Central Bank of Nigeria, Tinubu Square, wrote the respondent’s company thus:–

“Trade Debt Refinancing

“We refer to your letter No. FOR/PAO/1A/689/89 of July, 1989 and write to inform you that the claim was rejected because there was no Naira deposit made by the importer for the transaction.

Yours faithfully,

A.O. IKEM

ASSISTANT DIRECTOR

FOREIGN OPERATIONS DEPARTMENT.”

The expression “curiouser and curiouser” was first used, in *Alice in Wonderland*.

This is what the case is turning out to be. On 12 October, 1989, the Central Bank wrote to the respondent company that the application submitted to it in respect of the appellant had been rejected on account of no Naira deposit made by the importer. Yet on 27 July, 1989 the respondent wrote to the Central Bank thus:–

“RE – OUR BC/1406/81 AB FOR £17,647.00 drawn on CHIMA OKWARA METAL WORK and FOUNDRY (NIGERIA) BY NEWBY and SON IRON FOUNDERS LIMITED

We refer to the above bill application which was forwarded to you and given approval under your batch reference No. 17/1395 dated 3 March, 1983 for £244,456.40. On receipt of CBN Print-Out (Run 5.1) for Naira confirmation we initially confirmed N-No. Naira available but later amend it to A i.e. O.K. for further processing and not ‘T-Previously Paid’ as claimed by you.

We attach herewith photocopies of report G Run 5.1 and our customer’s protest letter to enable you [to] ascertain the correct action on this matter. Presently, our records show that the application is still pending with Central Bank.
Thank you for your co-operation.
Yours faithfully,
AFRIBANK/IBWA LTD.
HEAD OFFICE, LAGOS.”

Two points stand out distinctly in this letter. First there was a request for the no Naira equivalent to be substituted with stating that Naira was indeed available. Secondly, there was a protest letter from the appellant indicating most probably that the respondent has not been dutiful in executing its duty as a nominating bank. Was the respondent negligent in its operation and in the performance of its role as a nominating bank to the appellant? In this connection I refer to the plaintiff’s Exhibit 15, a letter written by Afribank to Counsel for the appellant. It goes as follow:–

“RE: CHIMA KWARA METAL WORKS AND FOUNDRY NIGERIA – alleged claim

Further to our letter dated 14 December, 1989 in respect of the above, we have conducted our investigation and forward our reply thus:

Our bank was not negligent neither did it erroneously informed [sic] Central Bank of Nigeria that no such sum in Naira had been deposited with the Bank. It is incorrect to state that we conveyed false report to the Central Bank of Nigeria. Our Aba Branch confirmed the availability of Naira as attested by our print out.

In fact by our letter reference FOR/CC/TAOT/4008/87 of 18 December, 1987 to Deputy Director, Refinancing Office Tinubu Square Lagos, the bank confirmed the status of the Bill as ‘Naira Available’ as evidenced by our copy of the report G post verification. This ‘availability of Naira’ was reaffirmed in our above mentioned letter following allegation by the beneficiary Newby Foundry Division, that the Central Bank of Nigeria had rejected the claim as previously paid.

In fact we urge Central Bank of Nigeria to kindly look into the matter and advise Chase Manhattan U.K. to issue the Promissory Note on the pending application.

We believe from the foregoing you are certain that we were not negligent at all.
Thank you for your co-operation.
Yours faithfully,
AFRIBANK (NIGERIA) LIMITED.”
The message conveyed by that letter is that the respondent was indeed insisting that there was Naira available – a stand that it has now turned to maintain. Before going further, I shall equally set down the contents of the letter from Messrs Newby Foundry Ltd in U.K. to the appellant: It read thus:

"Ref BC 1406/81AB

It is very disappointing to learn from our CASE-OF-NEED that the Central Bank of Nigeria have found from their records that you did not settle the above Bill in Local Currency as claimed by yourself.

This concerns us greatly, but we have no reason to disbelieve them. It is little wonder that your bankers do not often reply to our correspondence and we now have to believe that the information from your bank confirming payment on 23 July, 1982 was misleading and, furthermore, that there was an intention to mislead us.

We regret, but feel, that there must have been some manipulation by yourself of this information, which disturbs us greatly. We cannot, however, believe that the information from the Central Bank of Nigeria could be manipulated, and therefore have no reason to doubt their report.

If you had told us originally that you had not paid the Bill then although we would not have been happy, we would not have been so badly misled, and we would not have had to expend so much money following up on a Bill which had not been honoured. As you are aware, the costs have been considerable, with several visits to Nigeria and the employment of consultants.

You no doubt will also remember that, as soon as we received confirmation that you had paid (as we then thought), we went ahead with the production of another consignment, which has been stockpiled here since 1982.

We are gravely disappointed that, after all the correspondence that has gone between us over the years, no action has yet taken place, and we wonder whether you have been, under these circumstances, to effect proper trading with Europe.

We now ask you to make what arrangements are necessary to effect payment of that shipment as not only does this apparent dishonesty reflect very badly on you, but also on your country.

Your sincerely,

R.C. NEWBY."
On 21 December, 1989 the Newby Foundry Ltd wrote another rather disturbing letter to the appellant:

"Dear Mr Akwara,

As a follow up to our last letter, we wish to warn you to make every possible arrangement to transfer the funds before the end of February, 1990.

Be informed that failure to do this will force us to take the following steps:

1. Publish facts about this transaction in all European Chambers of Commerce including London Chambers of Commerce.

2. Remind your first customer John Williams of Cardiff to continue the credit embargo on you. Remember John Williams Steel introduced and recommended you to us. We had earlier done this in 1984.

3. Remind your other European confirmers to halt renewal of your credit agreement with them.

4. You must also return the sum £8,500 which was the cost of Hotel Accommodation paid on your behalf from 1982 to 1987 on visits to us, including your upkeep expenses.

5. We will do everything possible to reach every other area you now intend to import from.

6. Second Bi-Monthly Shipment proceeds should no longer be used for factory land. Please return same immediately.

7. The industrial joint venture has been terminated forthwith.

We are sorry we have to take this hard line as you know what losses we have incurred as a result of this ill fated transaction.

Yours sincerely,

P. BAGGOTT."

What is manifestly evident is that the respondent spoke from both sides of the mouth. It returned a No Naira report and later made a somersault to the effect that there was all along Naira availability. It thus indulged in equivocation. By sending a negative No Naira report it set loose a chain reaction. It was well aware there was a Naira deposit.

Its report which it sent to the Central Bank made that bank inform Messrs Newby that there was no Naira available.
This led to the destruction of trust and creditworthiness of the appellant. If there was a shortfall, what is the convincing reason to turn round to say that Naira was in fact available.

The appellant maintained that he never received the letter informing him that there was a shortfall it had to make good.

In his evidence-in-chief the appellant stated thus:

“The defendant owed me a duty of care to give accurate and correct information of my transaction with them to the Central Bank. They negligently failed to give the correct information. The defendant did not communicate the information they gave to the Central Bank early enough to me even on the several occasions I called on them to ask why the customer was not paid. It was not until after my visit to England and my customer was being hostile to me that I came back and worried the defendant before the defendant gave me information about the transaction.”

With respect to the assertion that he was communicated about the shortfall, he said he received no letter or correspondence to that effect. It is apparent that the respondent made a volte face. In Motunwase v Sorungbe (1988) 5 NWLR (Part 92) 90, it was held that where a party to a case had made an oral or written statement adverse to its contention, it is admissible in evidence in subsequent proceeding as facts against his interest. This was the case in Bello v Eweka (1981) 1 SC 101 at 118 and Seismograph Service (Nigeria) Ltd v Chief Keke Ogbenegweke Eyuafe (1976) 9–10 SC 135 at 146.

The court below had largely premised its decision on the ground that there was no Naira made available by the appellant. But the appellant in two documents showed that there was indeed Naira availability and the no Naira report was made in error. The whole case of the respondents rested primarily on the non-availability of Naira. With greatest respect, if this was so, how come then that it had to turn round in two separate correspondences to both the Central Bank and the Counsel for the appellant to show that Naira was indeed available. Assuming for a moment there was a shortfall which is doubtful having regard to the inconsistent
stand of the respondent the exchange risk indemnity signed by the appellant has made adequate provision that one may well ask, why did the respondent not comply with the risk indemnity if indeed there was a shortfall. It was inextricably bound by the obvious contents of that document. Exhibit 4 is a document which authorises the respondent – a nominated bank and therefore a mere agent – to do something in a certain way. As an agent, it is bound to do what the principal authorises as long as there is not found to be a false representation.

Two matters stand out clearly. If there was a shortfall and there is this indemnity risk, there has not been shown a convincing reason why the respondent failed to adhere to the contents of that document by making good the shortfall and debiting the appellant (2). If indeed there was currency, i.e. there was the availability of Naira as it later confirmed, it has not shown a satisfactory reason why it despatched a no Naira report. The appellant submits that these show a clear case of negligence. Indeed, it cannot be doubted that in terms of banker and customer relationship where the bank made a false statement in respect of the creditworthiness of the appellant he has been in breach of a duty of care as by this relationship he should exercise due care in giving out information which must not be detrimental to the interest of the appellant. Was the representation made by the respondent an innocent one which could have exonerated it? Lord Wrenbury had held in Banbury v Bank Montreal (1918) A.C. 629 at 713 that:

“An innocent representation per se constitutes no cause of action in bank customer relationship.”

Lord Wrenbury went further in that case:–

“The innocent misrepresentation is not the cause of the action but evidence of the negligence which is the cause of action.”

It seems to me that where a bank, which in this connection is also an agent of the customer, is required to give a report
which is important for the effectuation of a certain business transaction and any adverse report could be fatal or jeopardise the interest of the customer, the bank owes it as a duty of care to exercise utmost care in making a report. There is a duty of care. And where in making such a report evidence shows that there was manifest negligence, the duty of care has been broken. Contrast the situation with the case of Robinson v National Bank of Scotland (1916) 53 S.C.L.R. (390) where the bank and its agents were sued for false and fraudulent representation as to credit, Lord Haldane said at 382:–

“In a case like this no duty to be careful is established. There is the general duty of common honesty and that duty of course applies to the circumstances of this case as it applied to all other circumstances. But where a mere inquiry is made by one banker of another who stands in no special relation to him in the absence of special circumstances from which a contract can be referred, I think there is no duty excepting the duty of common honesty to which I have referred.”

In this case, there is the special relationship as has been adumbrated between the appellant and the respondent. There are both a contractual and fiduciary relationship between the appellant and the respondent in this matter. In such a case the respondent as a nominated bank in relation to the appellant which is a trading company that has applied for foreign exchange has a duty of care to ensure that by reporting what is not true the appellant’s application will fail. Consider for example the case of Hedley Byrne and Co Ltd v Heller and Partners Ltd (1964) AC 465 where the plaintiff had made enquiries of the defendant and as the result of the answer they received incurred liabilities and losses; Lord Morris of Borthy-Gest at 495 said:–

“If someone who was not a customer of a bank made a formal approach to the bank with a definite request that the bank would give him deliberate advice as to certain financial matters of a nature with which the bank ordinarily dealt, the bank would be under no obligation to accede to the request; if however they undertook though gratuitously to give deliberate advice . . . they would be under a duty to exercise reasonable care in giving this. They would
be liable if they were negligent although there being no considera-
tion, no enforceable contractual relationship was created.”

In the case before us the relationship between the parties is
so profound that in making a report to the Central Bank it is
of utmost importance that the respondent gives a report that
is not a false representation of the facts. Where a bank is
requested by the Central Bank to give it information relating
to the creditworthiness of a customer as regards an applica-
tion for foreign exchange and to the knowledge of the bank
there was money in the account or lodged for such an applica-
tion, it gives an advance information, it is a total breach of
duty of care and is liable for negligence as well as breach of
contract. What bothers me is why the respondent did not pay
if there was a shortfall and debit the appellants as made out
in the indemnity document.

In my view, the respondent by its action is responsible for
the failure of the appellant to secure the foreign exchange
remittance to its creditor abroad.

The next question is whether the issuance of a no report
was published and circulated to third parties apart from the
Central Bank. Well in the first place, the report was given,
and therefore published, to the Central Bank. Newby Found-
dry Ltd of U.K. got to know about it. Equally too the infor-
mation was given to other companies with whom the appel-
lant did business. The information given to the Central Bank
shows that on the face of it the appellant was impecunious
and therefore defamatory as such was not the case. Defama-
tion connotes publishing of words calculated to hold one in
hatred, contempt and ridicule. It has been extended in *Slim v
Strech* (1936) T.L.R. 669 at 671 as publication which would
cause someone to be shunned or avoided.

That the appellant submitted the phrase of no Naira avail-
able when the contrary is the case is suggestive of the fact
that the appellant is a fraud. He submitted that the false
information of appellant’s impecuniosity dealt a terrible
blow to his credit in connection with Newby Foundry Ltd with whom the appellant normally did business. The learned Counsel for the respondent countered this and submitted that the authentic report was the report contained in the report G Run 5-1 forwarded by the respondent to the Central Bank of Nigeria. It argued that the publication, even if extended to Newby Foundry Ltd, is not libellous and it cited *Lewis v Daily Telegraph* (1964) A.C. 234 at 259–260. In that case Lord Reed said:—

> “The test according to the authorities is whether under the circumstances in which the writing was published a reasonable man to whom the publication was made, would be likely to understand it in a libellous sense.

> . . . What the ordinary man not avid for scandal, would read into the words complained of must be a matter of impression.”

If a bank falsely and negligently made a publication indicating that a customer is impecunious and cannot meet credit obligations and such information is conveyed to the creditor, the resultant effect in my opinion is that the creditor and any company which deals with such customer and who is informed of that could tend to shun him and that attitude would readily erode the customer’s credibility. In *Davidson v Barclays Bank Ltd* (1940) 1 All ER 316 it was held that the words “not sufficient” in a bookmaker’s cheque was libellous there being found sufficient money to meet the obligation. I hold the view that where a bank gives an answer by way of N.A. or No Naira and there is evidence that there are sufficient funds to meet the requirement, it is libellous as it can be discerned from such representation that the bank intentionally decided to cast a slur on the character/creditworthiness of the customer. The appeal therefore succeeds and is allowed.

I now consider the issue of damages. By falsely and negligently representing that appellant was impecunious, when the contrary is the case, the bank dealt an incalculable harm to the credit of the appellant. In the case of *Wilson v United Counties Bank* (1920) AC 102, it was held that where a bank expressly contracted to sustain a trader’s financial credit,
and it failed to do so substantial damages were recoverable on proof of actual damage. In the case before us there is proof of actual damage sustained which in my opinion is heavy and weighty. Implicit in the indemnity document is the express agreement to protect the applicant’s credit. The appellant from some of the exhibits was regarded as a fraud and one who could not be trusted to maintain a line of credit with overseas customers and he lost considerable business (see Benue Printing and Publishing Corporation v Alhaji Umaro Gwagwada (1989) 4 NWLR (Part 116) 459 and In Re Felix v Egware (1974) 6 SC 103 at 108).

For libel and negligence, I award N4.5 million. It must not be easily forgotten that the parties entered in the transaction since 1982 when 1 dollar was less than 1 Naira. At that time £17,000 was N21,000 Naira odd. Now £17,000 is worth more than N2 million.

The respondent will pay the sum of N21,717.48 lodged with it at the interest rate of 20% until today the judgment day and interest of 4% on the judgment debt till it is completely liquidated. The proof of special damage is scarcity. But there is a proof of travels. On air ticket for overseas travels I find as proved a sum totalling only N5,940.

In the circumstance the judgment of the lower court is set aside as I have held and the appeal is allowed. The respondent shall pay costs assessed at N10,000.

OGEBE JCA: I had a preview of the lead judgment of my learned brother, Pats-Acholonu JCA, just delivered and I agree with his reasoning and conclusions. I adopt the judgment as mine.

AKPIROROH JCA: I agree.

Appeal allowed.
Trade Bank Plc v Benilux (Nigeria) Limited

COURT OF APPEAL, LAGOS DIVISION
ADEREMI, GALADIMA, SANUSI JJCA

Date of Judgment: 29 MAY, 2000
Suit No.: CA/L/200/95

Banking – “Banking business” – Section 61 of the Banks and Other Financial Institutions Decree No. 25 of 1991 – Connotation of


Banking – Conversion – Cheque crossed – Payment to a different payee – Action arising therefrom – Nature of – Whether for conversion in tort – Proof of contract between plaintiff and bank – Whether necessary

Banking – Mareva injunction – Scope of remedy – Grant of in favour of payee of cheque to restrain bank from removing its bank balance with the Central Bank of Nigeria – Property of


Words and phrases – “Conversion” – Meaning of

Facts

The respondent as plaintiff before the Lagos State High Court entered into a business transaction with a company styled as Messrs Accountable Finance and Investment Co Limited, a customer of the defendant/appellant.

The appellant was a banker. The finance company issued a cheque in the sum of ₦1,000,000 (One Million Naira) marked “A/C Payee Only”, “Not Negotiable” on the appellant at its Martins Street Branch, Lagos mandating it
(defendant/appellant) to pay the said sum of money to the plaintiff/respondent. The appellant upon the presentation of the said cheque to it by a stranger, paid the said sum of money to the stranger other than through a collecting banker acting for the plaintiff/respondent.

The plaintiff/respondent, upon getting to know of the payment to another person other than itself, challenged the act of the defendant/appellant. When the defendant/appellant did not rectify the situation, the plaintiff/respondent brought an action praying the court for a declaration that the appellant acted unlawfully and improperly in paying the cheque in question to a person or persons other than the respondent. The respondent also claimed that it was entitled to the value of the cheque on the expiration of five working days from the presentation of same to the appellant and an order that the appellant should pay the respondent the sum of ₦1,000,000 with interest at the rate of 50% per annum.

Subsequently, the respondent obtained an order for an interim Mareva injunction restraining the appellant from removing outside the jurisdiction of the court assets in excess of ₦2,000,000. The application was predicated upon the ground that the appellant had a cash liquidity problem.

The respondent on the other hand at the lower court filed an application praying for an order striking out the suit for lack of jurisdiction and/or that the writ of summons was irregular and incurably bad or, alternatively, vacating or discharging the order of an interim Mareva injunction.

At the conclusion of arguments on the application, the trial court in its ruling found that the respondent’s claim was founded on the tort of conversion and not on banking for which the Federal High Court had exclusive jurisdiction to entertain and consequently dismissed the application.

Dissatisfied with the ruling, the appellant appealed to the Court of Appeal. In resolving the appeal, the Court of Appeal considered the provisions of section 230(1)(d) of the
Constitution (Suspension and Modification) Decree No. 107 of 1993 which provides:

"Notwithstanding anything to the contrary contained in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly or a Decree, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters arising from:

230(1)(d) Banking, banks, other financial institutions, including any action between one bank and other, any action by or against the Central Bank of Nigeria arising from banking, foreign exchange, coinage, legal tender, bills of exchange, letters of credit, promissory note and fiscal measures."

Held –

1. By virtue of section 2(1) of the Bills of Exchange Act (Cap 35) Laws of the Federation of Nigeria, 1990, a cheque whether crossed or not is a bill of exchange.

2. The relationship between a banker and a customer is that of a debtor and a creditor. The customer is the one who has an account with the bank by paying money into it, and the trade of a banker is to receive money and use it as if it were his own, thus becoming a debtor to the person who has lent or deposited with him the money to use as his own.

3. One of the terms of the implied contract between a banker and the customer is that money lent to the banker is not payable except on demand by the customer who has paid it. In the instant case, the act of paying that sum to a stranger was a negligent one by the defendant/appellant. In such circumstance, proof of the existence of a contractual relationship between the plaintiff/respondent and the defendant/appellant was not required.

4. The tort of conversion is committed where one without lawful justification takes a chattel out of the possession of another with the intention of exercising permanent
or temporary dominion over it because the owner is entitled to the use of his property all times.

5. In conversion the act complained of is a single wrongful one, and the cause of action accrues at the date of conversion.

6. While provisions of section 230(1) of Decree No. 107 of 1993 enlarges the jurisdiction of the Federal High Court, that enlargement has not deprived any State High Court of the jurisdiction to determine any dispute as to the existence or extent of a legal right, power, liability, obligation or claim in issue since section 236(1) of the 1979 Constitution remains unsuspended. Hence the State High Court had jurisdiction to decide an action founded on the tort of conversion.

7. Generally the scope of a Mareva injunction was confined to a foreign-based defendant who has assets within the jurisdiction of the court but the scope has since been extended and the court has power to grant a Mareva injunction against a defendant even though he claimed to be or is in fact based within the jurisdiction if the circumstances were such that there is danger of his absconding or the court is apprehensive that he would remove his assets from its jurisdiction.

8. Under section 61 of the Banks and Other Financial Institutions Decree No. 25 of 1991, “banking business” means the business of receiving deposits on current account, savings accounts, or other similar accounts, paying or collecting cheques, drawn by or paid in by customers.

9. The essence of the power of the court to grant a Mareva injunction is to forestall assets from being removed from jurisdiction, and a great deal of exercise of discretionary power is required in determining this type of application. In the instant case, the Mareva injunction was properly granted.

Appeal dismissed.
a  Cases referred to in the judgment

_Nigerian_

\textit{Agbaje v Adelekan} (1993) 8 NWLR (Part 310) 166
\textit{Ihenacho v Uzochukwu} (1997) 2 NWLR (Part 487) 257
\textit{Khatoun v Holland West Africa Lines} (1961) 1 All NLR 318
\textit{Kosile v Folarin} (1989) 3 NWLR (Part 107) 1

\textit{Owena Bank (Nig.) Ltd. v NSCC Ltd.} (1993) 4 NWLR (Part 290) 696

\textit{U.B.N. Ltd v Osezuah} (1997) 1 NWLR (Part 485) 28

_b  Foreign_

\textit{Bahman (Prince Abdul) bin Turki al Surdairy v Abu-Tama} (1980) 3 All ER 409
\textit{Turner v Stallibrass} 67 LJ QBHZ 32

\textit{Nigerian statutes referred to in the judgment}

\textit{f  Banks and Other Financial Institutions Decree No. 25 of 1991, section 61}
\textit{g  Bills of Exchange Act (Cap 35) Laws of the Federation of Nigeria, 1990, section 2(1)}
\textit{h  Constitution of the Federal Republic of Nigeria 1979, section 33}
\textit{Constitution (Suspension and Modification) Decree No. 107 of 1993, section 230(1)(d)}

\textit{Book referred to in the judgment}
\textit{Clerk and Lindsell on Tort} (15ed) at 1020 paragraphs 11–15, 21–23

\textit{Counsel}
\textit{For the appellant: Babatunde (with him Daramola)}
\textit{j  Respondent unrepresented}
Judgment

ADEREMI JCA: (Delivering the lead judgment) This is an appeal against the ruling of a Lagos High Court (coram Ope-Agbe J) delivered on 24 March, 1995 dismissing an application brought pursuant to section 33 of the 1979 Constitution as amended and section 230(1)(d) of Decree No. 107 of 1993 and the inherent jurisdiction of the court praying for an order striking out the suit for reason of lack of jurisdiction and/or that the writ of summons is irregular and incurably bad or alternatively vacating or discharging the order of an interim Mareva Injunction.

In the court below, the respondent as plaintiff claimed against the appellant as defendant the following reliefs:–

“(i) A declaration that the defendants acted unlawfully and improperly in paying cheque No. 0337-031150013 A/C No. 101-372013-01-99 dated 27 January, 1993 in the sum of ₦1,000,000 crossed and further marked ‘A/C Payee Only’ ‘Not Negotiable’ drawn on the defendants by Accountable Finance and Investment Co Ltd in favour of the plaintiffs to a person or persons other than the plaintiffs at the defendant’s Martins Street Branch Office, in Lagos and otherwise than through a collecting banker acting for the plaintiffs.

(ii) A declaration that the plaintiffs are entitled to be credited with the value of the cheque (i.e. ₦1,000,000) referred to in paragraph 1 hereof on the expiration of 5 working days from the presentation of the same to the defendants on the 28 January, 1993 and that the defendants have wrongfully and improperly deprived the plaintiffs of the use and enjoyment of the said sum of ₦1,000,000 from the 3 February, 1993.

(iii) An order that the defendants shall pay the plaintiffs the said sum of ₦1,000,000 with interest at 50% per annum from 3 February, 1993 to 31 December, 1993 and further interest at 15% per annum from 1 January, 1994 until judgment and thereafter at 15% per annum until the judgment shall have been satisfied.”

Being dissatisfied with the said ruling, the defendant entered a notice of appeal which contains four grounds of appeal.
Distilled from the said grounds are three issues and as set out in its brief of argument; they are as follows:—

“(i) Given the state of respondent’s pleadings at the lower court, was the court vested with jurisdiction to entertain the suit, respondent not being a customer of the appellant bank? Or put in another way, was the lower court correct in its interpretation and application of section 230(1)(d) of Decree No. 107 of 1993?

(ii) If the lower court is vested with jurisdiction was the learned trial Judge right in law, to have refused to vacate the interim order of Mareva Injunction?

(iii) Would the interest of justice be better served with the order of interim Mareva Injunction?”

The two issues raised by the respondent in its brief are:—

“(i) Whether the cause of action disclosed by the writ of summons and statement of claim of the respondent is founded on the contractual relationship between banker/customer or on the tort of conversion?

(ii) Whether on the pleading of the respondent, the cause of action is caught by the provisions of section 230(1)(d) of Decree No. 107 of 1993.”

In his ruling, the learned trial Judge held, *inter alia*:

“As rightly submitted by the learned S.A.N., a look at the writ of summons and statement of claim above shows that the plaintiff/respondent’s claim is a claim of tort of conversion and it has nothing to do with section 230(1)(d) *supra* which on proper interpretation *non ceras* cause of action which relate to the internal affairs of the banks or must deal essentially with the kind of things the Federal High Court had always had jurisdiction and not actions of simple debt or money had and received. It does not seem that every cause of action in which a bank is involved must be determined by the Federal High Court . . . By virtue of section 230(1) of the 1979 Constitution as amended.

*This court has unlimited jurisdiction to adjudicate on the civil proceedings in which the existence or extent of a legal right, power, liability, obligation or claim is in issue, except as regards matters stated on section 230(1)(d) and its proviso. I hold that this Court had jurisdiction to entertain the action.*”

When the appeal came up for argument before us, Mr Layi Babatunde, learned Counsel for the appellant while adopting
the appellant’s brief filed on 26 February, 1996 and the reply brief filed on 13 July, 1998 submitted that since the claim was founded on a bill of exchange, by virtue of the definition of “bill of exchange” in section 3(1) of the Bills of Exchange Act (Cap 35) Laws of the Federation, 1990, the court below lacked the jurisdiction to entertain the suit, despite the grant of the Mareva injunction order, no undertaking was given by the respondent. He urged that the appeal be allowed. The respondent was not represented by Counsel although it was served with all processes including hearing notice.

This appeal calls to question the jurisdiction of the court below to entertain the suit. The issue of jurisdiction is so fundamental that once a court is shown to be lacking in its exercise a Judge must refrain from entertaining a suit brought outside his legal authority; for an action of a Judge which relates not to his office, is of no force. Let it be said that to a Judge exceeding his office there is no obedience. As conceded by both parties in their respective briefs, it is the claim of the plaintiff that determines the jurisdiction of the court.

The brief facts leading to this appeal are as follows. The respondent as plaintiff before the court below entered into a business transaction with a company styled as Messrs Accountable Finance and Investment Co Ltd, a customer of the appellant who was the defendant before the court below. Suffice it to say that the appellant is a banker. The finance company issued a cheque in the sum of ₦1,000,000 (One Million Naira) marked “A/C Payee Only” “Not Negotiable” on the defendant at its Martins Street branch, Lagos mandating it (defendant/appellant) Trade Bank (Nigeria) Ltd to pay the said sum to the plaintiff/respondent. The appellant, upon the presentation of the said cheque to it by a stranger paid the said sum of money to the stranger other than through a collecting banker acting for the plaintiff/respondent who, upon getting to know of the payment to another person other than itself, challenged the act of the defendant/appellant.
When the defendant/appellant did not rectify the situation, the plaintiff/respondent brought this suit the reliefs of which I have set out above. The above facts have not been controverted. Again as conceded by both parties in their respective briefs the relationship of a banker/customer does not exist between the plaintiff/respondent and the defendant/appellant. The appellant, through its brief, reasoned that the case is founded on a bill of exchange and that by virtue of section 230(1) of the Constitution (Suspension and Modification) Decree No. 107 of 1993 which provides:–

“Notwithstanding anything to the contrary contained in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly or a Decree, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters arising from:

(d) banking, banks, other financial institutions including any action between one bank and other, any action by or against the Central Bank of Nigeria arising from banking coinage, legal tender, bills of exchange, foreign exchange, letter of credit, promissory note and other fiscal measures.”

Although the word “banking” was not defined in Decree No. 107 of 1993, the appellant, through its brief prayed in aid of its submission, the definition accorded it in section 61 of the Banks and Other Financial Institutions Decree No. 25 of 1991 which defines it to mean:–

“The business of receiving deposits on current account, savings account or other similar account, paying or collecting cheques drawn by or paid in by customer.”

It was its further argument that for the successful maintenance of this suit the plaintiff/respondent was duty bound to prove the existence of a contract between the respondent and the appellant and that is a banker/customer relationship; placing reliance on the decision in Turner v Stallibrass 67 L.J. Q.B.N.S. 52. For its part, the plaintiff/respondent through its brief submitted that the kernel of its claim is as contained in leg (1) of the reliefs set out supra, the reliefs in (ii) and (iii) supra, according to it are only supplementary, subordinate and subsidiary to relief (i). It further argued that
the facts and circumstances of the case show clearly that it is complaining that the defendant/appellant being a banker unlawfully and improperly paid over to a person other than the plaintiff/respondent a cheque crossed, drawn on it (the appellant) and marked “A/C Payee Only”; “Not Negotiable.” Such an action, it argued, is founded on tort of conversion and not contract; it placed reliance on the decision in *Owena Bank (Nigeria) Ltd v NSCC Ltd* (1993) 4 NWLR (Part 290) 696.

By virtue of section 2(1) of the Bills of Exchange Act (Cap 35) Laws of the Federation of Nigeria, 1990, a cheque, whether crossed or not, is a bill of exchange. And the relationship between a banker and a customer is that of a debtor and a creditor. The customer is the one who has an account with the bank by paying money into it. And the trade of a banker is to receive money and use it as if it were his own, he becoming debtor to the person who has lent or deposited with him the money to use as his own. I go further to say that one of the terms of the implied contract between a banker and the customer is that money lent to the banker is not payable except on demand by the customer who has paid it in (see *U.B.A. Ltd v O. Abimbolu and Co* (1995) 9 NWLR (Part 419) 371). As I have pointed out, a banker/customer relationship does not exist between the appellant and the respondent. From the incontrovertible facts, the cheque marked “A/C Payee Only”, “Not Negotiable” was issued by the finance company on the defendant/appellant mandating it to pay the sum stipulated on it to the plaintiff/respondent. That sum was not paid to the respondent, instead, it was paid to a stranger who presented the cheque. When challenged, the defendant who refused to disclose the identity of the payee or the collecting banker promised the plaintiff/respondent that it was going to rectify the situation and effect proper payment to the plaintiff/respondent. That promise was never fulfilled. As I have said, hence this action. From this factual account, it is my considered view that the plaintiff’s/respondent’s action is in
respect of a cause of action. It is one challenging the act of payment by the defendant/appellant of the said sum of ₦1,000,000 to a stranger other than itself. It is saying no more than that the act of paying that sum to a stranger is a negligent one by the defendant/appellant. In such circumstance proof of the existence of a contractual relationship between the plaintiff/respondent and the defendant/appellant is not required. The action is rooted in tort (see Turner v Stallibrass 67 L.J. Q.B.H.Z. 32 relied upon by both parties in their respective briefs). Suffice it to say that the principle stated in Turner’s case was given approval by the Supreme Court in Khatoun v Holland West Africa Lines and another (1961) 1 All NLR 318. The relevant part of the law of tort to the case formulated by the plaintiff/respondent is conversion (tort of conversion). In law, tort of conversion is committed where one, without lawful justification, takes a chattel out of the possession of another with the intention of exercising permanent or temporary dominion over it, because the owner is entitled to the use of his property at all times. In conversion the act complained of is a single wrongful one, suffice it to say that the cause of action accrues at the date of conversion (see (1) Kosile v Folarin (1989) 3 NWLR (Part 107) 1; (2) U.B.N. Ltd v Osezuah (1997) 1 NWLR (Part 485) 28; (3) Ihenacho v Uzochukwu (1997) 2 NWLR (Part 487) 257 and (4) Clerk and Lindsell on Tort (15ed) at paragraphs 21–23). Reliefs (ii) and (iii) are merely subsidiary to relief (i). And in formulating its claim as it did, the plaintiff/respondent is taking a cover under section 236(1) of the 1979 Constitution as amended which confers unlimited jurisdiction on the State High Courts. I have had a careful study of section 230(1) of Decree No. 107 of 1993 on which the appellant placed much reliance. While its provisions enlarges the jurisdiction of the Federal High Court, that enlargement has not deprived any State High Court of the jurisdiction to determine any dispute as to the existence or extent of a legal right, power, liability, obligation or claim in issue. Section 236(1) of the 1979 Constitution remains unsuspended. By the combined effect of section 6(6)(b) and section 230(1) the unsuspended provisions of the 1979
Constitution remains supreme in so far as the Constitution (Suspension and Modification) Decree No. 107 of 1993 have not suspended their provisions (see Agbaje v Adelekan (1993) 8 NWLR (Part 310) 166). The resultant effect of all I have been saying is that issue (1) on the appellant’s brief of argument must be resolved against it. And I so do. The court below has jurisdiction to entertain the suit. My answer to issue (1) raised by the respondent in its brief is that the action is founded on the tort of conversion, and the action is not caught by the provisions of section 230(1)(d) of Decree No. 107 of 1993, this answers issue (2) on the respondent’s brief.

The second and third issues question the refusal of the trial Judge to vacate the Mareva injunction earlier granted. Sequel to an application brought ex parte by the plaintiff/respondent for an order of an interim injunction (Mareva) restraining the defendant from removing from the jurisdiction, disposing of and/or dealing with their assets within the jurisdiction in so far as the same do not exceed the sum of ₦2,000,000 and in particular its bank balance with the Central Bank of Nigeria, the trial Judge granted the application as prayed. The application ex parte was largely predicated on the ground that the defendant had a cash liquidity problem. An application was subsequently brought by the defendant to vacate the order of Mareva injunction. The defendant had shown through the affidavit deposed to on its behalf that it had not less than ₦200,000,000 to its credit in the Central Bank of Nigeria Stabilization Vault, its yearly profit after tax in the preceding accounting year was ₦24.9 million with a gross earning of ₦395.4 million. It was therefore not distressed. In a considered ruling after taking arguments from both Counsel, the trial Judge refused to dislodge the interim order of a Mareva injunction on the ground that no credible materials had been placed before him. Generally the scope of a Mareva injunction was confined to a foreign-based defendant who had assets within the jurisdiction of the court.
That scope has since been extended. The court now has power to grant a Mareva injunction against a defendant even though he claims to be or is in fact based within its jurisdiction, if the circumstances were such that there is a danger of his absconding or the court is apprehensive that he would remove his assets from jurisdiction (see Bahman (Prince Abdul) bin Turki al Surdairy v Abu-Tama (1980) 3 All ER 409). It must not be forgotten that the essence of the power of the court to grant a Mareva injunction is to forestall assets being removed from its jurisdiction. A great deal of exercise of discretionary power is required in determining this type of application. Evaluating the printed evidence on both sides the one requesting that the other be prevented from removing outside the jurisdiction of its assets in excess of N20,000,000 assets within its jurisdiction, it is my considered view that the order of the court below refusing to vacate the order of a Mareva injunction should not be disturbed. The court below has properly exercised its discretion in refusing it. Issues 2 and 3 formulated by the appellant are therefore answered in the affirmative; they are resolved against the appellant.

In the final result, I adjudge this appeal to be unmeritorious and it is accordingly dismissed and I assess the cost of the appeal at N4,000 against the appellant but in favour of the respondent.

SANUSI JCA: I read in draft the judgment of my learned brother, Aderemi JCA, just delivered. I entirely agree with his reasons and conclusion therein. I also hold that the appeal lacks merit and dismiss it accordingly. I endorse the order on costs made in the leading judgment.

GALADIMA JCA: I agree.

Appeal dismissed.
Joe Uwagba v Federal Republic of Nigeria

COURT OF APPEAL, ENUGU DIVISION

TOBI, FABIYI, OLAGUNJU JJCA

Date of Judgment: 30 MAY, 2000

Suit No.: CA/E/1/2000

Banking – Banking offences – Trial in absentia under the Failed Banks Decree No. 18 of 1994 (as amended) – Accused convicted in absentia – Accused asking for extension of time to appeal while still at large – Accused failing to take steps to comply with orders of conviction – Whether Court of Appeal will hear application – Relevant considerations

Criminal law and procedure – Appeal – Contemnor – Principle of law that a contemnor will not be heard – Whether applicable in criminal case

Facts

The appellant/respondent who was at large during his trial by the Failed Banks Tribunal had applied to the Court of Appeal for the extension of time to appeal against his conviction.

Learned Counsel for the respondent/applicant filed a preliminary objection for an order “striking out the applicant’s/respondent’s notice of application for an extension of time within which to appeal, dated 24 January, 2000 and filed on the same date”. The respondent relies on the following ground:-

“The applicant, who was at large during his trial and conviction, is yet to take any step towards complying with the orders of conviction made on him by the Enugu Zone of the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Tribunal, since he became aware of his said conviction and before his application for extension of time within which to appeal against it.”

Moving the motion learned Counsel argued in the main that a fugitive from justice just like a contemnor should not be heard while still in contempt. The appellant while still at
large in disobedience of the order of court should not be heard.

In replicando, Counsel for the appellant submitted that that principle of law that a contemnor while still in contempt should not be heard had never been invoked in a criminal case, and that the right of appeal invested in an appellant under section 5 of Decree No. 18 of 1994 and section 7 of Decree No. 62 of 1999 should not be fettered.

Held –

1. The right to appeal is either a constitutional or statutory right which cannot be denied an appellant. A right of appeal is a creation of statute. Therefore, once a statute donates the right, it should not be taken away, if the party shows that he comes within the provision of the statute.

2. Section 5(1) of the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree No. 18 of 1994 confers on a person convicted or against whom a judgment is given under the Decree the right of appeal within 21 days of the conviction or judgment. By section 21, a judgment of the tribunal is subject to appeal as specified in section 5. In the face of these clear statutory provisions it will be wrong to rely on decisions which are not even applicable in their factual content.

3. That principle of law precluding the person in disobedience of the orders of court against him from being heard in respect of the matters which he stands in disobedience does not apply in criminal cases as it will cause grave injustice to an appellant in criminal matter to deny him the right to appeal after incarceration.

Preliminary objection struck out.

Cases referred to in the judgment

Nigerian

Ajomale v Yaduat (No. 2) (1991) 5 NWLR (Part 191) 266

Amida v Oshoboja (1984) 15 NSCC 531
Echeazu v Commissioner of Police (1974) 2 SC 55
Governor of Lagos State v Ojukwu (1986) 1 NWLR (Part 18) 621
Mobil Oil Nig. Ltd v Assan (1995) 8 NWLR (Part 412) 129
Mohammed v Olawunmi (1993) 4 NWLR (Part 287) 254
Moses v Ogunlabi (1975) 4 SC 81
Obikoya v Wema Bank Ltd (1989) 1 NWLR (Part 96) 157
Odogwu v Odogwu (1992) 2 NWLR (Part 225) 539
Onigbeden v Balogun (1975) 4 SC 85
Ugwuh v Attorney-General East Central State (1975) 6 SC 13

Nigerian statutes referred to in the judgment
Evidence Act (Cap 112) Laws of the Federation of Nigeria, 1990, section 173
Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree No. 18 of 1994 (as amended), sections 5(1), 21, 27
Tribunals (Certain Consequential Amendments, etc) Decree No. 62 of 1999, section 7

Nigerian rules of court referred to in the judgment
Court of Appeal Rules, 1981, Order 4 rule 3

Counsel
For the appellant: Olajinmi, S.A.N. (with him Olaniyi)
For the respondent: Orbih

Judgment
TOBI JCA: (Delivering the lead judgment) On 24 January, 2000, the applicant gave notice to appeal out of time against the decision of the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Tribunal Zone 1, Enugu. In other words, he applied for an extension of time within
which to give notice to appeal. The notice is supported by an affidavit of 14 paragraphs and a proposed notice of appeal.

On 28 February, 2000, the respondent filed a preliminary objection for an order “striking out the applicant’s/respondent’s notice of application for extension of time within which to appeal dated 24 January, 2000 and filed on the same date”. The respondent relies on the following grounds:

“...the applicant, who was at large during his trial and conviction, is yet to take any step towards complying with the orders of conviction made on him by the Enugu Zone of the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Tribunal, since he became aware of his said conviction and before his application for extension of time within which to appeal against it.”

Moving the preliminary objection, learned Counsel for the respondent, Mr F.O. Orbih, relied on a 12-paragraph affidavit in support and submitted that, since there is no counter-affidavit, this Court should deem all the averments in the affidavit as proved. He contended that judicial orders or judgments should be obeyed and not be treated with arrogance and levity. He cited *Oba Amos Babatunde and others v Olatunji and others* (2000) 2 NWLR (Part 646) 557 at 572.

Learned Counsel submitted that in view of the fact that the applicant failed to serve his term of imprisonment and fine, he is in contempt and therefore cannot seek equitable remedies without obeying the court order. He cited *First African Trust Bank and Another v Ezegbu and another* (1992) 9 NWLR (Part 264) 132 at 154 and 155 and *Chief Ojukwu v Governor of Lagos State* (1986) 3 NWLR (Part 26) 39.

Urging the court to uphold the preliminary objection by striking out the application for an extension of time within which to appeal against the judgment of the Enugu Zone of the Failed Banks Tribunal, learned Counsel pointed out that the grounds of appeal do not challenge the jurisdiction of the tribunal.

Learned Senior Advocate for the applicant, Chief C.A. Olajinmi, submitted that the principle of law relied upon by Counsel for the respondent has never been invoked in any
criminal case and that explains why Counsel did not cite any single authority to justify the extension he seeks to make in a criminal case. The principle itself which debars a contemnor from being heard originated in a civil case and particularly in the ecclesiastical and canon courts because those courts in their history had no right to issue writ of fiat to enforce obedience to their orders. Continuing with the historical stuff, learned Counsel said that it was in the circumstances the courts propounded the principle to compel obedience to their orders. He therefore submitted that the principle is inapplicable in a criminal case. He cited Hadkinson v Hadkinson (1952) Probate 285 at 295. Since the principle was adopted in Governor of Lagos State v Chief Ojukwu (1986) 1 NWLR (Part 18) 621, it has not left the realm of civil cases, learned Senior Advocate contended.

Referring to section 5 of Decree No. 18 of 1994 and section 7 of Decree No. 62 of 1999, learned Senior Advocate argued that the right to appeal vested in an accused person is not subject to any condition and therefore the cases cited by Counsel for the respondent cannot tie down the constitutional right of appeal generously granted an appellant by the Constitution and the law.

Learned Senior Advocate argued that the principle of law will not even apply in a civil matter where an appellant appeals against the order he is alleged to have disobeyed. He cited Mobil Nigeria Ltd v Assan (1995) 8 NWLR (Part 412) 129 and Odogwu v Odogwu (1992) 2 NWLR (Part 225) 539 at 563.

Learned Counsel claimed that by the Rules of this Court, an appellant can elect whether he wants to be present at the hearing of his appeal or not. He called the attention of the court to forms 1, 2, 3 and 4 of the Rules of this Court, and submitted that it is in compliance with the Rules that the appellant says he will not be present at the hearing of the appeal. He cited Ifeadi v Atedze (1995) 5 NWLR (Part 394) 196.
Learned Counsel further argued that the principle of law will not apply even in civil cases once there is anything that will retract or jeopardise the fair hearing of a case. If the court comes to the conclusion that the principle is applicable, all it can do is to suspend action on the contemnor’s application but not to strike it out, Counsel argued. He cited once again the English case of Hadkinson v Hadkinson (supra). Since the objection is to strike out the motion, it fails, Counsel contended. He urged the court to strike out the preliminary objection.

Mr Orbih, in his reply, argued that the common trend that runs through all the authorities is that the court ought to protect its dignity and that is important whether the matter is civil or criminal. While conceding that section 5 of Decree No. 18 of 1994 is not subject to any condition in respect of appeal, learned Counsel submitted that the 1999 Constitution has vested in this Court the constitutional power to protect its dignity and the dignity of the lower court. He submitted that forms 1–4 are applicable only to an applicant in prison who has opted not to be present at the trial and not applicable to a convict at large. Counsel also submitted that the case of Ifeadi v Atedze (supra) its not applicable.

It is the law that a contemnor can exercise his constitutional right to appeal, if the appeal is against the order which he is held in contempt. Thus in Odogwu v Odogwu (1992) 2 NWLR (Part 225) 539, the Supreme Court held that the common-law rule precluding a person in disobedience of the orders of court against them from being heard in respect of the matters of which they stand in disobedience permits of an exception where the order disobeyed was made without jurisdiction, or where the party in disobedience is challenging the validity of the order.

Similarly, in Mobil Oil Nigeria Ltd v Assan (1995) 8 NWLR (Part 412) 129, the Supreme Court also held that the rule that a contemnor will not be heard does not and should not affect the constitutional right of the contemnor to appeal against the order of which he is held to be in contempt. He
will be heard in respect of the appeal as this is one of the recognised exceptions to the rule.

I seem to agree with the submission of learned Senior Advocate that the principle of law does not apply in criminal cases. Apart from the fact that there is no criminal case known to me in which the principle was applied, it will cause grave injustice to an appellant in a criminal matter to deny him the right to appeal after incarceration.

The right to appeal is either a constitutional or statutory right which cannot be denied an appellant. A right of appeal is a creation of statute. Therefore, once a statute donates the right, it should not be taken away, if the party shows that he comes within the provision of the statute (see generally Moses v Ogunlabi (1975) 4 SC 81; Onigbeden v Balogun (1975) 4 SC 85; Ugwuh v Attorney-General East Central State (1975) 6 SC 13; Obikoya v Wema Bank Ltd (1989) 1 NWLR (Part 96) 157; Mohammed v Olawunmi (1993) 4 NWLR (Part 287) 254).

Section 5(1) of the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree No. 18 of 1994 confers on a person convicted or against whom a judgment is given under the Decree, the right of appeal within 21 days of the conviction or judgment. By section 21, a judgment of the tribunal is subject to appeal as specified in section 5. In the face of the above clear statutory provisions, it will be wrong to rely on decisions which are not even applicable in their factual content.

The preliminary objection has no merit and it is hereby struck out. This Court will hear the notice for extension of time within which the applicant can give a notice of appeal.

OLAGUNJU JCA: Ordinarily the application for an extension of time within which the applicant can appeal against his conviction and sentence by the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Tribunal ought to be granted as a take-off of the applicant’s
constitutional right of appeal. But on the facts of this case that general proposition is open to serious misgivings because of the implications for the putative constitutional right of the convicted applicant who remained at large during his trial at the court below but later transmitted to this Court by proxy an application asking for leave to be allowed to fight his conviction and sentence “from behind the hedge” within the meaning of that metaphor in *Amida v Oshoboja* (1984) 15 NSCC 531 at 551, as implying some sly conduct on the part of the applicant.

Learned Counsel for the respondent opposed the application on the ground that the applicant who did not appear at his trial at the end of which he was convicted and sentenced to a term of imprisonment but who refused to come out of hiding to serve the prison sentence is not entitled to be heard while still a fugitive from justice on the principle of law that one who is in contempt of a court order cannot seek the relief of the court until he purges himself of his contempt.

Counteracting the objection, learned Senior Advocate for the applicant rejoined adroitly contending the inapplicability to criminal matters of the principle that one who is in disobedience of a court order cannot be heard in supplication for the court’s succour while the disobedience continues as enunciated in *Governor of Lagos State v Chief Odumegwu Ojukwu* (1986) 1 NWLR (Part 18) 621 at 645–646. That is fair enough as far as the historical evolution of that principle is concerned which is the basis of the distinction in its application between the civil and criminal matters drawn by the learned Senior Advocate even though I do not know when the authority of a competent court became vertically stratified so as to separate the sanction for its violation into civil and criminal compartments vis-à-vis the procedure for probing the diverse shades of infraction that give rise to sanction.

Nonetheless, the court is not precluded from evolving in criminal matters an analogous principle of law to tackle a situation of comparative gravity where it is necessary to moderate the right of the parties so as to check the ingenuity of an accused person overreaching the State over a matter on
criminal policy in an ostensible but disingenuous pursuit of his constitutional right.

The peculiar circumstances of the proposed appeal become worrisome because of the facetious and laughable picture that is likely to be portrayed by allowing a convict who was at large during his trial at the court below to turn round while still at large to use the appellate machinery of the self-same judicial system to fight the decision of the trial court which he had earlier spurned. That calls for caution. The adverse aftermath of such a parody inclines me to take the stand that in the event of the appeal coming up for hearing this Court should be wary of allowing the applicant to continue to operate from the hiding with no knowledge of this whereabouts than taking refuge on the address of his Counsel from whom the applicant is, by virtue of section 173 of the Evidence Act, entitled to the privilege of confidentiality but how, ironically, as a minister in the temple of justice cannot on his honour be seen as providing cover for a fugitive from justice.

To do otherwise will be tantamount to the court allowing itself to be buffeted to a corner where it will be constrained to concede to the applicant the benefit of having the best of both worlds: the prospect of emerging as a victor and walking into freedom if the appeal succeeds with the liberty to remain underground if the appeal fails. That cannot be justice. It is self-defeating as reviewing the complaints of a faceless appellant operating from the underground amounts to trying on its record the trial court and an indictment of the administration of justice.

Premium has been put by learned Senior Advocate for the applicant on rule 3 of Order 4 of the Rules of this Court incorporated into Criminal Forms 1–4 thereto whereby an appellant is given the choice whether at the hearing of his appeal he wishes to be present in court or not. Obviously, that concession applies to an accused person who was present at his trial and who at the time of filing the notice of appeal was in prison custody serving the sentence being
a appealed against. The position of a runaway convict fighting his conviction and sentence from a hiding is different.

The applicant in this case having chosen not to face the trial was tried, convicted and sentenced to terms of imprisonment in absentia as subsection 27(1) of the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree No. 18 of 1994 empowered the court to do. He is not entitled to the option given to one who braved out the trial and with whom the trial court was acquainted and who, pending the determination of the appeal, abides by the judgment of the court below which is presumed in law to be correct until it is set aside on appeal. Thus the option made available to a class of convicts who are being reconditioned to be amenable to law cannot be extended to a clan of runaway freebooters operating from the underworld without doing an incalculable harm to the fabric of the law enforcement arm of the public prosecution. Therefore, it will be a mockery of the appellate machinery to allow the applicant to exercise a right of appeal as a fugitive offender in flight from justice operating from a hideout.

Constitutional rights which include the right of appeal that the applicant is seeking leave of this Court to exercise are not meant to be vindicated under cloak or cover or by the supplicant shying away from the seat of justice. Indeed, a “right of appeal” is a safety scanning that enable a higher court to take another look at the trial of the dispute with a view to seeing whether the trial was properly conducted.

The device conceived for the protection of the litigants by cross-checking the correctness of the decision of the trial court on their dispute cannot be allowed to degenerate into a hide and seek ploy in a bid to secure a technical victory by one in defiance of the machinery for administration of justice regardless of whether the proceedings are civil or criminal. More so, in view of the judicial attitude of the apex court to lawlessness which equates a ruse such as the one being schemed by the applicant to a subversion of the
Constitution (see Ajomale v Yaduat (No. 2) (1991) 5 NWLR (Part 191) 266 at 288).

In the realm of criminal proceedings I find particularly ap-
posite the opinion of Irikefe JSC, as he then was, in Echeazu v Commissioner of Police (1974) 2 SC 55 at 69–70 that, while certain provisions of our law afford an accused person adequte safeguards it is clearly not the intention of the makers of those rules that they “should provide such an accused with a gratuitous ‘escape route’ to freedom in the face of overwhelming evidence”. That is a strong indictment of manipulation of the procedural law arising from amend-
ment of a charge which the defence in a criminal trial bent criminal charge. The dictum applies with stronger reason to the manipulation of the protective provisions of the Constitution that should be free from any take-in schemed by one craving for the protection of the Constitution.

Therefore, it will leave a sorry memory of an emasculated judiciary to be persuaded by the argument that, because of the sanctity of the constitutional right of fair hearing guaran-
teed to the citizenry encompassing the right of appeal, an accused person who went underground to evade a judicial trial should be allowed while operating from the hideout to use the appellate outfit of the same judicial system to chal-
lenge the decision of the trial court that is adverse to him. That will be preposterous.

In the final analysis, I have no bone to pick with my learned brother, Tobi JCA, that in principle the applicant is entitled to the right to challenge on appeal his conviction and sentence by the Failed Banks (Recovery of Debts), etc. Tribunal and that for a start he can be granted leave to appeal from the decision of that court. But for the various reasons canvassed hereinbefore and most particularly for the consistency and even-handedness of the law I will add a rider to the leading ruling that, in exercising the right of appeal for which leave is granted, the applicant cannot be allowed to remain faceless. Therefore, for a competent
a notice of appeal he must make a full disclosure of his whereabouts by furnishing his full address as stipulated by rule 3 of Order 4 of the Court of Appeal Rules, 1981, and Form 1 thereof. Nothing short of that fulfilment will ensure justice between the State as the formulatory and exponent of policy on criminal matters for the society at large and the defence as the fundamental human rights’ apologist.

b Fabiyi JCA: I had a preview of the lead ruling handed out by my learned brother, Tobi JCA. I agree with same.

Preliminary objection struck out.
Afribank Nigeria Plc v Alhaji Muraina
Adeniyi Alade

Banking – Overdraft – Interest thereon – Right of bank to charge at prevailing rate

Mortgage – Deed of legal mortgage – How made

Mortgage – Foreclosure – Meaning of – When ordered

Mortgage – Mortgagor admitting taking loan – Onus to show how mortgage was discharged – How discharged – Whether validity of mortgage an issue

Mortgage – Mortgagor signing deed – Effect of

Words and phrases – “Foreclosure” – Meaning of

Facts

The plaintiff/respondent in this appeal claimed against the defendant/appellant as follows:

1. A declaration that the plot of land No. 826, situated at No. 25, Link Road, Nassarawa Quarters Gyadi-Gyadi Kano, which land is covered by a Certificate of Occupancy No. LKN/CON/RES/81/471 on mortgage to the defendant is not subject to, and does not confer on the defendant any statutory right of sale. That the appellant does not possess any right on the said property.

2. A declaration that the plaintiff/respondent is still the statutory occupier of the said landed property.

3. Perpetual injunction restraining the defendant now appellant from selling the landed property, and

4. General damages of ₦150,600 for loss of job, delay caused and unlawful refusal to hand over the plaintiff/Certificate of Occupancy to the mortgage bank

The appellant in its statement of defence at the trial court counter-claimed against the respondent:

“… for an order of court to foreclose the property of the
a respondent, and for enforcement of the provision of the legal mortgage which the respondent executed in favour of the appellant to secure a housing loan, and for which he had failed to make payment, thereby erasing the interest of the plaintiff/respondent from the property and conferring right of power of sale to the defendant/appellant. The appellant also claimed, in the alternative, the sum of ₦170,743.87 being money due and owed to the appellant by the respondents as at 10 December, 1991.”

b The counter-claim averred that the respondent had failed to make the said payment due despite repeated demands. The court below dismissed the counter-claim, and entered judgment for the respondent by a declaration that the respondent is the legal owner of the property covered by the Certificate of Occupancy No. LKN/CON.RES/81/471. The claims of the plaintiff for general damages, and loss of job were refused. The court also found as premature the respondents’ claim for a return of the certificate of occupancy. The appellant was dissatisfied with the judgment of the court below and appealed to the Court of Appeal.

c Held –

1. Once an agreement exists between the parties and the instrument signed by the parties which is described as a legal mortgage, provided it is under a seal, a deed of legal mortgage is created between the parties.

2. The word “foreclosure” is a term of art used in conveyancing practices, particularly in a legal mortgage which means that the estate mortgaged or secured, as the mortgaged property has become the property of the mortgagee by the order made in a foreclosure suit.

3. The order of foreclosure is usually made upon the proved default of the mortgagor to observe the mortgage terms. Failing the institution of a suit, the terms of the mortgage may provide conditions upon which the mortgaged property may be sold if the mortgagor defaults in payment of the mortgage debt. In the instant case, the conditions provided for under the deed of legal mortgage
to entitle the appellant to exercise the right of foreclosure had become due since 1987, when the bank made demands for payment by itself and through its solicitors and the respondent failed to make payment after many months of the payment becoming due. The appellant was therefore entitled to foreclose on the property mortgaged.

4. It is settled law that a literate adult of sound mind and capacity is deemed to know the nature and contents of the document he signed. He is therefore presumed at law to understand what he appended his signature upon whatever the contents of the documents. It will not avail him to deny it. In the instant case, since the mortgage agreement between the parties, the mortgagor had covenanted to pay interest on the sum advanced at the prevailing rate of interest, any oral promise allegedly made to the mortgagor cannot derogate or be inconsistent with the terms of the written agreement in the mortgage deed.

5. The taking of a loan from the bank *prima facie* implies an obligation to repay it. In the instant case, the respondent having admitted the existence of the mortgage or indebtedness to the appellant, to succeed must show how the mortgage was discharged or the indebtedness was liquidated.

6. Generally, a debtor has a duty to seek his creditor and refund his indebtedness. In the instant case, the respondent, having admitted being indebted to the appellant, ought to have sought it and settled his indebtedness to the bank rather than embark on the futile attempt to frustrate the appellant. In other words, the respondent, whether or not there was in existence a valid mortgage was liable to the appellant on *quantum meruit* to refund the money he admitted receiving from the appellant on loan.

*Appeal allowed*
Cases referred to in the judgment

Nigerian

Adegoke v Adibi (1992) 5 NWLR (Part 242) 410
Atolagbe v Shorun (1985) 1 NWLR (Part 2) 360
Awosile v Sotunbo (1992) 5 NWLR (Part 243) 514
Ebba v Ogodo (1984) 2 SCNLR 372
Egbase v Oriareghan (1985) 2 NWLR (Part 10) 884
Enang v Adu (1981) 11–12 SC 25
Igbinoza v Aiyobagbie (1969) 1 All NLR 99
National Bank of Nigeria Ltd v Shoyeye (1977) 5 SC 181
Nishizawa v Jethwani (1984) 12 SC 234
Odife v Aniemeka (1992) 7 NWLR (Part 251) 25
Okoya v Santili (1994) 4 NWLR (Part 338) 256
Omoregbe v Edo (1971) All NLR 282

Foreign

Barnard v Harding (1955) 8 Exch. 822
Graven-Ellis v Canons Ltd (1936) 2 All ER 1066

Book referred to in the judgment

Stroud’s Judicial Dictionary Volume 4 at 1075

Counsel

For the appellant: Torabsi

Judgment

OMAGE JCA: (Delivering the lead judgment) In his amended statement of claim, in the court below, the plaintiff, now respondent, in this appeal claimed as follows:–

1. A declaration that the plot of land No. 826, which situates at No. 25 Link Road Nassarawa Quarters Gyadi Gyadi-Kano,
which land is covered by a certificate of occupancy number LKN/CON/RES/81/471 on mortgage to the defendant, now appellant in this appeal is not subject to, and does not confer on the defendant/appellant any statutory right of sale. That the defendant does not possess any right on the said property.

2. A declaration that the plaintiff/respondent is still the statutory occupier of the said landed property.

3. Perpetual injunction restraining the defendant now appellant from selling the landed property, and

5. General damages of N150,600 for loss of job, delay caused and unlawful refusal to hand over the plaintiff’s certificate of occupancy to the mortgage bank.”

The defendant in its statement of defence in the court below counter-claimed against the plaintiff:–

“... for an order of court to foreclose the property of the plaintiff, and for enforcement of the provision of the legal mortgage which the respondent executed in favour of the appellant to secure a housing loan, and for which he has failed to make payment, thereby erasing the interest of the plaintiff/respondent from the property and conferring right of power of sale to the defendant/appellant. The appellant also claimed in the alternative the sum of N170,743.87 being money due and owed to the appellant by the respondents as at 10 December, 1991.”

The counter-claim averred that the plaintiff has failed to make the said payment due despite repeated demands. The court below dismissed the counter-claim, and entered judgment for the plaintiff by a declaration that the plaintiff is the legal owner of the property covered by the certificate of occupancy No. LKN/CON/RES/81/471. The claims of the plaintiff for general damages, and loss of job were refused. The court also adjudged premature the plaintiff’s claim for a return of the certificate of occupancy. The defendant was dissatisfied with the judgment of the court below, it filed one original ground of appeal, and seven additional grounds from which he distilled the four issues for determination as follows:–

“1. Whether or not the appellant’s right of foreclosure in respect of the respondent’s property situate at plot No. 826, house No. 25, Link Road Hausawa or Nassarawa Quarters, Gyadi, Gyadi-Kano and covered by certificate of occupancy
No. LKN/CON/RES/81/471 had arisen regard been [sic] had to the testimony of PW1. The respondents at page 35 of the printed record and Exhibits A, D, E and H at pages 76, 99, 106–118 and 102 of the printed record respectively.

2. Whether the trial lower court’s finding of fact conclusions and inferences that the respondent’s claim is for a declaration that he was not indebted to the appellant in any sum were right regard been [sic] had to the fact that they were inconsistent with facts, as disclosed by the respondent’s testimony as PW1 and the respondent’s amended statement of claim.

3. Whether the trial lower court was right to have introduced extraneous consideration in interpreting the contractual relationship between the appellant and the respondent in utmost disregard of the evidence on the record.

4. Whether the decision of the trial court is not perverse and against the weight of evidence regard been [sic] had to its failure to consider relevant and established facts and his eventual error in evaluating evidence that resulted in his arrival at a wrong conclusion.

For his formulated issues for determination, the respondent in his brief submitted as follows:–

(a) Whether the appellant was right to have advertised the respondent’s property for sale under a public auction when the appellant failed to ascertain the specific amount the respondent was owing.

(b) Whether the appellant was right to have charged interest rates higher than the 8% which was agreed upon, when the appellant granted housing loan facility of N 45,000 to the respondent in 1983.

(c) Whether it was right for the appellant to have urged the lower court to give judgment in its favour against the respondent when the counter-claim filed by the appellant against the respondent was not proved on the preponderance of evidence as required by the law?

(d) Whether there was an enforceable legal mortgage which the appellant could fall back on in view of the contention of the respondent that he did not sign the original copy of the deed of legal mortgage and no formal demand notice was given to him by the appellant before his house was advertised for sale by public auction and when there was no evidence to show either that the statement of accounts were sent to the
respondent what is the effect of an unproved counter-claim filed by the appellant?"

Before I consider the arguments in the issues formulated, I wish to determine the appropriateness of the issues formulated by the respondent in his brief. The appropriateness of the issues formulated by the respondent is necessary because the rule must be embraced and observed that, in the absence of a cross appeal, the issues formulated by the respondent as indeed the issues distilled by the appellant must be founded on the ground of appeal filed (see Emeghara v Health Mgt. Board, Imo State (1987) 2 NWLR (Part 56) 330). In this instant, I start with issue 1 of the respondent’s brief. At the hearing of the appeal, the respondent’s Counsel informed the court that issue 1 was distilled from appellant’s ground of appeal number 6. It reads thus:--

“The learned trial High Court erred in law when it held at 58 of the printed record as follows:--

‘Apart from the pleading there was no proof of any statement of the account showing either the amount of the loan actually granted to the plaintiff, the total amount paid by the plaintiff as instalmental payment and the balance remaining unpaid.’”

There is nothing in the above ground of appeal of the appellant, or for that matter in any of the grounds of appeal which raised the issue of advertisement of respondent’s property as prepared in the respondent’s issue (a). Issue (a) in respondent’s brief is not founded on any ground of appeal filed in the appellant’s amended notice of appeal filed on 8 December, 1999. No leave of the court has been granted to the respondent to formulate the issue, and the respondent did not file a cross appeal in the court below. His argument in the brief on issue A in the respondent’s brief will not be countenanced (Odife v Aniemeka and others (1992) 7 NWLR (Part 251) 25).

Issues B, C, D and A formulated by the respondent in his brief do not directly answer to the numbered issues propounded in the appellant’s brief, but they will be considered where they are relevant to the ground of appeal filed by the
appellant, or to the issues formed by the appellant. This is not the correct way to respond to issues on an appeal. The respondent’s issues never answer directly to the ground of appeal filed. In this appeal the issues formulated by the appellant in his brief and those in the respondent’s brief are so awkwardly phrased that to describe the issue as inelegant is generous.

They were worse. I will however attempt to unravel the knot.

The appellant’s issue 1 is whether or not the appellant’s right of foreclosure in respect of the respondent’s property at 25 Link Road in Kano had arisen, regard being had to the testimony of PW1 at 25 of the printed record and Exhibits A, D, E and H on the pages cited. The question must be asked, what did PW1 say at page 35 of the record? The appellant did not supply the line or paragraph of page 35 relevant to his issue on appeal. However, the said page 35 contains the testimony of PW1 in the court below, since the issue under consideration is on the question as to whether a valid contract of mortgage exists, the testimony of PW1 relevant thereto is as follows:–

“Defence the mortgage deed was prepared by one Mr Odiakpo came with a draft for me to see he went away with the same draft which he never brought back to me again. He asked me to sign the draft and I signed it . . . though I signed the draft but the mortgage deed was not given to me until when my house was about to be auctioned I came to court.”

After signing the draft the PW1, who is the plaintiff/respondent, said:–

“Afterwards I received another additional of ₦15,000. It was true I submitted my tax clearance”, etc.

The appellant also referred to the contents of Exhibit A. This is contained at page 76 of the record. It is a letter from the appellant to the respondent accepting to grant a banking facility to the respondent of ₦45,000 upon some conditions which include the drawing up between the parties of a legal mortgage. The letter is dated 21 July, 1983. Exhibit D is a letter from the solicitors to the appellant addressed to the
respondent. It is dated 22 November, 1988. The solicitors are J.O. Adefila. They informed the respondent of his liability to the appellant in the following sums: ₦24,231,56 on account number 32003048, and ₦54,600 on account number 75000085. Exhibit E at pages 106–118 is the legal mortgage of a certificate of occupancy executed by the parties and registered at the registry in Kano as No. 277 at 277 in Vol. 5. Exhibit H is a letter of demand from the appellant to the respondent by which the former demanded from the respondent a banking facility on the two stated accounts, the sums are ₦16,495.45 and ₦54,600. The letter is dated 26 May, 1988.

Undoubtedly the above exhibits and testimony of PW1 quoted above indicate the existence of a legal mortgage in favour of the appellant by the respondent. The legal mortgage is dated 31 October, 1986. It is over a certificate of occupancy registered as No. LKN/CON/RES/81/471 dated 20 July, 1982. The testimony of the respondent at 35 showed that he signed the said mortgage and the exhibits show that the respondent collected money from the appellant after the respondent had signed the mortgage deed. The appellant by itself and through its Counsel demanded from the respondent the said sum with interest which had accrued at the time of the demand. In order to determine whether the right to foreclose had arisen as formulated in issue 1 of the appellant’s brief, it is needed to look at the provisions of the mortgage deed. Before I proceed with the provisions of the mortgage deed between the parties, I deem it right to entertain and consider, with the appellant’s issue 1, the respondent’s rather verbose issue (d) where the respondent asked the question as follows:–

"Whether there was an enforceable legal mortgage, which the appellant could fall back on in view of the contention of the respondent that he did not sign the original copy of the deed of the legal mortgage, and no formal notice of demand was given to him by the appellant before his house was advertised for sale by public auction and when there was no evidence to show either that a statement of accounts were sent to the respondent."

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The first issue to be considered in answer to the above question, is that there are counterparts to a deed of legal mortgage, that no original, a duplicate or any draft. Once an agreement exists between the parties, and the instrument signed by the parties which is described as a legal mortgage, provided it is under a seal, a deed of legal mortgage is created between the parties. In the instant case evidence exists and the respondent did not deny it that he signed Exhibit A. Exhibit A made the signing of and the creation of a legal mortgage a condition precedent to the grant of the banking facility which commenced with the advance by the appellant of N45,000 to the respondent. Offer and acceptance is complete between the parties. A legal mortgage completes it. The answer to the question contained in issue (d) of the respondent is yes, the appellant has an enforceable legal mortgage to fall back on. There is evidence of formal demand made by the appellant’s solicitors (see his exhibits referred to above).

At pages 106–118 of the printed record is contained the deed of legal mortgage. The word “foreclosure” is a term of art used in conveyancing practices, particularly in a legal mortgage which means that the estate mortgaged or secured, as the mortgaged property has become the property of the mortgagee by the order made in a foreclosure suit. Sometimes the agreement of foreclosure is contained in the deed. The order of foreclosure is usually made upon the proved default of the mortgagor to observe the mortgage terms. Failing the institution of a suit, the terms of the mortgage may provide conditions upon which the mortgaged property may be sold if the mortgagor defaults in payment of the mortgage debt (see Stroud’s Judicial Dictionary Volume 4 at 1075).

In this case, the deed of mortgage between the parties, the certificate of occupancy of the mortgagor, Murauna Adeniyi Alade, has been approved by the Military Governor of Kano State on 9/x/1986, see at 119 of the record. In the operative
part of the said deed of mortgage, the mortgagor is shown to have covenanted with the mortgagee as follows (see page 107 of the record *vizi*):

“All the moneys hereby secured shall immediately become payable in any of the following events:–

(a) On demand being made in writing in a letter delivered by the bank or sent by post to the registered office of the mortgagor.

(b) Death, bankruptcy or liquidation of the mortgagor.

(c) If any execution or distress is levied upon or against any of the chattels or property of the mortgagor.”

In the mortgagor’s covenant it is provided as follows (see at 110 of the record):

“The mortgagor covenants with the bank as follows:–

(1) A demand for payment or any other demand by any notice under the security may be made or given by any manager or authorities, official of the bank or the bank’s lawyer.

(4) The power of sale conferred on the mortgagee by the Conveyancing and Property Act 1881, shall take effect as regards these presents etc, but the said power shall not be exercised unless default is made in payment of the money secured for one month, after the same has become payable under the foregoing covenant.”

The exhibits quoted and described above showed that the mortgagor last made payment for the banking facility granted him in 1986. The bank as the appellant made demands for payment by itself and through its solicitors and the respondent failed to make the payment many months of the payment becoming due. The appellant was entitled to foreclose on the mortgaged property. The right to foreclose had arisen in 1987 when the appellant foreclosed on the property mortgaged by the respondent.

In issue D of the respondent’s brief the respondent had denied signing the mortgage deed, though he admitted in evidence that he signed a draft thereof. It is settled law that a literate adult of sound mind and capacity is deemed to know the nature and contents of the document he signed. He is therefore presumed at law to understand what he appended
his signature upon whatever the contents of the document is. It will not avail him to deny it (see *Egbase v Oriareghan* (1985) 2 NWLR (Part 10) 884 at 889; *Okoya v Santili* (1994) 4 NWLR 257 (Part 338) 256).

The above explanation in part also answers issue 2 in the appellant’s brief which asked whether the findings and conclusions of the trial court was right when he held that the respondent was not indebted to the appellant in any sum. Clearly the conclusions on the finding of facts by the trial court is perverse. The facts in the case show that the plaintiff took a loan of N45,000 from the defendant, now appellant. In 1986, the respondent, now plaintiff, in the court below said that, because he lost his job, he could no longer pay his instalment dues in repayment of the loan facility to the bank. He ignored all letters of demand sent to him, his complaints were:–

“(i) The rate of interest agreed on was 8%, the bank had no right to increase it.

(ii) The letter of demand from the bank did not state the actual sum owing by him.”

In the mortgage agreement between the parties, the mortgagor had covenanted to “pay interest on the sum advanced at the prevailing rate of interest”.

Any oral promise allegedly made to the mortgagee cannot derogate or be inconsistent with the terms of the written agreement in the mortgage deed. In answering issues 2 and 4 of the appellant’s brief that the conclusions of the trial court was wrong from the facts, issue 2; the prayers of the appellant is issue 4 of respondent’s requests that the court should consider the conclusion reached by the court below as perverse being that the trial is against the weight of evidence. As shown above, I find it convenient in the answer above to consider and deal also with issue B of the respondent’s brief and hold that the appellant for the reasons stated above was right to charge on the loan facility granted to the defendant/respondent, interest higher than 8%.

In dealing with issue 3 posed by the appellant, I will deal also simultaneously with issue C of the respondent. I quote
first the respondent’s issue. (C) Whether it was right to have urged the court to award judgment in his favour in the counter-claim, when the appellant’s counter-claim was not proved.

In fact it was the counter-claim of the defendant/appellant which brought into focus the real issues before the court below in the plaintiff’s claim. In the counter-claim the defendant/appellant sought a re-affirmation by the court of its accrued legal right while the plaintiff in his statement of claim succeeded in misleading the court. The court below, without any evidence of the requisite description of the notice to be given to the plaintiff by the defendant, introduced in his judgment the kind of notice receivable, in order to satisfy the notice of foreclosure despite the mortgage deed. In effect the conclusion of the court in the judgment is perverse. I have read the testimony of the witnesses of both parties, together with the covenant in the deed of mortgage between the parties, and I am of the view that the judgment of the court below is not justified by the facts.

In my view it is an occasion where an Appellate Court should intervene and set aside the decision of the court below, and I do so (see Adegoke v Adibi (1992) 5 NWLR (Part 242) 410, where the Supreme Court made the pronouncement). In the event, I set aside the decision of the court below, and order judgment in favour of the defendant/appellant. The appeal succeeds. The plaintiff’s claim in the court below is dismissed. There will be costs of ₦2,000 in the court below, and ₦1,000 in this Court in favour of the appellant.

SALAMI JCA: I had the preview of the judgment just delivered by my learned brother, Omage JCA, and agree with the conclusion arrived thereat.

The issues formulated, in this appeal, mainly touch upon the findings of facts of the learned trial Judge. An Appellate Court will, however, not lightly disturb the findings of facts of the trial court which had the wonderful opportunity of
watching and hearing the witnesses when testifying in court (Omoregbe v Edo (1971) All NLR 282) except it is obvious from the record that such findings cannot be supported by evidence (Ebba v Ogodo and another (1984) 4 SC 84, 89; Atolagbe v Shorun (1985) 1 NWLR (Part 2) 360; Enang and others v Adu (1981) 11–12 SC 25 at 38–39).

The finding of facts of the learned trial Judge, in the instant appeal, are not supported by evidence and respectfully are perverse. He found that the respondent did not execute the deed of mortgage contrary to the respondent’s express admission. The respondent told the court that a draft of Exhibit E was taken to him for his signature and he signed it but since appending his signature thereto he had not set his eyes on it. There is no better evidence of respondent executing the document than the one proceeding from his month. It is settled that when a person of sound mind, capacity and discretion voluntarily appends his signature, or mark and seal to a document, he is deemed or presumed at law to appreciate the contents of the document he signed (Egbase v Oriareghan (1985) 2 NWLR (Part 10) 884; Igbinosa v Aiyobagbiegbe (1969) 1 All NLR 99; Awosile v Sotunbo (1992) 5 NWLR (Part 243) 514 at 526–527).

The respondent further admitted in his testimony before the trial court that he took a loan from the appellant but stopped making his monthly instalment payment when he was out of a job. The learned trial Judge ought to have found him liable on his admission for at least the amount he admitted (Nishizawa v Jethwani (1984) 12 SC 234).

The respondent, having admitted being indebted to the appellant, he ought to have sought it and settled his indebtedness to the bank rather than embark on the futile attempt to frustrate the appellant. But when he failed to be gracious the learned trial Judge ought to have dismissed his suit and entered judgment for the appellant purely on respondent’s showing. The respondent, having admitted the existence of the mortgage or indebtedness to appellant, to succeed had to show how the mortgage had been discharged or the indebtedness was liquidated. The taking of the loan from the bank
prima facie implied an obligation to repay it (Seldon v Davidson (1968) 1 W.L.R. 1083; National Bank Nigeria Ltd v Shoyeye (1977) 5 SC 181). Finally, the respondent, whether or not there is in existence a valid mortgage, is liable to the appellant on quantum meruit to refund the money he admitted receiving from the appellant on loan. He had a duty to seek his creditor and refund his indebtedness. The learned trial Judge was, therefore, in error when he dismissed the appellant’s counter-claim which was admitted by respondent and gave judgment in favour of respondent who woefully failed to prove his case (Graven-Ellis v Canons Ltd (1936) 2 All ER 1066 and Barnard v Harding (1855) 8 Exch. 822).

For this reason and the fuller reason contained in the lead judgment of my learned brother Omage JCA, I, too, allow the appeal. I set aside the decision of the learned trial Judge allowing the respondent’s claim including the order as to costs. In its place the respondent’s claim which fails is dismissed. The counter-claim for an order of foreclosure succeeds. There is an order for enforcement of the provisions of the mortgage deed which the respondent executed in favour of the appellant. There is an order for the refund of the costs awarded by the trial court if the same had been paid. I endorse the order as to costs proposed in the lead judgment of my learned brother, Omage JCA.

MUHAMMED JCA: The judgment of my learned brother, Omage JCA, was read by me before today. I agree with his reasoning and conclusion in allowing this appeal. The evidence on record is overwhelming that the respondent as a customer of the appellant took a housing loan from the appellant and as a security for the repayment of the loan executed a legal mortgage of the property being developed in favour of the appellant. There is clear evidence that the loans granted to the respondent had not been liquidated. All the same, on the face of this glaring evidence before him, the learned trial Judge decided to close his eyes and ignore the evidence before him in entering judgment for the respondent.
and dismissing the counter-claim of the appellant in spite of the fact that the indebtedness of the respondent to the appellant was not in doubt as the respondent himself had made some repayments even in the course of the proceedings in this case at the lower court. Thus by deciding this case against the clear evidence on record, the learned trial Judge had plainly abdicated his responsibility as a Judge to determine cases before him between the litigating parties in accordance with the evidence before him and the law. This rather strange conduct of the learned trial Judge had resulted in labelling his judgment in this case as a perverse judgment justifying the interference by this Court in setting it aside to redress the miscarriage of justice as required by the Supreme Court in *Woluchem v Gudi* (1981) 5 SC 291.

Accordingly, I also allow this appeal, set aside the judgment of the court below in favour of the respondent and replace the same by the dismissal of the respondent’s claim and entering judgment for the appellant. There shall be ₦3,000 costs to the appellant in this Court and ₦2,000 in the court below.

*Appeal allowed.*
Savannah Bank of Nigeria Limited v Starite Industries Overseas Corporation and others

COURT OF APPEAL, LAGOS DIVISION

GALADIMA, IGE, SANUSI JJCA

Date of Judgment: 29 JUNE, 2000

Banking – Negligence – What amounts to – Duty of care – Doctrine of proximity – Bank paying money deposited with it to wrong beneficiary

Facts

This is an appeal by the third defendant against the judgment of Ilori J in Suit No. ID/1764/88 sitting at the Ikeja High Court on 28 January, 1993. The plaintiff, also now cross-appellant, supplied to the first defendant/respondent several goods made up of water pumps, swimming pool equipment and related products worth $172,921.85 of the equivalent of N864,609 being the amount due and claimed by the plaintiff with 12% interest per annum from 1 August, 1983 until the total sum is paid.

The first defendant/respondent was to deposit the naira equivalent with the appellant, who was supposed to source for the foreign exchange equivalent. The appellant confirmed this to the plaintiff, but after waiting for a long time, in response to his (plaintiff’s) solicitor’s letter was told that he had been paid by a spurious third party called Ituco International Co Ltd and that based on that information the money deposited with it (appellant) had been refunded to the depositor.

The lower court found against the appellant, who being dissatisfied appealed to the Court of Appeal contending in the main that there was no privity of contract between him and the plaintiff and that there was no negligence on his part.

Held –

1. The plaintiff’s action was not founded in contract only but also on negligence and lack of duty of care.
2. The assumption of responsibility demands for a corresponding duty of care to the plaintiff. The duty imposed here is not because there was a contract but because the defendant had impliedly undertaken not to injure the plaintiff. The obligation towards the contracting parties extended to all such persons who were likely to be injured by the act or omissions who ought to be in the contemplation of the defendant.

3. What amounts to negligence depends on facts and the doctrine of proximity as the foundation of duty of care is firmly established as the basis of an action in negligence.

4. The duty arising from the proximity of the appellant with Exhibit PW1–DD and the holding of the money for the plaintiff is so proximate that there is a duty to ensure that the plaintiff is not injured by any acts or conduct of non-performance. The third defendant has no reason to ignore the payment of money in the bills which it had collected. This is a clear breach of duty of care.

5. The third defendant, as a collector, duly appointed by the first defendant, should have taken care as a banker. But instead it completely neglected its duty in a move suggesting a lack of care and attention. It should not have taken instructions that someone has already paid the plaintiff, after it had informed the plaintiff that it had its money and was merely waiting for Central Bank approval to remit the said sum.

6. It is wrong for a bank to hold money as a trustee, and without making enquiry to accept that payment was made to someone else and not the beneficiary. The beneficiary should not be allowed to suffer losses in the amount the bank is holding.

7. It is trite law that, when one holds property beneficially owned by another person, the property remained that of its true owner and the holder is to account for such goods.
The appellant was grossly negligent and because it owed the plaintiff a duty of care as a result of its appointment as a banker for collection they should be made to pay back. 

*Appeal dismissed.*

**Cases referred to in the judgment**

**Nigerian**

*Abusomwan v Aiwerioba* (1996) 4 NWLR (Part 441) 130

*Abusomwan v Mercantile Bank of Nig. Ltd* 1987) 2 NSCC 879; (1987) 3 NWLR (Part 60) 196

*Awobiyi and Sons v Igbalaiye Bros.* (1965) 1 All NLR 163

*Balogun v Agboola* (1974) 1 All NLR (Part 2) 66


*Eze v George* (1993) 2 NWLR (Part 273) 86

*Fadahunsi v The Shell Co. of Nig. Ltd* (1969) NMLR 304

*Fatoyinbo v Williams* (1956) SCNLR 274; (1956) 1 FSC 87


*Laguro v Toku* (1986) 4 NWLR (Part 33) 90

*Lahan v Lajoyetan* (1972) 1 All NLR (Part 2) 217

*Mokwe v Williams* (1997) 11 NWLR (Part 528) 309

*Mukoro-Mowoe v The State* (1973) 1 All NLR (Part 1) 296

*N.B.C. Ltd v Nganadi* (1985) 1 NWLR (Part 4) 739


*Tella v Akere* (1958) WNLR 26

*UBA Ltd v Achoru* (1990) 6 NWLR (Part 156) 254

*U.B.N. Ltd v Odisote Bookstores Ltd* (1995) 9 NWLR (Part 421) 558

*UBN v Nwokolo* (1995) 6 NWLR (Part 400) 127
Savannah Bank of Nigeria Ltd v. Starite Industries Overseas

Books referred to in the judgment

Lexicon Webster Dictionary Volume 1 Encyclopedia Edition 1977
Webster Comprehensive Dictionary (International Edition)

Counsel
For the appellant/cross-respondent: Agbamuche
For the first respondent/cross-appellant: Ogunseitan
For the second and third respondents: Etuk

Judgment

GALADIMA JCA: (Delivering the lead judgment) This is an appeal by the third defendant against the judgment of Ilori J in Suit No. ID/1764/88 sitting at the Ikeja High Court on 28 January, 1993. The plaintiff, also now cross-appellant, supplied to the first defendant/respondent several goods made up of water pumps, swimming pool equipment and related products worth $172,921.85 of the equivalent of ₦864,609 being the amount due and claimed by the plaintiff with 12% interest per annum from 1 August, 1983 until the total sum is paid.

The plaintiff called and relied on evidence of only one witness. The defendants called no witnesses and evidence at the trial but after cross-examining the witness for the plaintiff, rested their case on plaintiff’s case and made submissions on a point of law.

The learned trial Judge gave judgment for the plaintiff in the sum of ₦1,729,281.05 with interest at 12% per annum
until the date of judgment and thereafter at 6% per annum a 

However, even though the Judge found that the first defendant received the goods and that both first and second defendants acknowledged that $172,921.85 was due, he nevertheless refused to give judgment against them as per the plaintiff’s claim. He also refused to enter judgment in dollars being the money payment of which the first, second and third defendants should provide enough local currency.

The appellant, dissatisfied with this judgment, has, by a notice of appeal dated 19 February, 1993, filed one ground and another omnibus ground of appeal in this matter. It has also by permission and order of this Court been allowed to file and argue three additional grounds of appeal.

The grounds of appeal are not reproduced. However, the learned Counsel for the appellant has formulated the following five issues for determination as arising from the grounds of appeal filed:–

(i) Whether in view of the evidence before the learned Judge the plaintiff/respondent made out a case of negligence of duty against the defendant/appellant. 

(ii) Whether the learned trial Judge correctly directed himself as to the possibility of maintaining an action in tort against the third defendant/appellant once he accepted that the action in contract could not be maintained, on the same facts and evidence when the plaintiff’s claim was in contract. 

(iii) Whether the plaintiff/respondents proved their case and were entitled to judgment. 

(iv) Whether the judgment of the learned trial Judge was not entered in disregard of the provisions of section 258(i) (as amended) of the Constitution of the Federal Republic of Nigeria, 1979, in that the judgment was given well after the three months stipulated by
(v) Whether there was a proper basis for finding that a fiduciary relationship existed between the plaintiff/respondent and the third defendant/appellant.

The plaintiff/cross-appellant adopted issues (i), (ii), (iii) and (v). They, however, disagree with issue (iv) as formulated.

Rather the cross-appellant formulated the issue as follows:

"Is the judgment of Honourable Justice S.O. Ilori given on 28 January, 1993 after the close of proceedings and addresses by Counsel on 1 December, 1992 covered by section 258(4) of the 1979 Constitution and section 4 of the Constitution (Suspension and Modification) Decree No. 17 of 1985 and was there a miscarriage of justice as a result of the delay?"

On the other hand, the three grounds of cross appeal filed by the cross-appellants are reproduced without the particulars thus:

1. The learned trial Judge erred in law and misdirected himself when after having found that the defendant/appellant Savannah Bank of Nigeria Limited were liable failed to award a sum $172,431.85 with interest at 12% from August, 1993, in accordance with the principles laid down in Milingos v George Frank Textiles Limited (1985) 3 All ER.

2. The learned trial Judge having found that second and third respondents received the goods for which they promised to pay, executed the promissory notes, paid money which they substantially withdrew erred in law in refusing to attach the final liability to them as person liable in contract.

3. The judgment is against the weight of evidence."

The second and third respondents adopted the issues for determination of the cross-appellant as already reproduced above.

The five issues formulated by the appellant are apt and appropriate for the determination of this appeal. I would be guided by them.

It would appear that the third defendant/appellant in their brief argued issues (i), (ii), (iii) and (v) as formulated together.
It is submitted by the learned Counsel for the appellant that, though the appellant did not call evidence at the trial, the onus was still on the respondents to prove their case and that in view of the evidence before the lower court the plaintiff failed to make out a case of negligence of duty against the appellant.

It is further submitted that to find the appellant bank guilty of negligence, even where no finding of breach of contract can be made in this case, is wrong in law and it is to ignore entirely the special relationship of banker and customer. The “neighbour” principle set out in Donoghue v Stevenson (1932) All ER 1 could not have been invoked in this case as no injury has been done to any of the contracting parties (the bank and its customer) which injury extended to a neighbour within the contemplation of the parties.

On issue 4, the learned Counsel submitted that the learned trial Judge disregarded the provisions of section 258(1) (as amended) of the 1979 Constitution in that he delivered the judgment well after the three months stipulated by the Constitution from the conclusion of final addresses.

The plaintiff/respondent adopted issues (i) and (ii) and argued them together. It is submitted by the learned Counsel for the plaintiff that the evidence of the plaintiff is unchallenged, uncontroverted and uncontradicted *viva voce* and documentary evidence in the proceedings before the lower court which entitled the plaintiff the judgment to be entered in its favour.

It is submitted by the learned Counsel for the plaintiff that the action for the plaintiff is not founded only on privity of contract but negligence and lack of duty of care according to paragraphs 4 and 5 of the amended statement of claim. Reference was made to Enyika v Shell BP Pet. Dev (1997) 10 NWLR (Part 526) 638.

On the issue that judgment of the learned trial Judge was given in complete disregard to section 258(1) of the 1979
a Constitution and section 4 of the Constitution (Suspension and Modification) Decree No. 17 of 1985, the learned Counsel has contended that the appellant gave particulars which are not only misconceived but misleading. That, firstly, addresses were not concluded on 22 May, 1992 but were finally concluded on 1 December, 1992. Learned Counsel did not concede that the judgment was delivered outside the period limited by law but that, even if it was, there is justification for it on the ground of illness of the learned trial Judge.

b It is the contention of the second and third respondents in their brief that the appellant acted as a collector of the plaintiff but failed, refused or neglected to remit the dollar equivalent to the plaintiff, it is therefore submitted that the learned trial Judge was right in holding that the appellant was in fact responsible for the payment of the amount due to the appellant.

c However, I will now consider the arguments and submissions of the parties in this order. First and second issues will be taken together; third and fifth together while the fourth issue will be considered singly.

d I have carefully considered the submissions of the learned Counsel for the appellant on issues (i) and (ii). These are not based both on the facts and law. There is misconception here by the appellant. The evidence of the plaintiff’s only witness and documents tendered in evidence in the proceedings before the lower court reveal the following:

1. The plaintiff’s action was not founded in contract only. By paragraphs 4 and 5 of the statement of claim, the third defendant was duly appointed by the plaintiff and the first and second defendants to look after its interest and collect the monies due under the bills which the plaintiff exported the water pump and related products to the first defendant. Paragraph 5 states that the third defendant owes the plaintiff a duty of care.

2. Large sums of money being the cost of water pumps and related products sold to the first defendant/respondent
had been paid to the third defendant/appellant for onward transfer to the plaintiff/cross-appellant and the appellant bank failed and/or neglected to transfer the said sum of money.

3. The appellant did not as a responsible bank make enquiries, but accepted that the plaintiff was paid by a spurious third party called Ituco International Co Ltd.

4. There is ample evidence of payment to the third defendant/appellant through various telex messages by the third appellant itself to the plaintiff confirming that the money had been paid to the third defendant by the second defendant and that they had sought Central Bank approval to remit the money to the plaintiff. Exhibit PW1–DD is the documentary evidence confirming that the third defendant was holding to the money meant for the plaintiff pursuant to the bills of collection.

These unchallenged uncontroverted evidence of instruction to the third defendant/appellant is contained at 109 and 110 of the records. There is also evidence that, in spite of the money third defendant admitted it was holding in trust for the plaintiff, it never paid it over. At 112 of the records in answer to the question asked by the court to the only witness, he said the third defendant admitted holding some money which they did not pass on to the plaintiff.

It would appear that the argument put forward by the appellant borders on the narrow nineteenth century view that action in tort cannot arise from a breach of contract. The learned Counsel misapplied the fact of the instant case when he contended that the trial Judge did not set out the terms of the credit transaction so as to enable him to establish that the appellant owed the plaintiff a duty of care. It will be recalled that the original contract of sale was between the plaintiff and the first defendant. It was the chief executive of the first defendant that diverted collection from International Bank for Africa to the third defendant. Then the said third
defendant acknowledged this service and responsibility in several telex messages to the plaintiff.

This assumption of responsibility demands for a corresponding duty of care to the plaintiff. This kind of relationship is made clear in the case of Abusomwan v Mercantile Bank of Nigeria Ltd (1987) 2 NSCC 879; (1987) 3 NWLR (Part 60) 196 thus:

“The duty imposed here is not because there was a contract but because the defendant had impliedly undertaken not to injure the plaintiff. The obligation towards the contracting part extended to all such persons who were likely to be injured by the act or omissions of the defendant. They are the neighbours who ought to be in the contemplation of the defendant.”

The action of the plaintiff in the instant case is not founded only on privity of contact but on negligence and lack of duty of care. What amounts to negligence depends on facts and what amounts to duty of care has been recently visited by this Court in Markus Enyika v Shell BP. Petroleum Dev Co and 2 others (supra), where it was held that the doctrine of proximity as the foundation of duty of care is firmly established as the basis of an action in negligence (see also N.B.C. Ltd v Ngonadi (1985) 1 NWLR (Part 4) 739; UBA Ltd v Achoru (1990) 6 NWLR (Part 156) 254 and UBN v Nwokolo (1995) 6 NWLR (Part 400) 127).

I am of the view that the duty arising from the proximity of the appellant with Exhibit PW1–DD and the holding of the money for the plaintiff is so proximate that there is a duty to ensure that the plaintiff is not injured by any acts or conduct of non-performance. The third defendant has no reason to ignore payment of money in the bills which it had collected. This is a clear breach of duty of care.

The evidence adduced showed that the third defendant, as a collector duly appointed by the first defendant, should have taken care as a banker. But instead it completely neglected its duty in a move suggesting a lack of care and attention. It should not have taken instructions that someone had already paid the plaintiff, after it had informed the
plaintiff that it had its money and was merely waiting for Central Bank approval to remit the said sum.

Sections 17 and 23 of the Bills of Exchange Act (Cap 35) Laws of the Federation of Nigeria, 1990 is inapplicable to this case. The suit is not contemplated within and under any of the provisions of that Act.

The contention of the appellant that it had only offered to help and had done “gratis” work or being a bailee does not arise. This was not canvassed by the appellant at the lower court and it cannot be so casually raised on appeal.

The next questions raised in Issues (iii) and (v) respectively are whether the plaintiff/respondent proved their case and therefore were entitled to judgment. There is also the question of whether there was a proper basis for a finding that a fiduciary relationship existed between the plaintiff/respondent and the third defendant/appellant.

As already observed, the evidence before the learned trial Judge entitled the plaintiff in their favour.

When the appellant was instructed as a banker to collect money on 60 days’ sight drafts, it reported it had done so and applied to the Central Bank as per its own admission, to source the foreign exchange for the total sum of $172,921.85. There is no rebuttal of the fact that the drafts were used by the appellant to source for the foreign exchange the sum of $864,609.25, the Naira equivalent of $172,921.85 provided by the first and second defendants.

It is in evidence that the appellant kept the money for five years. In spite of repeated demands and request, the appellant refused to release the money.

When respondent’s solicitor wrote the reply he received which is Exhibit PWI–E, there is a letter attached to this Exhibit from a company based in Northern Blvd, Bayside, New York, USA, that the beneficiary has been paid certain sums of money, not the $172,921.85, which the plaintiff/respondent had consistently demanded. This letter is
important as it completely weakens and whittles down the following submissions of the appellant:—

(a) That it has nothing to do with the plaintiff and does not owe it any duty of care and that it was therefore negligent.

(b) That it was not appointed as a bank to collect bills and none passed through it.

(c) That it was not in any way in collusion with the first and second defendants because when the plaintiff saw the letter it was confounded and when it made enquiries it was told that one late Dr Udoh, the first defendant’s managing director, and second defendant has something to do with the company.

(d) That it did not conspire with the first and second defendants to fraudulently deprive the plaintiff of its $172,921.85 due, for which it had received foreign exchange from the Central Bank of Nigeria.

The appellant ought to have known at one time or the other that it was wrong to make credit or pay for goods imported into this country except by the due process of the law. That is why in the first place the appellant applied to the Central Bank with relevant documents. One wonders why the payment in that letter was not to the plaintiff but to a spurious company called Ituco International Company. In any case it still beats one hollow, when the appellant supposedly received the letter on 23 July, 1985 saying that Ituco and not the plaintiff had been paid by first defendant, Zwischenstuck Eng. Nig. Ltd, as a prudent banker that was holding funds and had earlier communicated this state of affairs to the plaintiff/respondent why did it fail to write to it before returning the money to the first defendant, if at all it did so. Neither the appellant nor the first and second defendants were willing at the trial to explain the circumstances behind the letter.

It is wrong for a bank to hold money as a trustee, and without making enquiry to accept that payment was made to someone else and not the beneficiary. The beneficiary
should not be allowed to suffer losses in the amount the bank is holding.

It is not correct for the appellant to say that the plaintiff did not leave the money in the care of the appellant. The appellant had the plaintiff’s money and documents. It was acknowledged in Exhibit PW1–DD that the appellant was holding the money. The appellant was appointed by the first defendant to receive money and it then applied to the Central Bank to receive foreign exchange for onward transfer to the plaintiff. There is no evidence that the appellant did not receive the foreign exchange. Indeed, there was a contract between the plaintiff and the appellant for the latter to apply for foreign exchange and to send same to the plaintiff. From this flowed the duty of care. In the case of Abusomwan v Aiwerioba (1996) 4 NWLR (Part 441) 130 at 133 it was held thus:–

“It is trite law that when one holds property beneficially owned by another person, the property remained that of its true owner and the holder is to account for such goods.”

The questions raised in the third and fifth issues for determination have been answered in the affirmative. Evidence of the only plaintiff witness was properly evaluated as to the money deposited with the appellant. Justice demands that it has to be paid back. This money, having not been paid to the plaintiff, they are entitled to it. The appellant was grossly negligent and because they owe the plaintiff a duty of care as a result of its appointment as a banker for collection they should be made to pay back.

I do not find it difficult in resolving the issue (iv) formulated by the appellant in favour of the respondent. Section 258(1) of the Constitution of 1979 stipulates that every court shall deliver its decision in writing not more than three months after the conclusion of evidence and final addresses. However, the Constitution (Suspension and Modification) Amendment Decree, 1985 added a new subsection as follows:–

“258(4) The decision of a court shall not be set aside or treated
as a nullity solely on the ground of non-compliance with the provision of this section unless the court exercising jurisdiction by way of appeal from or review of that decision is satisfied that the party complaining of such non-compliance has suffered a miscarriage of justice by reason thereof.”

Addresses in the instant case were not concluded on 22 May, 1992 but were finally concluded on 1 December, 1992 (see at 166 and 167 of the records). At 167 line 27, Counsel for the appellants/third defendant finally urged the court to dismiss the two applications and to give a date for judgment.

Counsel for the appellant did not at the stage contest that the proceedings had been concluded a long time ago. What gave rise to the application was a motion for an amendment of the claim which was filed on 31 January, 1992. It had been in the court’s file and was slated for 7 February, 1992 but due to some inadvertence or because the court did not sit the application was not heard. The said application was opposed by a counter-affidavit filed on behalf of the defendant. The second application to arrest judgment was heard on 1 December, 1992 and it was opposed by Counsel for the parties. The learned trial Judge dealt exhaustively with these applications in the judgment delivered. Section 258 of the 1979 Constitution is not a rigid provision.

In Mokwe v Williams (1997) 11 NWLR (Part 528) 309 at 321 this Court held that:–

“If at the end of the day, the court gives judgment in the matter without hearing the motion it is not good defence that its attention was not called to the existence of the motion, particularly when a decision on the motion is relevant to the outcome of the judgment.”

The plaintiff would have definitely been denied a fair hearing, if when the court discovered that motion was pending since January, 1992 it had ignored it and proceeded to judgment.

This is clearly one of the reasons for the delay and it had not occasioned “a miscarriage of justice”.
It is also on record that when the addresses were taken on 22 May, 1992 the learned trial Judge adjourned the case to 10 September, 1992 for judgment. On that date the court did not sit and gave reason why it could not do so. This reason is not attributed to the Judge’s mental incapacity but that he was indisposed. It is not shown that the learned trial Judge negligently or flagrantly breached and ignored the provision of section 258(1) of the Constitution.

The learned Counsel for the appellant has submitted that in the course of judgment the learned trial Judge showed that he had either forgotten the evidence after a long time or had not understood the evidence presented before him. He gave one instance, that is at 176 of the record, the Judge stated in his summary of the facts thus:—

“The third defendant was the bank appointed by the plaintiff and the defendants to look after the plaintiff’s interest.”

Learned Counsel for the defendant has submitted that this statement is contrary to the evidence of PW1 at 112 and 115 where he assented that the third defendant was the banker of first defendant and that the plaintiff had no contract with them.

To agree with the interpretation of section 258(1) given by the learned Counsel for the appellant is to defeat the purpose and the intention of the lawmakers of that section of the Act.

In any case, paragraph 4 of the amended statement of claim of the appellant at 79 of the record agrees with the summary of facts made by the learned trial Judge at 176 in his judgment. It is the learned Counsel for the defendant who submitted that this statement is contrary to the evidence of PW1.

To my mind this is not a good instance justifying the appellant’s assertion that the trial Judge’s indisposition has affected his recollection of the facts in this case, to justify the application of section 258(1) of the 1979 Constitution.
The direct interpretation and purpose of section 258(1) is the desire to end the then prevalent delay in delivering of judgments in the past particularly in the lower courts where some Judges were in the habit of reserving their judgment for such long periods as to lose the advantage of having and seeing the witnesses and observing their demeanour, for the purpose of assessing their credibility (see *Ifezue v Mbadugha* (1984) 1 SCNLR 427; (1984) All NLR 256 per Aniagolu JSC at 269 and Echo JSC (as he then was) at 287. See also *Awobiyi and Sons v Igbalaiye Bros.* (1965) 1 All NLR 163).

The ratio decidendi in those cases have been clearly overtaken by the amendments in Decree No. 17 of 1985. The direct position of the law now is not only the consideration of inordinate delay *per se*, but whether the delay has amounted to a miscarriage of justice.

Subsection 258(1) of the 1979 Constitution and subsection 4 of Decree No. 17 of 1985 should be read together.

It has been held by the Supreme Court in *Ojokolobo and others v Lapade Alamu and others* (1987) 3 NWLR (Part 61) 377; (1987) SC (Part 1) 124 at 145 that the amendment introduced by subsection (4) and (5) of Decree No. 17 go beyond a mere procedure. His Lordship held, *inter alia*, per Obaseki JSC thus:–

“The amendments conferred jurisdiction which the courts exercising appellate jurisdiction did not have previously and took away jurisdiction it had previously. It altered the substantive law by giving validity to judgments which would have been declared null and void. It did not validate judgments that are already null and void.”

I am of the view that a delay in delivering the judgment by the lower court did not occasion a miscarriage of justice. The appellant has failed to show that by the delay the learned trial Judge did not remember the facts of this case.

In the result for all that I have said in this judgment, this appeal fails.
I shall now consider the cross appeal filed by this plaintiff. I have already set out above three grounds of the cross appeal.

The three issues formulated by the cross appeal are as follows:

(a) Having granted the amendment to claim the sum of $172,921.85 with interest at 12% per annum from 1 August, 1983; is the plaintiff not entitled to judgment against the defendant for the said sum having regard to the fact that the American dollar was the money of account?

(b) Whether the plaintiff/cross-appellant is not entitled to judgment against the first and second defendants jointly and severally when the third defendant having regard to the finding of fact that they imported the goods and that the sum of $172,921.85 has not been paid for goods sold and delivered to the first and second defendants.

(c) Is the cost awarded against plaintiff in favour of the first and second defendants justifiable in the circumstances?

In response to the cross appeal, the second and third respondents adopted the three issues formulated by the cross-appellants in its brief.

In the first issue in this cross appeal, it is the contention of the cross-appellant that the money of account being in dollars judgment should have been given to the plaintiff/cross-appellant in dollars. Reliance was placed on the Supreme Court decision in *U.B.N. Ltd v Odusote Bookstores Ltd* (1995) 9 NWLR (Part 421) 585. It is submitted that the cross-appellant sold in dollars and expects to recover its money in dollars. The learned Counsel for the cross-appellant further strengthened his submission on the ground that the acknowledgment by the promissory note, Exhibit PW1–DDA, was in dollars; the telex messages in which the third defendant quoted the money exportable to the cross-appellant was quoted in dollars; that all in all the transactions and most part of the judgment was read in dollars. It is therefore finally submitted that the judgment should be corrected to reflect the money of account of $172,921.85.
a) with interest at 12% per annum from August, 1983 until payment.

The cross-appellant by its application of 28 January, 1993 claimed the sum due for payment both in the writ and statement of claim, whereas its writ of summons filed is endorsed for the sum of ₦1,729,289.50, the equivalent of $172,921.85. The same amount is claimed in the second amended statement of claim filed by the cross-appellant (refer to 144 of the record of proceedings).

It is trite law that a statement of claim always supersedes the writ of summons. Hence, if a relief is claimed in the writ of summons but not in the statement of claim, it shall be deemed to have been abandoned. However, a relief endorsed in the statement of claim which is not in the writ subsists (see Eze v George (1993) 2 NWLR (Part 273) 86; Tella v Akere (1958) WNLR 26).

It is the cross-appellants’ claim as presented before the court that should be considered by the court. The decision of the Supreme Court in U.B.N. Ltd v Odusote Bookstores Ltd (supra) in the lead judgment of Honourable Justice Wali JSC, it is stated thus:–

“I may only need to emphasise that in transactions involving foreign currency, where the unit of the account is foreign currency, the debtor must provide enough local currency equivalent to the currency of account whenever the debt is being settled.”

Courts should frown on claims based on foreign currency not expressed in our local currency. The cross-appellant rightly provided ₦1,729,281.50 as equivalent of $172,921.85 which accords with the decision in Odusote’s case (supra).

The learned trial Judge was right in considering and choosing the Naira equivalent. For since the Rules of Court prescribe that a statement of claim should state specifically the relief which the plaintiff claims, it must be taken that it automatically alters, modifies or extends the writ without necessity of a formal order of amendment of the writ (see Eze v George (supra); Fadahunsi v The Shell Co. of Nigeria
The specific claim on the amended statement of claim is for the sum of ₦1,729,281.50 or $172,921.85. This has subsequently altered or modified the endorsement as the writ of summons.

The correct definition of the word “or” in the context of the endorsement by the cross-appellant in its statement of claim is necessary. In *Lexicon Webster Dictionary* Vol. 1 Encyclopedia Edition 1977, the word “or” is defined to mean a particle used to connect words, phrases or clauses representing alternatives; as this road *or* that; one used to connect alternative or equivalent terms. *Webster Comprehensive Dictionary* (International Edition) defines “or” as “introducing an alternative; as ‘stop or go’, ‘red or white’; *introducing an equivalent*, the second alternative of a choice limited to two” (italics mine).

In law, it is trite that the word “or” is *prima facie* and in the absence of some restraining context, to be read as disjunctive (see *Green v Premier Glynrhonwy Slate Co. Ltd* (1928) 1 KB 561; *Larngham v Peterson* (1903) 19 TLR 157).

In *Frank Mukoro-Mowoe v The State* (1973) 1 All NLR (Part 1) 296 at 312, the Supreme Court construed the word “or” as disjunctive while considering the word “or” in section 443 of the Criminal Code (Cap 28) of the Laws of Western State of Nigeria.

In this respect the phrase “the sum of ₦1,729,287.50 or $172,921.85” is to be read disjunctively. I am of the firm view that the pronouncement of the learned trial Judge in his judgment, to reflect ₦1,729,281.50 claimed in alternative as at 18 January, 1993, is a good decision and I so hold.

Issue 2 deals with whether the cross-appellant is entitled to judgment against the first and second defendants jointly and severally with the third defendant having regard to the finding of fact.
The vital and decisive findings of the trial court were based on the plaintiff’s/cross-appellant’s only witness in the case. The learned trial Judge’s findings is as follows:–

“The plaintiff’s only witness gave evidence soberly and impressed me as a gentleman who will not sacrifice the truth for the benefit of his case. His evidence is amply supported by documentary evidence. I accept his evidence and make findings of fact in accordance with it.”

It is trite law that ascription of probative values to evidence is a matter primarily for the court of trial. Where a trial court unquestionably evaluates the evidence and appraises the facts, it is no business of the Court of Appeal to substitute its own views of undisputed facts with the views of the trial courts (see Balogun v Agboola (1974) 1 All NLR (Part 2) 66; Laguro v Toku (1986) 4 NWLR (Part 33) 90).

This Court will only interfere with findings of fact where it is satisfied on the evidence before it that the findings are wrong and could not ordinarily have been based on the evidence. I do not see anything in the findings of the trial Judge that could invite this Court to interfere with such findings.

The findings of the trial court is that “the third defendant admitted in writing that payments were made to it. It also presented to the plaintiff that it was pursuing foreign exchange allocation for remittance of the money”.

The learned trial Judge also held that a fiduciary relationship was clearly established between the plaintiff and the third defendant whereby the plaintiff was the beneficiary of the money paid to the third defendant by the first defendant.

The learned trial Judge also held at 186 of the record that as between the plaintiff and the third defendant there is no denial that money was deposited by the first defendant with the third defendant for the benefit of the plaintiff. It is further held thus:–

“I find as a fact that the third defendant without exercise of the care and caution expected of a prudent bank and a responsible trustee of the funds accepted without question the pretence that the plaintiff was paid by a spurious third party.”
I do not think that such factors that could make me interfere with the above stated findings by the lower court are present. This Court should not easily disturb the findings of fact of a trial Judge who had the singular privilege and opportunity of listening to the witnesses and watching their demeanour, even though such findings of fact or the inference drawn from them may be questioned in certain circumstances (see Fatoyinbo and others v Williams (1956) SCNLR 274; (1956) 1 FSC 87).

I am of the view that the evidence before the lower court was properly evaluated and as such the trial Judge was right in holding that the respondents had no liability.

Issue 3 in the cross appeal is the question of whether the costs awarded against the plaintiff in favour of the first and second defendants was justifiable in the circumstance.

The learned trial Judge, having dismissed the claim against the first and second defendants, awarded N2,000 costs against the plaintiff.

The cross-appellant’s Counsel in the brief has submitted that the award of these costs is unjustifiable.

If the plaintiff fails to institute an action against the proper party or parties as a result of which the party is wrongly joined, no liability can be ascribable, then such a party is deemed wrongly joined and not liable, consequently the party is entitled to compensation by way of costs.

In the instant case, the award of costs by the learned trial Judge against the cross-appellant in favour of the first and second defendants was well founded in law. This is so considering the averment of the cross-appellant in its statement of claim, paragraph 4 which states as follows:–

“The third defendant was at all times material to this action the company/bank appointed by the plaintiff and the second and third defendants to look after its interest and collect the monies due under the bills which the plaintiffs exported the water pump and related products to the first defendant.”
a The cross-appellant’s only witness confirmed this during the trial. The trial Judge found in favour of the first and second defendants and exonerated them on the strength of the uncontroverted and unchallenged evidence. To do otherwise will amount to double compensation in favour of the cross-appellant since the appellant has been found liable in negligence to the cross-appellant.

b In the result the appeal against the judgment of the lower court fails and it is dismissed. So also is the cross appeal which is completely devoid of any merit. I also have no hesitation whatsoever in dismissing it.

c However, having regard to the appeal and the cross appeal, I do not find it appropriate to make any order as to costs.

Ige JCA: I have had the privilege of a preview of the judgment just delivered by my learned brother, Galadima JCA.

d My learned brother has dealt exhaustively with the issues involved in both the appeal and the cross-appeal.

I agree with him that both the appeal and the cross appeal are unmeritorious and should be dismissed. I too dismiss the appeal and the cross appeal. I also agree with the consequential orders of my learned brother including his order as to no costs.

Sanusi JCA: I read in advance a copy of the judgment just delivered by my learned brother, Galadima JCA. My lord has thoroughly dealt with the issue raised in this appeal. I agree with his reasons and conclusion. Both the appeal and cross appeal are devoid of any merit and deserve to be dismissed and I also accordingly do same.

e I abide by the consequential orders made in the leading judgment of my learned brother.

Appeal and cross appeal dismissed.
Benjamin Udeozor Osondu v Federal Republic of Nigeria

COURT OF APPEAL, CALABAR DIVISION
EDOZIE, EKPE, OPENE JJCA

Date of Judgment: 5 JULY, 2000. Suit No.: CA/C/137/99

Banking – “Business of banking” – Operation of a bank – What constitutes

Banking – Business or operation of a Bank – Offences in relation to – Failed Banks Tribunal has jurisdiction to entertain same – Section 3(1)(d) of the Failed Banks (Recovery of Debts) and Other Financial Malpractices in Banks Decree No. 18 of 1994 considered

Criminal law and procedure – Charges – Duplicity – Forgery of one document in respect of one bank or uttering of it to that bank – Separate offences

Criminal law and procedure – Conspiracy – Proof of – Can be inferred – Section 516 of the Criminal Code (Cap 77) of the Laws of the Federation of Nigeria, 1990 and section 3(1)(d) of the Failed Banks Decree No. 18 of 1994 (as amended)


Word and phrases – “Business of banking” – “Operation” – Meaning of

Facts

The appellant, Benjamin Udeozor Osondu, was on 20 July, 1998 arraigned before the defunct Failed Banks (Recovery of Debts) and Other Financial Malpractices in Banks Tribunal, Kano Zone II (hereinafter referred to as the Tribunal simpliciter) on allegations contained in an eight-count
charge consisting of conspiracy, stealing, forgery and altering of some documents.

The subject-matter of the charge was the fraudulent withdrawal of money from a foreign bank, that is Credit Suisse, Geneva in Switzerland. The money which was in foreign currency was withdrawn from the bank from the account held by a Panamanian registered company known as PASCO (Panama) S.A. whose president and owner was a Nigerian by name Chief Emmanuel Oti (PW6) and who was the sole operator of or signatory to the said account.

According to the prosecution, the appellant approached one Yusuf Ibrahim (PW2) and solicited for banking accounts held in a foreign country representing to the said Yusuf Ibrahim that he had a brother in London who wished to transfer a substantial amount of foreign currency to such account for remittance to Nigeria. As PW2 had no such account, he approached his business colleague, Tasiv Musa Abubakar (PW3), who procured two foreign account numbers from Bieta Bala (PW4) and Abubakar Abdullahi (PW5). These accounts were held in banks in Jakarta (Indonesia) and Hong Kong respectively by PW4 and PW5 jointly with others. On various dates viz: 28 June, 1996, 10 July, 1996 and 1 August, 1996 the Credit Suisse Switzerland (Swiss bank) received letters of instructions, Exhibits A7, A9 and A11, purporting to emanate from Chief Emmanuel Oti directing the transfer of the sums of $250,000; $400,000 and $300,000 American Dollars respectively from the accounts of PASCO (Panama) S.A. to the foreign account numbers of PW4 and PW5. The instructions were carried out. On the information by the appellant to PW2 (vide telex advices, Exhibits 12 and 13) that the transfer had been effected and confirmation to that effect by PW4 and PW5, PW4 and PW5 then arranged to pay the equivalent amount in Naira in Nigeria of the money transferred upon an agreed exchange rate, to the appellant through PW2 and PW3 who, after deducting their commission, paid over the balance of the proceeds to the appellant who in turn lodged it in his several accounts with Citizens International Bank Limited,
Agidingbi Branch, Ikeja, Lagos, and for fear of being suspected, from those account, various sums were transferred to Diamond Bank Limited and Chartered Bank Limited both in Lagos.

Upon discovery of this fraud by Chief Emmanuel Oti who denied being the author of the various instruments used to withdraw the money from his account, he through his Counsel, Mr Clement Akpamgbo, S.A.N., lodged a report to the Nigeria Deposit Insurance Corporation (NDIC) which in turn referred the matter to the police for investigation. The police in the course of investigation located and arrested the appellant who made several statements. In his first statement to the police, the appellant made mention of one Charlie whose surname he failed to supply as being the mastermind of the fraud. All efforts by the police to establish the identity of Charlie and his whereabouts proved abortive.

At the conclusion of the case for the prosecution, the defence made a no case submission, and upon its being overruled, the defence rested its case on the prosecution’s case and declined to give or call any evidence. Thereupon the Failed Banks Tribunal Chairman, Donli J in a reserved judgment delivered on 10 November, 1998 convicted the appellant on all eight counts of the charge and sentenced him to 10 years’ imprisonment in respect of counts 1–3 (which relate to conspiracy and stealing) and five years’ imprisonment in respect of each of counts 4–8. The sentences were to run concurrently. In addition, the Tribunal made an order that all the movable and immovable properties of the appellant be forfeited to the Government and transferred to Emmanuel Oti (PW6).

Dissatisfied with that judgment, the appellant by his Counsel lodged an appeal to the defunct Special Appeal Tribunal upon four grounds of appeal. Consequent upon the provision of section 7(1) of the Tribunals (Certain Consequential Amendments etc) Decree No. 62 of 1999 which confer on
the Court of Appeal the jurisdiction to hear an appeal from a person convicted under the said Decree, the appellant’s appeal was referred to the Court of Appeal for determination.

Arguing the appeal, Counsel for the appellant contended in the main that the Failed Banks Tribunal was without jurisdiction to hear and determine the eight counts charge preferred against the appellant on the ground that the subject-matter of the charge was purely a criminal matter between the appellant and the complainant and not a matter arising from the business or operation of a bank, as prescribed by section 3(1) of Decree No. 18 of 1994. On counts 6, 7 and 8, Counsel submitted that the documents alleged to be forged in those counts were not in fact forged, because the appellant presented the documents as having been made by himself stressing that the fact that he did so under false names did not mean that the documents were purportedly made by fictitious persons.

The Court of Appeal considered the following statutory provisions in determining the appeal.

Section 3(1)(d) of the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree No. 18 of 1994 which provides:–

“3(1) The Tribunal shall have power to:–
(d) try other offences relating to the business or operation of a Bank under any enactment.”

Sections 464(c), 465 and 468 of the Criminal Code (Cap 77) Laws of the Federation of Nigeria, 1990 respectively provides:–

“464. A document or writing is said to be false:–
(c) if the whole or some material part of the document or writing purports to be made by or on behalf of some person who does not in fact, exist.”

“465. A person who makes a false document or writing, knowing it to be false and with intent that it may be in any way used or acted upon as genuine, whether in the State or elsewhere, to the prejudice of any person, or with intent that any person may, in the belief that it is genuine, be induced to do or refrain from doing any act, whether in
the State or elsewhere, is said to forge the document or writing.”

“468. Any person who knowingly and fraudulently alters a false document or writing, or counterfeit seal is guilty of an offence of the same kind and is liable to the same punishment as if he had forged the thing in question.”

Held –

1. The business of banking as defined by law and custom consists in the issue of notes payable on demand intended to circulate as money when the banks are banks of issue, in receiving deposits payable on demand, in discounting commercial paper, making loans of money on collateral security, buying and selling bills of exchange, negotiating loans and dealing in negotiable securities issued by the government, state and national and municipal and other corporations.

2. “Operation” is exertion of power, the process of operating or mode of action; an effect brought about in accordance with a definite plan, action, activity.

3. From the definitions in (1) and (2) above, the business of a bank includes receiving deposits from customers, which deposits are payable on demand through cheques or letters of instruction while the operation of a bank means the way or manner a bank operates or carries out its function such as by maintaining current deposits and savings accounts and keeping of accounts in its transactions.

4. Since the offences for which the appellant was tried on the eight-count charge are conspiracy, stealing, forgery and uttering of documents in respect of the fraudulent transfer of money from the Swiss bank and the subsequent deposit of the proceeds in Citizens International Bank Limited, Diamond Bank Limited and Chartered Bank Limited in Lagos, it could not be seriously contended that those offences do not relate to the business or operation of a bank.
5. Conspiracy is an agreement of two or more persons to do an act which it is an offence to agree to do.

6. The crime of conspiracy is completely committed at the moment two or more persons have agreed that they will do at one or at some future time certain things and direct evidence of an agreement is not indispensable as it is open to the trial court to infer conspiracy from the fact of doing things towards a common end.

7. To prove conspiracy, it is not necessary that there should be direct communication between each conspirator and every other but the criminal design alleged must be common to all. Indeed, one conspirator may be in one town and the other in another town and they may never have seen each other but there would be acts on both sides which would lead the jury or the Judge sitting alone to the inference.

8. Direct evidence is not indispensable to establish conspiracy. It can be proved circumstantially. In the instant case, all the relevant pieces of evidence were available for the necessary inference to be drawn.

9. A document is said to be forged if the whole or part of it is made by a person with all falsity and knowledge of the falsity and with the intention that it may be used or acted upon as genuine to the prejudice of the victim.

10. The offence of uttering is committed when a person knowingly and fraudulently utters a false document or writing or a counterfeit seal.

11. Like other offences forgery and uttering may be proved by direct or circumstantial evidence.

12. It is the law that where a document was shown to be used as an intermediate step in a scheme of fraud in which an accused person was involved, then if it is shown that such document was false and was presented or uttered by an accused in order to gain advantage, an irresistible inference exists either that the accused forged the document with his own hand or procured someone to commit the forgery.
13. In the instant case, as it was obvious that it was the appellant who uttered the forged documents and derived benefit therefrom, it goes without saying that he forged those documents or procured someone to do so. The failure by the prosecution to call a handwriting expert is not fatal to the prosecution’s case because, even if there was such evidence which is negative, from the special circumstances of this case it will still be open to the court to draw the inference that the appellant procured someone else to forge and utter the aforesaid documents.

14. The framing of counts 6, 7 and 8 of the charges is duplicitous. The forgery of one document in respect to one bank or uttering of it to that bank constitutes a separate and distinct offence. By lumping in one court the forgeries of two documents in respect of two different banks makes the count bad for duplicity and so too is the counts for uttering two separate documents to two different banks.

15. It is the law however that duplicity in a charge or count does not vitiate a trial where no miscarriage of justice occurs.

16. Under section 465 of the Criminal Code forgery consists of making a false document or writing, knowing it to be false and with the necessary intent and section 464 defines a false document or writing as including one in which the whole or any material part purports to be made by or on behalf of some person who does not in fact exist.

In the instant case, the appellant presented the two documents as having been made by himself and the fact that he did so under a false name does not mean the documents purported to be made by some person who did not exist. The officials of the banks knew that the person with whom they were dealing was the appellant even if they did not know his true name, and the document did not purport to be made by or on behalf of anyone but the appellant. Hence the documents in question...
are not false documents and the appellant could not have been convicted for forgery and uttering them.

Appeal allowed in part.

Cases referred to in the judgment

Nigerian

A-G Fed. v Sode (1990) 1 NWLR (Part 128) 500
Alake v State (1991) 7 NWLR (Part 205) 567
Aqua Ltd v Ondo State Sports Council (1988) 4 NWLR (Part 91) 622
Awobotu v State (1976) 5 SC 49
Awolowo v Shagari (1976) 6–9 SC 51
Erim v The State (1994) 5 NWLR (Part 346) 522
Fasakin v Fasakin (1994) 4 NWLR (Part 340) 597
F.R.N. v Abubakar (1997) 1 FBTLR 129
Haruna v State (1972) 8–9 SC 174
Henshaw v C.O.P. (1963) 7 ENLR 120
Ijoma v Queen (1962) 2 SCNLR 157
Ishola v Ajiboye (1994) 4 NWLR (Part 352) 506
Madukolu v Nkemdi lim (1962) 1 All NLR 587; (1962) 2 SCNLR 341
Niger Progress Ltd v North East Line Corp. (1989) 3 NWLR (Part 107) 68
Odu v State (1965) 1 All NLR 25
Okeke v C.O.P. (1948) 12 WACA 363
Ondo State University v Folayan (1994) 7 NWLR (Part 354) 1
Onochie v The Republic (1966) NMLR 307
Onyema v Oputa (1987) 3 NWLR (Part 60) 259
Oyediran v Republic (1967) NMLR 122
Queen v Esege (1962) 1 SCNLR 189; (1962) 1 All NLR 110
R. v Domingo (1963) 1 All NLR 81; (1963) SCNLR 146
R. v Nta (1946) 12 WACA 54

Scott v King (1950–51) 13 WACA 25

Smart v State (1974) 11 SC 173

Foreign

Anne Lewis Case (1954) Foster Crown Cases 116

R. v Meyrick (1930) 21 Cr. App. R. 94

R. v Taylor 21 Cr. App. R. 20

Nigerian statutes referred to in the judgment

Criminal Code Act (Cap 77) Laws of the Federation of Nigeria, 1990, sections 464, 465, 468

Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree No. 18 1994 (as amended), section 3(1)(d)

Book referred to in the judgment

Black’s Law Dictionary (6ed) at 146, 1092

Counsel

For the appellant: Okoronji

For the respondent: Offiong

Judgment

EDOZIE JCA: (Delivering the lead judgment) The appellant, Benjamin Udeozor Osondu, was on 20 July, 1998 arraigned before the defunct Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Tribunal, Kano Zone II (hereinafter referred to as the Failed Banks Tribunal simpliciter) on allegations contained in an eight-count charge which as subsequently amended reads as follows:–

“Count 1

That you Benjamin Udeozor Osondu between the 2 July, 1996 and the 5 August, 1996 at Lagos within the jurisdiction of the Failed Banks (Recovery of Debts) and Financial
Malpractices in Banks Tribunal conspired with persons unknown to commit a felony to wit, stealing the sum of $951,070.69 American Dollars, the property of PASCO (Panama) S.A. and depositing it in diverse accounts at Citizens International Bank Limited, Diamond Bank Limited and Chartered Bank Limited in Lagos and thereby committed an offence contrary to section 516 of the Criminal Code Cap 77 Laws of the Federation of Nigeria, 1990 read in conjunction with section 3(1)(d) of the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree No. 18 of 1994 (as amended).

Count 2

That you Benjamin Udeozor Osondu between the 28 June, 1996 and the 1 August, 1996 at Lagos within the jurisdiction of the Failed Banks (Recovery of Debts) and other Financial Malpractices in Banks Tribunal conspired with persons unknown to forge documents to wit, letters of instructions purporting to emanate from Emmanuel Oti and addressed to Credit Suisse Geneva and thereby committed an offence contrary to section 516 of the Criminal Code Cap 77 Laws of the Federation of Nigeria, 1990 read in conjunction with section 3(1)(d) of the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree No. 18 of 1994 (as amended).

Count 3

That you Benjamin Udeozor Osondu between the 2 July, 1996 and the 5 August, 1996 at Lagos within the jurisdiction of the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Tribunal stole the sum of $951,070.69 American Dollars, property of PASCO (Panama) S.A. which naira equivalent you deposited in diverse accounts at Citizens International Bank Limited, Diamond Bank Limited and Chartered Bank Limited in Lagos and thereby committed an offence contrary to section 390(9) of the Criminal Code Cap 77 Laws of the Federation of Nigeria, 1990 read in conjunction with section 3(1)(d) of the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree No. 18 of 1994 (as amended).

Count 4

That you Benjamin Udeozor Osondu between the 28 June, 1996 and 1 August, 1996 at Lagos within the jurisdiction of the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Tribunal forged documents to wit, letters
of instruction purporting to emanate from Emmanuel Oti and addressed to Credit Suisse Geneva and thereby committed an offence contrary to section 467(2)(h) of the Criminal Code Cap 77 Laws of the Federation of Nigeria, 1990 read in conjunction with section 3(1)(d) of the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree No. 18 of 1994 (as amended).

**Count 5**

That you Benjamin Udeozor Osondu between the 28 June, 1996 and 5 August, 1996 at Lagos within the jurisdiction of the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Tribunal knowingly and fraudulently uttered false documents, to wit, letters of instruction purporting to emanate from Emmanuel Oti, the sole signatory of the account of PASCO (Panama) S.A. at Credit Suisse Geneva intending thereby to induce the said bank to accept as genuine the purported letters of instructions and to transfer sums amounting to $951,070.69 American Dollars from the accounts of PASCO (Panama) S.A. which amount you obtained fraudulently and deposited the Naira equivalent into diverse accounts at Citizens International Bank Limited, Diamond Bank Limited and Chartered Bank Limited and thereby committed an offence contrary to section 468 of the Criminal Code Cap 77 Laws of the Federation of Nigeria, 1990 read in conjunction with section 3(1)(d) of the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree No. 18 of 1994 (as amended).

**Count 6**

That you Benjamin Udeozor Osondu between the 4 February, 1996 and the 27 July, 1996 at Lagos within the jurisdiction of the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Tribunal knowingly and fraudulently uttered false document to wit, Diamond Bank Limited and Chartered Bank Limited current account opening forms purporting them to be made by Bob-Manuel Modebe and Jerome Osita Eseka respectively, intending thereby to induce the said banks to accept as a genuine transaction and to lodge and conceal from detection the sum of $951,070.69 American Dollars or its Naira equivalent fraudulently obtained by you from the account of PASCO (Panama) S.A. at Credit Suisse Geneva and thereby committed an offence contrary to section 468 of the Criminal Code Cap 77 Laws of the Federation of Nigeria, 1990 read
in conjunction with section 3(1)(d) of the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree No. 18 of 1994 (as amended).

Count 7
That you Benjamin Udeozor Osondu between the 12 February, 1996 and 22 July, 1996 at Lagos within the jurisdiction of the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Tribunal forged documents, to wit, letters of set-off addressed to Diamond Bank Limited and Chartered Bank Limited and thereby committed an offence contrary to section 467(2)(h) of the Criminal Code Cap 77 Laws of the Federation of Nigeria, 1990 read in conjunction with section 3(1)(d) of the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree No. 18 of 1994 (as amended).

Count 8
That you Benjamin Udeozor Osondu between the 22 February, 1996 and 22 July, 1996 at Lagos within the jurisdiction of the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Tribunal forged documents, to wit, current account opening mandate addressed to Diamond Bank Limited and Chartered Bank Limited and thereby committed an offence contrary to section 467(2)(m) of the Criminal Code Cap 77 Laws of the Federation of Nigeria read in conjunction with section 3(1)(d) of the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree No. 18 of 1994 (as amended)."

The appellant pleaded not guilty to each of the above counts and in the trial that ensued the prosecution called a total of eight witnesses and tendered several documentary exhibits. As borne out by the evidence, the facts upon which the charges are grounded may be summarised briefly as follows.

The subject matter of the charge is the fraudulent withdrawal of money from a foreign bank, that is, Credit Suisse, Geneva, in Switzerland. The money which was in foreign currency was withdrawn from that bank from the account held by a Panamanian registered company known as PASCO (Panama) S.A. whose president and owner is a Nigerian by name Chief Emmanuel Oti (PW6) and who also is the sole operator of or signatory to the said account.
According to the prosecution, the appellant approached one Yusuf Ibrahim (PW2) and solicited for banking accounts held in a foreign country representing to the said Yusuf Ibrahim that he had a brother in London who wished to transfer a substantial amount of foreign currency to such account for remittance to Nigeria. As PW2 had no such account, he approached his business colleague, Tasiu Musa Abubakar (PW3), who procured two foreign account numbers from Bieta Bala (PW4) and Abubakar Abdullahi (PW5). These accounts were held in banks in Jakarta (Indonesia) and Hong Kong respectively by PW4 and PW5 jointly with others. On various dates viz: 28 June, 1996, 10 July, 1996 and 1 August, 1996 the Credit Suisse Switzerland Bank (Swiss bank for short) received letters of instructions, Exhibits A7, A9 and A11, purporting to emanate from Chief Emmanuel Oti directing the transfer of the sums of $250,000, $400,000 and $300,000 American Dollars respectively from the accounts of PASCO (Panama) S.A. to the foreign account numbers of PW4 and PW5. The instructions were carried out. On the information by the appellant to PW2 (vide telex advices, Exhibits 12 and 13) that the transfers had been effected and confirmation to that effect by PW4 and PW5, the latter, that is PW4 and PW5 then arranged to pay the equivalent amount in Naira in Nigeria of the money transferred upon an agreed exchange rate to the appellant through PW2 and PW3 who, after deducting their commission, paid over the balance of the proceeds to the appellant who in turn lodged the money in his several accounts with Citizens International Bank Limited Agidingbi branch, Ikeja, Lagos and from those accounts various sums were transferred to Diamond Bank Limited and Chartered Bank Limited, both in Lagos. The fraud came to light when Chief Emmanuel Oti of No. 40 Norman Williams Street, S.W. Ikoyi, Lagos called at the Swiss bank in Geneva on 14 August, 1996 to transact business and was told that the business could not be transacted due to lack of funds in his account from which there had been several withdrawals. He was alarmed at the information and upon being shown the
letters of instructions, *viz.* Exhibits 7, 9, 11, and similar other documents, he denied their authorship. Thereafter, by his Counsel, Mr Clement Akpamgbo, S.A.N., he lodged a report to Nigerian Deposit Insurance Corporation (NDIC) which in turn referred the matter to the police for investigation. In the course of the investigation, the police located and arrested the appellant who made several statements. In his first statement to the police dated 22 March, 1997, he described himself as a marketing executive with his address at No. 17B, Ramat Crescent, Ogudu GRA, Lagos. The thrust of his defence was that it was one Charlie whose surname was not mentioned who masterminded the fraud and that, although he procured the foreign account numbers in Jakarta and Hong Kong, he only came to realise the nature of the transactions when the said Charlie revealed to him that the money that was being transferred was from somebody’s account. The appellant stated that the said Charlie was from Warri but was at one time a student of the Institute of Management and Technology, Enugu. He said that it was he, Charlie, who collected the greater part of the proceeds of transfer leaving only 30% to the appellant as commission. All efforts by the police to establish the identity of Charlie and locate his whereabouts proved abortive.

At the conclusion of the case for the prosecution, the defence made a no-case submission and on its being overruled, the defence rested its case on the prosecution’s case and declined to give or call any evidence. Thereupon the Failed Banks Tribunal Chairman, Donli J, in a reserved judgment delivered on 10 November, 1998 convicted the appellant on all eight counts of the charge and sentenced him to ten years’ imprisonment in respect of each of counts 1–3, and five years’ imprisonment in respect of each of counts 4–8. The sentence were to run concurrently. In addition, the Tribunal made an order that all the movable and immovable property of the appellant be forfeited to the Government and transferred to Emmanuel Oti (PW6).

Dissatisfied with that judgment, the appellant by his Counsel lodged an appeal to the defunct Special Appeal Tribunal
upon four grounds of appeal. Briefs of arguments were filed on both sides. Consequent upon the provision of section 7(1) of the Tribunals (Certain Consequential Amendments, etc) Decree No. 62 1999 which confers on the Court of Appeal the jurisdiction to hear an appeal from a person convicted under the said Decree, the appellant’s appeal was referred to this Court for determination.

On 9 May, 2000 when the appeal was heard, Counsel on both sides adopted their briefs of argument with oral submissions in amplification thereof. In the appellant’s brief of argument, the following two issues were identified for the determination of the appeal:

“2.01 Whether the 8-count charge as laid against the appellant and the evidence adduced in support of the charge are within the purview of section 3(1)(d) of the Failed Banks Decree No. 18 of 1994 (as amended), such that would enable the Failed Banks Tribunal to exercise jurisdiction to hear and determine the matter.

2.02 Whether from the evidence led, the prosecution proved the guilt of the appellant beyond reasonable doubt on the 8-count charge as laid.”

Similar issues were identified in the respondent’s brief thus:

“3.1 Did the offences alleged against the appellant at the Failed Banks Tribunal relate to the business and operation of a bank so as to vest jurisdiction in the Failed Banks Tribunal to hear and determine the said allegations contained in the charge.

3.2 Is the judgment of the Tribunal unreasonable, unwarranted and unsupportable having regard to the evidence adduced before the Tribunal in proof of the charges brought against the appellant.”

In regard to the first issue for determination in the appellant’s brief, it was contended in the said brief that the Failed Banks Tribunal was without jurisdiction to hear and determine the eight-count charge preferred against the appellant on the ground that the subject-matter of the charge was purely a criminal matter between the appellant and Emmanuel Oti and not a matter arising from the business or
operation of a bank. The eight counts of the charge, it was argued, relate to offences under the Criminal Code and that none of this is aimed by the appellant at depriving or diminishing the bank depositor’s money to justify the assumption of jurisdiction by the Failed Banks Tribunal. It was also reiterated that from the evidence before the tribunal, it was manifest that the case was not one of financial malpractice in banks, or management of the funds of a bank in any manner but the conversion or stealing of money belonging to Mr Emmanuel Oti. Reference was made to section 3(1)(d) of Decree No. 18 of 1994 (as amended). It was submitted that the section did not create an offence, rather it provides for the criminal jurisdiction of the Failed Banks Tribunal to try offences committed in the course of the business or operation of a bank. It was further submitted that from the counts of the charge as laid and the evidence adduced in support thereof, it cannot be said, however remotely, that the offences with which the appellant was charged concerned the business or operation of a bank and therefore that the tribunal chairman was in error to have found to the contrary. In support of the above submissions, learned Counsel cited and relied on the case of F.R.N. v Abubakar (1997) F.B.T.L.R. 129. He also cited the following additional authority: unreported judgment of the Lagos Division of this Court in appeal No. CA/L/118/98, Andrew Macaulay v Reiffeison Zentral Bank of Australia delivered on 15 March, 1999 to contend that since no bank in Nigeria was involved in the transaction that led to the trial of the appellant, the Failed Banks Tribunal lacked the jurisdiction to try him. Also referred to are the cases of African Newspapers of Nigeria Ltd v Federal Republic of Nigeria (1985) 2 NWLR (Part 6) 137; (1985) All NLR 168 at 183–184; Alh. Mandara v Attorney-General of Federation (1984) 1 SCNLR 311; (1984) All NLR 219 and Federal Ministry of Internal Affairs and others v Shugaba (1982) 3 NCLR 915 in which it was submitted that section 7(2) of the Federal Revenue Court Act, 1973 was construed restrictively as it related to matters arising from the revenue of the Federation. It was urged that section 3(1)(d) of the Failed Banks Decree No. 18 of 1994 be so
restrictively construed so that the words “other offences” appearing in that section should be limited to the business or operation of a bank.

In reply to the appellant’s submission on issue 1 above, learned Counsel for the respondent submitted in his brief that the decision of the Failed Banks Tribunal that the offences alleged against appellant in counts 1–8 of the charge relate to the business or operation of a bank and thus fell within the jurisdiction of the tribunal is well founded in law. In support of this stand Counsel relied on section 3(1)(d) of Decree No. 18 of 1994 and the cases of FRN v Michael Odebode (1997) 2 F.B.T.L.R. 37 at 150–151 and FRN v Mallam S. Bello Abubakar (supra). He argued that there was no justification whatever in seeking, as appellant’s Counsel had done, to limit the category of offences relating to the business or operation of a bank to only where it was a transfer from another bank without the intervention of third parties or where a depositor’s money was diminished because (i) such limitation is not contained in Decree No. 18 of 1994; and (ii) because indeed there were offences in respect of which no loss had occurred and yet the offences were regarded as having been committed.

The bone of contention is whether or not the Failed Banks Tribunal had the jurisdiction to entertain the counts of the charge, the subject-matter of this appeal. Jurisdiction, it is said, is a fundamental issue, for it is settled law that once a court does not have the jurisdiction to entertain a matter, the proceedings thereon no matter how well conducted will not confer on it a jurisdiction it never had. It is equally the law that neither consent nor acquiescence can confer jurisdiction where none existed (see Onyema and others v Oputa and others (1987) 3 NWLR (Part 60) 259; Attorney-General of the Federation and others v Sode and others (1990) 1 NWLR (Part 128) 500; Madukolu and others v Nkemdilim (1962) 1 All NLR 587; (1962) 2 SCNLR 341 and Ishola v Ajiboye (1994) 6 NWLR (Part 352) 506). The Failed Banks Tribunal, the jurisdiction of which is under consideration, is
a creature of statute and to its enabling law must one turn to ascertain the scope or extent of its jurisdiction. In so doing, it must be borne in mind that, according to the canons of statutory interpretation, the golden rule of interpretation of statutes is that the words must *prima facie* be given their ordinary meaning. In other words, where the words used in an enactment are plain on the face of it, their literal meaning should be given to them (see *Niger Progress Ltd v North East Line Corporation* (1989) 3 NWLR (Part 107) 68; *Amokeodo v I.G.P.* (1999) 6 NWLR (Part 607) 467 at 488).

It is a principle of interpretation of legislation that headings which are given to a section or group of sections of a statute cannot be relied upon to construe the plain words of the section or sections unless such words are found to be ambiguous (see *Ondo State University v Folayan* (1994) 7 NWLR (Part 354) 1 at 23).

It is common ground by Counsel on both sides that the jurisdiction of the Failed Banks Tribunal in relation to the subject-matter of the charge against the appellant is as spelt out in subsection 3(1)(d) of Decree No. 18 of 1994. The subsection enacts:

“3(1) The Tribunal shall have power to:–

(a) . . .

(b) . . .

(c) . . .

(d) try other offences relating to the business or operation of a bank under any enactment” (italics for emphasis).

It is not disputed that the appellant was charged with offences under the Criminal Code (Cap 77) Laws of the Federation of Nigeria, 1990. What is in contention is whether those offences relate to the business or operation of a bank within the meaning and intendment of section 3(1)(d) of the Failed Banks Decree No. 18 of 1994. In *Black’s Law Dictionary* (6ed) at 146, “the business of banking” which words, in my view, are interchangeable with the “business of a bank” is defined thus:–

“The business of banking as defined by law and custom, consists
in the issue of notes payable on demand intended to circulate as money when the banks are banks of issue; in receiving deposits payable on demand; in discounting commercial paper, making loans of money on collateral security; buying and selling bills of exchange, negotiating loans and dealing in negotiable securities issued by the government, state and national and municipal and other corporations. *Mercantile Bank v New York*, 121 US 138, 156 7 S. Ct 826, 30 L Ed. 895” (italics for emphasis).

The said *Black’s Law Dictionary* (supra) at 1092 defines “operation” thus:

“Exertion of power; the process of operating or mode of action; an effect brought about in accordance with a definite plan, action; activity . . .”

From the above definitions, it seems clear that the business of a bank includes receiving deposits from customers, which deposits are payable on demand through cheques or letters of instruction, while the operation of a bank means the way or manner a bank operates or carries out its function such as by maintaining current, deposit and savings accounts and keeping of accounts of its transactions, etc.

The offences for which the appellant was tried in the eight-count charge are conspiracy, stealing, forgery and uttering of documents in respect of the fraudulent transfer of money from the Swiss bank and the subsequent deposit of the proceeds in Citizens International Bank Limited, Diamond Bank Limited and Chartered Bank Limited in Lagos. It cannot be seriously contended that those offences do not relate to the business or operation of a bank.

In the case of *FRN v Mallam S. Bello Abubakar* (supra) to which learned Counsel on both sides have drawn my attention, the appellant who at the material time was the managing director and chief executive of Gamji Bank Plc was charged with offences under various sections of the Criminal Code of Lagos State in connection with dishonest transfer of his employer’s money to his personal account in a bank in London. He was tried by the Failed Banks Tribunal, Lagos Zone. In an appeal to the Special Appeal Tribunal against his conviction it was argued on his behalf that the Failed
a Banks Tribunal had no jurisdiction to entertain the charges against him on the ground that as “banking” falls within the exclusive list in the 1979 Constitution, no State of the Federation had the legislative competence to enact a law with respect to offences relating to a “bank” or “banking.” In reaction to that submission, the Special Appeal Tribunal opined at 150 of the report as follows:

“...It is pertinent to note here that section 3(1)(d) of the Decree does not say that the tribunal shall have power to try other offences relating to banks and banking but other offences relating to the business of or operation of a bank. . .

However, in the business or operation of a bank, offences may be committed by the director of the bank with respect to the books which a bank keeps. Such offences do not necessarily contravene the laws relating to banks and banking. But they have to do with something arising from the business or operation of a bank. Such offences may be stealing of money of the bank, fraudulent false accounting and false entries in the books of the bank. . .”

c This interpretation is in accord with the conclusion I have reached to the effect that the offences with which the appellant in the instant case was charged fall within the ambit of section 3(1)(d) of the Failed Banks Decree No. 18 of 1994 as amended. Learned Counsel for the appellant appears to have relied on the interpretation in the said case of FRN v Mallam S. Bello Abukakar (supra) to submit that the jurisdiction of the Failed Banks Tribunal will not arise if transfer were not from a bank abroad to a bank in Nigeria without the intervention of third parties. It was also contended that the jurisdiction of the said tribunal was limited to cases where a bank was the victim or complainant of an offence, or the offences had the effect of diminishing the depositor’s money in the bank. With much respect to the learned Counsel for the appellant, such limitations are not contained in section 3(1)(d) of Decree No. 18 of 1994 as amended. It is a cardinal principle in the interpretation of a statute that words are not imported into a statute which are not there (see Awolowo v Shagari (1979) 6–9 SC 51 at 90–96; Aqua Ltd v Ondo State Sports Council (1988) 4 NWLR (Part 91) 622 at 641–642 and Fasakin v Fasakin (1994) 4 NWLR (Part 340) 597 at 617). I am clearly of the view that the contention of
the appellant’s Counsel are not well founded. The additional authorities he referred to at the oral hearing of the appeal appear to me irrelevant and inapplicable to the facts of the case.

Before I conclude my judgment on the issue under consideration I wish to refer to paragraph 4.20 at 6 of the appellant’s brief with the following statement:–

“4.20. It is clear beyond doubt that the lower tribunal made an order for the recovery of Chief Emmanuel Oti’s money who is neither a bank nor a failed bank and, such an order, with respect, is wrong in law and without jurisdiction.”

My short reply is that the order of the tribunal under attack was not a ground of appeal nor was it raised in any of the issues for determination. Arguments in a brief are based on issues formulated as derived from the grounds of appeal and therefore any argument not related to any issue so formulated cannot be entertained. I will therefore discountenance the point raised with respect to the order of the tribunal in question. On the whole, it is my judgment that the Failed Banks Tribunal had the requisite statutory jurisdiction to entertain the eight-count charge, the subject-matter of this appeal. I will therefore resolve the first issue for determination under consideration against the appellant and in favour of the respondent.

The second issue for determination in the appellant’s brief which embraces the corresponding issue in the respondent’s brief poses the question whether from the evidence led, the prosecution proved the guilt of the appellant beyond reasonable doubt in the eight-count charge as laid.

In regard to the charge for conspiracy to steal in count 1 and conspiracy to forge letters of instruction, Exhibits 7, 9 and 11, as laid in count 2, the substance of the appellant’s complaint is that there is no evidence that he was a party to a design with persons known or unknown to steal the amount stated in count 1 or forge the letters of instructions, Exhibits 7, 9 and 11, as alleged in count 2. It was contended that,
a since the prosecution successfully rebutted the appellant’s statement that he was acting in concert with one Charlie and the tribunal found as a fact that the said Charlie did not exist, the tribunal was in error to have held that the appellant must have conspired with the officers of Credit Suisse (Swiss bank), Counsel referred to the cases of Erim v The State (1994) 5 NWLR (Part 346) 522 and Oladejo v The State (1994) 6 NWLR (Part 348) 101 at 106 to submit that in the absence of proof that the appellant acted in concert with another, the convictions under counts 1 and 2 are unsustainable. Counsel further alluded to the cases of Queen v Wilcox (1961) 2 SCNLR 296; (1961) 1 All NLR 658; Muhammadu Duriminiya v C.O.P. (1961) NNLR 70 to contend that the tribunal, having found that Charlie alleged to have acted in concert with appellant did not exist, it was wrong for it to embark on a private investigation outside the court to hold that the appellant had conspired with the officials of the Credit Suisse Bank since, according to the prosecution, the police investigation did not extend to that bank.

b In answer to the above submissions, it was contended in the respondent’s brief that the evidence that the appellant was acting with some person or persons unknown to the prosecution was overwhelming and that the existence of conspiracy is generally a matter of inference to be deduced from certain criminal acts of the parties concerned done in pursuance of an apparent criminal purpose in common between them. The case of Daboh v The State (1977) 5 SC 197 was alluded to.

c Conspiracy is an agreement of two or more persons to do an act which it is an offence to agree to do (see Haruna v The State (1972) 8–9 SC 174). The crime of conspiracy is completely committed at all the moment two or more have agreed that they will do at one or at some future time certain things. Direct evidence of an agreement is not indispensable as it is open to the trial court to infer compliance from the fact of doing things towards a common end (see Paul Onu-
conspiracy, it is not necessary that there should be direct communication between each conspirator and every other but the criminal design alleged must be common to all. Indeed one conspirator may be in one town and the other in another town and they may never have seen each other but there would be acts on both sides which would lead the jury or the Judge sitting alone to the inference (see R. v Meyrick and another (1930) 21 Cr. App. R. 94; Queen v Esege (1962) 1 SCNLR 189; (1962) 1 All NLR 110; Oyediran v Republic (1967) N.M.L.R. 122; Erim v State (supra)).

In this case, the evidence adduced by the prosecution showed that the appellant solicited for foreign banking account numbers from PW2 to whom he represented that he had a brother in London who wanted to remit money to Nigeria through the foreign account. PW4 and PW5 furnished foreign account numbers held in Jakarta and Hong Kong banks. The foreign account numbers appeared in the letters of instructions, Exhibits A7, A9 and A11, addressed for the attention of Mr Klaus Scharft and purporting to emanate from Emmanuel Oti (PW6) directing the Credit Suisse Bank, Geneva, to transfer funds from the account of PASCO (Panama) S.A. to the foreign accounts in Jakarta and Hong Kong furnished by PW4 and PW5. The said letters of instructions, Exhibits A7, A9 and A11, contained the account number of PASCO (Panama) S.A. account in Credit Suisse Bank, Geneva, and were despatched to that bank from Lagos according to the DHL shipment bills. The Exhibits, that is A7, A9 and A11, bore signatures which resemble but are different from those on the mandate of PASCO (Panama) S.A. with Credit Suisse Bank (Exhibits C1–C19). It is further in evidence that, after the transfer of funds by the Credit Suisse Bank, the appellant was sent a telex advice, Exhibits 12 and 13, indicating that the transfer had been effected. He presented Exhibits 12 and 13 through PW2 to PW4 and PW5 and upon confirmation that their foreign accounts had been credited, the Naira equivalent of the money so credited was paid over to the appellant less commission. In its
appraisal of the evidence, the tribunal at 26 lines 34 et seq of
the judgment record reasoned thus:—

“The identity of those who worked with the accused is clearly in-
ferable that the unknown persons were within Credit Suisse Bank
itself and elsewhere for the reason that an International Bank of
that repute should have seen by the naked looking of Exhibits C1–
C19 that the signatures were not the same with the signatures of
Exhibits A7, A9, A11 and all the others shown to me in this case. I
therefore hold that the accused never knew PW6 before the date of
the hearing of this case and that the conspirators are unknown but
may be within the Credit Suisse Bank itself.”

One pertinent question that needs to be answered is how did
the account number of PASCO (Panama) S.A. in Credit
Suisse Bank, Geneva, and the name of Mr Klaus Scharft
find their way into Exhibits A7, A9, A11 which originated
from Lagos. Chief Emmanuel Oti (PW6), the sole signatory
to that account, in his evidence at 67 lines 23, 27–29 ac-
knowledged that he did not know his account number in
Geneva and that such non-disclosure of an account number
to an account holder was peculiar with Swiss bank accounts.
It is reasonable to infer that it is the officials of the Credit
Suisse Bank in Geneva who have access to the accounts of
its customers who must have supplied the account number in
question and the name of Mr Klaus Scharft to their co-
conspirators in Lagos. I am therefore inclined to agree with
the tribunal that some officials in the Credit Suisse Bank
were involved in the fraudulent transfers not necessarily
from the point of view that they acted on Exhibits A7, A9
and A11 which might have been done negligently but be-
cause the inference is irresistible that they made the account
number of PASCO (Panama) S.A. in the Credit Suisse Bank
available for use in the perpetration of fraud. It also seems to
me that Exhibits 12 and 13 which ought to have been re-
ceived by Chief Emmanuel Oti (PW6) at his No. 40 Norman
William Street, Ikoyi address was intercepted by unknown
persons and diverted to the appellant. The contention by
appellant’s Counsel that because the person, Charlie, men-
tioned by the appellant in his statement to the police was
found not to exist, conspiracy could not be established is not
tenable. The counts of the charge were not framed on the
basis that the appellant conspired with the said Charlie. It is
equally preposterous to contend, as the appellant’s Counsel
had done, that because the police investigation did not ex-
tend to the Credit Suisse Bank, the tribunal could not have
found that some of the officials of the bank acted in concert
in the fraudulent transfers. This is so because direct evidence
is not indispensable to establish conspiracy. It can be proved
circumstantially. All the relevant pieces of evidence were
available for the necessary inference to be drawn.

With respect to the third count of the charge alleging that
the appellant stole the sum of US$951,070.69, the property
of PASCO (Panama) S.A., it was submitted in the appel-
lant’s brief that the prosecution failed to prove the appel-
lant’s guilt beyond reasonable doubt since there was no
evidence as to who initiated Exhibits A7, A9 and A11 or
who transmitted them by DHL. In response Counsel for the
respondent contended in his brief that the evidence was
overwhelming that the appellant acting in concert with oth-
ers not known committed the offence and was rightly con-
victed. I am entirely in agreement with the learned Counsel
for the respondent that there is a strong body of evidence to
sustain the conviction on count 3. There was the unchal-
lenged evidence accepted by the tribunal to the effect that on
the strength of Exhibits A7, A9 and A11 a total of
US$950,000 was transferred from the account of PASCO
(Panama) S.A. in Credit Suisse Bank, Geneva, to bank ac-
counts in Jakarta and Hong Kong held by PW4 and PW5
jointly with others under a pre-arrangement with the appel-
lant to whom was paid, less commission, the Naira equiva-
 lent of the proceeds which were deposited in the appellant’s
accounts with Citizens Bank, Diamond Bank and Chartered
Bank. The appellant himself admitted that much except that
he asserted that Charlie took a greater part of the money, an
assertion which is demonstrably false. By fraudulently con-
verting to his own use money belonging to PASCO
Counts 4 and 5 deal respectively with the offences of forgery and uttering of Exhibits A7, A9 and A11. Learned Counsel for the appellant referred to the cases of *Awobotu v State* (1976) 5 SC 49 and *Alake v State* (1991) 7 NWLR (Part 205) 567 on the ingredients of the offence of forgery as provided for under section 467 of the Criminal Code. He then submitted that from the totality of the evidence led by the prosecution the offence was not proved beyond reasonable doubt as there was no evidence as to who made Exhibits A7, A9 and A11. Counsel referred to the evidence of Emmanuel Oti (PW6) where he stated that the police in Geneva did the signature analysis of the exhibits in question but that the result of the analysis was not before the tribunal. Counsel invoked the provisions of section 149(d) of the Evidence Act to submit that the only reason why the result was not tendered was that if produced it would be unfavourable to the prosecution. In regard to count 5, it was also submitted that there was no evidence as to who uttered Exhibits A7, A9 and A11. Counsel cited the case of *Alake v State* (*supra*) in support of the view that the prosecution failed to prove beyond reasonable doubt the offences alleged in count 5. Responding to the foregoing submissions, learned Counsel for the respondent urged that the prosecution proved its case on both counts beyond reasonable doubt.

I agree with Counsel for the appellant that a document is said to be forged if the whole or part of it is made by a person with all falsity and knowledge of the falsity and with intention that it may be used or acted upon as genuine to the prejudice of the victim. I also agree with him that the offence of uttering is committed when a person knowingly and fraudulently utters a false document or writing or a counterfeit seal (see *Smart v State* (1974) 11 SC 173; *Awobotu v State* (1976) 5 SC 49; *Alake v State* (1991) 7 NWLR (Part 205) 567). Like other offences, forgery and uttering may be proved by direct or circumstantial evidence. Of the latter, it
has been said that it is evidence of surrounding circumstances which by undesigned coincidence is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial (R. v Taylor, Weaver and Donovan (1930) 21 Cr. App. R. 20). In the case in hand, the tribunal in convicting the appellant on count 4 had this to say at 45 of the judgment records:

“Agreed that there was no direct evidence that the accused made Exhibits A7, A9 and A11 there were circumstances that proved the accused conspired with unknown persons to commit the offence of stealing the sums stated therein in Exhibits A7, A9 and A11 and the law attributes the action of any of them including the person who forged Exhibits A7, A9 and A11 to the action of the accused. As stated in the case of Okorie v Queen (supra), the two men or as in this case the accused and the unknown persons were hands in glove in the commission of the stealing of the various sums on Exhibits A7, A9, A11 and the forgeries committed. The action of the unknown conspirator who forged Exhibits A7, A9 and A11 became the action of the accused who now denied the forgeries. He the accused is equally guilty of the offence as charged under section 467(2)(h) of the Criminal Code.”

That finding is impeccable and cannot be faulted. The record of proceedings shows that, based on the evidence of PW6 that he did not make Exhibits A7, A9 and A11 and the visual examination of the signatures in those exhibits and the mandate or admitted signature and writing of PW6 on Exhibits C1–C19, the tribunal reached the conclusion that Exhibits A7, A9 and A11 were forged. It does not appear there is any dispute about that finding. The pith of the complaint of the appellant is that there is no evidence that he made those Exhibits, A7, A9 and A11. It will be recalled that it was the appellant who through PW2 sought foreign bank account numbers for use in transferring money to Nigeria. PW4 and PW5 supplied to him their foreign account numbers in Jakarta and Hong Kong banks. These account numbers were inserted in Exhibits A7, A9 and A11. Who else other than the appellant could have entered the foreign account numbers in those exhibits? After the Credit Suisse Bank had complied with the directives in Exhibits A7, A9 and A11,
the appellant was sent telex advices, Exhibits A12 and A13, to confirm the remittance. If he was not the one who despatched Exhibits A7, A9 and A11 why were Exhibits A12 and A13 sent to him? Upon PW4 and PW5 being satisfied that their bank accounts in Jakarta and Hong Kong had been credited with the amount of money remitted by the Credit Suisse Bank, they paid the appellant the naira equivalent less commission. In my humble view the circumstantial evidence is overwhelming and pointed irresistibly to the fact that it was the appellant himself who forged and uttered Exhibits A7, A9 and A11 or that he procured someone to forge and utter them and in either case he is guilty of committing those offences by virtue of section 7 of the Criminal Code. It is the law that where a document was shown to be used as an intermediate step in a scheme of fraud in which an accused person was involved, then if it is shown that such document was false and was presented or uttered by an accused in order to gain advantage, an irresistible inference exists that either the accused forged the document with his own hand or procured someone to commit the forgery (see George Abel Scott v The King 13 W.A.C.A. 25; Pearce Henshaw v Commissioner of Police (1963) 7 ENLR 120 at 122). As it is obvious that it was the appellant who uttered the forged documents, Exhibits A7, A9 and A11, and derived benefit therefrom it goes without saying that he forged those documents or procured someone to do so. The failure by the prosecution to call a handwriting expert to show that by comparing the appellant’s admitted writing and signature in his written statement to the police, Exhibit A1, and the disputed signatures on Exhibits A7, A9 and A11 to show that appellant is the author of the latter is not fatal to the prosecution’s case because, even if there was such evidence which is negative, from the special circumstances of this case it will still be open to the court to draw the inference that the appellant procured someone else to forge and utter Exhibits A7, A9 and A11. It is therefore my view that the convictions of the appellant in counts 4 and 5 are in order.
At the time the appellant collected the proceeds of the fraudulent transfers, it would appear that he had accounts only with the Citizens International Bank into which the money was deposited. Apparently, being apprehensive of the suspicion the magnitude of the account would raise, the appellant then proceeded to open accounts with the Diamond Bank and Chartered Bank and to conceal his identity in the name of Bob-Manuel Modebe and Jerome Osita Eseka, respectively. In opening these accounts, the appellant had to complete some bank forms. It is alleged that in so doing, he committed certain offences the subject-matter of counts 6, 7 and 8 of the charge. In count 6 the appellant was charged with uttering Diamond Bank Ltd. and Chartered Bank Ltd Current account opening forms purporting them to be made by Bob-Manuel Modebe and Jerome Osita Eseka. In count 7 the charge was for forging of documents, to wit, letters of set-off addressed to Diamond Bank Ltd and Chartered Bank Ltd. Count 8 was for forgery of account opening mandate addressed to Diamond Bank Ltd and Chartered Bank Ltd.

Before considering the submissions of Counsel on the convictions of the appellant on those counts, that is counts 6, 7 and 8, I wish to observe that the counts as framed are duplicitous. The forgery of one document in respect of one bank or uttering of it to that bank constitutes a separate and distinct offence. By lumping in one count the forgeries of two documents in respect of two different banks makes the counts bad for duplicity. So too is the counts for uttering two separate documents to two different banks (see R v Nta and others (1946) 12 WACA 54; Okeke v Commissioner of Police (1948) 12 WACA 363). It is, however, the law that duplicity in a charge or count does not vitiate a trial where no miscarriage of justice occurs (Ogenyi v Inspector-General of Police (Ijoma v Queen) (1962) 2 SCNL R 157). The foregoing is merely by way of an observation as the question of duplicity of the counts was neither raised in the tribunal nor in this Court.
As noted earlier, counts 6, 7 and 8 of the charge relate to the documents used by the appellant in opening accounts in the Diamond and Chartered Banks.

These documents are Exhibits G9, H12, B1 and B2. Exhibit G9 is a “Reference Form” of Diamond Bank dated 13 February, 1996. In it, the appellant wrote in the space for “Name of applicant” the name Bob-Manuel Modebe with a passport photograph of himself pasted on that name. And in the space provided for “Referee” he filled his real name Benjamin O. Udeozor. In the case of the Chartered Bank, the appellant also completed a “Reference Form” dated 22 July, 1996 Exhibit H2. Therein, he wrote the name of JO Eseka in the space provided for “applicant” with his passport photograph fixed to it and inserted his real name Ben O Udeozor in the blank space for “Referee”. Exhibit B1 is the letter of set-off from Diamond Bank signed by Bob-Manuel Modebe and witnessed by the appellant, Ben O Udeozor. In Exhibit B2, the letter of set-off from Chartered Bank it was signed by JO Eseka and witnessed by the appellant. The appellant appeared before the banks in question to complete the forms.

The main plank of the appellant’s appeal against his convictions on counts 6, 7 and 8 of the charge is that the documents alleged to be forged in those counts were not in fact forged. Learned Counsel argued that the appellant presented the documents as having been made by himself stressing that the fact that he did so under false names did not mean that the documents were purportedly made by fictitious persons.

The case of Odu v State (1965) 1 All NLR 25 at 29 was called in aid. The contention of the respondent’s Counsel is that the appellant falsely represented that he and Bob-Manuel Modebe or Jerome Osita Eseka were different persons whereas he, the appellant, was the one masquerading in those names and as a result the documents were forgeries.

As the counts of the charge under consideration relate to the offences of forgery and uttering, it is necessary to refer to sections 465, 468 and 464(c) of the Criminal Code. The
sections provide *inter alia*, as follows:–

“465. A person who makes a false document or writing knowing it to be false, and with intent that it may in any way be used or acted upon as genuine . . . to the prejudice of any person, . . . is said to forge the document or writing.”

“468. Any person who knowingly and fraudulently utters a false document or writing or counterfeit seal, is guilty of an offence of the same kind and is liable to the same punishment as if he had forged the thing in question.”

“464. A document or writing is said to be false:–

(a) . . .

(b) . . .

(c) if the whole or some material part of the document or writing purports to be made by or on behalf of some person who does not, in fact, exist.”

As can be seen from sections 465 and 468 of the Criminal Code, one of the essential ingredients of the offence of forgery or uttering is the falsity of the document allegedly forged or uttered and by section 464 a document is said to be false if the whole or some material part of the document purports to be made by or on behalf of some person who does not in fact exist. The narrow issue raised in the appeal against the convictions in counts 6, 7 and 8 of the charge is whether the bank forms (Exhibits G9, H12, B1 and B2) made by the appellant in the names of Bob-Manuel Modebe or Jerome Osita Eseka were false documents. A similar issue arose for consideration by the Supreme Court in the case of *Odu v State* (*supra*).

In the case of *Odu v State* (*supra*), the appellant appeared in person at the Bank of West Africa, Uyo, gave his name as Bassey Etor and said he wished to open a savings bank account. He completed a specimen signature card in the name of Bassey Etor and also paying-in-slip for a cheque for £4,885. In convicting him for the forgery of those documents the trial Judge stated that the case “came within the principle of the cases in which it has been held that the use
of a pretended name of a fictitious person amounts to for-
gery” and referred to Anne Lewis case 1754 Foster’s Crown Cases 116. In allowing the appeal against his conviction, the Supreme Court per Brett JSC at 131–132 held:–

“Under section 465 of the Code, forgery consists of making a false document or writing, knowing it to be false and with the necessary intent, and section 464 defines a false document or writing as including one in which ‘the whole or any material part purports to be made by or on behalf of some person who does not in fact exist’. In this case the appellant presented the two documents as having been made by himself and the fact that he did so under a false name does not mean the documents purported to be made by some person who did not exist. The officials of the Bank of West Africa at Uyo know that the person with whom they were dealing was the appellant, even if they did not know his true name, and the document did not purport to be made by or on behalf of anyone but the appellant.”

The Supreme Court referred to its earlier decision in R. v Domingo (1963) 1 All NLR 81; (1963) SCNLR and in distinguishing it from Odu’s case held at 132:–

“Albert Omowale Domingo was convicted of forging two applications for registration under the Registration of Business Names Ordinance by signing them in fictitious names. He never dealt personally with the Registrar Business Names as the person who was being registered as the person doing business under the registered name and the whole transaction was a sham. Having opened a bank account in the name of DAOT Stationery Supply Agency he was convicted of forging a specimen signature card bearing the signatures of Akinola Olatunji Domingo and A. James and a mandate authorising A. James to operate the account. A. James was a fictitious person. The bank knew that Albert Omowale Domingo was the person opening the account but there was evidence which the Judge accepted, that if it had known that the names A.O. Domingo and A. James belonged to the same person, it would not have permitted the account to be opened. There was no similar evidence in the present case and the distinction between Domingo’s case and the present one lies in the fact that in the present case a known person assumed a false name in order to conceal his true identity whereas in Domingo’s case the persons with whom the registrar and the bank officials believed they were dealing or agreeing to deal were no more than characters in a work of fiction.”
As can be seen from the above extracts, there was in the 
signature card a representation that A.O. Domingo and A. James were two separate persons just as in the instant case there was also a representation in Exhibits G9, H12, B1 and B2 that the appellant, Benjamin O. Udeozor, and Bob-Manuel Modebe or J.O. Eseka were different persons. But unlike in the Domingo’s case there was no evidence from the Diamond Bank and Chartered Bank that if they had known the representation to be false they would not have permitted the accounts to be opened. I am therefore inclined to agree with the learned Counsel for the respondent that the facts of the instant case are more consistent with the principles in Odu’s case (supra). I am of the view that the documents in question are not false documents and the appellant could not have been convicted for forgery and uttering them.

In answer to the question posed in the second issue for determination, it is my view that the prosecution proved the guilt of the appellant beyond reasonable doubt in counts 1, 2, 3, 4 and 5 but failed to do so in respect of counts 6, 7 and 8 of the charge.

On the whole, this appeal is partially allowed. The convictions and sentence in counts 1, 2, 3, 4 and 5 are affirmed. The convictions and sentences in counts 6, 7 and 8 are set aside. The appellant is discharged and acquitted on counts 6, 7 and 8.

**OPENE JCA:** I have had a preview of the judgment just delivered by my learned brother, Edozie JCA. I agree with him that the eight-count charge as laid against the appellant and the evidence in support of the charge are within the purview of section 3(1)(d) of the Failed Banks Decree No. 18 of 1994 (as amended) and that the Failed Banks Tribunal has jurisdiction to entertain the matter.

I also agree with him in respect of counts 1, 2, 3, 4 and 5 that the prosecution have proved the guilt of the appellant and that they have not established the guilt of the appellant in counts 6, 7 and 8.
In the result, the appeal partially succeeds, the appeal against counts 1, 2, 3, 4 and 5 is hereby dismissed and the convictions and sentences are affirmed. The convictions and sentences in counts 6, 7 and 8 are set aside and the appellant is hereby discharged and acquitted on counts 6, 7 and 8.

EKPE, JCA: I had a preview of the leading judgment just read by my learned brother, Edozie JCA. I am in complete agreement with his reasoning and conclusions. The judgment is not only lucid but also is comprehensive enough that it covered all the issues raised in the appeal. There is nothing more that I can usefully add.

Appeal allowed in part.
Oreoluwa Onakoya v Federal Republic of Nigeria

COURT OF APPEAL, LAGOS DIVISION
ONNOGHEN, ADEREMI, OGUNTADE JJCA

Date of Judgment: 11 JULY, 2000

Banking – Banking offences – Accused charged with unlawfully approving grant of facility under section 19(1) of the Failed Banks Decree No. 18 of 1994 (as amended) – Whether or not it is material if the sum approved was actually disbursed

Banking – Banking offences – Charge of “unlawfully granting and approving the grant” of facility under section 19(1) of the Failed Banks Decree No. 18 of 1994 (as amended) – Whether form two distinct offences – Whether accused can be convicted for the offence proved when the prosecution proves only one of the offences

Criminal law and procedure – Banking offences – Charge of “unlawfully granting and approving the grant” of facility under section 19(1) of the Failed Banks Decree No. 18, 1994 (as amended) – Whether form two distinct offences – Whether material if sum approved was not actually disbursed

Facts

The facts of the case, as can be gathered from the record, includes the fact that the appellant was an executive director of Savannah Bank of Nigeria Plc at the material time. He is alleged to have approved the granting of an overdraft facility of ₦14 million in favour of PW6, Alhaji Gajimi Ibrahim, a customer of the Maiduguri branch of the bank. PW6 travelled to Lagos where he met the appellant in his office and requested for the overdraft facility. The appellant is said to have given oral approval of the facility and thereafter rang PW3 and PW4 asking that the facility be granted against security to be lodged by PW6.
PW3 later reduced into writing his discussion with the appellant and asked for a written confirmation of same. The trial court found that the appellant duly confirmed the said approval of the facility.

On the other hand, the appellant stated that, when PW6 called on him in Lagos, he and PW6 could not communicate due to the language barrier so he directed PW6 to the Maiduguri branch of the bank and that it was PW3 and PW4 who later communicated to him orally the telephone request made by PW6 which request he said he asked to be put down to him in writing; which was done via a fax memo dated 24 May, 1996 from PW3. The appellant endorsed an approval on the fax memo and returned same to PW3. However, the controversy between the appellant and the respondent is whether the fax message from PW3 to the appellant was a request made for N14 million or N1.4 million and also whether the endorsement made on 27 May, 1996 by the appellant on the said fax message was for an approval he was alleged to have given orally on 24 May, 1996. The trial Judge found as a fact that the approval given by the appellant was for N14 million as against the N1.4 million contended by the appellant and that the approval by the appellant, though dated 27 May, 1996, was to confirm the oral approval he gave on 24 May, 1996.

Dissatisfied with the judgment of the Tribunal, the appellant appealed to this Court on four grounds of appeal.

The appellant’s contention was that, since the dispute between the prosecution and the defence was whether it was N14 million or N1.4 million that was approved the original document on which the approval was given should have been tendered to resolve the issue, and not photocopies. Failure to tender the original approval, he argued, was fatal to the prosecution’s case.

The respondent maintained that the trial Judge was right in her conclusion having had the opportunity of watching the demeanour of all the witnesses and assessing their credibility.
Held –

1. On a charge of unlawfully approving the grant of facility under section 19(1) of the Failed Banks Decree No. 18 of 1994 (as amended) it is immaterial that the funds approved was or was not disbursed.

2. The offence with which the appellant was charged under section 19(1) of the Failed Banks Decree No. 18 of 1994 (as amended), to wit, “unlawfully, granting and approving the grant” of facility, form two distinct offences. In the instant case, although the appellant was charged with the two offences as if they were one, since the prosecution was able to prove only the offence of approving the grant of a credit facility of N14 million to PW6 and the appellant was not misled by the charge, the appellant can be convicted for that offence.

Appeal dismissed.

Cases referred to in the judgment

Nigerian

Akalezi v The State (1993) 2 NWLR (Part 273) 1
Awopeju v The State (2000) 6 NWLR (Part 659) 1
Effa v The State (1999) 8 NWLR (Part 613) 1
Khaleel v The State (1997) 8 NWLR (Part 516) 237
Nasiru v The State (1999) 1 SC 1
Nwaemereji v The State (1997) 4 NWLR (Part 497) 65
Sugh v The State (1988) 2 NWLR (Part 77) 475
The State v Danjuma (1997) 5 NWLR (Part 506) 512

Nigerian statutes referred to in the judgment

Evidence Act (Cap 112) Laws of the Federation of Nigeria, 1990, section 138
Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree No. 18 of 1994 (as amended), section 19(1)
ONNOGHEN JCA: (Delivering the lead judgment) This is an appeal against the judgment of Honourable Justice Amina Adamu Augie sitting as the chairman of the Failed Banks Tribunal, Lagos Zone 5 in charge No. FBFMT/L/ZV/3C/97 delivered on 2 February, 1999 in which she convicted and sentenced the appellant to a term of imprisonment.

The charge against the appellant is as follows:–

“That you Oreoluwa Sylvester Adedeji Onakoya (Male) while being a Director of Savannah Bank of Nigeria PLC in Lagos, between 20 May, 1996 and 28 May, 1996 committed felony to wit you approved the granting and granted credit facility of ₦14 m (Fourteen Million Naira) to one Alhaji Gajimi Ibrahim a customer of the Maiduguri branch of the Savannah Bank of Nigeria PLC without lawful authority and in violation of lending rules and regulations in force at the time in Savannah Bank of Nigeria PLC particularly memorandum 119. You thereby committed an offence contrary to section 19(1)(a), (b) and (c) of the Failed Banks (Recovery of Debts) and Financial Malpractices in Bank Decree No. 18 of 1994 (as amended) and punishable under section 20(1)(a) of the same Decree.”

The facts of the case, as can be gathered from the record, includes the fact that the appellant was an executive director of Savannah Bank of Nigeria Plc at the material time. He is alleged to have approved the granting of an overdraft facility of ₦14 million in favour of PW6, Alhaji Gajimi Ibrahim, a customer of the Maiduguri branch of the bank and that PW6 travelled to Lagos where he met the appellant in his office and requested for the overdraft facility. The appellant is said to have given oral approval of the facility and thereafter rang PW3 and PW4 asking that the facility be granted against security to be lodged by PW6.
PW3 later reduced into writing his discussion with the appellant and asked for a written confirmation of same. The trial court found that the appellant duly confirmed the said approval of the facility.

On the other hand, the appellant stated that when PW6 called on him in Lagos he and PW6 could not communicate due to the language barrier so he directed PW6 to the Maiduguri branch of the bank. It was PW3 and PW4 who later communicated to him orally the telephone request made by PW6 which request he said he asked to be put down to him in writing; which was done via a fax memo dated 24 May, 1996 from PW3. The appellant endorsed an approval on the fax memo and returned same to PW3. However, the controversy between the appellant and the respondent is whether the fax message from PW3 to the appellant was a request made for N14 million or N1.4 million and also whether the endorsement made on 27 May, 1996 by the appellant on the said fax message was for an approval he was alleged to have given orally on 24 May, 1996. The trial Judge found as a fact that the approval given by the appellant was for N14 million as against the N1.4 million contended by the appellant and that the approval by the appellant, though dated 27 May, 1996, was to confirm the oral approval he gave on 24 May, 1996.

Dissatisfied with the judgment of the Tribunal, the appellant appealed to this Court on four grounds of appeal. See at 164–167 of the record out of which learned Counsel for the appellant has formulated two issues in the appellant’s brief of argument for the determination of this Court. The said brief of argument was filed on 14 January, 2000 and was adopted by Counsel for the appellant, Prof AB Kasummu, S.A.N., during oral arguments on 19 April, 2000. The issues are as follows:

“1. Was the trial Judge right to hold as he did on page 154 of the record that the appellant admitted under cross-examination to approving the grant of N14 Million to the customer and also in holding that there was evidence both
oral and documentary to support the holding that ₦14 Million and not ₦1.4 Million was approved by the appellant.

2. Assuming but without conceding that the appellant approved an overdraft facility of ₦14 million to the customer, was the grant and disbursement of that sum made pursuant to the approval so granted as to constitute an offence having regard to the charge before the Tribunal.”

While dealing with Issue 1, learned Counsel for the appellant submitted that the conviction of the appellant could only be justified if the tribunal was right that the amount of credit facility approved by the appellant to the customer in respect of which he was convicted was ₦14 million which sum is far in excess of the appellant’s lending powers of ₦1 million for unsecured loans and ₦2.5 million for secured loans.

That the learned trial court was wrong in the finding that the appellant approved ₦14 million instead of ₦1.4 million because there are conflicts in the figures on the fax message allegedly approved by the appellant, photocopies of which were tendered and admitted as exhibits at the trial. That only the originals of the fax message could have shown clearly whether it was ₦14 million or ₦1.4 million that was approved but was not produced at the trial. That the production of the original would have proved beyond reasonable doubt the actual amount approved by the appellant.

That the absence of the original made the Tribunal to rely on photocopies with conflicting figures, viz. Exhibits C1, C2, D and H as well as the testimonies of PW2, PW3, PW4, PW5 and PW6 and the appellant. That based on the exhibits it cannot be said that the prosecution proved the charge beyond reasonable doubt that the appellant approved ₦14 million and not ₦1.4 million. That “the documents are so unreliable in terms of their sources that one would hesitate to smear the distinguished banking career” of the appellant based on them.
That it is not true that the appellant admitted under cross-examination that he was misled by PW3 and PW4 on the position of the account of PW6 in approving the grant of N14 million as found by the learned trial Judge. That the learned trial Judge was therefore in error in basing his decision to convict on an admission that was never made by the appellant.

That the learned trial Judge was in error in believing the evidence of PW3, PW4 and PW6 at the expense of that of the appellant despite the fact that the witnesses were telling some obvious lies. That the trial Judge did not base the decision on whom to believe on the facts established before the court but more on inferences.

Finally learned Counsel submitted that the Court of Appeal should have no hesitation in coming to the conclusion that based on the documentary and oral evidence before the court the prosecution has not established beyond reasonable doubt that what the appellant approved was N14 million and not N1.4 million.

In his reply contained in the respondent’s brief filed by Graba M. Gana, Esq., on 19 April, 2000, learned Counsel for the respondent submitted that the respondent proved the charge against the appellant beyond reasonable doubt.

That PW3 and PW4 were directly involved in the transaction that gave rise to the charge and that they testified to the fact that what the appellant approved was N14 million credit facility to PW6. That PW6 himself confirmed that he went to Lagos and requested for the amount from the appellant who approved same. That he never requested for N1.4 million.

That PW3 told the Tribunal that the appellant and himself had discussed the approval of the N14 million temporary overdraft for PW6 on the telephone and that the appellant approved same after which PW3 requested for a confirmation from the appellant by a fax message which was duly done. The approval was endorsed on the fax message.
That PW4 had said that the appellant had called him to say that he had approved an overdraft of N14 million for PW6. That the appellant never denied calling PW4 and telling him that he had approved N14 million overdraft for PW6. That the response of the appellant to the verbal query from PW2 on the issue of approval of N14 million did not contain any element of surprise which could have been the case if what the appellant actually approved was N1.4 million instead of N14 million. That the approval of N14 million was done orally between the appellant, PW3, PW4 and PW6. That the wording of Exhibits C1 and C2 leaves no room for doubt that the matter was actually discussed between PW3 and the appellant before the exhibits were written by PW3 for confirmation. That the amount for which the confirmation was sought is clearly N14 million.

That the learned trial Judge was right in believing the evidence of PW3, PW4 and PW6 having watched their demeanour.

That Exhibits C1, C2 and D are the same except that there is a heavy dot between one and four in Exhibit D to make it look different from N14 million in Exhibits C1 and C2. That the figure on Exhibit D is an afterthought. That it is easier to produce N1.4 million from N14 million than to produce N14 million from N1.4 million.

That Exhibits C1 and C2 do not show that the figure of N1.4 million could have been changed to read N14 million.

That the appellant admitted under cross-examination that he was misled to approve and grant the N14 million for PW6.

Learned Counsel then urged the court to resolve the issue against the appellant.

I agree with the submission of learned Counsel for the appellant that the conviction of the appellant in this appeal can only be justified if the Tribunal is right that the amount of credit facility approved by the appellant to PW6 was N14 million which sum was far in excess of the appellant’s
lending powers. This is because the tribunal had found at 152 of the record as follows:–

“The evidence before the Tribunal, which is confirmed by the accused person is that as Executive Director, he had a lending limit of N2.5 million for a secured loan and N1 million for an unsecured loan.”

It is trite that in a criminal case the burden of proof lies on the prosecution and the standard of such proof is proof beyond reasonable doubt (see section 138 of the Evidence Act Cap 112 Laws of the Federation of Nigeria, 1990). However, when we say that the standard of proof is beyond reasonable doubt we do not mean beyond any shadow of doubt (see Akalezi v The State (1993) 2 NWLR (Part 273) 1 at 13; Nasiru v The State (1999) 1 SC 1).

This Court has held per Amaizu JCA in Awopejo v The State (2000) 6 NWLR (Part 659) 1 at 22 that:–

“. . . proof beyond reasonable doubts stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice . . .”

The question then is whether the prosecution discharged that burden placed on it by law in the case on appeal under consideration?

Learned Counsel for the appellant has argued that with the absence of the original fax message on which the approval of the appellant is endorsed and the conflicting figures of N14 million and N1.4 million in Exhibits C1, C2 and D the prosecution cannot be said to have discharged the burden placed on it by law in that the original would have confirmed either of the versions put forward by the prosecution and the defence.

It is trite that the original of the fax message on which the approval of the appellant was endorsed was not tendered in evidence at the trial. The trial court therefore based its judgment on the photocopies, Exhibits C1, C2, D and H, and the oral testimonies of PW3, PW4, PW6 and the appellant in arriving at its decision on the matter.
At 148 of the record, last paragraph the learned trial Judge found *inter alia* as follows:–

“The long and short of it all is that Exhibits C1, C2, D and H are exactly the same except for the figure ‘₦1.4m’ in Exhibit D. PW3 did not deny that the fax message in all the exhibits were in his handwriting.”

While still considering whether the appellant approved ₦14 million as alleged by the prosecution or ₦1.4 million as he claimed, the learned trial Judge held at 150 of the record *inter alia* as follows:–

“It all boils down to who to believe, the prosecution witnesses who allege that the accused person approved the sum of ₦14 million or the accused person who claims he only approved the sum of ₦1.4 million . . .”

Going further at 151 the learned trial Judge found as follows:–

“The main thing is that I watched PW6 in court and I believe him that he came to Lagos to request for a ₦14 million credit facility from the accused person and I am convinced from the totality of the evidence before the tribunal that the accused person granted the request . . .”

Further down at 151, last but one paragraph, the learned trial Judge also made the following findings:–

“I have also critically examined Exhibits C1, C2, D and H and I have no doubt whatsoever in my mind, that a dot was clearly inserted between 1 and 4 to make it appear that the sum approved was ₦1.4 million.”

I do not agree with the submission of learned Counsel for the appellant that the issue of the amount approved by the appellant could only be proved by the production of the original fax message in view of the findings made by the learned trial Judge.

Both parties are agreed and the court did find as a fact that the principal characters in the drama were PW3, PW4, PW6 and the appellant. Following the absence of the original fax message and in view of the discrepancy in the figure of the loan approved the only way to resolve the issue was examining the evidence of these witnesses and deciding on who to
believe after watching them testify. The essential issue before the tribunal was whether the appellant approved₦14 million or ₦1.4 million and in resolving it the learned trial Judge believed the evidence of the prosecution witnesses and disbelieved that of the appellant. I am of the firm view that the trial Judge was right in so doing having regards to the state of the law as stated in very many cases including Sugh v The State (1988) 2 NWLR (Part 77) 475 where it was held that:–

“It is trite law that the assessment of credibility of a witness is a matter within the province of the trial court, as it is only that court that has the advantage of seeing, watching and observing the witnesses in the witness box. It has the liberty and privilege of believing him and accepting his evidence either as a whole or in part in preference to the evidence adduced by the defence.”

It is also settled law that the Appellate Court will only interfere with the findings of fact made by the trial court where there are special circumstances justifying such or where the findings are unsound or perverse. It is therefore beyond the duty of the Court of Appeal to substitute its view for that of the trial Judge who saw and heard the witnesses unless the findings are clearly perverse (see Effa v The State (1999) 8 NWLR (Part 613) 1).

Learned Counsel has not drawn our attention to the special circumstances which will justify our interference on the findings of facts made in this appeal, neither are the findings said to be perverse particularly as the findings are based on the credibility of the witnesses including their demeanour. I do not agree with learned Counsel for the appellant that the witnesses were telling lies as regards the facts of the case on appeal. The fact that they might have told lies regarding matters relating to their past conduct is not conclusive that they were lying that the appellant approved ₦14 million instead of ₦1.4 million.

Another reason why learned Counsel for the appellant said that the prosecution failed to prove the charge against the appellant is the finding by the learned trial Judge at 154 of
the record to the effect that:–

“The accused person under cross-examination, admitted that he was misled by PW3 and PW4 on the position of the account of PW6 in approving the grant of ₦14 million . . .”

Whereas the appellant made no such admission.

At 6 of the respondent’s brief of argument, learned Counsel for the respondent stated thus:–

“The appellant under cross-examination told the Tribunal that he was misled to approve and grant the fourteen million (₦14 m) for PW6.”

Again at 131 of the record of proceedings the learned Counsel for the respondent, in his address before the lower court, stated inter alia as follows:–

“Accused in his evidence under cross-examination confessed that he was misled by the regional and Branch Manager in approving the ₦14 million (Fourteen Million Naira) for Gajimi Ibrahim . . .”

The question is whether the appellant said so as found by the learned trial Judge.

The cross-examination of the appellant who testified as DW2 is contained at 95–98 of the record. At 97, the appellant stated as follows:–

“As at that date, both the Area Manager and the Branch Manager misled me on the position of the account and to further buttress the point the customer before he paid back the ₦13.5 million illegally given to him by the Branch Manager and Area Manager PW3 and PW4, he had to be arrested by the police.”

The above is clearly not an admission of the facts stated in the judgment. The appellant only admitted that he was misled as to the position of the account of PW6 and never said that he granted ₦14 million to the said PW6. The source of the error on the part of the learned trial Judge is obviously the address of learned Counsel for the prosecution at 131 of the record reproduced supra. This is very sad and unfortunate. Judges must always be very careful when considering
submissions of Counsel before them in their judgments. This is a clear case of learned Counsel deliberately misleading the court and to say the least very ungentlemanly. It is a conduct unbecoming of a gentleman at the bar.

The seriousness of the situation comes forcefully to mind when one realises that the deliberate falsehood is committed in a criminal trial.

What makes the whole episode more disturbing is the fact that learned Counsel for the respondent repeated this falsehood in his respondent’s brief also reproduced supra. This was after having been served with the notice and grounds of appeal and the record of proceedings and the appellant’s brief of argument. He had all the time to cross-check the record of proceedings and find out the true position of things but did not. He decided to continue in his act of misleading the court even in this Court. This is, to say the least, very nauseating.

However, the issue is, what is the effect of this perverse finding on the judgment of the trial court?

It is trite law that it is not all errors committed by a trial Judge that will lead to a setting aside of the judgment. In the present appeal the learned trial Judge had already come to the conclusion that the appellant approved the sum of N14 million instead of N1.4 million he claimed before making the finding complained of. In fact, the said finding is at the last but two paragraphs of the judgment at 154 of the record.

In other words, I am of the firm view that, despite the said finding, there is sufficient evidence to support the finding by the learned trial Judge that what the appellant approved for PW6 was N14 million and not N1.4 million. That being the case, it is my view that the said finding has not resulted in a miscarriage of justice to necessitate the judgment of the court being set aside on that ground alone. The learned trial Judge believed the evidence of the appellant long before making that erroneous finding.
On the issue of contradiction as to the source of Exhibits C1, C2 and H so as to render same unreliable in the determination of the guilt of the appellant as submitted by learned Counsel for the appellant, it is trite law that for contradiction to render any evidence unreliable it must be material to the ingredients of the charge before the court (see Nwaemereji v The State (1997) 4 NWLR (Part 497) 65; Khaleel v The State (1997) 8 NWLR (Part 516) 237; The State v Danjuma (1997) 5 NWLR (Part 506) 512; Awopeju v The State (2000) 6 NWLR (Part 659) 1 etc, etc).

In the charge before the lower court the primary issue was whether the appellant approved a credit facility of ₦14 million as alleged by the prosecution or ₦1.4 million as contended by the appellant. There is no contradiction in the evidence of the prosecution witnesses as to the amount allegedly approved by the appellant – none of them said that the appellant approved any sum less than the ₦14 million charged. Learned Counsel has also not said that there is such a contradiction.

The alleged contradiction being complained of is as to the source of Exhibits C1, C2 and H. It is my considered opinion that this is not fatal to the case of the prosecution since it is not substantial nor is it fundamental to the main issue in question before the lower court. In other words, the alleged contradiction had nothing whatsoever to do with the ingredients of the charge before the lower court and is therefore very immaterial and irrelevant.

On issue 2, learned Counsel for the appellant submitted that section 19 of Decree No. 18 of 1994 (as amended), under which the appellant was charged created four distinct offences to wit:–

(a) grants;
(b) approves the grant;
(c) is connected with the grant;
(d) is connected with the approval.
That the charge before the lower court is not in accordance with the offence created because instead of charging the appellant with two distinct offences, he was charged with one, i.e. “approving the grant and granting”.

That that being the case, for the prosecution to succeed it must establish that it was the accused who approved the grant and also granted the sum of N14 million to the customer.

That the learned trial Judge misdirected himself in holding inter alia, thus:–

“Now in his address Mr Gana submitted and I agree with him, that it is important to note that the accused person is not being charged with disbursing the sum of N14 million to PW6.

The charge is that of approval which was done between 20 May, 1996 and 28 May, 1996. It is immaterial whether the money was actually disbursed or not.”

When the evidence before the court does not show that the grant (disbursement) was made in accordance with the approval of the appellant. That it was therefore wrong for the trial court to have convicted the appellant as charged.

That there is evidence that the disbursement was done before the receipt of the approval by PW4. That the conclusion reached by the Judge that the approval given by the appellant was to reconfirm an earlier oral approval given by him is perverse having regard to the actual text of the approval.

Learned Counsel then urged the court to set aside the conviction.

In his reply learned Counsel for the respondent submitted that the one-count charge was not misleading neither did it occasion a miscarriage of justice. That no one is accused or charged for disbursing money to PW6. That the charge against the appellant is of absolute liability; disbursement or no disbursement.

I have carefully gone through the record of proceedings and the submissions of both Counsel on the issue under consideration.
It is clear from the facts of this case and the findings of the lower court that, though the appellant was charged with two offences as one, the prosecution proved one of the offences and failed to prove the other.

Now section 19(1) of Decree No. 18 of 1994 (as amended), under which the appellant was charged provides that any director, manager, officer or employee of a bank, who knowingly, recklessly, negligently, wilfully or otherwise grants, approves the grant, or is otherwise connected with the grant or approval of a loan, an advance, a guarantee or any other credit facility or financial accommodation to any person in any of the circumstances specified under subsections (i)–(iv) of section 19(1)(c) of the said Decree is guilty of an offence under that Decree.

I am of the firm view that, even though the appellant is charged with granting and approving the grant as one even though they constitute two distinct offences under the Decree, if the prosecution, as in this case, proves one of the offences under the Decree against the appellant, he can be convicted for that offence. In the present appeal, the lower court rightly held that the offences of approving the grant of a credit facility of ₦14 million to PW6 was proved against the appellant and that it was immaterial whether the sum so approved was disbursed or not. I am of the view that the appellant was not misled by the charge neither has any miscarriage of justice occurred.

Learned Counsel for the appellant has submitted that the conclusion reached by the lower court to the effect that the Exhibits C1, C2, D and H is to confirm an oral approval is perverse in view of actual text of the approval. The finding of the lower court complained of is at 151 of the record. It states inter alia:–

“I do not believe the accused person that it was PW3 who telephoned him to inquire about the request of PW6 for a credit facility of ₦14 million.

Contrary to the submission of learned Counsel for the accused person, it is evidently clear from the third paragraph of Exhibit C1,
C2, D and H which reads ‘please confirm your action in approving this TOD of ₦14 million (or ₦1.4 million) for a week, payable by 30 May, 1996’, that PW3 was asking for a written approval to cover an earlier approval on the telephone from the accused person.”

It must be noted that the learned trial Judge has believed the evidence of the prosecution witnesses as against that of the appellant. The believed evidence of the prosecution witnesses include the evidence of an oral approval preceding the written one. I agree with the trial Judge that the words, “Please confirm your action” refers to the oral approval earlier given, so the court’s finding cannot be said to be perverse.

In conclusion, it is my view that the prosecution did prove the charge against the appellant beyond reasonable doubt as required by law and that this appeal lacks merit and should be dismissed. I accordingly dismiss same.

The judgment of the lower court in charge No. FBFMT/L/ZV/3C/97 delivered by Honourable Justice Amina Adamu Augie on 2 February, 1999, convicting the appellant, is hereby affirmed.

OGUNTADE JCA: I read before now a copy of the lead judgment by my learned brother, Onnoghen JCA. I agree with his reasoning and conclusion. I would also dismiss this appeal and affirm the judgment of Augie J delivered on 2 February, 1999.

ADEREMI JCA: I have had a preview of the judgment just delivered by my learned brother, Onnoghen JCA. I agree that all the ingredients required to establish the guilt of the appellant were proved, I would also dismiss the appeal for reason of being unmeritorious. I am in agreement with the reasoning and conclusion reached in the judgment of my learned brother.

Appeal dismissed.
Union Bank of Nigeria Plc v Integrated Timber and Plywood Products Limited

COURT OF APPEAL, BENIN DIVISION
BA’ABA, AKAAHS, AKINTAN JCA

Date of Judgment: 12 JULY, 2000
Suit No.: CA/B/295/97

Banking – Letters of credit – Dispute between advising and confirming bank and seller – Whether an action between individual customer and bank – Jurisdiction of the Federal High Court to entertain – Section 1(1)(h) of the Admiralty Decree No. 59 of 1991

Facts

The respondent’s claim in the statement of claim dated 1 December, 1997 was as follows:–

“Special damages of DM28,572.70 being value of Iroko Furniture component exported to Belgium under LC No. K16167/65626 or the Naira equivalent of ₦1,478,279.80, loss of earnings on investment of DM28,527.70 at the rate of 15% per annum at the commercial bank savings rate of 15% per annum from 1 January, 1991 to the day of judgment and ₦60,000 as general damage for negligence.”

The case of the plaintiff/respondent was that, sometime in 1990, it received through its bankers, the New Nigeria Bank Plc, a telex of an irrevocable documentary letter of credit no. 16167/65626 from the defendant/appellant. The applicants to the letter of credit was C.I.E. Dubois-Stockmanns of Belgium, the beneficiary was the respondent while Krediet Bank N.V. of Belgium was the foreign bank that purportedly issued the letter of credit. The respondent contended that by a letter reference no. IDCOO90190 dated 12 October, 1990 addressed to the respondent’s said bankers and a copy to the respondent, the defendant advised on and confirmed the authenticity of the telex establishing the letters of credit requested for their commission which was paid. Acting on the appellant’s advice and confirmation, the respondent exported Iroko furniture components to C.I.E.
Dubois-Stockmanns in Belgium between 30 November, 1990 and 30 December, 1990 (both days inclusive). The respondent averred further that by the terms of the letters of credit, the respondent’s draft for value of the goods were to be paid on presentation of the relevant shipping documents to the appellant which the respondent did but the appellant refused to pay. The respondent further contended that the appellant at the time of giving the advise and confirmation ought to have known that it would be relied upon and it was in fact relied upon by the respondent and so should have exercised due care before so doing and that the appellant had breached this duty of care.

The defendant/appellant on the other hand filed a motion dated 24 March, 1992 contending that the claim of the plaintiff/respondent did not fall within the jurisdiction of the court and prayed the court to dismiss and or strike out the suit.

After argument by both Counsel, the learned trial Judge in his ruling held that the suit was one within the Admiralty Jurisdiction of the Federal High Court and that the court has jurisdiction to entertain the suit. He therefore overruled the objection and dismissed the motion.

Being dissatisfied with the ruling, the appellant appealed to the Court of Appeal contending that by virtue of the proviso to section 230(1)(d) of the 1979 Constitution as amended by Decree No. 107 of 1993 the jurisdiction of the Federal High Court was ousted.

Held –

1. Generally a customer is someone who has an account with a bank, or without having an account the relationship of banker and customer exists. In the latter case some money transaction must connect the banker and the customer, but must arise from the nature of a contract.

2. In banking, a customer is any person having an account with a bank or for whom a bank has agreed to collect
items and includes a bank having an account with another bank. As to letters of credit, a buyer or other person who causes an issuer to issue credit or a bank which procures issuance or confirmation on behalf of that bank’s customer.

3. Since in the instant case, the dispute that gave rise to this action falls within the confines of the relationship between a bank and the customer in which case the jurisdiction of the Federal High Court has been ousted by the proviso to paragraph (d) of section 230(1) of the 1979 Constitution as amended by Decree No. 107 of 1993.

Appeal allowed.

Cases referred to in the judgment

Nigerian

A-G Federation v Sode (1990) 1 NWLR (Part 128) 500
Adeyemi v Opeyori (1976) 9–10 SC 31
Agwuna v A-G Federation (1995) 5 NWLR (Part 396) 418
Bizee Bee Hotels Ltd v Allied Bank (Nig.) Ltd (1996) 8 NWLR (Part 465) 176
Egbuziem v N.R.C. (1994) 3 NWLR (Part 330) 23
Izenkwe v Nnadozie (1953) 14 W.A.C.A. 361
Lipede v Sonekan (1995) 1 NWLR (Part 374) 668
Western Steel Works v Iron Steel Workers (1987) 1 NWLR (Part 49) 284

Nigerian statutes referred to in the judgment

Admiralty Jurisdiction Decree No. 59 of 1991, section 1(1)(h)
Constitution of the Federal Republic of Nigeria, 1979 (as amended by Decree No. 107 of 1993), section 230(1)(a)–(d)
Federal High Court Act (Cap 134) Laws of the Federation of Nigeria, 1990, section 22(2)
Nigerian rules of court referred to in the judgment
Federal High Court (Civil Procedure) Rules, 1976, Order 8

Book referred to in the judgment
Black’s Law Dictionary (6ed) at 386

Counsel
For the appellant: Akpofure, S.A.N. (with him Ususuakpo)
For the respondent: Ajuyah

Judgment

BA’ABA JCA: (Delivering the lead judgment) This is an appeal against the decision of Abutu J of the Federal High Court, sitting at Benin delivered on 7 July, 1997, refusing or dismissing the application brought by the appellant to strike out the respondent’s suit on the ground that the honourable court lacked jurisdiction.

The respondent’s claims in the statement of claim, dated 17 February, 1997, filed on 18 February, 1997 at 15 of the record reads:

“Wherefore the plaintiff’s claims against the defendant are as follows:

(a) Special damages of DM28,572.70 being the value of the Iroko furniture component exported to Belgium under LC No. K16167/65626 or the Naira equivalent of ₦1,478,279.80.

(b) Loss of earnings on investment of DM28,527.70 at the rate of 15% per annum at the commercial bank savings rate interest of 15% per annum for the period 1 January, 1991 to the day of judgment.

(c) ₦60,000 as general damage for negligence.”

In the statement of claim the respondent in paragraphs 1, 2, 3, 4, 5, 6, 7, 8 and 9 averred as follows:

1. The plaintiff is a company registered under the laws of the Federal Republic of Nigeria which carries on the business of processing Timber and Plywood of various kinds for export and local use. The plaintiff has its registered office in Warri, Delta State of Nigeria.
2. The defendant is a Public Limited Liability Company incorporated under the laws of the Federal Republic of Nigeria to carry on banking business and in furtherance of its business operations opened and runs various branches in different parts of Nigeria, including Warri.

3. As part of defendant's business structure, defendant has International Banking Department, Export Unit, which renders professional banking advice and export banking services to members of the business public on letters of credit, export on foreign trade and allied matters on commission basis.

4. Sometime in 1990, the plaintiff received through its bankers, the New Nigeria Bank Plc, a telex of an Irrevocable Documentary Letter of Credit No. 16167/65626 from the defendant which said letter of credit has as its applicant, CIE Dubois-Stockmanns of Belgium, the plaintiff as the beneficiary and Krediet Bank N.V. of Belgium as the foreign bank which purportedly issued same. The plaintiff shall found on a copy of the said telex letter for its full terms and effects.

5. By a letter Reference IDC0090/90 dated 12 October, 1990 addressed to the plaintiff's said bankers, and a copy to the plaintiff, the defendant advised on and confirmed the authenticity of the telex establishing the letter of credit and requested for the sum of N25 as advising commission. The plaintiff upon receipt of a copy of defendant's letter paid the commission of N25 to the defendant with a NNB Limited draft No. 602092 of 19 November, 1990 and acted on the defendant's advice and confirmation by exporting Iroko furniture components to C.I.E. Dubois-Stockmanns in Belgium between the 30 November, 1990 and 30 December, 1990 (both days inclusive). The plaintiff shall found on NNB letter of 14 November, 1990, plaintiff's letter of 21 November, 1990 addressed to the NNB Limited, Warri, plaintiff's invoices No. 007, 008 and 009 for the export in the value of DM28,527.70 delivered to the defendant.

6. By the terms of the letter of credit, the plaintiff's drafts for the value of the goods were to be paid on presentation of the relevant shipping documents to the defendant which the plaintiff duly submitted to the defendant and up till now the plaintiff has received no draft or payment for the value of the goods exported under the said letter of credit.
7. At the time the defendant forwarded to the plaintiff the said letter of credit and the letter of confirmation dated 12 October, 1990, the defendant intended and it well knew or ought to have known that the plaintiff would rely on them and would be induced thereby to export its goods upon the terms contained therein. In the premises, the defendant was under a duty to take care in the making of the said representation to the plaintiff so as not to cause plaintiff any financial loss or damage.

8. Acting on the faith of the defendant’s representations and induced thereby, the plaintiff exported Iroko furniture components in the value of DM28,527.70 to C.L.E. Dubois-Stockmanns in Belgium and for which no payment has been received.

9. In breach of the said duty, the defendant was guilty of negligence in making the said representations.”

By a motion dated 24 March, 1997, filed on 24 March, 1997, the appellant as the defendant sought for an order of the Honourable Court, dismissing and or striking out the suit on the grounds that it lacked jurisdiction to entertain the suit. The motion was supported by a seven-paragraph affidavit, deposed to by one J.O. Muwhen, a legal practitioner of No. 78, Warri/Sapele Road, Warri. Paragraphs 1–6 of the supporting affidavit reads as follows:–

“1. That I am a legal practitioner in the firm of E.L. Akpofure and Co Counsel to the defendant/applicant by virtue of which I am conversant with the facts of this case.

2. That the plaintiff/respondent filed this suit on the 9 October, 1996. Herein attached and marked Exhibit ‘A’ is the plaintiff/respondent’s claim.

3. That I know as a fact that by virtue of Exhibit ‘A’ i.e. plaintiff/respondent’s statement of claim, this Honourable Court lacks jurisdiction to entertain this suit.

4. That such claim as per Exhibit ‘A’ does not fall within the purview of this Honourable Court’s power to determine.

5. That this Honourable Court should dismiss and or strike out this suit.

6. That the plaintiff/respondent will not be prejudiced.”
No counter-affidavit was filed in opposition to the motion. After argument by both Counsel, the learned trial Judge in his ruling on 7 July, 1997 held:—

“In the result, I hold that the suit is one within the admiralty jurisdiction of this Court. The Court therefore has jurisdiction to entertain the suit. The objection is overruled and the motion is hereby dismissed.”

Being dissatisfied with the ruling the appellant filed his notice and grounds of appeal on 11 July, 1997 containing one ground of appeal and with the leave of this Honourable Court, filed one additional ground of appeal incorporated in his brief of argument. From his two grounds of appeal, the appellant formulated two issues for the determination of this Court as follows:—

1. Whether the learned trial Judge was right in law when he held that he had jurisdiction to entertain this suit by virtue of section 1(1)(h) of the Admiralty Jurisdiction Decree No. 59 of 1991.

2. Whether the learned trial Judge was right in law when he held that section 230(1)(d) of the 1979 Constitution as amended by Decree No. 107 of 1993 does not apply to the suit because the transaction is not one between a bank and its customer.”

The respondent in the respondent’s brief formulated one issue for the determination of this Honourable Court which reads:—

“1. Whether the learned trial Judge was wrong in holding that he had jurisdiction to entertain the claim of the plaintiff?”

When the appeal came up before this Honourable Court on 6 June, 2000 for hearing, both Counsel adopted and relied on their respective briefs.

Chief B.L. Akpofure, the learned Senior Advocate of Nigeria, for the appellant submitted in the appellant’s brief of argument that the transaction that gave rise to this appeal was between a bank and customer. He stated that the complaint of the respondent can be found at 7 lines 25–40 and 8 lines 1–28 and pointed out that a close look at the complaint
would reveal that the dispute has arisen out of a banker/customer relationship. The learned Senior Advocate of Nigeria further submitted that by the proviso of section 230(1)(d) of the 1979 Constitution as modified by Decree No. 107 of 1993, the jurisdiction of the Federal High Court was ousted. He stressed that the issue involved in this appeal could better be appreciated when one takes a close look at the proviso of section 230(1) of the 1979 Constitution. Learned Counsel referred to section 230(1) of the 1979 Constitution as well as the proviso to section 230(1)(d) of the 1979 Constitution as modified by Decree No. 107 of 1993 and contended that it was immaterial whether the transaction arose from a letter of credit or any other form of banking or duty as the main issue for consideration was whether the dispute was between an individual customer and a bank. It is the submission of the learned Senior Advocate of Nigeria that Decree No. 107 of 1993 being later in time takes precedence over and above the provisions of section 1(1)(h) of the Admiralty Jurisdiction Decree No. 59 of 1991; consequently the provision of section 1(1)(h) of the Admiralty Decree ceases to have effect as a result of the amendment to section 230(1) of the 1979 Constitution by Decree No. 107 of 1993.

Relying on the authority of Lipede v Sonekan (1995) 1 NWLR (Part 374) 668 at 690, learned Counsel for the appellant concluded his argument on his issue 1 by submitting that the learned trial Judge was wrong in relying on section 1(1)(h) of Admiralty Jurisdiction Decree No. 59 of 1991 in conferring jurisdiction on the trial court.

On his issue 2, learned Senior Advocate of Nigeria for the appellant submitted that the learned trial Judge erred in law when he held that section 230(1)(h) of the 1979 Constitution as modified by Decree No. 107 of 1993 did not apply to this suit on the ground that the transaction was not one between a bank and its customer when the averments in paragraphs 4–9 of the statement of claim showed beyond question that the
a dispute between the parties was in connection with a letter of credit transaction for exportation of goods out of Nigeria, citing *New Nigeria Bank v Odiase* (1993) 8 NWLR (Part 310) 235–243, in support of his submission. In conclusion, the learned Senior Advocate of Nigeria for the appellant urged us to allow the appeal.

In reply, Mr C.A. Ajuyah, the learned Counsel for the respondent, in the respondent’s brief commenced his submission by referring to the writ of summons which set out the respondent’s claim which was amplified in paragraphs 4, 5, 6, 7 and 8 of the statement of claim endorsed on the writ of summons and submitted that the learned trial Judge was perfectly right in his finding. Relying on the authorities of *Egonu v Egonu* (1978) 11/12 SC 111; *Lipede v Sonekan* (1995) 1 NWLR (Part 374) 668 at 685, learned Counsel for the respondent submitted that this honourable Court should not disturb the finding of the learned trial Judge. He further submitted that the Admiralty Jurisdiction Decree No. 59 of 1991 had vested on the Federal High Court exclusive jurisdiction to hear and determine any banking or letter of credit transaction involving importation or exportation of goods to and from Nigeria in a ship, notwithstanding that the transaction is between a bank and its customer and referred to sections 1(1)(h) and 19 of the Decree. He emphasised that the learned trial Judge was not wrong in assuming jurisdiction by virtue of Decree No. 59 of 1991. It is the submission of the learned Counsel for the respondent that section 230(1)(d) and its proviso are not applicable to this case; consequently the learned trial Judge was right in dismissing the appellant’s application. He contended, assuming but without conceding that the Federal High Court did not have jurisdiction, that the proper order to be made is transfer of the suit to the appropriate State High Court by virtue of the provisions of section 22 of the Federal High Court Act and not striking out or dismissing the action. Learned Counsel for the respondent finally submitted that the appeal lacked merit and ought to be dismissed.
In my humble opinion, the main issue in controversy in this appeal is the issue of jurisdiction of the trial court, the Federal High Court, having regards to the respondent’s claim and the provisions of the Admiralty Decree No. 59 and the 1979 Constitution particularly section 230(1)(d) as modified by Decree No. 107 of 1993. It is for this reason that I have opted to determine this appeal on the sole issue formulated for determination in this appeal by the respondent. It is therefore necessary for a better understanding of the matter to reproduce the provisions of the law relied upon by the parties and the learned trial Judge in reaching his decision.

The learned trial Judge relied on section 1(1)(h) of the Admiralty Decree No. 59 of 1991 in his decision that the Federal High Court has jurisdiction to entertain the suit in refusing the order sought for striking out the suit by the appellant and in dismissing the motion. Section 1(1)(h) of the Decree reads:

“1(1) The admiralty jurisdiction of the Federal High Court (in this Decree referred to as ‘the Court’) includes the following, that is:–

(a) jurisdiction to hear and determine any question relating to a proprietary interest in a ship or aircraft or any maritime claim specified in section 2 of this Decree;

(b) any other admiralty jurisdiction being exercised by any other court in Nigeria immediately before the commencement of this Decree;

(c) any jurisdiction connected with any ship or aircraft which is vested in any other court in Nigeria immediately before the commencement of this Decree;

(d) any action or application relating to any cause or matter by any ship owner or aircraft operator or any other person under the Merchant Shipping Act or any other enactment relating to a ship or an aircraft for the limitation of the amount of his liability in connection with shipping or operation of aircraft or other property;

(e) any claim for liability incurred for oil pollution damage;
Section 230(1) of the 1979 Constitution which spelt out the jurisdiction of the Federal High Court, reads as follows:

"230(1) Subject to the provisions of this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have jurisdiction:

(a) in such matters connected with or pertaining to the revenue of the Government of the Federation as may be prescribed by the National Assembly; and

(b) in such other matters as may be prescribed as respects which the National Assembly has power to make laws.

(2) Notwithstanding subsection (1) of this section where by law any court established before the date when this section comes into force is empowered to exercise jurisdiction for the hearing and determination of any of the matters to which subsection (1) of this section relates, such court shall as from the date when this section comes into force be restyled 'Federal High Court', and shall continue to have all the powers and exercise the jurisdiction conferred upon it by any law."
The relevant provision of Decree No. 107 of 1993, referred to and considered in the ruling, is section 230(1)(d) of the 1979 Constitution as amended by Decree No. 107 of 1993 which reads:

“230(1) Notwithstanding anything to the contrary contained in this Constitution and in addition to such other jurisdiction as may be conferred upon it by any Act of the National Assembly or a Decree, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters arising from:–

(a) the revenue of the Government of the Federation in which the said Government or any organ thereof or a person suing or being sued on behalf of the said Government is a party;

(b) the taxation of companies and other bodies established or carrying on business in Nigeria and all other persons subject to Federal taxation;

(c) Customs and excise duties and export duties, including any claim by or against the Department of Customs and Excise or any member or officers thereof, arising from the performance or purported performance of any duty imposed under any regulation relating to customs and excise duties and export duties;

(d) banking, banks, other financial institutions including any action between one bank and other, any action by or against the Central Bank of Nigeria arising from banking, foreign exchange, coinage, legal tender, bills of exchange, letter of credit, promissory note and other fiscal measures; Provided that this paragraph shall not apply to any dispute between an individual customer and his bank in respect of transactions between the individual customer and the bank.”

The position on the question of the criterion to be followed in determining jurisdiction has long been settled. The position is that it is the plaintiff’s demand or claim that determines the jurisdiction of a court. Therefore, in order to ascertain whether or not a court has jurisdiction to try a case, one only needs to look at the plaintiff’s claim (see Izenkwe v
In New Nigeria Bank Ltd v Boardman Odiase (1993) 8 NWLR (Part 310) 235 at 243, a bank customer was defined as follows:–

“Generally a customer is someone who has an account with a bank, or without having an account the relationship of banker and customer exists. In the latter case some money transaction must connect banker and customer, but must arise from the nature of a contract.”

The definition of a customer also at 386 of Black’s Law Dictionary (6ed) in relation to a bank is as follows:–

“In banking, any person having an account with a bank or for whom a bank has agreed to collect items and includes a bank carrying an account with another bank. As to letter of credit, a buyer or other person who causes an issuer to issue credit or a bank which procures issuance or confirmation on behalf of that bank’s customer.”

In my view from a careful examination of the respondent’s claims contained in the respondent’s statement of claim, herein reproduced and taking into consideration the two definitions above, it cannot be disputed that the dispute that gave rise to this action falls within the confines of the relationship between a bank and customer in which case the jurisdiction of the Federal High Court has been ousted by the proviso to paragraph (d) of section 230(1) of the 1979 Constitution as amended by Decree No. 107 of 1993.

With the greatest respect to the learned trial Judge, I disagree with him that section 1(1)(h) of the Admiralty Jurisdiction Decree No. 59 of 1991 has conferred jurisdiction on the trial court when the said section ceases to have effect by virtue of the modification of the Constitution by Decree No. 107 of 1993 (see Bizee Bee Ltd v Allied Bank (Nigeria) Ltd (1996) 8 NWLR (Part 465) 176 at 181).
The case of *Lipede v Sonekan* (1995) 1 NWLR (Part 374) 668, called in aid by the respondent, is rather in support of the appellant’s case and against the respondent in that in *Lipede* (*supra*) the Supreme Court gave effect to an amendment to the law pertaining to chieftaincy matters. Issue (*c*) formulated for determination in the appeal before the Supreme Court in *Lipede* (*supra*) was whether Exhibit 18 (the registered registration) had been revoked by the Western State Legal Notice No. 6 of 1976 as to render it inapplicable to the Ashipa Egba Chieftaincy.

The Supreme Court resolved issue (*c*) as follows:–

“To hold that Exhibit 18 applies to the minor chieftaincy of Ashipa Egba, therefore, is to make a pronouncement that Part 2 of the Chiefs Law applies to minor chieftaincy and thus a negation of the provisions of W.S.L.N. No. 6 of 1976 as well as sections 4 and 22(2) of the Chiefs Law Cap 20 of Ogun State. While Part 2 of the Chiefs Law is not a repealed Ordinance, it only became inapplicable to the Ashipa Egba Chieftaincy by operation of law.”

It is trite law that courts guard their jurisdiction zealously and jealously but where in a given case that jurisdiction is expressly ousted by the provisions of the Constitution, an Act, Law, Decree and Edict once it is couched in clear and unequivocal terms there must be compliance with such an ouster clause (*Agwuna v Attorney-General Federation* (1995) 5 NWLR (Part 396) 418; *Attorney-General of the Federation v Sode* (1990) 1 NWLR (Part 128) 500).

My answer to the sole issue is therefore in the affirmative in that the learned trial Judge, in my opinion, was wrong to have held that he had jurisdiction to entertain the claim of the plaintiff/respondent.

In the result, in view of the foregoing, the appeal succeeds and is hereby allowed. I hold that the learned trial Judge lacks the jurisdiction to entertain the action having regard to the proviso to paragraph (*d*) of section 230(1) of the 1979 Constitution (as amended).

Having held that the Federal High Court lacks jurisdiction to entertain the matter, I order that Suit No. FHC/B/134/96,
pending before the Federal High Court, Benin, be transferred to the Delta State High Court, the appropriate court, for hearing and determination, in accordance with section 22(2) of Federal High Court Act (Cap 134) Laws of the Federation, 1990 and Order 8 of the Federal High Court (Civil Procedure) Rules, 1976.

The appellant is entitled to costs assessed at N3,000 against the respondent.

AKINTAN JCA: I had a preview of the lead judgment prepared by my learned brother, Ba’aba JCA. I entirely agree with his reasoning and conclusion as set out in the lead judgment. I also agree that the plaintiff’s claim in the instant case could not be said to be one covered by the admiralty jurisdiction of the Federal High Court. In fact, I believe that the claim has nothing to do with admiralty matters. In the result, I too allow the appeal and abide by all the consequential orders made in the lead judgment, including that on costs.

AKAAHS JCA: I was privileged to read in draft the judgment prepared by my learned brother, Ba’aba JCA. He set out in extenso the admiralty jurisdiction of the Federal High Court which is contained in the Admiralty Decree No. 59 of 1991 and especially section 1(1)(h) thereof; section 230(1)(d) of the 1979 Constitution as modified by Decree 107 of 1993. I agree with his reasoning and conclusion that this appeal should be allowed because the Federal High Court lacks jurisdiction to entertain the matter. I abide by the consequential orders contained in the lead judgment.

Appeal allowed.
Lawrence Jirgbagh v Union Bank of Nigeria Plc

COURT OF APPEAL, JOS DIVISION
CHUKWUMA-ENEH, AKPABIO, UMOREN JJCA

Date of Judgment: 13 J U L Y, 2000
Suit No.: CA/J/140/99

Banking – Banking business – One erected on trust and confidence

Facts

The facts of this case show that the dispute arose out of a master/servant relationship. The appellant was employed by the respondent on 6 May, 1997 as a co-note-counter staff with one Daniel Adejoh. Their functions as note-counter staff have been defined not only in the evidence witnesses but also more elaborately in the handbook to include to cross-check entries in the teller with actual amounts paid in. Arising from some problems relating to a customer’s cash lodgement on 14 June, 1996 in the respondent’s office, the appellant was queried as shown in Exhibit C. He was later suspended by Exhibit E. On 24 May, 1996 a customer came to make lodgements with the respondent in the sum of N221,000 cash. The total from the breakdown in the teller came to N216,000 instead of N221,000 in physical cash. They were supposed to have been received by the appellant and one Daniel Adejoh. The sum of N5,000 was discovered in the drawer used by the appellant and Daniel Adejoh where the money was counted. On 6 May, 1997, he was summarily dismissed by Exhibit G for gross misconduct and the appellant brought this action against his employer challenging his wrongful dismissal. The claim was dismissed hence the appeal to the Court of Appeal.

Held –

1. The respondent is a bank and banking business is one erected on trust and confidence not only between customer but also between bank and its staff.
a 2. **Per curiam**

“One poignant factor that cannot be glossed over in this judgment is the impact of the appellant’s gross misconduct on the master/servant relationship between them. The appellant and one Daniel Adejoh his co-note-counter were at all material times bank staffs. The alleged misconduct culminating in the appellant’s summary dismissal borders on dishonesty and breach of confidence. This conclusion is incontestable. The appellant has pleaded in Exhibit F that he must have erred by way of omission or commission. The appellant having got that far in his disclosure as to what happened on that day, it must be recognised that the respondent is a bank. And banking business is one erected on trust and confidence, not only between customer and bank but also between a bank and its staff. The master/servant relationship between them (i.e. the appellant and respondent) has been greatly damaged in this respect.

As found by the trial court the appellant’s misconduct was of great embarrassment to the respondent with regard to its instant customer. In these days of huge banking fraud perpetrated by fraudsters and miscreants and leading to bank failures here and there, it matters the quality of best staffs.”

f **Cases referred to in the judgment**

**Nigerian**

*Adedeji v Public Service Commission* (1968) NMLR 102


*Garba v University of Maidiguri* (1986) 1 NSCC (Vol. 17) 245; (1986) 1 NWLR (Part 18) 550


*Ilodibia v Nigeria Cement Co Ltd* (1997) 7 NWLR (Part 512) 174

*Imoloame v W.A.E.C.* (1992) 9 NWLR (Part 265) 303

*Kotoye v CBN* (1989) 1 NWLR (Part 98) 419

*Metal Construction W/A Ltd v Milgore* (1979) 6–9 SC 163
Narumal and Sons (Nig.) Ltd v Niger Benue Transport Co Ltd (1989) 2 NWLR (Part 106) 730


Okesiji v Lawal (1991) 1 NWLR (Part 170) 661; (1991) 2 SCNJ

Olaniyan v University of Lagos (1985) 2 NWLR (Part 9) 599

Rabiu v State (1981) 2 NCLR 293; (1980) FNLR 509

Shitta-Bey v Federal Public Service Commission (1981) 1 SC 40

Silli v Mosoka (1997) 10 NWLR (Part 479) 98

U.B.N. v Ogboh (1995) 2 NWLR (Part 380) 647

Wilson v A-G, Bendel State (1985) 1 NWLR (Part 4) 572; (1985) NSCC (Vol.16) 191

Yusufu v U.B.N. Ltd (1996) 6 NWLR (Part 457) 632

Foreign

Denmark Productions Ltd v Boscobel Productions Ltd (1969) 1 Q.B. 699

Diggle v Ogston Motors Co (1995) 84 L.J.K.B. 2165

Leary v National Union of Vehicle Builders (1971) Ch.D. 34

Rigby v Connol (1880) 14 Ch.D. 482

Shanks v Plumbing Trade Union 15 November, 1967 unreported

Tomlinson v L.M.S. RY Co (1944) 1 All ER 537

Vine v National Bank Dock Labour Board (1956) 3 All ER 939

Counsel

For the appellant: Tongu

For the respondent: Igbarago
Judgment

CHUKWUMA-ENEH JCA: (Delivering the lead judgment)

The appellant (as plaintiff) sued the respondent (as defendant) before the Vandekya High Court of Benue State in Suit No. MHC/25/95. The relief sought against the respondent as contained in paragraph 16 of the statement of claim are as follows:

(a) A declaration that both the suspension of the plaintiff on 5 September, 1996 and purported dismissal from the services of the defendant is illegal, null and void and of no effect whatsoever.

(b) A declaration that plaintiff is still in the services of the defendant and thus entitled to his salary and other entitlement of the staff of the defendant of the rank of the plaintiff.

(c)(i) The plaintiff claims the sum of ₦56,019.93 as special damages being the plaintiff’s salary, housing, transport, utility lunches on voucher allowances from May, 1997 to May, 1998.

(ii) Half salary and other allowances not yet paid to the plaintiff by the defendant ₦5,273.25.

(iii) All financial and other entitlements due to the plaintiff from May, 1997 till date of judgment.

(iv) ₦50,000 general damages for inconveniences caused the plaintiff. Interim grand total ₦106,019.93.”

The appellant (as plaintiff) gave oral evidence and tendered Exhibits A–H. Three witnesses testified for the defendant and tendered Exhibits I–M. Written addresses as ordered by the trial court were filed. In a considered judgment on 16 September, 1998, the trial court gave judgment in favour of the defendant. The action was dismissed with ₦1,000 costs to the defendant.

The appeal is against that decision and the notice of appeal filed in that regard contains three grounds of appeal without their particulars as follows:

“1. The decision of the Benue State High Court sitting in Vandekya, is unreasonable and cannot be supported having regard to the weight of evidence.
2. The trial High Court of Benue State sitting in Vandeikya, erred in law when it failed to hold that the appellant was neither queried nor given a hearing before he was purportedly dismissed from service by the respondent, and this error has occasioned a miscarriage of justice.

3. The trial High Court of Benue State sitting in Vandeikya, erred in law when it dismissed the appellant’s case before it holding that the complaint concerning non-prosecution in a criminal court before summary dismissal is without substance, and this error has occasioned a miscarriage of justice.”

Briefs of argument were filed and exchanged by the parties. The appellant in his brief of argument has made out two issues for determination and they read as follows:—

“1. Whether upon the true dispassionate construction of Article 4(iv) of Exhibit ‘I’, the dismissal of the appellant by the respondent is lawful; and

2. Whether or not the lower court was right in dismissing the appellant’s claims before it.”

The two issues for determination raised by the respondent are contained at page 2 of his brief of argument and they read as follows:—

“(a) Whether having regard to pleadings, totality of evidence adduced and the provision of Articles 4(iv)(a)(i), (iv)(b) and (iii)(a) of the main collective agreement tendered as Exhibit ‘I’ and common law principles of master/servant contract of employment whether the trial Judge was correct to hold that the appellant’s suspension and summary dismissal was proper, lawful or justifiable?

(b) Having regard to the provisions of Article 4(iv)(a)(i) of the collective agreement admitted as Exhibit ‘I’ and under the common law principles of a master/servant contract service, whether the appellant must be prosecuted before a law court for accusation of gross misconduct involving dishonesty, mistrust or defalcation before respondent can summarily dismiss the appellant from her services?”

The issues raised for determination by the parties seem to me to be ad idem and I adopt the appellant’s in resolving this appeal.
The facts of this case show that the dispute arose out of a master/servant relationship. The appellant was employed by the respondent on 6 May, 1997 (see exhibit 1) as a co-note-counter staff with one Daniel Adejoh. Their functions as note-counter staff have been defined not only in the evidence witnesses but also more elaborately in the handbook, Exhibit I, to include to cross-check entries in the teller with actual amounts paid in. Arising from some problems relating to a customer’s cash lodgement on 14 June, 1996 in the respondent’s office, the appellant was queried as shown in Exhibit C and he was later suspended by Exhibit E. On 24 May, 1996 a customer came to make lodgements with the respondent in the sum of N221,000 cash. The total from the breakdown in the teller came to N216,000 instead of N221,000 in physical cash. The cash was supposed to have been received by the appellant and one Daniel Adejoh. The sum of N5,000 was discovered in the drawer used by the appellant and Daniel Adejoh where the money was counted. On 6 May, 1997, he was summarily dismissed by Exhibit G for gross misconduct and the appellant brought this action against his employer challenging his wrongful dismissal. The claim was dismissed hence the appeal to the Court of Appeal.

The first issue relates essentially to the disciplinary procedure followed in dismissing the appellant for his misconduct and the contention that it did not conform with clause 4(iv)(a)(i) to (xi) of Exhibit 1, ie the collective agreement. He was particularly irked by the contention that his employment was terminated for gross misconduct without being given a written query nor afforded due opportunity of being heard in his defence as provided in Article 4 of the disciplinary procedure of Exhibit 1 on the offence of “defalcation”. The query was on the offence of “mistrust”, an unknown offence as it was not listed in Article 4(iv) as one of the offences to attract summary dismissal (see also Exhibit C, i.e. query, and Exhibit D). In challenging the oral evidence of DW3 who claimed he gave the appellant a
verbal query at 39 lines 2–3 and at 38 lines 38–44 of the record and to justify his position he contended that he was not queried for defalcation as alleged by the respondent but for the offence of “mistrust” which is criminal in content. He further contended that the issue of defalcation was raised as an after-thought. More importantly, in flagrant violation of his right as enshrined in section 33(4) of the 1979 Constitution, he was dismissed without notice for an unknown offence without being heard. Therefore, the dismissal was null and void.

On the second issue the appellant has taken the point that his alleged misconduct being of criminal nature he ought to have been prosecuted first before being dismissed as all the offences enumerated in Article 4(a)(i) to (xi) of Exhibit 1 were crimes to be contested in court. That having failed to initiate criminal proceedings against him, the appellant, the respondent has to be taken to have compromised the crime aspect of his misconduct and could not therefore be heard to rest his dismissal on that premise.

The respondent argued that the discretionary power to summarily dismiss the appellant derived from Article 4(a)(i)–(xi) of the collective agreement of Exhibit 1 as read into the appellant’s contract of employment and from the established common-law principles pertaining to a master/servant relationship. And the appellant’s summary dismissal was lawful under the said provisions aforesaid. Again, the degree of misconduct to justify summary dismissal is not fixed in a master/servant relationship. And also the test in such matters depends on the nature of the business and the position held by the servant, in other words that what would constitute a misconduct was for the respondent to decide, i.e. by constructing the provisions (see S.C.O.A Motors v Koramsteng (1967) 1 ALR (Comm.) 377; Diggle v Ogston Motors Co (1945) 84 LJ KIB 2165). He also submitted that it is a misconception in law for the appellant to submit that summary dismissal could only be invoked as between them for offences covered by the broad headings of gross
misconduct as defined in Article (iv)(a)(i) to (xi) of Exhibit 1 and that the offence of “mistrust” with which the third appellant was charged did not so come within the said broad headings (see *Jupiter General Insurance Co Ltd v Shroff* (1937) 3 All ER 67 at 74). The master/servant relationship in banking business is of the utmost trust and confidence he submitted (see *Maja v Stocco* (1968) NMLR 372). For purposes of this case he added that defalcation was defined as an act of default or failure to account for trust funds and not having been defined in the Penal Code that the courts had no competence to prescribe it as an offence. On the allegation that the appellant was not given a fair hearing as per section 33 of the Constitution, 1979 as amended, the respondent has reiterated that a lack of fair hearing had to be predicated on solid facts, rather than mere speculations and doubtful inferences which characterised contention in this matter (see *Akoh v Abuh* (1988) 3 NWLR (Part 85) 696 at 701 as per Oputa JSC). Even then the appellant having made a written representation on the allegation in addition to his verbal explanation that the principle of *audi alteram partem* has been sufficiently complied with (Shaibu v NAB Ltd (1998) 5 NWLR (Part 551) 582; (1998) 4 SCNJ 109 at 128–129. See also *Hart v Military Governor of Rivers State and others* (1970) ULIR (Part IV) 537 at 548 whereof Fatai-Williams JSC held thus:–

“We would like to point out that it is now settled that natural justice does not require that the hearing should be oral only.”

He went on to submit that as the plaintiff had admitted the offence, the allegation is deemed unchallenged and uncontroverted and it did not therefore require proof by the prosecution and conviction before the appellant’s dismissal could be effected. In other words, there are no pre-conditions to be met before a servant could be dismissed summarily under the collective agreement.

The first question that has to be grappled with, given the background facts of this matter, is whether the appellant’s misconduct complained of is of such a degree that the
appellant had breached a major term of his contract of employment, i.e. an important term, as to leave the respondent with a clear choice of either suing for damages or rescinding the contract by summary dismissal as he did. It boils down to this, that unless there is sufficient grounds in law to justify the notice of summary dismissal of the appellant’s contract of employment without due notice, the respondent would have committed a breach of contract.

Adverting to the oral testimony of the appellant before the trial court, it has brought out some of the salient facts in this case including the letter of 17 February, 1992 i.e. Exhibit A by which he was offered a temporary appointment and Exhibit B that brought him under permanent situation. The appellant also tendered Exhibit C of 14 June, 1996 – a query from his employer headed “gross misconduct” and Exhibit D his reply thereto. The letter of his suspension Exhibit E, was dated 5 September, 1996 and Exhibit F of 11 October, 1996 was written by the appellant appealing for a reconsideration of Exhibit E. The next thing was Exhibit G, a letter of 6 May, 1997 summarily dismissing the appellant. Exhibit 11 was on the confirmation of the appellant’s appointment.

The respondent countered that the appellant was otherwise given a second chance in that he was not only verbally queried by the respondent’s supervisor (DW3) there and then...
but later given a written query, exhibit G, which again afforded him another chance of making a written representation, ie Exhibit D, on the issue before he was suspended and eventually dismissed summarily. All these measures were provided in Article 4(iii)(b) of Exhibit I, ie the handbook containing the collective agreement. The respondent was not in any doubt that, in complying with Article 4(iv)(b) of Exhibit I, the appellant was given due hearing in compliance with the rules of natural justice which was also in tacit recognition of his rights as enshrined in section 33 of the Constitution, 1979.

The trial court in its judgment has paid adequate attention to the foregoing issues by observing at 67 lines 3–20 of the record thus:—

“I find as a fact that the defendant through its supervisor (DW3) Simon Abeje verbally and also interviewed the plaintiff on 14 June, 1996 before he issued a written query (Exhibit ‘C’) dated 14 June, 1996. The plaintiff answered the query which is Exhibit ‘D’ dated 14 June, 1996. It was after this that the plaintiff was on 5 September, 1996 suspended from office with effect from 16 October, 1996 (Exhibit ‘E’). There is no provision in Exhibit ‘I’ Article 4(iii)(b) for the employee to be queried verbally or in writing before he is even suspended from duty by the employer. All that is required is for the employer to suspect the employee of dishonesty or any other serious misconduct for the employee to be suspended before full-scale investigation into the alleged dishonesty or other serious misconduct is investigated. Here, the defendant went even beyond the terms of Exhibit ‘I’ to issue verbal queries followed by a written one before the plaintiff and Adejo Daniel were suspended from duty. Furthermore I do not see where the plaintiff or an employee has to be reported to the police before the person is suspended by the employer.”

The foregoing excerpts from the judgment of the trial court represent its solid findings of fact and inferences drawn from accepted facts. It is on these findings that the trial court has rightly in my view adjudged the disciplinary procedures as provided under Article 4, i.e. the disciplinary procedure, and applied by the respondent in this scenario as sufficiently wide enough and in consonance with the rules of natural
justice to afford the appellant due opportunity of being heard in his defence. These findings flow from the accepted facts and cannot be faulted.

Here, I may say, is a convenient stage to reproduce the terms of the collective agreement on disciplinary procedure as encompassed in Exhibit I as far as they are materially relevant to the issue. Article 4(i) covers “caution”, Article 4(ii) is on termination after warning; Article 4(iii) relates to “suspension” while Article 4(iv) is on “summary dismissal”. The appellant’s complaint in this Court concerns in the main of the non-application to this case of the provision of Article 4(iii) and (iv); and these provisions are reproduced here-under thus:–

“(a) If an employee is suspected of dishonesty or any other serious misconduct he will be suspended from duty for a period not exceeding six months during which investigations shall be concluded. During the period of such suspension, the employee shall be paid half of his basic salary and full transport and housing allowances. If after such investigations he is exonerated, he shall be recalled and the balance of his basic salary and any other entitlement due to him shall be made good to him from the date of suspension. If however the employee is found guilty he will be dealt with in accordance with the disciplinary procedure.

(b) If any employee is suspected of a criminal offence by the police he may be suspended and paid half of his basic salary and his full transport and housing allowances from the date of suspension for a maximum period of eighteen months. If he is exonerated within the period of eighteen months, he shall be recalled and the balance of his basic salary and any other entitlements due to him be made good from the date of his suspension. If however, the case has not been disposed of, he shall be dealt with in accordance with the disciplinary procedure as set out in the collective agreement provided that the matter is not in court.

(c) An employee on suspension may where practicable be required to report each working day (morning or afternoon) for two hours to an official designated by the employer.”

Article 4(iv) then provides for circumstances under which an
employee may be dismissed summarily. I reproduce them:–

“(a) The law provides that employee may be summarily dismissed for certain offences covered by the broad headings of gross misconduct. Such offences include:–

(i) Proven cases of theft, fraud, dishonesty, defalcations and irregular practices in respect of cash, vouchers, records, returns or customers accounts;

(ii) Wilful disobedience of a lawful order or serious negligence;

(iii) Drunkenness or taking drugs other than for medical reasons, rendering the employee unfit to carry out his or her duties;

(iv) Divulging confidential information in breach of declaration of secrecy;

(v) Conviction for a criminal offence;

(vi) Prolonged and/or frequent absence from work without leave or reasonable cause;

(vii) Fighting and assault or engaging in disorderly behaviour during working hours, or on the office premise or within its immediate surroundings;

(viii) Deriving any benefit in the course of his official duties which places him in such position that his personal interest and his duty to the employer or to any customer of the employer are in conflict;

(ix) Failure to report promptly any irregularity on the part of any other member of staff after having knowledge of such irregularity;

(x) Abusive or insulting language or behaviour to any client which is prejudicial to the business interest of the employer;

(xi) Any other offences which may be agreed upon between the Association and the Union from time to time.

(b) Before summary dismissal is effected the employee shall be given a written query and afforded the opportunity of defending himself in writing except where the employee has absconded.

(c) Where an offence has been committed which merits summary dismissal but where the member company does not exercise its prerogative of dismissal a ‘first and last’ warning letter may be issued and the fact that the warning is a final one will be made clear in the letter” (italics mine).
I now turn to deal with the issue in detail. It is not recondite that at common law the employer is obliged to follow any particular procedure in summarily dismissing his servant. But where, however, the dismissal is in breach of a fundamental term of the contract as by summary or by giving insufficient notice to terminate the contract, the servant has to accept the fact that the contract is at an end and his remedy lies in suing for wrongful termination of his contract of service (see Vine v National Bank Dock Labour Board (1956) 3 All ER 939; Imoloame v W.A.E.C. (1992) 9 NWLR (Part 265) 303; Ilodibia v Nigeria Cement Co Ltd (1997) 7 NWLR (Part 512) 174). Harman LJ in Denmark Productions Ltd v Boscobel Production Ltd (1969) 1 QB 699 said:–

“An employee dismissed in breach of his contract of employment cannot choose to treat the contract as subsisting and sue for an account of profits which he would have earned to the end of the contractual period, he must sue for damages for the wrongful dismissal and must, of course, mitigate those damages so far as he reasonably can.”

In other words, like in all matters subject to the law of contract, the employer’s right of summary dismissal has to arise from the terms express or implied in the contract of employment. The master/servant relationship being basically one founded in contract and subject to the vagaries of the ordinary law of contract, the employer’s right of summary dismissal can be circumscribed and this has been achieved by the incorporation into the contract. The collective agreement Exhibit I has been incorporated in the appellant’s contract of employment. If I may pause here to restate the respondent’s case: He is saying that the respondent’s right under the contract of employment has been effectively circumscribed by the collective agreement, Exhibit 1, and binding on the respondent. Thus making the procedure followed in terminating his appointment null and void as he was not given a hearing as clearly implied in the collective agreement. In another breath, however, the courts have resisted granting specific performance in respect of breach of contract of service (see Rigby v Connol (1880) 14 Ch.D. 482
per Jessel MR; Denmark Production Ltd v Boscobel Productions Ltd (1969) 1 Q.B. 697 per Harman LJ). Furthermore, a rationalisation of the cases in a master/servant relationship reveals that as an employer is not bound to follow a proper procedure in summarily dismissing an employee, there is a long line of decided cases identifying two or three exceptions where to properly and effectively terminate a contract of employment, the employer has to follow the proper procedure and the instant matter falls squarely into one of the three exceptions that is to say:–

(1) Where the contract itself has made provisions for a procedure to be followed, that procedure has to be followed effectively to determine the contract.

(2) Where a statute regulates the appointment and dismissal of a servant, the requirements of the statute must be complied with. In that case, the master/servant relationship has what is known as a “statutory flavour” (see Federal Civil Service Commission v Laoye (1989) 2 NWLR (Part 106) 652; (1989) 45 CAJ 146 and 160 and Imoloame v W.A.E.C. (1992) 9 NWLR (Part 265) 303).

(3) The third category affects holders of offices involving public function. Here, the rules of natural justice must be complied with in the dismissal (see Shanks v Plumbing Trade Union 15 November, 1967 unreported, cited in Leary v National Union of Vehicle Builders (1971) Ch.D. 34 per Megary J).

As regards where the contract has provided for its termination but the procedure was not followed, the servant cannot treat the contract as still subsisting as the contract stands repudiated by the acts of wrongful dismissal and the servant’s only remedy is in damages for wrongful dismissal.

See Vine v National Dock Labour Board (1956) 3 All ER 939 where Lord Keith said:–

“If the master wrongfully dismisses the servant either summarily or by giving insufficient notice the employment is effectively terminated.”
In *Imoloame v W.A.E.C.* (*supra*) and *Nnoli v U.N.T.H. Mgt. Board* (1994) 13 K.L.R. 163; (1994) 8 NWLR (Part 363) 376, the Supreme Court has observed thus:–

"Where the procedure is not followed it is incapable of terminating the employment relationship, and the servant could be granted a declaration. See also *Vidyo-Daya University v Silva* (1964) 3 A.E.R 865; *Vine v National Dock Labour Board* (*supra*)."

As regards the second exception as stated above even though it was never in issue that the appellant’s contract of employment was not regulated by statute the appellant has asked to be reinstated as if it was. The implications of employment with statutory flavour was fully explored by Karibi-Whyte JSC in the case of *Imoloame v W.A.E.C. (*supra*) where he said:–

"It is now accepted that where the contract of service is governed by the provision of statute or where the conditions of service are contained in regulations derived from statutory provisions they invest the employee with a legal status higher than the ordinary one of master and servant. They accordingly enjoy statutory flavour."

See *Adedeji v Public Service Commission* (1968) N.M.L.R. 102; *Shitta-Bey v Federal Public Service Commission* (1981) 1 SC 40; *Olaniyan v University of Lagos* (1985) 2 NWLR (Part 9) 599. In this class of case the court invariably is prepared to reinstate the servant by granting declarations and injunctions.

On the third exception: In this aspect I refer to the case of *Shanks v Plumbing Trade United* cited in *Leary v National Trade Union of Vehicle Builders* (*supra*). The only issue in the motion in that case was for the removal from office of district secretary of a union. Having made out a *prima facie* case that he was likely to succeed in the action, Buckley J said:–

"It has been submitted on behalf of the Union that this is a case in which the court ought not to grant the relief sought because that will be tantamount to specific performance of a contract of employment. It seems to me that every different considerations apply
when one is dealing with an elected officer whom somebody other than those who elected him is seeking to remove him from office, than apply in the ordinary case of employer and employee. In the circumstance, I propose to grant the plaintiff the injunction he seeks until judgment in the action.”

Any dismissal of a servant under the right class of employment must accord with the rules of natural justice.

Having set out the principles very material in resolving this appeal in the above paragraph of this judgment, the appellant has the task of bringing his case within the principles in Adedeji v Public Service Commission (1968) NMLR 102 and Shitta-Bey v Federal Public Service Commission (1981) 1 SC 40 in order to have himself flavour to it. One of the implications of the appellant’s contention in this matter is the misconception of the relief sought on the facts of this case, i.e. that the dismissal be declared null and void. This line of approach with respect fails to recognise the impact of the act of the appellant’s dismissal on his contract of employment. By that singular act of apparent breach, the contract has come to an abrupt end, and the parties were left to their remedies in damages. Because as I stated above his contract of employment lacks statutory flavour.

Reverting to the instant matter proper, it seems to me that the appellant’s contract of employment having clearly provided for a procedure to be followed to summarily terminate it that procedure has to be followed to terminate the contract of his employment (it has to be followed). And if I may observe it is not in doubt that adherence to strict procedural safeguards makes for justice under the law. I have already alluded to the servant’s options where his contract of employment is terminated by wrongful dismissal. The instant case clearly comes within the first exception as enunciated above. And I now proceed to consider whether the appellant’s summary dismissal is justifiable. In that case, I have to advert to Article 4(iii) and (iv) of Exhibit I and to start with, I agree with the true construction given by the trial court to
the provision of Article 4(iii) thus:

“It seems to me that once the defendant employer suspects the employee of dishonesty or any other serious misconduct, the employer reserves the right to suspend the employee and then commence investigations which must be concluded within six (months). The above provision appears to be subjective, vesting on the employer the absolute right to determine which conducts are regarded as dishonesty or as coming within the ‘terms or any other serious misconduct’.”

The first principle of the rules of construction, and it is trite, is that where words used in a document are clear and unambiguous their ordinary meaning should prevail (Wilson v Attorney-General, Bendel State and others (1985) 1 NWLR (Part 4) 572; (1985) NSCC (Vol.16) 191). The words used in Article 4(iii) are clear and unambiguous and do not tend to absurdity and therefore are entitled in the context to be given their ordinary meaning. In this regard, the respondent and I agree with the trial court, reserve the right to suspend the appellant based on suspicion and within six months thereof to conduct investigation regarding the suspicion and to reinstate the appellant to his employment on being exonerated by the investigation. Before Exhibit G, the appellant sent in Exhibit F in which he more or less admitted he erred. The fact is that he was not exonerated and Exhibit G finally sealed his fate. He was summarily dismissed. I recognised that introducing a subjective element in this manner by the provisions of Article 4(iii) has posed its own problems. Has it diminished or more appropriate impinged on the appellant’s right of fair hearing? That is to say oral hearing. I think not. In Hart v Military Government of Rivers State and others (supra), Fatai-Williams JSC rightly in my view observed that “natural justice does not require that the hearing be oral”. The collective agreement has clearly introduced a subjective element in this context. More often than not it poses some difficulties where this is the case. The right to an oral hearing as a matter of procedure for satisfying the requirement of natural justice has to depend on the facts of the particular case as it is bound to differ from case to case.
a Without letting the matter rest there, in this case, it has to be observed that the fact on which the respondent hinged his suspicion have been known to the appellant and they gave rise to Exhibits C and D, i.e. the query and the appellant’s answer respectively. These facts have been set forth earlier on in this judgment. I may say that in such cases it is still open to the court to enquire if a reasonable employee could honestly have come to hold such suspicion on the particular facts of the case as in this matter and if the answer is “yes” then the court could not enquire further into the matter, that is to say, into the propriety or otherwise of acting on the suspicion. In *Diggle v Ogston Motors Co* (1995) 84 L.J.K.B. 2165 where employment was made subject to “your carrying your duties to the satisfaction of the directors” (as in the above cited case). It was held that the court enquire into the question whether a reasonable board of directors could honestly have come to the conclusion that they were not satisfied with the employer’s [decision]. If the answer to that was in the affirmative then the court could not enquire further into the correctness of the director’s decision that they were not satisfied with the employee’s work. The instant trial court looked at this side of the appellant’s case and came to the conclusion that the suspicion leading to the ultimate act of summary dismissal of the appellant was well founded. I find myself in complete agreement with this conclusion. The appellant has, however, raised unnecessary dust by complaining that he was queried as to the offence “mistrust” and not of “defalcation”. And so was punished for an offence he never committed. This confusion is misplaced as it has no foundation in that in Exhibit F written by him to the respond he said:–

“... as we rummaged around, the money was found in an open drawer full of wrappers ... I must have erred by way of omission or commission ...” (italics mine for emphasis).

To contend therefore before the trial court and in this Court that he was punished for an offence he did not commit smacks of defiance against proven facts. The appellant
cannot be heard to renege from the import of Exhibit F, where he more or less admitted the respondent’s story of how the sum of N5,000 was found in his drawer. The only money recovered from the drawer was the amount defalcated from a customer’s money for lodgement with the respondent on 14 June, 1996. And he and one Daniel Adejoh manned the chest of drawers from where the sum of N5,000 was retrieved. He never offered any satisfactory explanation of how part of a customer’s money handed to him for counting found its way into the drawer in their control.

Furthermore, Article 4(iv) of Exhibit I has equally made provisions where an employee is dismissed summarily. I have earlier reproduced these provisions herein. According to Article 4(iv)(b) the employer is enjoined to do no more than, “before summary dismissal is effected, the employee shall be given a written query and afforded the opportunity of defending himself in writing except where the employee has absconded”. The respondent gave a written query to the appellant and he replied to it. The trial court was satisfied that the respondent so complied. There is evidence of a query and answer as per Exhibits C and D. The findings that the appellant was given a written query, i.e. exhibit C and that the appellant admitted being so queried and his answer as per Exhibit D and that he wrote Exhibit F, a letter for leniency, and that due opportunity was given to the appellant to defend himself, all these relate to questions of fact. And not having found the findings in any way to be perverse, this Court is precluded from interfering with them as they fall within the exclusive preserves of the trial court to determine. This Court has no intention to interfere with the findings (see Narumal and Sons (Nigeria) Ltd v Niger Benue Transport Co Ltd (1989) 2 NWLR (Part 106) 730 at 742; Silli v Mosoka (1997) 10 NWLR (Part 479) 98). Following from the letter and spirit of the collective agreement which confided in the respondent the right to take a final decision in the matter that is whether to caution, suspend, give summary dismissal and warning. If I may say now, what will
justify an instant dismissal? Something done by the servant which impliedly or expressly is a repudiation of the fundamental terms of the contract, and in my judgment if ever there was such a repudiation this is it.

I have no reason to fault in any way the findings of the trial court as to the procedures followed in terminating summarily the appellant’s appointment. As found by the trial court I am satisfied that the procedures as required by Article 4(iii) and (iv) dealing with disciplinary procedures were duly complied with pari passu with the principles of natural justice. The appellant was given due opportunity to be heard and indeed had his say. He cannot be heard to complain. I must however add that where the procedure for such an exercise has been provided for in a contract of employment it has to be complied with faithfully against the background of the rules of natural justice as in this matter. I have no difficulty in coming down on the side of the respondent and to affirm the trial court’s finding that the appellant’s summary dismissal was justifiable. I have dealt fully, I am afraid, with all those matters because of the way they were strenuously argued. This disposes of issue 1.

The second issue raises an interesting legal point as to whether the appellant should have been prosecuted first before being dismissed summarily. The decision in Garba v University of Maiduguri (1986) 1 NSCC (Vol. 17) 245 at 248; (1986) 1 NWLR (Part 18) 550 has been cited in support of the proposition. In that case the Supreme Court has stated a much-quoted passage relating to section 33 of the Constitution, 1979. Briefly, some students of the University of Maiduguri, who engaged in a rampage that caused much property damage, arson and looting, were expelled. The Senate met and handed down the expulsion order without first having the students tried in regular courts for the criminal offences arising out of their misconduct. And it held thus:—

“There is no doubt that in the context in which the term
‘misconduct’ is used in section 17 of Act, the complaints, to wit arson, wilful destruction of properties, looting and assaults made against the appellants fell within the definition, and the Vice-Chancellor can expel a student if he is satisfied that he is guilty of misconduct but where the misconduct alleged involved crimes against the state it is no longer a matter for internal discipline but a matter for a court or tribunal vested with judicial powers to try such offences. It is only after conviction by a proper court for these offences that the Vice-Chancellor can proceed to exercise his disciplinary powers and expel the students if he so wishes.”

The judicial opinion now is that the decision in Garba is no impediment to summary dismissal of a servant for gross misconduct even where the misconduct approximates to a criminal offence provided the exercise was conducted against the backdrop of the provision of section 33(4) of the 1979 Constitution. But where the servant has owned up as to his misconduct he could be proceeded with without more (see Federal Civil Service Commission v Laoye (1989) 2 NWLR (Part 106) 652 per Eso JSC). In Yusufu v Union Bank of Nigeria Ltd (1996) 6 NWLR (Part 457) 632 Onu JSC stated thus:–

“On the issue of fair hearing . . . before an employer can dispense with the service of his employee, under the common law all he needs to do is to afford the employee an opportunity of being heard before exercising his power of summary dismissal even where the allegation for which the employee is being dismissed involves accusation of crime.”

Wali JSC in his leading judgment in the same matter also stated in like manner. However, at common law, it is open to an employer to dismiss the employee summarily even where his misconduct is criminal content (see Tomlinson v L.M.S. RY Co (1944) 1 All ER 537). The respondent in that case, i.e. the railway company, summarily dismissed the appellant who had violently assaulted another employee at a meeting, without first prosecuting that appellant. In fact, the meeting and the assault took place outside the normal business premises. Also the misconduct took place outside normal working hours yet it was brought under the contract.

In the instant matter before the appellant’s summary
dismissal was effected, as found by the trial court, he was
given due opportunity of being heard. Having been given the
opportunity he should not be seen to complain (see Kotoye v
CBN (1989) 1 NWLR (Part 98) 419 per Nnaemeka-Agu
JSC). The ultimate decision in the matter was confided in
the respondent and it reserved the right to take a favourable
or unfavourable decision against the appellant in the matter.
In this case it took the unfavourable decision to dismiss him
summarily. The appellant in further explanation of his repre-
sentation in Exhibit D also made Exhibit F in which he
confessed that he might have “erred in omission or commis-
sion” in this matter. Besides, the facts of this case are totally
dissimilar to those in Garba’s case where the students com-
mitted diverse offences of destruction to property, arson,
looting and assaults – all criminal in nature as against “mis-
trust” in this matter – a misconduct not known to our crimi-
nal law as a crime. Garba’s case is therefore not a binding
authority in this respect. I think that the appellant’s case falls
beyond the scope of the principle set down in Garba but
more within the confines of the principles in Laoye. The
appellant’s misconduct was incompatible with due or faith-
ful discharge of his duty to the respondent and the respon-
dent has a right to dismiss him summarily. It is also
important to note that neither of the parties in the case
lodged a report to the police. Secondly, the appellant did not
plead any specific crime for which he was accused and, that
being so, the trial court was not bound to delve into an issue
not joined on the pleadings (see Metal Construction W/A Ltd
v Milgore (1979) 6–9 SC 163). Besides, it was not made a
specific ground of appeal in this Court. Equally noticeable is
that the query given to the appellant did not allege crime but
raised the issue of “mistrust” – a misconduct which as I
stated above has not been defined in our criminal law as a
crime. And the same goes for the allegation of defalcation. It
is futile therefore to argue that the definition of “miscon-
duct” in the context in which it is used in Article 4(iv) of
Exhibit I does not comprehend “mistrust” although not spe-
cifically spelt out in broad headings of gross misconduct in
Article 4(iv). There can be no doubt that it comes within the meaning of the words used in Article 4(iv)(a)(i) which provides thus: “The law provides that employee may be summarily dismissed for certain offences covered by the broad headings of gross misconduct. Such offences includes:” (italics mine for emphasis). The trial construed the foregoing provision thus:–

“In other words the offences for which the employer can summarily dismiss the employee under ‘the broad headings of gross misconduct’ is elastic. Those provided or set out under Article 4(iv)(a)(i) Exhibit ‘I’ are only inserted as examples or as a guide. It is for the employer to determine which offences it regards as ‘gross misconduct’ worthy of summary dismissal. This is in addition to those set out in Article 4(iv)(a)(i)–(ix) of Exhibit ‘I’.”

When the word “include” is used in a document it has the effect of extending the scope of the concept covered by the terms mentioned (see Okesiji v Lawal (1991) 1 NWLR (Part 170) 661; (1991) 2 SCNJ and Nafiu Rabiu v The State (1981) 2 NCLR 293; (1980) FNLR 509 at 524). Besides, the appellant having the advantage of knowing the truth in this matter did not to my mind get mixed up in his written representation by the fact of denoting his misconduct as either “mistrust” or “defalcation” in Exhibits C, D, F and G. I am satisfied that not only is it not correct to contend that the appellant must be prosecuted first before being summarily dismissed in this case and such cases as the instant matter but also it is important to note that the suggestion to first prosecute the appellant before dismissing him could not derive from Article (iv) of Exhibit I, however construed.

In the final analysis the issue is therefore whether the respondent has satisfied the trial court that the appellant’s conduct constituted a misconduct for which it (i.e. the respondent) was justified in dismissing him summarily and, if not, the appellant would be entitled to payment in lieu of notice. The respondent acquitted himself of this onus creditably.

One poignant factor that cannot be glossed over in this judgment is the impact of the appellant’s gross misconduct
on the master/servant relationship between them. The appellant and one Daniel Adejoh, his co-note-counter, were at all material times bank staffs. The alleged misconduct culminating in the appellant’s summary dismissal borders on dishonesty and breach of confidence. This conclusion is incontestable. The appellant has pleaded in Exhibit F that he must have erred by way of omission or commission. The appellant having got that far in his disclosure as to what happened on that day, it must be recognised that the respondent is a bank. And banking business is one erected on trust and confidence, not only between a customer and the bank, but also between the bank and its staff. The master/servant relationship between them (i.e. the appellant and respondent) has been greatly damaged in this respect.

As found by the trial court the appellant’s misconduct was of great embarrassment to the respondent with regard to its instant customer. In these days of huge banking fraud perpetrated by fraudsters and miscreants and leading to bank failures here and there, it matters the quality of best staffs. Such factors as these should have been considered by his Counsel to so moderate the nature of the appellant’s claim against the respondent. His remedy lies in damages and no more if his action in wrongful dismissal had succeeded. It is settled law that the courts will not grant specific performance for breach of contract of service.

Having exhausted all the issues in this appeal and having resolved these against the appellant his appeal successfully fail. The appellant was guilty of gross misconduct and he can be dismissed without notice and without wages. In the circumstances his summary dismissal is justifiable. This appeal therefore fails and it is hereby dismissed with ₦2,000 costs in favour of the respondent.

AKPABIO JCA: I have read in advance the judgment of my learned brother, Chukwuma-Eneh JCA, just delivered and agree with him that this appeal should be dismissed. The appellant as a bank staff was guilty of fraudulently removing ₦5,000 which was among the money given to him to count.
Mass-checking and counter-checking was done, and the money ultimately traced to him. He was also thereafter summarily dismissed for gross misconduct. My learned brother in the lead judgment has meticulously considered all the issues formulated for determination in this case, and resolved them against the appellant, and I agree with him. In our law the penalty for gross misconduct is summary dismissal and not re-instatement or payment of wages in lieu of notice (see the case of Union Bank of Nigeria v Ogboh (1995) 2 NWLR (Part 380) 647). I too hereby dismiss this appeal with costs as awarded by my learned brother in the lead judgment.

Umoren JCA: I have had the privilege of reading in draft he judgment of my learned brother, C.M. Chukwuma-Eneh JCA. I agree with his reasoning and conclusion. I also dismiss the appeal and abide by consequential orders made therein including the order as to costs.

Appeal dismissed.
Nigeria Deposit Insurance Corporation v. Mr E.A. Obende

COURT OF APPEAL, JOS DIVISION
AKPABIO, MANGAJI, UMOREN JJCA

Date of Judgment: 13 JULY, 2000

Banking – Provisional liquidator of a bank – Appointment of – Purpose of – Rationale – Section 422(1) of the Companies and Allied Matters Act (Cap 59) Laws of the Federation of Nigeria, 1990

Facts

By legal notice dated 16 January, 1998 made pursuant to the Banks and Other Financial Institutions Decree No. 25 of 1991, the operating licences of 26 banks including Progress Bank of Nigeria Plc, the appellant herein was revoked and the Nigeria Deposit Insurance Corporation appointed as their provisional liquidator, with effect from the same date.

The present application was consequently filed for leave of the court to substitute the applicant, Nigeria Deposit Insurance Corporation, the provisional liquidator as the appellant and an order amending the notice and grounds of appeal, appellant’s brief of argument and other court processes already filed accordingly.

The respondent on his part raised a preliminary objection that the appellant’s banking licence having been revoked, the appeal was no longer competent in that the cause of action did not survive the defunct bank.

The applicant, however, submitted that the corporate personality of Progress Bank Plc was derived from its being incorporated as a limited liability company. Therefore, the revocation of its banking licence did not remove its corporate personality, but only implied that it could no longer carry on its banking business and that the death of a company could only arise when it had been wound up, and that
the appointment of a liquidator is a step towards winding-up, but not the winding-up itself.

**Held**

The purpose of appointing a liquidator for a company is not to conduct legal proceedings in winding-up a company. That would be a very restricted function and one which would be rather unproductive in the interest of all concerned. The real purpose of appointing a liquidator is for the liquidator to:

(a) take control of the company;
(b) collect its assets;
(c) pay its debts; and
(d) distribute any surplus among members in accordance with their rights.

The foregoing is what amounts to “conducting the proceedings in winding up a company” and performing such duties in reference thereto as the court may impose as prescribed in section 422(1) of the Companies and Allied Matters Act, 1990.

*Application granted.*

**Cases referred to in the judgment**

**Nigerian**

*Abekhe v NDIC* (1995) 7 NWLR (Part 406) 228

*CCB (Nig.) Plc v O’Sylvavax International Ltd* (1999) 7 NWLR (Part 609) 97

*NDIC v Vincent Oranu* unreported, Appeal No. CA/J/149/96 decided on 22 February, 2000

*SGBN Ltd v Buraimoh* (1991) 1 NWLR (Part 168) 428

**Nigerian statute referred to in the judgment**

Companies and Allied Matters Act (Cap 59) Laws of the Federation of Nigeria, 1990, section 417

**Counsel**

For the applicant: *Okafor, S.A.N. (with him Ochigbo)*
a For the respondent: James
   For the third–fourth accused: Iluyomade

b **Judgment**

AKPABIO JCA: *(Delivering the lead judgment)* This is an
application on notice brought on behalf of appellant/ applicant pursuant to Order 3r 13 and 16 of the Court of
Appeal Rules, 1981 and section 417 of the Companies and
Allied Matters Act, 1990 for the following orders:–

\(1\) An order that the appellant, Progress Bank of Nigeria Plc be
substituted with Nigeria Deposit Insurance Corporation
(NDIC) the (Provisional Liquidator of the Bank) as appel-

\(2\) An order amending the Notice and Grounds of Appeal,
appellant’s Brief of Argument and other court processes al-
ready filed accordingly.”

c The said application was supported by a nine-paragraph
affidavit to which was exhibited a photostat copy of a legal
notice captioned:

25)

REVOCATION OF BANKING LICENCES”

which set out a list of 26 banks whose banking licences were
revoked with effect from 16 January, 1998 and the Nigeria
Deposit Insurance Corporation appointed as their provi-

sional liquidator, with effect from the same date. The list
included “Progress Bank of Nigeria Plc”, i.e. the appellant
herein who was Serial No. 13 in the said list.

h It was then deposed to in the affidavit in support that fol-
lowing the revocation of appellant’s banking licence on 16
January, 1998, the said Progress Bank of Nigeria Plc was
wound up by the Federal High Court, Enugu on 12 March,
1998, as a result of which the present appeal could only
proceed to conclusion if the provisional liquidator (NDIC)
was substituted as the appellant. The leave of the court was
therefore required and was being sought to substitute the
applicant as the appellant and amend all records and
processes already filed as shown on the heading to the motion paper.

In response to this application, a preliminary objection was filed on behalf of the respondent as follows:–

“That the appellant’s banking licence having been revoked, this appeal was no longer competent in that the cause of action did not survive the respondent.”

A copy of the revocation of appellant’s banking licence was also exhibited as Exhibit A to the preliminary objection.

For ease of exposition the parties were ordered to file their briefs of arguments and they complied.

On the oral hearing of this application on 22 June, 2000, it was decided and agreed upon that the appellant herein should move his motion after which the respondent should argue his preliminary objection by way of a reply and that was duly done.

Moving his motion, Mr GO Okafor, S.A.N. (with whom was OJ Ochigbo, Esq.), relied on his nine-paragraph affidavit in support and the revocation of the banking licence of Progress Bank already referred to above, and adopted his short brief of arguments dated 3 February, 2000.

It was then argued that, contrary to the contention of the respondent, the revocation of the banking licence of a bank was not synonymous with the death of a natural person. He then submitted that the corporate personality of Progress Bank Plc was derived from its being incorporated as a limited liability company. The revocation of its banking licence did not remove its corporate personality. It simply meant that it could no longer carry on its banking business. He then referred to the case of Abekhe v N.D.I.C. (1995) 7 NWLR (Part 406) 228 at 240C–D. The death of a company could only arise when it has been wound up, a liquidator is a step toward winding-up, but not the winding-up itself. The case of C.C.B. (Nigeria) Plc v Silvawax International Ltd (1999) 7 NWLR (Part 609) 97 at 103A–B was cited in support. It
was then submitted that if the bank was wound up, a liquidator will then step into its shoes, in the same way an administrator or executor steps into the shoes of a deceased person. Section 425(1)(a) of the Companies and Allied Matters Act, 1990, was also cited in support.

It was also pointed out that the present suit was an action in contract of service, and not an action in tort. He referred to page 72 of the records for the various monetary awards made by the trial court in favour of the respondent. Even if the respondent died today, his personal representatives can pursue his rights already accrued. He urged the court to grant this application as some of the judgment debts have already been paid into court. He then cited the yet unreported case of NDIC (Provisional Liquidator of Progress Bank) v Vincent Oranu Appeal No. CA/J/149/96 recently decided by this Court on 22 February, 2000 (coram Muhammad, Chukwuma-Eneh and Mangaji JJCA) in which identical reliefs as those asked for in this application were granted. He urged the court to grant the application.

In his reply/preliminary objection, Mr OB James, the learned Counsel for the respondent also filed a short brief of argument in which the following legal arguments were submitted:

“ARGUMENT

It is submitted that this appeal is no longer competent in that by the revocation of the appellant’s banking licence, the appellant is deemed to have died. It is further submitted that the appointment of a liquidator for the bank further confirms the fact of the death of the appellant. It is settled law that a dead person ceases to exist in the eyes of the law and any cause of action pending against such a person automatically abates unless it is one that survive the person. See the case of S.G.B. Ltd v Buraimoh (1991) 1 NWLR (Part 168) page 428 at 434 paragraphs D–C.

It is submitted that since the cause of action in this appeal borders on master/servant relationship it does not survive any of the parties.

CONCLUSION:

In the circumstances, Your Lordships are respectfully urged to strike out the appeal.”
In his oral argument of his objection in this Court on 22 June, 2000, OB James, Esq., further elaborated his arguments as follows. While asking that this application and the main appeal be struck out, he, respondent’s Counsel, nevertheless conceded that the mere revocation of a banking licence did not bring an end to the existence of the bank as a legal personality. However, as from the date the bank was wound up on 12 March, 1998, it ceased to exist as a legal person. On that date it died and was later buried. It was pertinent to note that the revocation of the banking licence of the applicant was done on 16 January, 1998 by the Governor of the Central Bank of Nigeria. Barely two months thereafter, while it was already in liquidation, it was wound up. Having become a dead person, the next question was whether the cause of action would survive. He then submitted that the cause of action in this case bordered on a master and servant relationship, and did not survive. He said sections 422–425 of the CAMA (Companies and Allied Matters Act, 1990) could not aid the applicant. That was so because the Federal High Court did not appoint the NDIC as a liquidator when on the contrary it was the Central Bank of Nigeria that appointed the NDIC as a liquidator after which the company was wound up. The case of C.C.B. (Nigeria) Plc v O’Sylvawax International (Nigeria) Ltd (supra) already cited by his learned friend was also cited and relied upon. He then urged the court to dismiss both the motion and the application.

In a brief rejoinder on law, Mr Okafor, the learned Senior Advocate, said this Court should distinguish this case from that of O’Sylvawax (supra) in that orders had been made in favour of a dead person. The liquidator had not been appointed when the court gave its order. In the instant case it was not denied that a liquidator had been appointed.

I have carefully considered all the facts of this case as well as all the authorities cited above by learned Counsel on both sides, including the unreported case of NDIC (Provisional
There is no dispute that the original appellant (Progress Bank of Nigeria Plc) is now dead by virtue of not only the revocation of its banking licence by the Governor of CBN on 16 January, 1998, but also by the appointment of a provisional liquidator of the bank by the same authority (CBN) on the same date. What is being disputed is whether with the Progress Bank now being a dead company, the Nigeria Deposit Insurance Corporation, as its provisional liquidator can now be substituted for it as the appellant in this case. It appears to me that the objection of respondent in this case is borne out of a misconception or improper appreciation of the role and function of a liquidator in company law. For a proper appreciation of this see the case of Solomon Abekhe v Nigeria Deposit Insurance Corporation (1995) 7 NWLR (Part 406) 228, decided by the Lagos Division of this Court where the purpose of appointing a liquidator for a company was set out as follows at 240–241H–B per Uwaifo JCA (as he then was) in the lead judgment:–

"3. On purpose of appointing a liquidator for a company:–

The purpose of appointing a liquidator for a company is not to conduct legal proceedings in winding-up a company. That would be a very restricted function and one which would be rather unproductive in the interest of all concerned. The real purpose of appointing a liquidator is for the liquidator to:–

(a) take control of the company;
(b) collect its assets;
(c) pay its debt and;
(d) distribute any surplus among the members in accordance with their rights.

The above is what amounts to ‘conducting the proceedings in winding up a company’ and performing such duties in reference thereto as the court may impose as prescribed in section 422(1) of the Companies and Allied Matters Act, 1990 (pages 240–241 paras. H–B).”

From the foregoing one will see that it is in the interest of both the appellant and the respondent that a liquidator be...
appointed for a wound-up company so as to gather the assets of the company together and to distribute to those entitled. This is similar to the role of an administrator or administra-
trix of the estate of a deceased person. In the same way that nobody has ever heard of the appointment of an administra-
tor or administratrix of a living person, so also it is unthink-
able for a liquidator to be appointed in respect of the affairs of a viable and on-going company. A company must first be wound up before a liquidator can be appointed to manage the affairs of the dead company. In this regard I have looked at the case of *C.C.B (Nigeria) Plc v O’Sylvawax Interna-
tional Ltd and others* (1999) 7 NWLR (Part 609) 97, cited and relied upon by learned Counsel on both sides, and find that the facts of that case were not on all fours as those of the instant case. The facts in the *O’Sylvawax* case were as follows:–

“Pursuant to an application made by the appellant to the Court of Appeal, the court, on 24 March, 1998, granted the appellant an order extending the time within which the appellant can seek leave to appeal against the *ex parte* orders of the Federal High Court made on 12 November, 1996 and 19 March, 1997 and an order extending the time within which the applicant can appeal against the said orders.

The first and second respondents filed a preliminary objection at the Court of Appeal challenging the competence of the orders aforesaid granted by the Court of Appeal and the appeal filed pur-
suant thereto on the grounds that the appellant’s banking licence had been revoked by the Governor of Central Bank on the 16 January, 1998; that the Federal High Court had wound up the app-
pellant on 12 March, 1998 and that the appellant did not exist at the time the order for extension of time was made.”

The Court of Appeal unanimously upheld the preliminary objection.

It will be seen therefore that in the *O’Sylvawax* case, there was no application to substitute anybody for anybody. Rather, the objection was that the appellant (a company already in liquidation) had applied for extension of time within which to appeal, and leave to appeal, and it was granted the leave and extension, when it had already ceased
to be in existence. In the instant case, however, it is sought to substitute the original appellant, now under liquidation with its “provisional liquidator” who was appointed by the CBN at the same time the banking licence was revoked. This is a legitimate thing to do, since the NDIC is a juristic person while the Progress Bank of Nigeria Plc is no longer a person in the eye of the law. If the application in the O’Sylvawax case (supra) had been made by its provisional liquidator instead of by the C.C.B, itself I am sure there could have been no objection.

Before concluding, I must refer to the unreported case of N.D.I.C. (Provisional Liquidator of Progress Bank) v Vincent Oranu, decided by this Court in Appeal No. CA/J/149/96 on 22 February, 2000, and to say that that case was an identical application as the instant one, in which both the respondent and his Counsel were absent, although duly served with hearing notices. The appellant’s Counsel was therefore allowed to move his application and the order sought granted without objection. With all the relevant cases having now been fully considered in the instant case, I cannot say that application was decided per incuriam. Rather, the application was rightly granted, and I am bound by it.

Whether the cause of action in this appeal is one that survives the company (Progress Bank of Nig. Plc) or not is what the liquidator will have to decide after it has been substituted as the appellant in this case (see the case of S.G.B.N. Ltd v Buraimoh (1991) 1 NWLR (Part 168) 428 cited by learned Counsel for respondent in his brief). I should, however, quickly add that that case had nothing to do with the winding-up of a company, nor the appointment or substitution of a liquidator in legal proceedings. It simply dealt with the question whether the cause of action in that suit was available against the deceased guarantor of a bank loan, so as to make his estate a party to the proceedings.

On the totality of all the authorities considered above, I hold that this application succeeds and is hereby granted. It is in the interest of both the applicant and the respondent that the NDIC be substituted as the appellant in this appeal as the
“provisional liquidator of the Progress Bank of Nigeria Plc”.  

The notice and grounds of appeal, the briefs of arguments and all other court processes already filed in this appeal are hereby ordered to be amended accordingly.

Costs of this application are assessed at ₦2,000 in favour of the applicant against respondent.

_UMOREN JCA:_ I agree.

_MANGAJI JCA:_ I entirely agree with the opinion of my learned brother, Akpabio JCA, in the ruling just read, that this appeal should succeed and ought to be allowed. The obvious resolution of the substantive appeal lies in the substitution sought to be made. My learned brother said it all in the leading ruling and I have nothing more to add to it.

The application is accordingly granted. Nigeria Deposit Insurance Corporation (NDIC), the provisional liquidator of Progress Bank Nigeria Plc is hereby substituted for the latter. In the event, the notice and grounds of appeal, the briefs of arguments and all other court processes already filed in this appeal shall be amended accordingly.

I abide by the order of cost contained in the lead ruling.

_Appeal allowed._
Nigeria Deposit Insurance Corporation v Chief Gabriel B. Emeji

Banking – Loan – Defendant admitting receiving – Onus on him to show repayment or reasons for non-payment

Facts
The applicant, NDIC, was claiming the sum of ₦2,073,221.85 plus 21% interest being an outstanding loan granted to the defendants by Pan African Bank Plc in liquidation.

The case was initially filed at the defunct Failed Banks Tribunal before its transfer to the Federal High Court.

The defendants also filed at the defunct tribunal a motion on notice on 4 May, 1999 which was subsequently struck out by the court on 15 February, 2000 for want of prosecution. Save that motion and memorandum of appearance no other document was filed suggesting any possible interest to defend the matter, and the previous records was not in doubt that the defence Counsel was reasonably aware of the case. Unfortunately he refused or neglected to file any defence thereto.

Held –
In cases of loan, once the defendant admits that he has received the loan in question, the onus is on him to show that he has repaid it or reasons for non-repayment. In the instant case, all the depositions and exhibits placed before the court established that a loan was granted to the defendants by the plaintiff in liquidation and he (they) defendant(s) acknowledged the receipt and several times admitted liability upon demands for repayment of the loan but unfortunately when called upon by the court to answer this case refused or failed to show either by filing evidence of repayment or to give reasons why he should not repay or even appearing before
the court or by his Counsel to defend same. In the particular circumstance the only conclusion is that defendants have no defence to this suit and hence the plaintiff is entitled to judgment.

Judgment for plaintiff.

Case referred to in the judgment

Nigerian Macaulay v NAL Merchant Bank (1990) 4 NWLR (Part 144) 283

Judgment

HOBON J: This ruling is upon the plaintiff’s claim of N2,073,221.85 (Two Million, Seventy-three Thousand, Two Hundred and Twenty-two Naira, Eighty-five Kobo) plus 21% interest thereon from 16 January, 1998 until final liquidation, being an outstanding loan granted to the defendants by Pan African Bank Plc in liquidation.

The case was initially filed at the defunct Failed Banks Tribunal before its transfer to this Court.

The defendants also filed at the defunct Tribunal a motion on notice on 4 May, 1999 which was subsequently struck out by this Court on 15 February, 2000 for want of prosecution. Save that motion and memorandum of appearance no other document was filed suggesting any possible interest to defend the matter; and the previous records is not in doubt that the defence Counsel is reasonably aware of this case. Unfortunately he refused or neglected to file any defence thereto.

I have carefully perused the plaintiff’s application for the recovery of the debts along with the affidavit in support of the application of 19 February, 1999, further affidavit of 27 May, 1999, further and better affidavit no. 2 of 8 November, 1999 together with all the annexures attached thereto as exhibits. In accordance with section 10 of the Failed Banks Recovery of Debts and Financial Malpractices in Banks Act (Decree), 1994, a prima facie case is disclosed or established.
by the plaintiff against the defendants that defendants owed the amount in question to Pan African Bank Plc, a failed bank, which amount remains outstanding as at the date of closure of business of that failed bank which reasonably demands an answer from the defendants. Unfortunately the defendants have not shown any reasonable interest to defend same.

In cases of loan once the defendant admits that he has received the loan in question the onus is on him to show that he has repaid it or reasons for non-repayment (see Macaulay v NAL Merchant Bank (1990) 4 NWLR (Part 144) 283 ratio 19).

In the present case, all the depositions and exhibits placed before this Court established that a loan was granted to the defendants by the plaintiff in liquidation and he (they) defendant(s) acknowledged the receipt and several times admitted liability upon demands for repayment of the loan but unfortunately when called upon by this Court to answer this case refused or failed to show either by filing evidence of repayment or to give reasons why he should not repay or even appearing before this Court or by his Counsel to defend same.

In this particular circumstance the only conclusion is that defendant has no defence to this suit and hence the plaintiff is entitled to judgment.

Accordingly this application ought to succeed in the absence of any contrary reasons and it is hereby granted.

Judgment is hereby entered in favour of the plaintiff against the defendant(s) in the sum of:–

(a) Two Million, Seventy-three Thousand, Two Hundred and Twenty-one Naira, Eighty-five Kobo (₦2,073,221.85) plus 21% interest thereon from 16 January, 1998 until final liquidation.

(b) It is further ordered that this judgment be satisfied within 30 days from this day.

(c) Five Thousand Naira ₦5,000 is awarded as costs.

All against defendant in favour of the plaintiff.

These are the ruling and orders of this Court and so be it.
Federal Republic of Nigeria v M.G. Adigun and others

BELLO J

FEDERAL HIGH COURT, ILORIN DIVISION

Date of Judgment: 24 AUGUST, 2000

Suit No.: FHC/IL/FBFMT/20/200

Banking – Banking offences – Fiat of Attorney-General granted before repeal of section 24 of the Failed Banks Decree No. 18 of 1994 (as amended) by Decree No. 62 of 1999 – Whether render fiat incompetent

Criminal law and procedure – Fiat of Attorney-General to prosecute – Where prosecutor fails to produce in court – Whether fatal – Whether presumption of regularity applicable – Section 150(1) of the Evidence Act (Cap 112) Laws of the Federation of Nigeria, 1990

Evidence – Presumption of regularity – Prosecutor failing to produce fiat of Attorney-General in court – Applicability of presumption – Section 150(1) of the Evidence Act (Cap 112) Laws of the Federation of Nigeria, 1990

Facts

By a notice of preliminary objection the second accused sought to show that the charge against him was incompetent on the ground that the proceedings were instituted and undertaken against him by a person other than the Attorney-General of the Federation or official of his Department, to wit, Yusuf O. Ali Esq., S.A.N.

The second accused sought to rely on:–

1. Section 174(2) of the Constitution of the Federal Republic of Nigeria, 1990 which requires that the public prosecution must be instituted by Attorney-General of the Federation or officials of his Department.

2. Section 24 of the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree No. 18 of 1994 which allowed prosecution by all persons authorised by the
Attorney-General has been repealed by Decree No. 62 of
1999 (Part 1 of the Schedule).

Paras. B–F following *Attorney-General Kaduna v Hassan* (1985) 2 NWLR (Part 8) 483 at 488.”

It was contended on behalf of the second accused that the
Attorney-General of the Federation could only mandate
officers of his Department to prosecute and not any other
persons which included the present prosecutor.

Section 24 of the Failed Banks (Recovery of Debts) and
Financial Malpractices in Banks Decree No. 18 of 1994 (as
amended) repealed by Decree No. 62 of 1999 reads:—

“24(1) The rules of procedures for offences under this Decree
and the forms to be used in such proceedings shall be as
set out in Schedule 2 to this Decree.

(2) Prosecutions for offences under this Decree shall be
instituted before the Tribunal in the name of the Federal
Republic of Nigeria by the Attorney-General of the
Federation or such officer in the Federal Ministry of
Justice as he may authorise so to do, and in addition
thereto, he may:—

(a) after consultation with the Attorney-General of any
State in the Federation, authorise the Attorney-
General or any officer in the Ministry of Justice of
that State; or

(b) if a Tribunal so directs or if the Central Bank of
Nigeria or the Nigeria Deposit Insurance Corpora-
tion so requests, authorise any other legal practitio-
nor in Nigeria, to undertake any such prosecution
directly or assist therein.

(3) The question whether any or what authority has been
given in pursuance of subsection (2) of this section shall
not be inquired into by any person other than the Attor-
ney-General of the Federation.

(4) A person accused of an offence under this Decree shall
be entitled to defend himself in person or by a person of
his own choice who is a legal practitioner resident in
Nigeria.

(5) Where the rules of procedure contained in Schedule 2 to
this Decree contain no provisions in respect of any
matter relating to or connected with the trial of offence under this Decree, the Tribunal may apply the provisions of the Criminal Procedure Code or, depending on the venue, the Criminal Procedure Act, with such modifications as the circumstances may require, in respect of such matter to the same extent as they apply to the trial of offences generally.

(6) Subject to section 4(2) of this Decree, prosecution for offences under this Decree shall be instituted within 21 days after the receipt by the Attorney-General of the Federation of the file containing completed police investigation or the complete report by the Central Bank of Nigeria or Nigeria Deposit Insurance Corporation in respect of the offence.”

Held –

1. The fiat granted to Mr Yusuf O. Ali, S.A.N., to prosecute the accused person and the subsequent charge filed on 26 April, 1999 pursuant to section 24 of Decree No. 18 of 1994 in so far as it predates the amendment by Decree No. 62 of 1999 which came into force on 28 May, 1999 is still extant and is subsisting and is unaffected by the promulgation of Decree No. 62 of 1999.

2. Section 150(1) and (2) of the Evidence Act dealing with presumption of regularity will apply to the fiat given by the Attorney-General of the Federation to Mr Yusuf O. Ali even if he did not produce a copy of the said fiat in court.

Cases referred to in the judgment

Nigerian

A-G Kaduna v Hassan (1985) 2 NWLR (Part 8) 483


Nigerian statutes referred to in the judgment

Evidence Act (Cap 112) Laws of the Federation of Nigeria, 1990, section 150(1) and (2)
Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree No. 18 of 1994 (as amended), section 24

Counsel
For the first accused: Abdullahi
For the second accused: Akpocheyoubi

Judgment
BELLO J: This ruling is sequel to the notice of preliminary objection filed by the second accused person on 15 May, 2000. The objection is predicated on the following grounds:

1. The charge is incompetent as the proceedings were instituted and undertaken against the second accused person by person other than the Attorney-General of the Federation or official of his Department, to wit, Yusuf O. Ali Esquire (S.A.N.).

The second accused person sought to rely inter alia upon the following:

1. Section 174(2) of the Constitution of the Federal Republic of Nigeria, 1990 which requires that the public prosecution must be instituted by the Attorney-General of the Federation or officials of his Department.

2. Section 24 of the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree No. 18 of 1994 which allowed prosecution by all persons authorised by the Attorney-General has been repealed by Decree No. 62 of 1999 (Part 1 of the Schedule).


Now I have no intention whatsoever of reproducing the detailed arguments and submissions of the learned Counsel representing especially the complainant, the first and second
accused persons made for and against the preliminary objec-
tion, more so, as I viewed all the submissions of the learned
Counsel for the second accused as merely amplifying the
grounds of the objection already spelt out and the two
learned Counsel representing the first accused and the com-
plainant reacted accordingly.

It is worthy of note the fact that the learned Counsel for the
first accused in his own contribution conceded to the fact
that the case of Comptroller, Nigerian Prison Service v
Adekanye (cited supra) by the learned Counsel for the sec-
ond accused is to the effect that a private prosecutor who has
the fiat of the Attorney-General is competent to prosecute
cases on his behalf, quite contrary to the assertion of the
applicant’s Counsel. It is also for the same reason that the
learned Senior Advocate of Nigeria opposing the prelimi-
nary objection on behalf of the complainant, submitted that
the case of Adekanye supported the complainant’s case
rather than the applicant’s.

And having read the case myself I am entirely in agree-
ment with the two learned Counsel that Adekanye’s case did
not decide that the Attorney-General of the Federation can
grant a fiat to a private prosecutor such as was done in this
case. I refer in particular, to the last sentence at 177 of the
report where in his leading judgment Oguntade JCA said,
and I quote:—

“Let me say finally that this Court will be willing to recognise the
appearance of Mr Fidelis Nwadialo, S.A.N. as soon as he shows a
proper authorisation from the Attorney-General of the Federation.”

Luckily for us here the court is not concerned with the issue
of whether or not Yusuf O. Ali has the fiat of the Attorney-
General of the Federation, just as he rightly pointed out, that
issue has not been raised by the applicant/second accused.
His contention is that the Attorney-General of the Federation
can only mandate officers of his Department to prosecute
and not any other persons which include the present prose-
cutor, a contention which has been shown by the authority of
Adekanye (supra) and a plethora of other cases cited by the learned Counsel for the complainant, to be baseless in law.

Having said that, the Attorney-General can mandate a private prosecutor to prosecute cases on his behalf such as was done in this case and the fact that the fiat granted to the present prosecutor to prosecute this case has not been challenged or made an issue in this application it is needless for me to venture into the issue whether or not Yusuf O. Ali, S.A.N., has the mandate of the Attorney-General of the Federation to prosecute the accused persons herein. I am content to rely on the provisions of section 150(1) and (2) of the Evidence Act referred to by both Counsel for the first accused and the complainant dealing with a presumption of regularity even if the learned Counsel for the complainant did not produce a copy of the fiat before the court which he did any way even though it has not been properly filed in the court’s record.

I now consider the issue of the repeal of section 24 of the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree No. 18 of 1994 by Decree No. 62 of 1999 and its effects, if any, on the fiat earlier on granted by the Attorney-General of the Federation to the present prosecutor to prosecute the accused persons. Again, I find myself in total agreement with all the submissions of the learned S.A.N. to the effect that the fiat granted to him to prosecute the accused persons and the subsequent charge filed on 26 April, 1999 pursuant to section 24 of Decree No. 18 of 1994 is so far as it predates the amendment Decree No. 62 of 1999 which came into force on 28 May, 1999 is still extant and subsisting and is unaffected by the promulgation of Decree No. 62 of 1999.

In other words, the repealment of section 24 of Decree No. 18 of 1994 by Decree No. 62 of 1999 will not nullify or render otiose anything done under section 24 of the Decree. So the fiat earlier on granted by the Attorney-General of the Federation remains valid and subsisting. Consequently, I hold that Mr Yusuf O. Ali S.A.N. is competent to prosecute the accused persons in this case including the second
accused/applicant. It follows therefore that the charge being brought by a person duly authorised to do so by the Attorney-General of the Federation.

On the whole I hold that his preliminary objection lacks any merit. It is accordingly dismissed.

I make no order for cost.
Jimoh Agaro Owoeye v Wema Bank Limited

COURT OF APPEAL, ILORIN DIVISION
AMAIZU, OKUNOLA, ONNOGHEN JJCA

Date of Judgment: 28 SEPTEMBER, 2000

Facts

This is an appeal against the judgment of Fawehinmi J sitting at the Ikere-Ekiti Judicial Division of the High Court of Justice of the then Ondo State, in Suit No. HCR/15/82. In the suit, the plaintiff, now the respondent, claimed against the first defendant, Jimoh Agaro Owoeye, now the appellant:

"... the sum of ₦131,478.63 at 10 percent per annum interest from the date aforesaid until payment or judgment and at 5 per centum per annum interest from judgment till payment."

The respondent’s case was that it was a licensed banker with headquarters in Lagos. It had a branch office at Inipan Street, Igbara-Odo, Ekiti. The appellant was, at the time relevant to this case, a businessman. He was a current account customer of the respondent bank at Igbara-Odo. In 1979, he applied for a loan of ₦50,000 with which to run his business, Exhibit A. Although there was no document to show that the loan was approved, the appellant drew on it. Eventually, he became indebted to the bank to the tune of ₦131,478.63k, that is, principal and interest. The appellant refused or neglected to pay the said sum despite repeated demands hence the present action against him.
The appellant admitted that he applied for a loan of N50,000 per Exhibit A. He added that the application was not approved. According to him, he withdrew from his account a sum under N20,000 at various times until he discovered that the second defendant was withdrawing money from the account without his knowledge and consent. He stopped running the account.

He admitted that he received a letter from the respondent, Exhibit G, demanding payment of the sum of N127,665.37 being the loan plus interest thereon in respect of his account with the respondent’s branch at Igbara-Odo, Ekiti.

At the close of the trial and after addresses by the learned Counsel for the parties, the learned trial Judge entered judgment for the respondent as per its claim.

The appellant was dissatisfied with the said judgment and appealed to the Court of the Appeal.

**Held –**

1. The law regulating banking in Nigeria is a specie of law of contract. It follows that for a contract to exist between a bank and its customer there must be an offer and an acceptance of that offer.

2. If a customer of a bank draws a cheque when he does not have sufficient funds to meet the withdrawal and the cheque is honoured by the bank in spite of the insufficiency of funds, it amounts to an approval of an overdraft by the bank to the customer of the excess above the funds in the customer’s account.

3. A cheque is the machinery by means of which a current account customer in a bank makes use of the money that he has with the bank.

4. It is not in dispute that the procedure followed in issuing and withdrawing money in the instant case are normal banking procedures. In the face of substantial compliance with steps normally taken by banks in the issue of
a. Cheques and withdrawals of money by cheques, the Lower Court rightly reached its decision.

5. A ledger card or a statement of account like Exhibit C is only a method of proof by a bank and not a defence by the bank.

Appeal dismissed.

c. Cases referred to in the judgment

Nigerian

Barclays Bank DCO Ltd v Hassan (1961) 1 All NLR 836

Dumez (Nig.) Ltd v Ogboli (1972) 1 All NLR (Part 1) 241

George v Dominion Flour Mills (1963) 1 SCNLR 242; (1963) 1 All NLR 71

Olasehinde v A.C.B. Ltd (1990) 7 NWLR (Part 161) 180

Owena Bank (Nig.) Ltd v Akintuyi (1992) 8 NWLR (Part 259) 347

Quo Vadis Hotels v Maritime Services (1992) 6 NWLR (Part 250) 653; (1992) 7 SCNJ (Part 1) 172


Union Bank of Nigeria Ltd v Ozigi (1991) 2 NWLR (Part 176) 677

Usman v Garke (1999) 1 NWLR (Part 587) 466

d. Counsel

For the appellant: Adedeji

For the respondent: Jejilola

i. Judgment

AMAIZU JCA: (Delivering the lead judgment) This is an appeal against the judgment of Fawehinmi J sitting at Ikere Ekiti Judicial Division of the High Court of Justice of the then Ondo State, in suit HCR/15/82. In the suit, the plaintiff,
now the respondent, claimed against the first defendant, Jimoh Agaro Owoeye, now the appellant:

"... the sum of ₦131,478.63K at 10 percent per annum interest from the date aforesaid until payment or judgment and at 5 percent per annum interest from judgment till payment."

Pleadings were filed and duly exchanged by the parties. Before the commencement of trial, the appellant filed a motion on notice in which he prayed the lower court for an order joining one Abiodun Ayansola as a co-defendant in the suit. The said Anyansola was the manager of the respondent bank at Igbara-Odo branch, at the time relevant to this case. The application was granted. Abiodun Ayansola thereafter filed a statement of defence as the second defendant. The appellant filed an amended statement of defence after the second defendant joined. The trial proceeded thereafter.

At the trial, only one witness gave evidence for the respondent. He is Fidelis Akinyode Bankole Bello. He was a cashier at Igbara-Odo branch of the respondent bank at the time of the transactions which gave rise to this suit. At the time he gave evidence, he was an accountant.

The respondent’s case is that it is a licensed bank with headquarters in Lagos. It has a branch office at Inipan Street, Igbara-Odo, Ekiti. The appellant was, at the time relevant to this case, a businessman. He was a current account customer of the respondent bank at Igbara-Odo. In 1979, he applied for a loan of ₦50,000 with which to run his business, exhibit A. Although there is no document to show that the loan was approved, the appellant drew on it. Eventually he became indebted to the bank to the tune of ₦131,478.63k, that is, principal and interest. The appellant refused or neglected to pay the said sum despite repeated demands hence the present action against him.

The appellant admitted that he applied for a loan of ₦50,000 per Exhibit A. He added that the application was not approved. According to him, he withdrew from his account a sum under ₦20,000 at various times until he discovered that the second defendant was withdrawing money
from the account without his knowledge and consent. He stopped running the account.

He admitted that he received a letter from the respondent, Exhibit G, demanding payment of the sum of N127,665.37 being the loan plus interest thereon in respect of his account with the respondent branch at Igbara-Odo, Ekiti. He immediately instructed his lawyer to reply to the letter, Exhibit H, denying the indebtedness. The witnesses that testified on the appellant’s behalf told the court that, when the inspectors came to Igbara-Odo branch of the respondent bank to check the records of the branch, they gave the second defendant all the assistance he needed to balance his books. DW1 testified that the second defendant asked him for a loan of N20,000. He could not lend him the money. He took the second defendant to the house of the then chairman of the respondent in order to plead with him not to sack the second defendant. The chairman, however, told them that a decision had been taken on the second defendant and that their request was late. The other defendant claimed that he gave the second defendant a cheque for N3,600, Exhibit K, to help him balance his books. He later stopped the cheque.

On the other hand, the second defendant denied manipulating the appellant’s account or withdrawing money therefrom. He confirmed that the appellant applied for a loan of N50,000. He gave as a security for the loan Exhibit B (the title deeds relating to his landed property). He sent the application through their Akure branch to the head office in Lagos. In anticipation of approval, he was instructed by the area manager at Akure to release funds to the appellant whenever there was allocation of motor cycles to him by his customers. In addition, the appellant was allowed to cash over the counter his Igbara-Odo cheques at the Akure branch of the respondent bank. He identified Exhibits D–D9 as advice slips in respect of cheques cashed by the appellant at Akure, which were sent to Igbara-Odo branch office for entry in the appellant’s ledger.
At the close of the trial and after addresses by the learned Counsel for the parties, the learned trial Judge in a reserved judgment held as follows:

“From the evidence before me, the second defendant ought not to have been made a co-defendant and having been so made, I will strike his name out of the proceedings.

... 

As between the plaintiff bank and the first defendant, I rely on Exhibits A, B, C, D–D9, E–E4 and J to find for the plaintiff bank in their claim.”

The appellant was dissatisfied with the above judgment. He appealed to this Court. He filed seven grounds of appeal. In accordance with the rules of this Court, the parties through their Counsel filed and exchanged briefs of argument wherein they identified issues for determination arising from the grounds of appeal. The appellant identified the following issues for determination, namely:

**Issue 1**: Whether it was right in law for the learned trial Judge to find in favour of the plaintiff when the plaintiff failed to tender in evidence the cheques for the sum of N77,000 said to have been sent by the Akure branch to the Igbara-Odo branch, any document approving the grant of overdraft facilities for that amount and also the legal bill for this action and its demand note by the bank to the defendant.

**Issue 2**: Whether the learned trial Judge was right in law in admitting Exhibits D–D9 in evidence and basing its judgment on them when they were not pleaded by the plaintiff and the first defendant did not sign them and they were tendered solely against him.

**Issue 3**: Whether the learned trial Judge has properly weighed the plaintiff’s evidence against that of the first defendant before arriving at his decision.

**Issue 4**: Whether on the facts and on the evidence the second defendant was not a necessary party in the case and whether the plaintiff could benefit from the delicts of its own agent.
Issue 5: Whether it was right in law to have awarded costs of N250 or any costs at all in favour of the second defendant when the court has found him guilty of wrongdoing which the first defendant alleged was the root cause of this action.

The learned Counsel for the respondent also formulated five issues. Because of the similarities of the said issues with the issues formulated by the appellant, I do not consider it necessary to reproduce them here.

When the appeal came up before us for hearing, the learned Counsel for the parties adopted their respective briefs and relied on the submissions contained therein. Adedeji, Esq., of Counsel urged the court to allow the appeal and set aside the judgment of the lower court. Jejiola, Esq., of Counsel submitted an additional authority to wit Deacon JK Oshatoba and others v Chief John Olajutan and others (2000) 5 NWLR (Part 655) 159; (2000) 2 SCNJ 159 in respect of issue 5. He referred to the provisions of section 220(2) of the 1979 Constitution of the Federal Republic of Nigeria and contended that it is mandatory to seek leave of the court before appealing against an award of costs. He urged the court to dismiss the appeal and uphold the judgment of the lower court.

I shall now proceed to consider the appeal based on the above issues formulated by the learned Counsel for the appellant.

On issue 1, Adedeji, Esq., of Counsel, referred to the statement of claim filed by the respondent in the lower court. In particular, he referred to the relief sought by the respondent to wit:

“... the sum of N131,478.63K at ten per cent per annum interest from the date aforesaid until payment and at five per cent per annum interest from judgment till payment”

and the avermnt in paragraph 7 thereof that the plaintiff will, at the trial, tender all papers including the statement of account, letters and any necessary document relevant to the course of dealings between plaintiffs and the defendant.
The learned Counsel observed that the respondent did not tender the alleged letter of approval given by the respondent in respect of the alleged loan of ₦50,000 to the appellant. It is his view that the respondent should have tendered the document because the appellant in his amended statement of defence denied that the respondent ever approved his application for an overdraft. The learned Counsel contended that he who asserts must prove. He referred to sections 135 and 136 of the Evidence Act. He contended that it is for the respondent to prove that the overdraft was granted.

The learned Counsel referred also to the sum of ₦77,000 which was allegedly withdrawn by the appellant at various times by cheques at the Akure branch of the bank. The said cheques were later returned to the Igbara-Odo branch of the respondent and the value therein debited to the appellant’s account. He observed that the cheques were not tendered in evidence, even though the cheques were in the custody of the respondent. It is the learned Counsel’s contentions that the cheques should have been produced to enable the appellant to confirm or deny the signatures on them. This, according to the learned Counsel, is more so as the appellant denied ever collecting money from the Akure branch with his Igbara-Odo cheques.

Finally on this, the learned Counsel referred to the evidence of the witness called by the respondent that:

“We have included the cost of this present litigation in Exhibit C as being a debt against the first defendant.”

He observed that the “bill for the litigation was not sent to the defendant”. He urged the court to expunge that part of the claim.

In his reply, Jejilola, Esq., of Counsel urged the court to answer issue 1 in the affirmative. It is his view that there were sufficient and material evidence, both documentary and oral, in support of the respondent’s claim. It is the learned Counsel’s view that the respondent should not be expected to prove admissions made in the pleadings by the
appellant. To this end, the learned Counsel referred to part of the evidence of the second defendant, i.e.:–

“During my tenure of office first defendant operated current account No. 161 with the bank and in the course of the operation of the account, he asked for an overdraft of $50,000. The application was sent through our Akure branch to our Head Office in Lagos, pending the determination of his application the Area Manager Akure instructed the release of funds to the first defendant whenever there was allocation of motor cycles to him from Bolus Enterprises . . . The bank’s branch at Akure obliged him to honour cheques issued by the first defendant.”

The learned Counsel observed that this piece of evidence was not challenged by the appellant. He referred to the case of Mallam Hamidu Musa and others v Alhaji Yahaya Kefas Yerima and another (1997) 7 NWLR (Part 511) SC 27; (1997) SCNJ 109 at 123. It is the learned Counsel’s view that the respondent discharged the burden of proof placed on it. He observed that the appellant did not challenge the contents of Exhibits C and F.

Jejilola, Esq., of Counsel, referred to the serial numbers of the cheques recorded in Exhibits E–E4 and observed that they were the same cheques issued to the appellant at Igbara-Odo branch. He contended that Exhibits D–D9 showed that the appellant withdrew the amount stated in the cheques. It is his view that Exhibit F corroborated that fact.

The learned Counsel submitted that the contention by Adedeji, Esq., of Counsel, that the appellant should have been shown the cheques in order to confirm his signatures thereon had no basis.

The learned Counsel referred to Exhibit B and in particular to paragraph 1 thereof. He submitted that under the terms of the agreement the respondent was entitled to the cost of litigation. He relied on the case of Calabar Cement Co Ltd v Daniel (1991) 4 NWLR (Part 188) 750 at 760. He urged the court to dismiss the appeal.

It is common ground that the respondent is a licensed bank and the appellant one of its current account customers. It is
trite that the law that regulates banking in Nigeria is a specie of the law of contract. It follows that for a contract to exist between a bank and its customer there must be an offer and an acceptance of that offer.

In the present case, it is common ground that the appellant applied for an overdraft of N50,000. In the letter of application for the overdraft, Exhibit A, he expressed an intention to secure the proposed overdraft with the title deeds to his property, exhibit B. It is not in dispute that it is only the approval of the application by the respondent that would seal the agreement between the parties. There was no evidence before the lower court that such an approval had been given. The question then is, what is the effect of the absence of evidence of approval of the application by the respondent on the relationship between the parties? In other words, is there any enforceable contract between the parties?

It is important to mention here that if a customer of a bank draws a cheque when he does not have sufficient funds to meet the withdrawal and the cheque is honoured by the bank in spite of the insufficiency of funds, it amounts to an approval of an overdraft by the bank to the customer of the excess above the funds in the customer’s account (see Union Bank of Nigeria Ltd v Professor Albert Ojo Ozigi (1991) 2 NWLR (Part 176) 677).

In the present case there is evidence of an application by the appellant for an overdraft facility of N50,000 (see Exhibit A). The question is: Was the application approved? Exhibit C, the statement of account of the appellant, shows the withdrawals made by the appellant during the period relevant to this suit. If, therefore, there is evidence that the respondent honoured cheques issued by the appellant in excess of the funds in his account then there is an approval, though tacit, of the overdraft. Did the appellant overdraw his account? Before I answer the question I will digress a bit. A cheque is the machinery by means of which a current account customer in a bank makes use of the money, which he
has with the bank. I have earlier in this judgment referred to
the appellant’s statement of account, Exhibit C. Exhibits E–
E4 show that five cheque books were issued to the appellant
respectively on 6 August, 1980, 1 September, 1980, 26 June,
1980, 11 November, 1980 and 14 April, 1980. It is in evi-
dence that the appellant is in possession of the stumps of the
above cheques.

Exhibits D–D9 are advice notes of the alleged withdrawals
made by the appellant in the respondent bank at Akure. A
cursory look at Exhibits D–D9 shows that the cheques re-
corded therein bear the same numbers with the cheques
issued to the appellant at Igbara-Odo branch of the respon-
dent as per Exhibits E–E4.

It is not in dispute that the procedure followed in issuing
and withdrawing money in the instant case are normal bank-
ing procedures. Under section 149 of the Evidence Act:–

“The Court may presume the existence of any fact which it thinks
likely to have happened, regard being had to the common course
of natural events, human conduct and public and private business,
in their relation to the facts of the particular case, and in particular
the court may presume:–

(c) that the common course of business has been followed in
particular cases.”

I am aware that the appellant averred in the statement of
defence that the second defendant manipulated his account.
It is my view that the appellant should have, in addition,
pleased facts that render Exhibit C and other documents
rendered in the lower court unenforceable against him. In the
absence of such averment, it was not open to the lower court
to consider such facts (see Barclays Bank DCO Ltd v Has-
san (1961) 1 All NLR 836–849). Related to this, is the fact
that neither forgery nor fraud was pleaded or proved. On the
authority of George and others v Dominion Flour Mills
(1963) 1 SCNL 242; (1963) 1 All NLR 71, the lower court
was therefore right in not declaring Exhibits C, E–E4 etc
false or fictitious.

In the face of substantial compliance with steps normally
taken by banks on the issue of cheques and withdrawal of
money by cheques it is my view that the lower court rightly reached its decision. I am aware of the decision in the case of Owena Bank (Nigeria) Ltd v Adejumo Edmund Akintuyi (1992) 8 NWLR (Part 259) 347 that a ledger card or a statement of account like Exhibit C is only a method of proof by a bank and not a defence by the bank. The facts of the present case are however very much different from the facts of the case of Olasehinde v A.C.B. Ltd (1990) 7 NWLR (Part 161) 180. The inference drawn by the lower court that the appellant withdrew the money shown in Exhibits D–D9 is correct. In that case and for the reasons I have given earlier, there was an implied approval of Exhibit A.

Finally I refer to the evidence of the respondent that the costs of the present litigation was included in Exhibit C. A cursory look at Exhibit C shows that the statement is not true as it affects the present claim. The present claim is in respect of the account of the appellant as at 24 April, 1982. The inclusion of costs of litigation in Exhibit C was made in 1987. In the light of the observation, I do not consider it necessary to comment on the submission.

In a civil action the standard of proof is on preponderance of evidence. Consequently, a plaintiff should adduce evidence which ought reasonably to satisfy a court that the fact sought to be proved is established.

In the present case as it was not suggested that the entries in Exhibits C, E–E4 and D–D9 were false or forged, there was no need to tender the cheques referred to in the exhibits. For the reasons I have given earlier in this judgment the exhibits tendered by the respondent were enough to prove his case.

On issue 2, Adedeji, Esq., of Counsel, referred to the statement of claim filed in the lower court. He observed that the respondent did not aver in the pleading that there was any transaction between it and the appellant at Akure branch of the respondent, which gave rise to Exhibits D–D9. It is his view that the respondent should have given notice of the
alleged transaction in its pleadings. In support he referred to the case of *Adejumo and others v Governor of Lagos State* (1971) All NLR 454 in which it was held that the golden rule is not to spring surprise on your adversary. The learned Counsel relied also on the case of *Idahosa v Oronsaye* (1959) SCNLR 407; (1959) 4 FSC 166 at 177. Finally, the learned Counsel submitted that the lower court speculated on how Exhibits D–D9 came into existence and should not have based its judgment on them. He relied on the following cases: *Ugochukwu v Co-operative and Commerce Bank Ltd* (1996) 6 NWLR (Part 456) 524; (1996) 7 SCNJ 22 at 35; *Ojiako v Ewuru* (1996) 9 NWLR (Part 420) 460; (1995) 12 SCNJ 79 at 90.

In his reply, *Jejiola*, Esq., of Counsel submitted that the learned Judge was right in admitting Exhibits D–D9 in evidence and also in basing his judgment on them. It is his view that the respondent at page 3 pleaded the documents, paragraph 30 of the record of proceedings. He contended that the provisions of sections 6, 7 and 8 of the Evidence Act are in favour of the respondent in this regard.

It is trite that the aim of pleadings is to set out clearly the facts on which the parties rely for their case. Thus, pleadings must only contain the facts on which the parties rely. The facts as pleaded must be concise and unambiguous (*Alhaja Buba Usman v Mohammed Garke* (1999) 1 NWLR (Part 587) 466). In this light, I refer to paragraph 7 of the statement of claim. It reads thus:

“*The plaintiffs will, at the trial, tender all papers including the statement of account, letters and any necessary document relevant to the course of dealings between the plaintiffs and the defendants.*”

The question then is, does the averment cover Exhibits D–D9? I think it does. In any case, if the averment is not very explicit, the rule is that, if a plaintiff fails to set out in descriptive detail the particulars of documents he wishes to tender in his statement of claim, there is nothing to prevent a defendant from asking for further and better particulars of
the documents pleaded in the statement of claim. If a defendant fails to ask for such particulars, a plaintiff is entitled to give evidence at the trial of any document supporting the averment.

In the light of the foregoing, it is my view that the lower court was right in admitting Exhibits D–D9 in evidence as they were covered by paragraph 7 of the statement of claim.

On Issue 3, Adedeji, Esq., of Counsel, submitted that in a civil case a judgment is based on preponderance of evidence. In this regard the learned Counsel referred to the relief of N131,478.68k sought by the respondent. It is his view that the respondent should have proved how it became entitled to every kobo of the money. He cited the case of Balogun v U.B.A. Ltd (1992) 6 NWLR (Part 247) 336; (1992) 7 SCNJ 61.

The learned Counsel referred to the evidence of the only witness of the respondent that:

“We have included the cost of this present litigation in Exhibit C as being a debt against the first defendant.”

He observed that the amount charged the respondent in respect of the present litigation was not stated in the pleadings. There is no proof that the amount has been paid by the respondent to its solicitor. He contended that this relief should have been proved strictly as a special damage. It is his view that it cannot be said that the respondent proved the claim with certainty.

The learned Counsel observed that the amount allegedly granted to the appellant as an overdraft has not been proved. He contended that a party is bound by his pleadings. He cited the case of Spasco Vehicle and Plant Hire Co v Alraine (Nigeria) Ltd (1995) 8 NWLR (Part 416) 685; (1995) 9 SCNJ 299. It is further the learned Counsel’s view that the learned trial Judge should not have believed the evidence of the only witness called by the respondent because of the contradiction in his evidence as it affects the amount of the alleged loan granted to the appellant. He cited the case of
Finally, it is his view that the district manager of the respondent bank in charge of Akure at the time of the alleged loan, the inspectors that checked the books of the respondent at Igbara-Odo should have been called to give evidence in view of the non-production of Exhibits D–D9 at the trial. He cited *A.C.B. Ltd (Calabar) v J.O. Agbanyim* (1960) SCNLR 57; (1960) 5 FSC 19; *Quo Vadis Hotels v Maritime Services* (1992) 6 NWLR (Part 250) 653; (1992) 7 SCNJ (Part 1) 172 at 180.

He urged the court to allow the appeal.

In his reply, Jejilola, Esq., of Counsel, submitted that the learned trial Judge was right in awarding the cost of litigation in respect of this suit to the respondent. The learned Counsel referred to paragraph 1 of Exhibit B to justify his contention. The cost of the litigation was not stated in the pleading. It is his view that, as the terms of contract between the parties were clear and unambiguous, and the parties signed the document, the parties were bound by its content. He cited the case of *Calabar Cement Co Ltd v Daniel* (1991) 4 NWLR (Part 188) 750 at 760.

I do not think that Jejilola, Esq., of Counsel, understood the submission of the learned Counsel for the appellant in respect of the relief for the cost of the present litigation, which he claimed, was granted by the lower court.

It is his submission that the claim should be proved strictly as a special damage. He observed that no evidence was led to show that the respondent paid any solicitor any amount for this suit. It is his view that the lower court should not have allowed the claim.

I agree with the learned Counsel that it is axiomatic that special damages must not only be specially pleaded but must be strictly proved. It is unlike general damages where, if a plaintiff establishes in principle his legal entitlement to
them, a trial Judge must make his own assessment of the quantum of such a general damage (see Messrs. Dumez (Nigeria) Ltd v Patrick Ogboli (1972) 1 All NLR 241 at 249).

I have earlier in this judgment observed that the sum of ₦131,478.68k claimed and granted by the lower court did not include the cost for this litigation. It only reflects the indebtedness of the appellant as at 24 April, 1982. The cost of litigation appeared in Exhibit C as from 1987. I have also held that the evidence adduced in the lower court, including the exhibits tendered before it, are enough to find the appellant liable for the sum claimed by the respondents (see my earlier comments). The contention of Adedeji, Esq., of Counsel, does not arise, as the lower court did not include the cost of litigation in its judgment.

In respect of issue 4, Adedeji, Esq. of Counsel, referred to part of the judgment of the lower court which reads:–

“From the evidence before me the second defendant ought not to have been made a co-defendant and having been so made, I will strike his name out of the proceedings.”

The learned Counsel referred to paragraph 3 of Exhibit H, which linked the second defendant to the present suit. It is his view that the second defendant was a necessary party. He cited the case of Benson Akintola Sumola Ige v Alhaji A. Akinyemi and others (1998) 7 NWLR (Part 557) 281; (1994) 7–8 SCNJ 284 at 300. He contended that the learned trial Judge had no jurisdiction to sit on appeal on the order made by his learned brother that the second defendant should be joined as a co-defendant. He cited the case of Chidiak v Laguda (1964) N.M.L.R. 123 at 125.

He observed that the second defendant was the manager at Igbara-Odo branch of the respondent bank at the relevant time and that the second defendant exceeded his powers in granting the overdraft of ₦50,000. It is his view that the second respondent should be responsible for what he did in excess of his powers. He cited the case of A.C.B. Ltd v Agbanyim (1960) SCNLR 57; (1960) 5 FSC 19.
He contended that if the lower court had treated the second defendant as the agent of the respondent, the court would have dismissed the claim against the appellant. He urged the court to allow the appeal.

In his reply, Jejilola, Esq., of Counsel, contended that the second defendant was an agent of the respondent. It was therefore superfluous to add him as a party. It is his view that the role of the second defendant vis-à-vis that of the respondent in this case is akin to that of master and servant. He cited the case of Niger Progress Ltd v N.E.L Corporation (1989) 3 NWLR (Part 107) 68 at 92. He referred to the unchallenged evidence of the second defendant:

"I obeyed the instruction passed to me by the Area Manager at Akure that pending the approval of the first defendant’s application for an overdraft I should assist him by giving him overdraft on demand by him."

It is his view that the case of A.C.B. Ltd v Agbanyim (supra) cited by the appellant is not relevant.

It is trite that a court has jurisdiction to join a person whose presence is necessary for the disposition of a suit. The only reason, however, which makes it necessary to make a person a party to an action is that he should be bound by the result of the action. In that case, the question to be settled must be a question in the action, which cannot be effectively and completely settled unless the person is a party.

In the present suit, the second defendant is an employee of the respondent. There is no claim against him. In addition, the appellant did not counter-claim. Ordinarily the respondent as an employer of the second defendant is vicariously liable for his wrongful act committed in the course of his duty. What then is the rationale for joining him as a second defendant?

I observe that the courts are always reluctant to join as a party in a suit a person who a plaintiff does not want to sue. In the circumstances of the present suit I am of the firm view that the lower court was right in holding that the second defendant should not have been made a party in the suit.
Even if the lower court was in error in holding that the second defendant should not have been made a co-defendant, it is my view that the error did not affect its judgment.

On issue 5, Adedeji, Esq., of Counsel, observed that costs are at the discretion of the court. It is his view that an award of costs in each case follows the circumstances of each case. He referred to the findings of the lower court that the second defendant was deeply involved in the manipulation of the appellant’s account. It is his view that in that case the learned trial Judge should not have awarded costs against the appellant in favour of the second defendant.

In his reply the learned Counsel for the respondent submitted that the provisions of section 220(2) of the 1979 Constitution of the Federal Republic of Nigeria was not complied with before the appellant raised issue 5. He urged the court to strike it out. He cited the case of Deacon J.K. Oshatoba and another v Chief Johnson Olujutan and others (2000) 5 NWLR (Part 655) 159; (2000) 2 SCNJ 159.

It is the rule that a successful party is entitled to his costs and it is only for special reason(s) which must be stated that a court could deprive a successful party of such costs.

In the present case, the lower court found that the second defendant was not in any way liable for the whole or part of the sum claimed against the appellant. It follows, in my view, that the second defendant should not have been joined as a party in the suit. He is therefore entitled to some costs. In the light of the above, there is no need to delve into the provisions of section 220(2) of the 1979 Constitution of Nigeria and the related cases.

In the light of the foregoing, the appellant has failed in all the five issues formulated in his brief of argument. Consequently, the appeal fails. Appeal is dismissed. I make no order as to costs.

Okunola JCA: I have had the benefit of reading in draft the leading judgment just read by my learned brother,
Amaizu JCA. My learned brother has succinctly considered all the salient points raised in the said appeal. I agree with his reasoning and conclusion that the appeal lacks merit and same should be dismissed. I also hereby dismiss the appeal.

I abide by all the consequential orders made in the lead judgment including the order as to costs.

ONNOGHEN JCA: I have had the opportunity of reading in draft the lead judgment of my learned brother, Amaizu JCA, just delivered.

I agree with his reasoning and conclusion that this appeal lacks merit and should be dismissed.

I accordingly dismiss same and abide by the consequential orders made in the said lead judgment of my learned brother, Amaizu JCA, including the order as to costs.

Appeal dismissed.
Francis Ejiogu and others v Nigeria Deposit Insurance Corporation

Bankers acceptance facility – Features of Banking – Loan – Borrower complaining of inability to pay because of non-payment by his customer – Whether a defence

Failed bank – Action on behalf of – Who can bring – Section 11(1) of the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree No. 18 of 1994 (as amended)

Failed bank – Nigeria Deposit Insurance Corporation – Locus standi of in recovery of debt owed to a failed bank

Guarantor – Obligation of – Admission of liability by guarantor – Effect

NDIC – Locus standi of in recovery of debt owed to a failed bank

Facts

This is an appeal against the judgment of the Zone 2, Failed Banks Tribunal, Lagos per Ope-Agbe J delivered on 22 August, 1997 in Suit No. FBFM/L/ZII/34/96. The respondent, as applicant, claimed against the respondents, now the appellants, jointly and severally the sum of N21,139,612.24 as at 31 May, 1996 being the balance of an unliquidated facility granted to the fourth respondent, plus interest at the rate of 21% then lending rate from 1 June, 1996 till judgment; thereafter at 6% till the entire sum is liquidated.

The respondents filed their amended reply dated 4 February, 1997 to the application. With the exchange of pleadings, the application was heard and judgment entered in favour of
the applicant as per its claim. Dissatisfied the respondents have appealed to this Court.

Arguing the appeal, appellants’ Counsel contended inter alia that Nigeria Deposit Insurance Corporation had no locus standi to bring the action and that the loan was not a banker’s acceptance facility.

**Held** —

1. By the provisions of section 11(1) of the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree No. 18 of 1994, two categories of persons can bring an application on behalf of a bank which has been declared “failed” by the Central Bank of Nigeria. These categories are:
   
   a. a receiver/liquidator of failed bank; or
   
   b. where there is no receiver, any person appointed by the Central Bank of Nigeria or the Nigeria Deposit Insurance Corporation.

2. The respondent is a creation of a statute. It is a statutory body. The Central Bank of Nigeria, by the provision of Decree No. 18 of 1994, can appoint a statutory body of its choice to recover debt owed by a failed bank managed by the respondent. By the provision of section 11(1) of Decree No. 18 of 1994 the Central Bank of Nigeria is not restricted from appointing the respondent to institute an action to recover a debt owed to a failed bank.

**Per curiam**

“Giving section 11(1) of Decree No. 18 of 1994 wider interpretation rather than a restrictive or narrow interpretation, it would be seen that this section does not restrict the Central Bank of Nigeria from appointing the respondent, who are the managers of the failed bank (Progress Bank of Nigeria Plc) to institute an action to recover a debt owed to the said failed bank, that is, Progress Bank of Nigeria Plc.”

3. In deciding whether the respondent has judicial powers to institute an action, the question that needs to be asked is, who will be failing in its obligation, its rightful
discharge of its duties, if the debt owed the bank by the fourth appellant is not recovered. The principle governing the question of judicial powers (in other words *locus standi*) in any given action was established by the Supreme Court.

**Per curiam**

“The bank, which affairs the respondent was to manage, was already a failed bank. It was ineffective. It could not discharge its obligation to its numerous depositors. It has failed in its duty as a bank. The respondent, as an insurer of the depositors has the obligation to ensure that the depositors are duly indemnified. When the fourth appellant failed to liquidate its debt owed the failed bank, it was the responsibility of the respondent to indemnify and compensate the depositors. Hence it will be failing in its duty as an insurer of the depositors’ money if the debt owed by the fourth appellant is not recovered.

The respondent has *locus standi* to institute the action at the lower tribunal.”

4. Where a borrower takes money to execute an unpaid contract it is not the business of the lender whether he was paid or the job executed or not.

5. A banker’s acceptance facility is a short-term loan. It does not require any draw-down, therefore it does not require opening of any account.

6. The obligation imposed upon a guarantor is to settle the amount involved to the judgment creditor only if the judgment debtor fails or is unable to pay the debt.

7. Admission of liability by the guarantors discharges the respondent of the burden of proof.

*Appeal dismissed.*

**Cases referred to in the judgment**

**Nigerian**

*A-G Kaduna State v Hassan (1985) 2 NWLR (Part 8) 483*
Francis Ejiogu v. Nigeria Deposit Insurance Corporation 695

a Adesanya v The President (1981) 5 SC 112; (1981) 2 NCLR 358

Adimora v Ajufo (1988) 3 NWLR (Part 80) 1

b Alpha Allied Nigeria Ltd v NDIC (1999) 1 N.B.L.R. 72

Balogun v Labiran (1988) 3 NWLR (Part 80) 66

Cardoso v Daniel (1986) 2 NWLR (Part 20) 1

c Engineering Enterprises Ltd v A-G, Kaduna State (1987) 2 NWLR (Part 57) 381

Hydro-Quest (Nig.) Ltd v B.O.N. Ltd (1994) 1 NWLR (Part 318) 41

d Ilesha L.P.A. v Olayide (1994) 5 NWLR (Part 342) 91

Jobi v Oshilaja (1963) 1 All NLR 12

Mogaji v Odofin (1978) 4 SC 91

e Mojekwu v Mojekwu (1997) 7 NWLR (Part 512) 283

Nsirim v Omuna Construction Co Ltd (1994) 1 NWLR (Part 318) 1

f N.U.H.P.S.U. v Imo Concorde Hotels Ltd (1994) 1 NWLR (Part 320) 306

Nwokafar v Udegbe (1963) 1 All NLR 104

Odulaja v Haddad (1973) 11 SC 357

g Olufosoye v Olorumfemi (1989) 1 NWLR (Part 95) 26

Omoregbe v Lawani (1980) 3-4 SC 108

Onah v State (1985) 3 NWLR (Part 12) 236

h Omuaguluchi v Ndu (2000) 11 NWLR (Part 679) 519

Onyekaonwu v Ekwubiri (1966) 1 All NLR 32

Oteju v Oluguna (1992) 8 NWLR (Part 262) 752

i Nigerian statute referred to in the judgment

Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree No. 18 of 1994 (as amended), section 11(1)
Counsel

For the appellants: Ejikonye

For the respondent: Ogadi

Judgment

GALADIMA JCA: (Delivering the lead judgment) This is an appeal against the judgment of Ope-Agbe J delivered on 22 August, 1997, sitting at Lagos Zone II of the Failed Banks Tribunal in Suit No. FBFM/L/ZII/34/96. The respondent, as applicant, claimed against the respondents, now the appellants, jointly and severally the sum of N21,139,612.24 as at 31 May, 1996, being the balance of an unliquidated facility granted to the fourth respondent, plus interest at the rate of 21%, the then lending rate from 1 June, 1996 till judgment; thereafter at 6% till the entire sum has been liquidated.

The respondents filed their amended reply dated 4 February, 1997 to the application. With the exchange of pleadings, the application was heard and judgment entered in favour of the applicant as per its claim.

Dissatisfied, the respondents have appealed to this Court on ten grounds. As usual briefs were filed and exchanged.

The appellants formulated nine issues for determination as follows:

1. Whether the application for the recovery of debt brought by and in the name of the respondent as managers of Progress Bank of Nigeria Plc (the bank) is competent.

2. Whether on the preponderance of evidence before the lower tribunal the respondent established its case that the N6.8 million used in executing the contract was a Banker’s Acceptance (‘B.A.’) facility granted to the fourth appellant on 30 April, 1991 based on Exhibit A and the fourth appellant is liable on the alleged facility to the tune of N21,139,612.24 as at 31 May, 1997.

3. Whether the first, second and third appellants are liable to the respondent under the guarantees Exhibits ‘B–B1’, ‘C–C1’ and ‘D–D1’.
4. Whether all necessary parties to the action were before the lower tribunal and whether the lower tribunal took the proper view of or course with respect to the application, filed on the 16 January, 1997.


6. Whether any pieces of evidence before the lower tribunal, particularly Exhibits ‘O’, ‘P’, ‘J’, ‘K’ and ‘Q’ gave rise to any presumptions of law, inferences and/or conclusions which the learned Chairman of the lower tribunal ought to have made, drawn and or reached but failed to.

7. Whether the parties did join issues on any of the facts found by the learned Chairman of the tribunal to be undisputed and whether these findings are supported by the evidence before the lower tribunal.

8. Whether the delivery of the judgment of the lower tribunal more than 21 working days from the day of its first sitting on the matter occasioned a miscarriage of justice.

9. Whether the appellants were given a fair hearing by the lower tribunal.”

Counsel for the respondent formulated the following seven issues for determination:

“(i) Whether the respondent has the locus standi to bring an action to recover the funds in question?

(ii) Whether the lower tribunal made a correct approach to the evidence in arriving at its decision?

(iii) Whether there ever existed a joint venture agreement between the fourth appellant, PBN trustees and the respondent or any other party with regard to the loan facility granted the fourth appellant by Progress Bank Nigeria Plc?

(iv) Whether the loan facility granted the fourth appellant company by Progress Bank of Nigeria Plc is a Banker’s Acceptance facility or not?

(v) Whether all necessary parties to the action were before the lower tribunal?

(vi) Whether the first, second and third appellants were liable to the respondent as guarantors of the loan facility?
(vii) Whether the delivery of the judgment of the lower tribunal outside 21 working days occasioned a miscarriage of justice.”

Before I proceed to consider these issues, there is procedural aspects of the briefs filed by the parties. First, I must observe that the appellants’ issues are unnecessarily proliferated. So also is my observation in the number of issues identified by the learned Counsel for the respondent.

My observations above apart, the issues formulated by the respective Counsel in the brief of argument are not properly identified. Where some speculations have to be done, that is not good for this Court. Although the Rules of the Court of Appeal do not provide that issues formulated should be identified on top of the relevant argument or arguments, I am of the opinion that it is ideal and necessary to do so; when this is done, it makes it easy for the issues to be identified and argued.

The Supreme Court and, indeed this Court, in several of their numerous decisions have made comments on brief writing on the format and contents of a good brief. For a good brief facilitates a comprehensive understanding of it. This apart, it saves so much time and helps the court when writing the judgment (see Engineering Enterprises Ltd v Attorney-General, Kaduna State (1987) 2 NWLR (Part 57) 381 at 414; Okechukwu Adimora v Ajufo (1988) 3 NWLR (Part 80) 1 and Rev Onuaguluchi v Ben Collins Ndu (2000) 11 NWLR (Part 679) 519 at 555).

It is necessary to follow the procedure suggested in writing a brief in the case of Mojekwu v Mojekwu (1997) 7 NWLR (Part 512) 283 at 299.

It is suggested per Tobi JCA thus:–

“It is the practice in brief writing that apart from the formulation of the issues for determination it is necessary to identify in the body of the brief under argument the issue or issues taken. In other words, Counsel should indicate by way of sub-heading the issue or issues he wants to argue before commencing his argument. This will not only facilitate easy identification of the issue or issues
argued in the brief but also promote easy comprehension of the arguments in the brief. A situation where the court is made to speculate what issue is argued is most unhelpful. Learned Counsel for the respondent did not see the necessity to identify in the body of his brief the issue or issues argued. And so, I was in great confusion. That is not good. It does not only waste the time of the court, but also creates so much room for conjecture.

The learned Counsel for the appellants was not the only one who did not follow the procedure suggested in *Mojekwu v Mojekwu* (supra); so also the Counsel for the respondent.

The appellants filed a 76-page document. This was labelled “appellant’s brief”. The arguments were lumped up together with the issues. The brief in my opinion is unnecessarily verbose, lengthy and repetitive. The brief of argument filed by the respondent is, however, shorter in volume. It is better or more comprehensive than that of the appellants. I am left to carefully decipher appellants’ brief in order to find out which piece of prose writing relates to any issues as formulated. This makes it more onerous for me, all in the interest of justice. I will, however, urge both Counsel in this appeal to once again have a look at Nnaemeka-Agu’s JSC *Manual of Brief Writing* and a few other books published recently on this important subject-matter.

Guided mostly by the issues formulated by the respondent, and what I have been able to salvage from the issues formulated by the appellants, I think precisely the real issues that call for my determination in this appeal should be as follows:

1. Whether the respondent has the *locus standi* to bring the action in question.
2. Whether all necessary parties to the action were before the lower tribunal; and whether the lower tribunal took the proper view of publication filed on 16 January, 1997.
3. Whether there ever existed a joint venture agreement between fourth appellant, P.B.N. trustees, and the respondent or any other party with regard to the loan
facility granted the fourth appellant by Progress Bank of Nigeria Plc.

4. Whether the loan facility granted the fourth appellant company by Progress Bank of Nigeria Plc is a banker’s acceptance facility or not.

5. Whether the first, second and third appellants were liable to the respondent as guarantors of the loan facility or not.

6. Whether the lower tribunal made a correct approach in the evidence in arriving at its decision.

7. Whether the delivery of the judgment of the lower tribunal outside 21 working days occasioned a miscarriage of justice.

On the first issue whether the respondent has *locus standi* in the matter, the appellants’ argument seems to be predicated on the argument that, since the bank was a separate existing legal entity with all the powers of a legal personality, the respondent ought to have brought the application in the name of the bank. This argument does not hold water. The provision of section 11(1) of the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree No. 18 of 1994 is very clear. This section allows two categories of persons to bring an application on behalf of a bank which has been declared “failed” by the Central Bank of Nigeria (which I will hereinafter simply refer to as “CBN”). These categories are:

(a) a receiver/liquidator of a failed bank; or

(b) where there is no receiver, any person appointed by the CBN or the Nigeria Deposit Insurance Corporation (the respondent herein).

In paragraph 3(i) of the respondent’s amended application at the lower tribunal, the respondent was referred to as a person appointed by the CBN. The appellants did not challenge this in their amended reply to the respondent’s application.
They averred in paragraph 4 thus:–

“Save paragraph 3(i), the respondents deny the entire paragraph 3 of the application and put the applicant to the strictest proof thereof.”

I can see that by this pleading, the appellants are deemed to have admitted the capacity in which the respondent instituted its action at the tribunal. A fact admitted in the pleadings of the parties will not require further proof (see Omoregbe v Lawani (1980) 3–4 SC 108 at 117; Odulaja v Haddad (1973) 11 SC 357). A trial court ought to accept and act upon evidence that is not clearly challenged or contradicted.

The respondent is a creation of a statute. It is a statutory body. The CBN, by the provision of Decree No. 18 of 1994, can appoint a statutory body of its choice to recover debt owed to a failed bank managed by the respondent. By the provision of section 11(1) of Decree No. 18 of 1994, the CBN is not restricted from appointing the respondent to institute an action to recover a debt owed a failed bank.

Giving section 11(1) of Decree No. 18 of 1994 a wider interpretation other than the restrictive or narrow interpretation, it would be seen that this section does not restrict the CBN from appointing the respondent, who are the managers of the failed bank (Progress Bank of Nigeria Plc) to institute an action to recover a debt owed to the said failed bank, that is Progress Bank of Nigeria Plc.

In deciding whether the respondent has judicial powers to institute an action, the question that needs to be asked is who will be failing in its obligation, its rightful discharge of its duties if the debt owed the bank by the fourth appellant is not recovered. The principle governing the question of judicial powers (in other words locus standi) in any given action was established by the Supreme Court in the celebrated case of Adesanya v The President (1981) 5 SC 112 (1981) 2 NCLR 358 (see Attorney-General, Kaduna State v Hassan (1985) 2 NWLR (Part 8) 483).
The bank which affairs the respondent was to manage was already a failed bank. It was ineffective. It could not discharge its obligations to its numerous depositors. It has failed in its duty as a bank. The respondent, as an insurer of the depositors, has the obligation to ensure that the depositors are duly indemnified. When the fourth appellant failed to liquidate its debt owed the failed bank, it was the responsibility of the respondent to indemnify and compensate the depositors. Hence it will be failing in its duty as an insurer of the depositors’ money if the debt owed by the fourth appellant is not recovered.

The respondent has *locus standi* to institute the action at the lower tribunal. By virtue of section 3(1) of Decree No. 18 of 1994 the lower tribunal was given power to recover all debts owed to a failed bank.

The second issue is whether all the necessary parties to the action were before the lower tribunal, and whether the lower tribunal took the proper view of the application filed on 16 January, 1997.

The learned Counsel for the appellants has submitted in their brief that PBN Trustees Ltd and Imo State Public Utilities Board were necessary parties to the action and the lower tribunal ought to have ordered their joinder or stayed proceedings in the action pursuant to the appellants’ application of 16 January, 1997 pending their joinder as parties to the action as co-respondents. It is submitted by the learned Counsel for the respondent that all the necessary parties to the action were before the tribunal.

I do not see the necessity of joining the two parties. In the first place, from the evidence before the tribunal PBN Trustees was not a party to the supply contract loan facility which was granted the fourth appellant company by the bank. PBN Trustees was neither the borrower nor the lender, nor was it a guarantor to the loan, nor even a beneficiary to that loan. Similarly, Imo State Utility Board or indeed Imo...
State Government, was not at any time party to the loan facility granted the fourth appellant.

In the case of *Ilesha L.P.A. v Olayide* (1994) 5 NWLR (Part 342) 91, the Court of Appeal on the issue of privity of contract held thus:–

“Where privity is absent, the action in question is incompetent.”

I agree with the view expressed by the learned trial Judge, in his judgment delivered in the case of *Alpha Allied Nigeria Ltd v NDIC* (unreported Appeal No. SAT/FBT/423/97) that:–

“Where a borrower takes money to execute unpaid contract it is not the business of the lender whether he was paid or the job executed or not.”

In the case of *N.U.H.P.S.U. v Imo Concorde Hotels Ltd* (1994) 1 NWLR (Part 320) 306 this Court, considering, *inter alia*, the question of who may sue on a contract, had this to say:–

“Only a party to a contract may sue on it or be sued on it.”

In that case, the court has made it clear that in a contract of employment between the union members and his employer, the union is not a party to the contract.

It is on this score that I feel strongly that the application for joinder was properly struck out at the tribunal based on the principle of privity of contract and also the fact the decision of the tribunal will in no way affect the parties who sought to be joined.

The third issue is whether there ever existed a joint venture agreement between the fourth appellant, PBN Trustees and the respondent or any other party with regard to the loan facility granted the fourth appellant or by Progress Bank of Nigeria Plc. It is not in dispute that the fourth appellant approached the bank for a loan facility to execute a contract for the supply of submersible pumps to Imo State Utility Board. It is also not in dispute that the fourth appellant nominated suppliers of the materials for the contract. These suppliers were paid by the bank in the presence of the representatives of the bank, fourth appellant company and Imo
State Utility Board. It is also clear from Exhibits E–E2, L–L2 that these roll-over letters were sent only to the fourth appellant and not to PBN Trustees and fourth appellant and company.

In this issue I have also considered the following factors:–

(a) The fact that the 100% guarantee granted was made only by the directors of the fourth appellant to the bank and not by PBN Trustees and the fourth appellant company.

(b) The fact that all the demand notices (Exhibits F–F4) for the entire amount owed to the bank for the execution of the contract was sent only to the fourth appellant and not to PBN Trustees and fourth appellant company.

(c) The fact that in fourth appellant company’s response to the demand notice (Exhibits G–G4) the fourth appellant company alone admitted the entire sum involved in the transaction plus accrued interest, as its indebtedness to the bank. And at no time it made mention of PBN Trustees or made any reference to the purported joint venture agreement.

(d) The fact that the fourth appellant had paid ₦1.25 million to the bank and in Exhibit G3, fourth appellant made a proposal for a monthly repayment, till the entire debt is liquidated by the fourth appellant and not by PBN Trustees and fourth appellant.

(e) The fact that Exhibits O and P (as an incomplete evidence) is not the purported joint venture agreement, neither is it a counterpart.

It would appear to me that the averment of the existing purported joint venture agreement was an afterthought by the appellants.

The appellants served the respondent notice to produce the purported joint venture agreement and the account number. The respondent did not hesitate to inform the appellants and
the lower Tribunal that the bank is never and had never been in possession of any joint venture agreement.

The respondent having right from the onset denied being in possession of the joint venture agreement and account number, it is left for the appellant to prove that the respondent actually has it in his possession.

I do not think the presumption under sections 149(d) and 122 of the Evidence Act (Cap 112) Laws of the Federation of Nigeria, 1990 is applicable in this case. For these sections to apply, section 98 of the Evidence Act must first be satisfied; that is to say that the secondary evidence of the content of the purported document shall then become admissible in evidence where the original is not produced. Section 97(a) provides for admissibility of secondary evidence of the content of a document. If the joint venture agreement as claimed by the appellants ever existed there should have been duplicates or triplicates, as the case may be, which by provision of section 97(2) of the Act becomes admissible in evidence to avoid the court speculating on the content of the purported document.

The appellants have failed to prove the existence of the purported joint venture agreement. It is in the case of Paul Cardoso v Bankole Daniel (1986) 2 NWLR (Part 20) 1 at 36 that the Supreme Court held thus:—

“It is a well settled principle of the administration of justice that a party who sets out to assert the existence of a claim bears the burden of establishing the claim, and must fail if he does not succeed in establishing what he has undertaken to do.”

See also Jobi v Oshilaja (1963) 1 All NLR 12; Nwokafor v Udegbe (1963) 1 All NLR 104.

It is well-settled law that where a party fails to call a vital witness, whose evidence may help the court decide the case one way or the other, it should be presumed that had that witness been called to testify, his evidence would have been unfavourable to the party who called him (see Onah v State (1985) 3 NWLR (Part 12) 236). This is where section 149(d) of the Evidence Act is applicable. The presumption is that had first, second and particularly the third appellant been
called to give evidence, their evidence would have been unfavourable to the appellants’ case.

The fourth issue is whether the loan facility of N6.8 million granted the fourth appellant by the bank is a banker’s acceptance facility. It is submitted by the learned Counsel for the respondent that this facility granted on 30 January, 1991 on the basis of Exhibit A made the fourth appellant liable to the tune of N21,139,612.24 as at 31 May, 1997. It is further submitted that the first, second and third appellants are liable to the respondent under the guarantees, Exhibits B–B1, C–C1 and D–DL.

Evidence of AW1 is that the loan facility is a banker’s acceptance (“BA”) facility and that the loan facility met all the features of a banker’s acceptance. This was admitted by RW1 in his evidence at the lower tribunal. He admitted that the loan was not disbursed to the fourth appellant directly, neither was it obtained by fourth appellant by draw-downs, but that it was disbursed to the suppliers of the contract materials who were nominated by the fourth appellant company.

At 27 of the record, RW1 admitted that Exhibits E–E2 and L–L2 (the roll-over letters) were accepted by the fourth appellant company and that the terms in these exhibits met the features of a banker’s acceptance facility which is a short-term loan. It does not require any draw-down, therefore it does not require opening of any accounts.

There is therefore no onus on the respondent to prove that which had been admitted. See the following cases:

(a) *Nsirim v Omuna Construction Co Ltd* (1994) 1 NWLR (Part 318) 1;

(b) *Balogun v Labiran* (1988) 3 NWLR (Part 80) 66;

(c) *Onyekaonwu v Ekwubiri* (1966) 1 All NLR 32.

As regards the fifth issue, the learned Counsel for the respondent submitted that the first, second and third appellants were liable to the respondent as guarantors of the loan. It is the submission of the learned Counsel for the appellants that
the first, second and third appellants were not liable to the respondent on the guarantees, exhibits B–B1, C–C1 and D–D1. Relying on a number of authorities, it was further submitted by the learned Counsel for the appellants that if the offer pursuant to which the guarantees were given was destroyed and failed to materialise into a binding contract, the guarantors became automatically discharged from the guarantees.

The obligation imposed upon a guarantor is to settle the amount involved to the judgment creditor only if the judgment debtor fails or is unable to pay the debt. This is the law (see Hydro-Quest (Nigeria) Ltd v B.O.N. Ltd (1994) 1 NWLR (Part 318) 41 at 53).

Exhibits B–B1, C–C1 and D–D1 are the guarantees executed by the first, second and third appellants, respectively.

It is very clear from the second paragraph in each of the guarantee forms the undertaking made by the guarantors. It is stated as follows:

“. . . and undertake on demand in writing made on the undersigned or at anyone or more of the undersigned by you . . .”

The third appellant is the chief executive officer and chairman of the fourth appellant. He acknowledged receipt of all the demand notices Exhibits F–F4. He was also the signatory to Exhibits G, G2 and G3.

RW1 in his evidence admitted that first, second and third appellants were guarantors to the loan facility and that the amount guaranteed represented 100% in relation to the amount for the contract and that guarantorship signified acceptance or liability in a loan transaction.

In paragraph 2 of Exhibits B–B1, C–C1 and D–D1, it is provided thus:

“Any admission or acknowledgment in writing by the principal or any person on behalf of the principal of the amount of the indebtedness of the principal or otherwise in relation to the subject matter of this guarantor or any judgment or award, obtained by you against the principal or proof by you against the principal or proof by you in bankruptcy or companies winding up which is admitted or any statement of account furnished by you the correctness of
which is certified by your auditors, shall be binding and conclusive on the undersigned and my estate(s) and effects in all court of justice and elsewhere.”

In Exhibits G–G4, reproduced at 128 of the record, fourth appellant company admitted the indebtedness while RW1 also admitted the liability of the guarantors to the bank. This admission of liability by the guarantors discharges the respondent of the burden of proof (see Nsirim v Omuna Construction Ltd (supra); Onyekaonwu v Ekwubiri (supra)).

I will finally take the sixth and seventh issues together. From the consideration of the preceding issues, I am not in doubt to say that the lower tribunal made a correct approach to the evidence in arriving at its decision. Learned tribunal chairman properly evaluated all evidence before him, particularly Exhibits J, K, M, N–N1, O, P and Q.

The evaluation of evidence is the primary responsibility of the trial court. It is trite law that an Appellate Court will only interfere with a finding of fact made by a trial Judge where such finding is perverse, or unreasonable in the light of the evidence adduced before the court (see Olufosoye v Olorunfemi (1989) 1 NWLR (Part 95) 26; Mogaji v Odofin (1978) 4 SC 91).

Learned Counsel for the appellants had contended that delivery of judgment by the learned chairman of the lower tribunal more than 21 working days from the day of its first sitting on the matter occasioned a miscarriage of justice.

It is submitted that, because of the delay in delivering the judgment, the learned chairman could not and did not take advantage of the benefit of hearing the witnesses and watching their demeanour.

In Oteju v Oluguna (1992) 8 NWLR (Part 262) 752 at 766, my learned brother, Tobi JCA, in deciding whether the delay in delivery of judgment occasioned a miscarriage of justice stated the law as follows:–

“The legal position is that an Appellate Court can only come to the conclusion that there is a miscarriage of justice and that injustice has been caused to the party who lost in the case, if the trial Judge
a could be faulted in the exercise of his judicial function of evaluation of evidence and attaching probative value thereto, including issue of credibility of witnesses.”

b I have gone through the judgment of the lower tribunal, I cannot fault the exercise of the judicial function of the learned trial Chairman on evaluating the evidence. I cannot therefore come to the conclusion that there has been a miscarriage of justice. I cannot therefore set aside the decision of the lower tribunal or treat it as a nullity unless I am satisfied that the appellants have suffered a miscarriage of justice. This apart, the learned Counsel for the respondent has shown copiously that all through the proceedings at the lower tribunal no single adjournment was ever made at the instance of the respondent. The appellants’ Counsel addressed the Tribunal on three different sittings and on two occasions he took the whole day addressing the tribunal. On the whole, from the circumstances of the trial, it cannot be faulted, because the evidence before the lower tribunal were well evaluated and probative value was attached to both documentary and oral evidence.

c On the whole, I see no merit in this appeal. It should be dismissed with N5,000 costs to the respondent.

OGUNTADE JCA: I read before now a copy of the lead judgment by my learned brother, Galadima JCA. As I agree with his reasoning and conclusion, I would also dismiss this appeal with N5,000 costs in favour of the respondent.

ADEREMI JCA: I have read before now, in draft, the judgment delivered by my learned brother, Galadima JCA. I agree with his reasoning in coming to the conclusion that the appeal is unmeritorious. I adopt the said judgment as mine. I would also dismiss the appeal. And I so do while abiding by all other orders including the order as to costs contained in the said judgment.

i Appeal dismissed.
Co-operative Development Bank Plc v O.A. Essien

COURT OF APPEAL, CALABAR DIVISION

OPENE, EDOZIE, EKPE JJCA

Date of Judgment: 8 NOVEMBER, 2000

Suit No.: CA/C/136/99

Banking – Main collective agreement providing for terms of employment between bank and its staff – Not providing for summary dismissal – Whether employer can dismiss summarily

Banking – Misconduct – What constitutes – Effect

Practice and procedure – Issue raised which does not relate to or derive its root from grounds of appeal – Effect

Facts

The respondent was an employee of the appellant. The respondent was dismissed by the bank for refusing to obey a proper instruction of his employer and granting unauthorised overdrafts and loans to customers, an allegation which he admitted.

The respondent went to court contending that the dismissal was wrongful because it was not in accordance with the provisions of a collective agreement, Exhibit 18, which stated how discipline was to be administered between banks and their employees. His contention was that, since the collective agreement did not provide for summary dismissal, the employer could not resort to this method of discipline.

The lower court agreed that his action was gross misconduct, but the appellant should have exhausted the conditions contained in paragraph C of page 8 in Exhibit 18 and that the respondent must have been guilty on three occasions of committing acts of misconduct and three warnings issued to him. He therefore declared the dismissal unlawful and awarded him damages.
The appellant, not satisfied with the verdict of the lower court, appealed to the Court of Appeal, contending, *inter alia*, that the dismissal was justified and tenable in law.

**Held** –

1. Gross misconduct has been identified as conduct that is of grave and weighty character as to undermine the confidence which should exist between an employee and the employer and a refusal by an employee to obey a proper instruction of his employer and granting unauthorised overdrafts and loans to customers and which are of course working against the deep interest of the employer amounts to a gross misconduct and entitles the employer to summarily dismiss an employee.

2. If the collective agreement does not provide for summary dismissal, then the parties have to fall back on common law, which allows an employer to summarily dismiss an employee for an offence which amounts to a gross misconduct.

3. The findings of the learned trial Judge that the respondent ought to have exhausted the conditions contained in paragraph C of page 8 in Exhibit 18 and that the respondent must have been guilty on three occasions of committing acts of misconduct and three warnings issued to him within 12 months has no basis. The paragraph in question deals with termination after warning and the appellant did not terminate the respondent’s appointment. If the appellant had terminated the respondent’s appointment without following the procedure laid down in paragraph C page 9 of Exhibit 18, the respondent could make out a case as the procedure could be declared wrongful and the fact that the respondent was given a warning did not debar the appellant from dismissing him if the offence he had committed amounted to a gross misconduct.

Appeal allowed.
Cases referred to in the judgment

**Nigerian**

*Adewumi v Nigerian Produce Marketing Board* (1972) 11 SC 111

*Agbaje v National Motors Ltd* SC20/68 dated 13 March, 1970; (1971) 1 UILR 119

*Chukwuma v Shell Petroleum Development Co. Ltd* (1993) 5 SCNJ 1; (1993) 4 NWLR (Part 289) 512

*Enigbokan v Baruwa* (1998) 8 NWLR (Part 560) 96

*Ijebu-Ode Local Govt. v Adedeji Balogun and Co. Ltd* (1991) 1 NWLR (Part 166) 136

*Kalu v Odili* (1992) 5 NWLR (Part 240) 130; (1992) 6 SCNJ 76

*Mobil Oil Nig. Ltd v Akinfosile* (1969) NMLR 217

*Nwobosi v A.C.B. Ltd* (1995) 6 NWLR (Part 404) 658

*Obot v CBN* (1993) 8 NWLR (Part 310) 140

*Odife v Aniemeka* (1992) 7 NWLR (Part 251) 25; (1992) 7 SCNJ 337

*Ojomo v Incar (Nig.) Ltd* (1993) 9 SCNJ 130; (1993) 7 NWLR (Part 307) 534

*Olaniyan v University of Lagos* (1985) 2 NWLR (Part 9) 599

*P.Z. and Co. Ltd v Ogedengbe* (1972) 1 All NLR 202

*Sule v Nigeria Cotton Board* (1985) 2 NWLR (Part 5) 17


**Foreign**

*Koufos v C. Czanikow Ltd* (1967) 3 WLR 1491

**Counsel**

For the appellant: *Okolo, S.A.N.* (with him *Okolo*)

For the respondent: *Nandi*
a Judgment

**OPENE JCA:** *(Delivering the lead judgment)* In the High Court of Cross River State holden at Calabar, the respondent as the plaintiff filed an action against the appellant claiming as follows:–

1. A declaration that the purported dismissal of the plaintiff by the defendant on 16 July, 1992, is wrongful, null, void and of no effect whatever.
2. **₦12,000,000** general damages for wrongful dismissal.”

Pleadings were ordered and duly filed and exchanged and at the end of the trial, the learned trial Judge, Obasse J, in a reserved judgment delivered on 28 October, 1995, entered judgment in favour of the plaintiff/respondent and awarded him the sum of **₦100,000** (One Hundred Thousand Naira) as general damages for wrongful dismissal.

The appellant was dissatisfied with the judgment and has therefore appealed to this Court.

Both parties have through their Counsel filed and exchanged briefs of argument and the appellant has also filed a reply brief.

In the appellant’s brief of argument, two issues are identified for determination. They are:–

“(i) Whether the trial court was right on the evidence in the verdict of wrongful dismissal entered in favour of the respondent?

(ii) Was the award of **₦100,000** general damages justifiable in law?”

In the respondent’s brief of argument, the respondent adopted the two issues raised in the appellant’s brief and, in addition to that, he also raised the following issue for determination:–

“Whether on the state of pleadings and evidence, the respondent was entitled to be dismissed by the Board of Directors of the appellant which is a different body from the management of the same without affording the respondent the opportunity of defending himself.”
I must observe that the two issues formulated in the appellant’s brief were raised from the two grounds of appeal in the appellant’s notice of appeal and these have been adopted by the respondent in his brief of argument and having done this, he has no business to raise another issue which does not relate or derive its root from the two grounds of appeal filed by the appellant in an absence of his filing a cross-appeal or a respondent’s notice that the appeal be affirmed on other grounds.

It therefore follows that the issue raised in the respondent’s brief is incompetent and should be struck out and it is accordingly struck out (see Odife and another v Aniemeka and others (1992) 7 NWLR (Part 251) 25; (1992) 7 SCNJ 337; Chief Onwuka Kalu v Chief Victor Odili (1992) 5 NWLR (Part 240) 130; (1992) 6 SCNJ 76; Enigbokan v Baruwa (1998) 8 NWLR (Part 560) 96).

In respect of issue 1, Mr Okolo, S.A.N., in the appellant’s brief of argument referred to paragraphs 16, 17, 18, 19 and 20 of the statement of claim and the reply to these in paragraphs 12, 13, 14, 15, 17, 18, 19 and 20 of the amended statement of claim contending that given those facts amounting to gross misconduct on the part of the respondent that his summary dismissal was proper and valid.

He also referred to the evidence before the court and stated that the respondent conceded the lesions complained of by the appellant, that embargo was placed on all forms of lending, that he exceeded his limit in respect of five customers and that by the offence that he committed he was entitled to a warning and not to be dismissed.

In respect of the trial court’s finding that the respondent must have been guilty on three occasions of committing misconduct and three warnings issued to him within 12 months before he could be dismissed, he submitted that the procedure accepted by both sides as regulating their legal relationship is that whenever an offence amounting to gross misconduct is committed that it becomes the prerogative of
the employer to exercise the first option, that is, the right of summary dismissal and that it is where this right is not exercised, that he will issue “a first and last warning” as the second option and that it is wrong to insist as the court did on the issuance of three warning letters.


He submitted that the learned trial Judge was in serious error in his finding that the dismissal of the respondent was wrongful.

Mr *Nandi*, the learned Counsel for the respondent, in the respondent’s brief argued that it appeared that the appellant had neglected to consider the duty imposed on them by Exhibit 18 which is the collective agreement which regulated and guided the legal relationship between the appellant and the respondent and that both parties relied on it during the trial, that the trial court found and held that as much as the respondent and appellant relied on Exhibit 18 as a condition for the respondent’s employment that the appellant ought to have exhausted the conditions contained in paragraph C of page 8 in Exhibit 18, that is, that the respondent must have been guilty on three occasions of committing an act of misconduct and three warnings issued to him within 12 months.

He submitted that for not complying with the provisions of paragraph C page 8 in Exhibit 18 that the appellant was found liable for wrongful dismissal of the respondent from his employment.

He stated that there is a very great harm in the excerpts of the main collective agreement reproduced in appellant’s brief and that Exhibit 18 did not contain those excerpts and that reliance on it was misleading. He also stated that the appellant in both its pleadings and evidence never challenged Exhibit 20 tendered by the respondent and that in Exhibit 20 which was a letter by the appellant’s general manager it was stated that offenders in the case of excess lending would be treated as first offenders and warned and that Exhibit 20 watered down the effect of Exhibit 28.

He then argued that DW1’s testimony under cross-examination that the general manager and Miss Veronica Usoro were each found to have exceeded their lending limit and that while the general manager was simply asked to go and not dismissed, that Miss Veronica’s appointment was terminated and that a court of competent jurisdiction was perfectly enjoined to act on unchallenged and uncontradicted evidence. He referred to *I.B.N. v A.T.M. Co.* (1992) 42 LRC 1523; *Ivienagbor v Bazuaye* (1999) 70 LRC 2256.

He finally submitted that the following cases were inapplicable: *Sule v Nigeria Cotton Board* (1985) 2 NWLR (Part 5) 17 and *Ajayi v Texaco (Nigeria) Ltd* (1987) 3 NWLR (Part 62) 577.

I must observe that this is a straightforward case of master and servant. The respondent was an employee of the appellant, a commercial bank, and at the time of the incident which is the cause of this action, the respondent was the manager at the appellant’s Calabar branch. Sometime in 1992, it was observed that the respondent had granted loans and facilities to five different customers without security or authority to the tune of over ₦2,000,000. The respondent was therefore given a query for granting unauthorised loans and facilities as per Exhibit 12 and it was after this that the respondent was dismissed by the appellant. It was after the receipt of the letter of dismissal that the respondent filed this action challenging the validity of the said dismissal.
The respondent in his evidence at 81 of the record of proceedings stated:

“On 12 March, 1992, the General Manager of the defendant issued a circular to all Branch Managers of the defendant bank on the issue of exceeding their lending limit. He went further to say that any manager who exceeds his limit would be treated accordingly. I received a copy of the circular dated 12 March, 1992.”

Under cross-examination at 82 of the records, he said:

“I tendered Exhibit 20. I tendered Exhibit 20 to show that by the offence I committed I was entitled to a warning and not to be dismissed. It was an offence of alleged grant of loans and advances in excess of my limit.”

This clearly shows that throughout the trial the respondent never disputed the fact that he granted loans and advances in excess of his limit which was the reason why he was dismissed by the appellant. His case is that he was entitled to a warning and not a dismissal.

In fact, the learned trial Judge made a specific finding on this. In his judgment at 169 of the records, he observed as follows:

“There is no doubt that the plaintiff knew of his lending limit and what he should do when a customer needed to exceed his/her limit. . . . By not keeping to his lending limits as contained in Exhibit 20 and by not waiting for approval from his head office before the plaintiff granted the facilities to the customers in Exhibits 11, 12 and 15, he refused to obey proper instruction of his employer and which instruction he was supposed to obey. See paragraph 11(a) at Page 8 of Exhibit 18” (italics mine for emphasis).

It was after making this specific finding that the respondent refused to obey a proper instruction of his employer that he at 171 of the records observed:

“The defendant and the plaintiff relied on Exhibit 18 as a condition for plaintiff’s employment. See Exhibit I, the defendant ought to have exhausted the conditions contained in paragraph C of page 8 in Exhibit 18. That is that the plaintiff’s (sic) must have been guilty on three occasions of committing act of misconduct and three warning issued to him within twelve months.”

It was a result of this reason that he declared the dismissal of the respondent wrongful.
It has also been the respondent’s contention that before the appellant could remove the respondent from office without incurring any liability that it is mandatory for it to follow the laid-down procedure in Exhibit 18.

When this appeal was argued on 27 September, 2000, both Counsel, Mr Okolo, S.A.N., for the appellant and Mr Nandi, Esq., for the respondent by agreement tendered Exhibit 18, the main collective agreement and this copy they both agreed is the correct document which stipulates the respondent’s conditions of service.

The relevant portions are at 8 and 9 and they read as follows:

“PART II (SECTION 1)
(ii) TERMINATION AFTER WARNING
(a) Where the services of an employee have proved unsatisfactory he may be given written warnings. For the purpose of this paragraph, such written warnings may be issued only in respect of the following major cases of misconduct:

(i) Absenting himself at any time from the place proper and appointed for the performance of his work without leave or other legitimate cause;

(ii) Unfitting himself for the proper performance of his work during working hours, for example by becoming intoxicated;

(iii) Neglecting to perform any work which it was his duty to have performed, or carelessly or improperly performing any work which from its nature it was his duty to have performed carefully and properly;

(iv) Using any abusive or insulting language or becoming guilty of insulting behaviour to any person placed in authority over him;

(v) Refusing to obey any proper instruction of any person placed in authority over him which instruction it was his duty to obey; and

(vi) Any other act of misconduct which may be agreed upon between the Association and the Union from time to time.
Before a written warning is issued the employee shall first be given a written query and opportunity of stating his case in writing.

An employee’s services may be terminated if, within any period of 12 (twelve) months, he had been guilty on three occasions of committing any act of misconduct for which a warning letter has been issued. Termination may only be effected on the third occasion provided warnings in writing have been given to the employee in respect of two previous cases of misconduct within the preceding 12 (twelve) months. Persistent breaches, however, will be treated in accordance with the employee’s previous records even though they may have been ineffective after 12 (twelve) months from the date of warning.

An employee whose services have been terminated under the provisions of this paragraph shall, nevertheless, be entitled to one month’s notice in the case of a confirmed employee or two weeks’ notice in the case of a probationer or salary in lieu, in addition to any other terminal benefits that may be due to him.

It can be seen from the above that in respect of summary dismissal, it states “No agreement” and there is nowhere it has been shown that there is any agreement and the respondent of course does not contend that there is any agreement. The question is, where the collective agreement does not provide for summary dismissal, can the employer not dismiss his employee when he commits an act that amounts to a gross misconduct simply because the collective agreement does not provide for summary dismissal?

Will the employer exhaust the conditions contained in paragraph C of page 8 in Exhibit 18, that is, the plaintiff must have been guilty on three occasions of committing acts of misconduct and three warnings issued to him within 12 months as the learned trial Judge had found?
The learned Counsel for the respondent in the respondent’s brief referred to *Union Bank of Nigeria Ltd v Ogboh (supra)* and stated that the Supreme Court held that in cases governed only by way of agreement of parties that termination of appointment or dismissal will be in the form agreed to and that any other form of dismissal or termination connotes only wrongful termination or dismissal. This has always been the correct statement of the law but that case does not support the respondent’s case because the collective agreement, Exhibit 18, does not provide for summary dismissal or any dismissal.

He also referred to *Nwobosi v A.C.B. Ltd (supra)* and argued that in that case the collective agreement specifically provided for summary dismissal which is not the case with Exhibit 18. The short answer to this is that if the collective agreement, Exhibit 18 does not provide for summary dismissal that the parties have to fall back on the common law and the respondent’s Counsel cannot seriously argue that, because Exhibit 18 does not provide for summary dismissal, the respondent cannot be summarily dismissed if he had committed an offence which amounts to a gross misconduct.

The finding of the learned trial Judge that the respondent ought to have exhausted the conditions contained in paragraph C of page 8 in Exhibit 18 and that the respondent must have been guilty on three occasions of committing acts of misconduct and three warnings issued to him within 12 months has no basis. The paragraph in question deals with termination after warning and the appellant did not terminate the respondent’s appointment. If the appellant had terminated the respondent’s appointment without following the procedure laid down in paragraph C page 8 of Exhibit 18, the respondent could make out a case as the procedure could be declared wrongful and the fact that the respondent was given a warning did not debar the appellant from dismissing him if the offence he had committed amounted to a gross misconduct.
In *Nwobosi v A.C.B. Ltd* (1995) 6 NWLR (Part 404) 658 at 686, Iguh JSC observed:—

“In the present case, the appellant was in wilful disobedience of the lawful and reasonable order of his employers. It is a conduct of such grave and weighty character as to undermine the relationship of confidence which should exist between an employer and the employee. He was therefore guilty of gross misconduct and was liable to dismissal without notice and without wages.”

Kutigi JSC at 681, observed as follows:—

“It seems quite clear to me that the list of offences contained in Article 5(d)(i)(x) cannot be regarded as exhaustive. It is equally clear to me that the act of granting unauthorised overdrafts and loans to customers by the appellant contrary to specific instructions as contained in Exhibits C and L–L3, amounted to an irregular practice in respect of cash.

It was unauthorised and therefore irregular. The act also in my view amounted to a gross misconduct for which the appellant was liable for summary dismissal under the common law, whether or not it was covered by any of the provisions of Exhibit P.”


Gross misconduct has been identified as conduct that is of so grave and weighty character as to undermine the confidence which should exist between an employee and the employer and a refusal by an employee to obey a proper instruction of his employer and granting unauthorised overdrafts and loans to customers and which are of course working against the deep interest of the employer amount to gross misconduct and entitle an employer to summarily dismiss an employee and this is exactly what the appellant did in this case.

The respondent had of course admitted that he was given a specific instruction by the appellant not to grant unauthorised loans without approval from the head office and also that he granted to five customers unauthorised loans and facilities totalling to the tune of over ₦2,000,000, this no doubt amounted to a gross misconduct for which the respondent was liable for summary dismissal. The fact that Exhibit 18 does not provide for summary dismissal is quite
irrelevant as the appellant can fall back on the common law. The respondent had also referred to the case of Miss Veronica Usoro, whose appointment was terminated or the general manager, who was asked to go; this is also very irrelevant as it does not lie in the mouth of the respondent to dictate to the appellant what it should do with an employee whose conduct amounted to a gross misconduct. It is entirely up to the appellant to treat the matter as it deems fit and proper.

If the learned trial Judge had well addressed his mind to the fact that the appellant did not act under Exhibit 18 which does not provide for summary dismissal but under the common law and also that issue involved is not termination of an employee’s appointment which is provided for in Exhibit 18, obviously he would not have held that the appellant ought to have followed the condition contained in paragraph C page 8 in Exhibit 18 and that the respondent must have been guilty on three occasions of committing acts of misconduct and three warnings issued to him within 12 months.

It is as a result of this that he declared the summary dismissal wrongful and he was in a very serious error to have come to such a conclusion.

Issue 2 questions the justifiability in law of the award of ₦100,000 as general damages.

The respondent in this action claimed the sum of ₦12,000,000 as general damages for wrongful dismissal.

The learned trial Judge in his judgment at 172–173 of the records observed as follows:

“An employee whose services have been terminated under the provisions of this paragraph, shall, nevertheless, be entitled to one month’s notice in the case of a confirmed employee or two weeks’ notice in the case of a probationer or salary in lieu, in addition to any other terminal benefits that may be due to him. This is in the case where the proper procedure as outlined in paragraphs 8B and C of Exhibit 18, page 8 is followed. What then should the plaintiff whose appointment was wrongfully dismissed be entitled to in terms of salary damages? It is my opinion that the plaintiff should be entitled to receive such damages as may be fair and reasonable. I disagree with the defendant Counsel’s submission that a plaintiff..."
in an action for wrongful dismissal is not entitled to general damages as they belong to a claim in tort. The only remedy for wrongful dismissal of the plaintiff based on the agreement by the parties referred in Exhibit 18 which is not a statute is damages, see the case of Union Bank v Ogboh (1995) 2 SCNJ; (1995) 2 NWLR (Part 380) 647 Paragraph 1 at Page 16.”

At 175, he observed:–

“But by the authority of Union Bank v Ogboh (supra) his wrongful dismissal cannot be declared null and void as plaintiff’s employment was not statutory or with statutory flavour to have enabled him be reinstated. Accordingly, I hereby declare that the dismissal of the plaintiff was wrongful. And because he was wrongfully dismissed, I award the sum of N100,000 (One Hundred Thousand Naira) general damages in favour of the plaintiff with N200,000 (Two Thousand Naira) cost against the defendant.”

It is this finding that the appellant is complaining about, and it is the appellant’s contention that a suit for wrongful dismissal sounds on contract and that it is trite that for damages to follow any breach of contract that the details of such damages must first be pleaded and proved by evidence and that the learned trial Judge did not specify on what bases the award was hinged or calculated.


It is settled that, in an award of damages for breach of contract, it is not proper to award general damages and that it is only special damages that are claimable and that the particulars and evidence in support of all awards are required (see Chief J.A. Ojomo v Incar (Nig.) Ltd. (1993) 9 SCNJ 130; (1993) 7 NWLR (Part 307) 534; Ijebu-Ode Local Government v Adedeji Balogun and Co. Ltd (1991) 1 NWLR (Part 166) 136; Mobil Oil Nig. Ltd v Abraham Akinfosile (1969) NMLR 217 and Universal Insurance Co. Ltd v T.A.

In PZ and Co. Ltd v Ogedengbe (1972) 1 All NLR (1990 Edition) supra at 202, Madarikan JSC very aptly and fully expounded the law as follows:–

“In the preparation of the claim for as well as in the consideration of an award in consequence of a breach of contract, the measure of damages is the loss flowing naturally from the breach and is incurred in direct consequence of the violation. The damages recoverable are the losses reasonably foreseeable by the parties and foreseen by them at the time of the contract as inevitably arising if one of them broke faith with the other. In the contemplation of such a loss, there can be no room for claims which are merely speculative or sentimental unless these are specifically provided for by the terms of the contract. It is only in this connection that damages can be properly described as ‘special’ in the conception of contractual awards, and it must be borne in mind that damages normally recoverable are based on the normal and presumed consequences of the breach complained of. (See Koufos v C. Czarnikow Ltd (1967) 3 W.L.R. 1491). Thus the term ‘general’ and ‘special’ damages are normally inapt in cases of breach of contract. We have had occasion to point this out before (See Agbaje v National Motors Ltd SC 20/68 dated 13 March, 1970) and we must make the point that apart from damages naturally resulting from the breach no other form of general damages can be contemplated.”

In Chukwuma v Shell Petroleum Development Co Ltd (supra) at 53, Karibi-Whyte JSC observed:–

“This claim was based on the assumption that the plaintiff’s appointment was wrongfully terminated. There is no doubt that if appellant had established that his appointment was wrongfully terminated, he would be entitled to damages. And this would be what was due to him for the period of notice. See Adewumi v Nigerian Produce Marketing Board (1972) 11 SC 111; WNDC v Abimbola (1966) 1 All NLR 159. This is consistent with the contract between parties which has stipulated the measure of damages.”

It can be seen that this is not a case that an award of N100,000 as general damages ought not to have been made and, in fact, there is no basis for this award which is very highly speculative and sentimental.
It is also not a measure of damage which is a loss that flows naturally from the breach of contract and is incurred in direct consequence of the violation which is wrongful dismissal.

I must observe that the measure of damages for wrongful dismissal is the amount that the plaintiff would have earned had he continued in the employment and these are the items of special damages limited and calculated within the period of notice of termination or dismissal alongside any entitlement due to such employee within the period (see A.O. Adewumi v Nigerian Marketing Board (supra) and Obot v CBN (1993) 8 NWLR (Part 310) 140 at 162).

As I had earlier observed, this is not a case that an award of general damages could have been made and the learned trial Judge was therefore in an error to have awarded the respondent the sum of ₦100,000 as general damages for wrongful dismissal.

On the whole, from pleadings and evidence before the trial court, it is clear that the respondent’s action amounted to gross misconduct and that the appellant was quite justified in dismissing him summarily. Further, it was wrong for the respondent to have been awarded the sum of ₦100,000 as general damages. This award was arbitrary, speculative and does not flow from the breach of contract which is wrongful dismissal.

In the final result, I am of the view that the appeal is meritorious and that it ought to be allowed. I, therefore, allow the appeal and hereby set aside the judgment of the High Court of Cross River State, delivered on 28 October, 1995, by Obasse J and in its place, I dismiss the respondent’s action with ₦5,000 costs in the appellant’s favour.

Edozie JCA: I had a preview of the lead judgment just delivered by my learned brother, Opene JCA. I am in complete agreement with him that in the absence of agreement between the parties with respect to the procedure for dismissal the appellant was justified under common law in
summarily dismissing the respondent on the ground of gross misconduct which was admitted by him. The finding to the contrary by the court below is patently erroneous. I also hold the view that the sum of N100,000 awarded as damages to the respondent for the purported wrongful dismissal is not in accord with the normal measure of damages for breach of a contract of employment.

For these reasons as amplified in the lead judgment, I also dismiss the appeal with the consequential orders made in the lead judgment.

**Ekpe JCA:** I had a preview of the lead judgment delivered by my learned brother, Opene JCA, and I agree with him in its entirety. I equally allow this appeal and abide by the orders made in the lead judgment.

*Appeal allowed.*
Societe Generale Bank (Nigeria) Limited v Bremar Holdings Limited

COURT OF APPEAL, LAGOS DIVISION
SANUSI, CHUKWUMA-ENEH, IGE JJCA
Date of Judgment: 8 NOVEMBER, 2000

Facts

The respondent as plaintiff in the lower court provided financial support to a Nigeria company known as the Exchange Fishing Industries Limited (hereinafter referred to as “Exchange”) for the purchase of a cargo of frozen fish from Argentina for shipment to Nigeria. The said Exchange was a customer of the appellant, a bank registered to do banking business in Nigeria. It was the plaintiff’s case that the bills of lading relating to the consignment of the frozen fish were to be despatched to the defendant/appellant bank who in turn accepted responsibility for the documents and undertook not to release such documents until and unless full payment was received by them in local currency of the sum contained in the invoice. The defendant bank also agreed to collect the amount and remit same to the plaintiff in foreign currency. It was also the case of the plaintiff/respondent that the defendant/appellant without its proper knowledge or consent and
in breach of the undertaking of the defendant, released the bill of lading to Exchange who cleared the goods and obtained possession thereof. The plaintiff now contends that by reason of the breach of the undertaking, the defendant/appellant bank as trustee of the bills of lading, caused the plaintiff/respondent to suffer loss of their security for the repayment of the monies owed to them by Exchange.

In its judgment delivered on 19 January, 1990, the trial court found in favour of the plaintiff and entered judgment in its favour to the tune of US$243,316 being the balance of monies received by the defendant/appellant for the use of the plaintiff/respondent with interest of 10% per annum from 23 January, 1981 until the date it delivered its judgment. The trial court also entered an alternative judgment in the same amount and at the same rate of interest for the same period “being the loss caused to the plaintiff by the defendant in its capacity as the trustee of the bills of lading relating to the consignment of the frozen fish or as the plaintiff’s agent in the dealing with the bills of lading”. Dissatisfied with the judgment of the lower court, the appellant has appealed to the Court of Appeal.

Held –

1. By virtue of the provisions of section 149 of the Evidence Act, a trial court is empowered to presume the existence of facts having regard to the common course of natural events, human conduct and public business in their relation to the facts of the particular case before it. It must however be emphasised that, in doing so, it must take into consideration the totality of the case. In other words, in presuming the existence of any fact which a court thinks likely to have happened having regard to the common course of natural events, human conduct and public or private business, it must relate all those factors to all the facts of the case that are relevant to the facts, the existence of which was in question.
2. On documentary bill, the seller often attaches to a bill of exchange which he has drawn on the buyer, the bill of lading to the goods sold. Such a bill of exchange is known as a documentary bill. The purpose of issuing a documentary bill is mainly to ensure that the buyer shall not receive the bill of lading and therewith the right of disposal of the goods unless he has first accepted or paid the attached bill of exchange according to the arrangement between the parties. If the buyer fails to honour the bill of exchange, he has to return the bill of lading, and if he wrongfully retains the latter, the law presumes that the property in the goods sold has not passed to him.

3. This practice is in keeping with the provisions of section 19(3) of the English Sale of Goods Act of 1893 which is applicable in Lagos State. By virtue of the above-quoted practice and the above-mentioned provisions, the court rightly presumed that the bill of lading was sent directly to the defendant bank and not to the defendant’s customer. The defendant bank cannot exonerate itself from liability simply on the pretext that “proper procedure” was not followed.

4. A bank alleging insufficiency of funds in a customer’s account must tender a statement of account of the customer. Failure so to do will attract the presumption under sections 142 and 149 of the Evidence Act (Cap 112) Laws of the Federation of Nigeria, 1990 respectively that the statement of account is unfavourable to it. It has the burden to tender the statement of account since it contains facts within its knowledge only.

5. It needs to be noted that Uniform Rules for Collection (URC) apply only to the extent that there are no express agreements of the parties excluding the same.

6. The salient requirement inherent in Uniform Rules for Collection have been whittled down to the following:

   (a) There must be a valid contract of international sale in respect of which the foreign seller/exporter (the
principal) wishes to collect the purchase price in the country of the buyer or some other valid contract which entitles the collection to be made.

(b) The parties must act in good faith.

(c) The collection is to be effected through banks (the remitting bank acting for the principal in the country of the seller, and the collecting/presenting bank acting in the country of the buyer).

(d) There must be a formal collection order from the remitting bank to the collecting/presenting bank, the contents of which are derived from the principal’s instructions, and which must specifically and formally state the instructions the collecting/presenting bank must follow.

(e) The remitting bank must send to the collecting/presenting bank, with the collection order, the necessary shipping documents.

7. The clear import of the foreign provisions of Uniform Rules of Collection (URC) is that, where parties as happened in this matter have expressly agreed as regards the appellant’s obligation to the respondent, it overrides Uniform Rules for Collection (URC). In other words, Uniform Rules for Collection (URC) do not apply. The obligation as created between the parties in the instant case is grounded on the express agreement between them.

Appeal dismissed.

Cases referred to in the judgment

Nigerian

\[\text{Adimora v Ajufo (1988) 3 NWLR (Part 80) 1}\]
\[\text{Atolagbe v Shorun (1985) 1 NWLR (Part 2) 360}\]
Societe Generale Bank (Nigeria) Ltd v. Bremar Holdings Ltd

Statutes referred to in the judgment

Nigerian

- Evidence Act (Cap 112) Laws of the Federation of Nigeria, 1990, sections 142, 149

Foreign

- English Sale of Goods Act, 1893, section 19(3)
- Law Reform (Miscellaneous Provisions) Act, 1934, section 3

Books referred to in the judgment

- Benjamin’s *Sale of Goods* at 1414–1416
- CH Schmitthoff *Export Trade* (8ed) at 326
- CH Schmitthoff *The Export Trade* (6ed) at 212–215
- Chambers and Guest on *Bills of Exchange Promissory Notes* by A.A. Guest at 363–366
- Han Van Huntee *The Laws of International Trade* at 341–343
- William Hedley *Bills of Exchange and Documentary Credits* at 264

Counsel

- For the appellant: *Sofola, S.A.N.* (with him *Ebuna*)
- For the respondent: *Williams, S.A.N.* (with him *Williams*)
Judgment

SANUSI JCA: (Delivering the lead judgment) This is an appeal against the judgment of Segun J sitting at the Lagos High Court in Suit No. LD/1601/80 in which the plaintiff now respondent in this appeal claimed as follows:

“(a) The sum of US$243,316 (or its equivalent in Nigerian currency) being balance of money received by the defendant bank to the use of the plaintiff with interest thereon at such rate and for such period as may seem to the court just and proper pursuant to section 3 of the Law Reform (Miscellaneous Provisions) Act, 1934 of the United Kingdom.

ALTERNATIVELY

(b) The sum of U.S. Dollars $243,316 (or its equivalent in Nigeria currency) being the loss caused to the plaintiff by the defendant bank in its capacity as the Trustee of the Bills of Lading of a consignment of frozen fish or as the plaintiff’s agent in the dealing with the Bills of Lading aforesaid plus interest on the said sum at such rate and for such period as may seem to the court just and proper pursuant to section 3 of the Law Reform (Miscellaneous Provisions) Act, 1934 of the United Kingdom.”

The facts of this case which gave rise to this appeal are simple and straightforward. The respondent as plaintiff in the lower court provided financial support to a Nigeria company known as the Exchange Fishing Industries Limited (hereinafter referred to as “Exchange”) for the purchase of a cargo of frozen fish from Argentina for shipment to Nigeria. The said Exchange was a customer of the appellant, a bank registered to do banking business in Nigeria. It was the plaintiff’s case that the bills of lading relating to the consignment of the frozen fish were to be despatched to the defendant/appellant bank that in turn accepted responsibility for the documents and undertook not to release such documents until and unless full payment was received by them in local currency of the sum contained in the invoice. The defendant bank also agreed to collect the amount and remit same to the plaintiff in foreign currency. It was also the case of the plaintiff/respondent that the defendant/appellant with
out its proper knowledge or consent and in breach of the undertaking of the defendant, released the bill of lading to Exchange who cleared the goods and obtained possession thereof. The plaintiff now contends that, by reason of the breach of the undertaking, the defendant/appellant bank as trustee of the bills of lading, caused the plaintiff/respondent to suffer loss of their security for the repayment of the monies owed to them by Exchange.

In its judgment delivered on 19 January, 1990, the trial court found in favour of the plaintiff and entered judgment in its favour to the tune of US$243,316 being the balance of monies received by the defendant/appellant bank for the use of the plaintiff/respondent with interest of 10% per annum from 23 January, 1981 until the date it delivered its judgment. The trial court also entered alternative judgment in the same amount and at the same rate of interest for the same period “being the loss caused to the plaintiff by the defendant bank in its capacity as the trustee of the Bills of Lading relating to the consignment of the frozen fish or as the plaintiff’s agent in the dealing with the Bills of Lading”. Dissatisfied with the judgment of the lower court, the appellant bank has appealed to this Court. The amended notice of appeal filed contained the following grounds of appeal which are reproduced without their particulars. They are:

1. That the learned trial Judge erred in law in finding that the plaintiff was a banker.

2. The learned trial Judge erred in law in finding as a fact that the plaintiff had financed the importation of frozen fish by Exchange Fishing Ltd.

3. The learned trial Judge erred in law in finding that the defendant had agreed unconditionally to accept a banker’s collection on behalf of the plaintiff.

4. The learned Judge erred in law in finding that a bill of lading had been sent to and received by the defendant and that it thereafter released the same to Exchange Fisheries Limited.
5. The learned trial Judge erred in law in finding that the defendant had undertaken “full responsibility” for the document and for the collection of the proceeds of the plaintiff’s transaction with Exchange Fisheries Limited when at the relevant time there was no document and no agreement in existence.

6. The learned trial Judge erred in law in finding that Exchange Fisheries Limited in fact lodged money with the defendant in relation to the fishing transaction alleged to have been financed by the plaintiff, and that the defendant thereafter diverted this money to its own uses when there was no evidence to this effect before the court.

7. The learned trial Judge erred in law in finding that the burden of tendering Exchange Fisheries Limited’s statement of account was with the defendant in order to show that Exchange Fisheries Limited had not paid the money due from it to the plaintiff.

8. The learned trial Judge erred in law in finding that the defendant assisted the plaintiff to recover a substantial portion of the debt owed to them by Exchange Fisheries Limited not out of a wish to assist but due to a legal and commercial obligation to transfer money to the plaintiff.

9. The judgment is against the weight of the evidence.

Distilled from the above-mentioned grounds of appeal are the under-mentioned three issues for determination in the appellant’s brief of arguments filed by the learned Counsel, Chief Kehinde Sofola, S.A.N. The three issues are as listed below:

(a) What are the requirements of law and banking practice for documentary collection by banks?

(b) Did the respondent fulfil those requirements in this case?
Did the evidence before the learned trial Judge support the judgment given?

The learned Counsel for the respondent, Chief FRA Williams, S.A.N., framed five issues for determination in the respondent’s brief of argument. These issues are reproduced below:

(i) Was the learned trial Judge correct in holding that the defendant bank entered into a definite commitment with the plaintiff that on their responsibility they would receive documents from the plaintiff in trust and would not hand them over to their customer, Exchange Fishing Industries Limited, until or unless they receive payment in naira equal to U.S.$893,316?

(ii) Was the court below correct in finding that the plaintiff is a banker? If the answer is in the negative, has this error led to a miscarriage of justice?

(iii) Was the court below correct in its finding that the bills of lading relating to the consignment were sent “directly” to the defendant bank and were received by them? If the answer to this question is in the affirmative, was the proper procedure followed?

(iv) Was there evidence to justify the finding by the court below that the defendant bank released the bills of lading to their customer, Exchange, before full payment of the proceeds of the frozen fish was paid to them?

(v) Was the court below correct in its finding that Exchange Fishing Industries Limited paid the plaintiff in full through the defendant bank, but the latter remitted only part of the money.

I must say that the issues for determination formulated by the learned S.A.N. for the respondent properly covered all the grounds of appeal relied on by the appellant and they also subsumed the issues identified by the learned S.A.N. for the appellant. I shall as such adopt and be guided by them
for the determination of this appeal. I shall deal with them seriatim. The first issue for determination appears to have been distilled from third and fifth grounds of appeal. It poses a question as to whether the appellant had entered into any definite agreement or made any written commitment with plaintiff that it would be responsible to receive documents from the respondent in trust and on condition that it (the appellant) would only surrender them to Exchange upon the appellant bank receiving payment in Naira or its value in foreign currency. In fact, the main complaint of the appellant appears to be on the finding of the learned trial Judge at 230 lines 15–24 where the trial court found thus:–

“Reading through the list of exchange of telexes between both parties, it is established beyond doubt that according to internationally accepted standard banking practice the defendant bank entered into a definite commitment with the plaintiff that on their responsibility, they would receive documents from the plaintiff on trust; and would not hand them over to their customer Exchange Fishing Industries Limited until or unless they received payment in Naira equal to $893,319 (US Dollars).”

It is the argument of the learned Senior Advocate, Chief Kehinde Sofola, in his brief on behalf of the appellant that for the lower court to be correct in its finding reproduced above, there must have been adduced by the plaintiff/respondent evidence that the latter had first of all issued instructions for a documentary collection against payment.

Also, a “collection order” must have been issued to the appellant/defendant which could serve as an authority for it to collect the money owed by Exchange Fishing Industries Limited and remit same to the plaintiff/respondent. The learned Counsel for the appellant further argued in his brief that there was no evidence that the shipping documents were sent to the appellant as stated in Exhibit A or that such documents were released to Exchange Fishing Industries Limited. The learned silk further argued in the appellant’s brief that the issue of documentary collection in this suit is governed by the provisions of rules and conventions in the
International Chambers of Commerce Uniform Rules for Collection (URC), i.e. Exhibit C. The learned S.A.N. argued that the requirements of the said rules as contained in Part A of the said rules are:

(a) That there must be a valid contract of international sale in respect of which the foreign seller/exporter (i.e. the principal) wished to collect the purchase price in the country of the buyer; or some other valid contract which entitles the collection to be made.

(b) The parties must act in good faith.

(c) The collection is to be effected through banks (the remitting bank acting for the principal in the country of the seller and the collecting/presenting bank acting in the country of the buyer).

(d) There must be a formal collection order from the remitting bank to the collecting/presenting bank, the contents of which are derived from the principal’s instruction, and which must specifically and formally state the instructions the collecting/presenting bank must follow.

(e) The remitting bank must send to the collecting/presenting bank with the collection order, the necessary shipping documents.

On this portion of his submission the learned Counsel referred to some publications which include: *The Law of International Trade* by Han Van Huntee at 341–343; Benjamin’s *Sale of Goods* at 1414–1416; Chambers and Guest on *Bills of Exchange, Promissory Notes* by AA Guest at 363–366 and *The Export Trade* by C.H. Schmitthoff (6ed) at 212–215. The appellant in concluding his argument on this issue argued that the plaintiff/respondent neither proved any valid contract for any documentary collection nor any contract for sale to base the transaction. He cited and relied on *Robin v National Trust Co* (1927) AC 515 at 520; *Berliet Ltd v Francis* (1987) 2 NWLR (Part 58) 673 at 679 D–H. He also referred to a book authored by William Hedly, *Bills of Exchange and Bankers Documentary Credits* at 264.
On the other hand it was part of the arguments of Chief F.R.A. Williams, S.A.N., on behalf of the respondent that there was sufficient evidence supporting the trial court’s finding reproduced above. The learned silk referred us to the testimony of PW1, Brian Raymond Bell, the general manager of plaintiff/respondent, at page 19 which gave credence to Exhibit A and, according to the learned Counsel, these pieces of evidence were neither impeached nor contradicted. It will not be out of place to consider the antecedents of the transaction before an attempt is made to answer the question posed on this issue. In doing so, a consideration must be made of the evidence contained in Exhibit A, such as telexes exchanged between the respondent as plaintiff at the court below and the appellant as defendant thereat. At page 1 of Exhibit A there is a telex sent by the appellant to the deputy chairman of the plaintiff company in London which reads thus:—

“At the request of the Exchange Fishing Industries Limited we will process the Form ‘M’ in respect of the Proforma Invoice No. 1/79 issued by Comualor Finaz AG on receipt of instructions we will not release the documents until we receive full payment in local currency. Also we assure you of our best co-operation for the proceeds being remitted as quickly as possible in accordance with Nigerian regulations.”

This telex is dated 9 May, 1979. In apparent reference to the above-quoted telex the first witness of the plaintiff, Mr Brian Raymond Bell, had this to say in his testimony:—

“The telex was received by the plaintiff in London. I saw it when it arrived. When we received the telex what we took it to mean was that the defendants were accepting responsibility for the documents and that they would not be released until full payment has been received by them in local currency. This is standard and banking practice. The documents in question were the Bills of Lading. The significance of Bills of Lading as far as the transaction of this nature is concerned is that Bills of Lading is the bank’s security by way of title to the goods and therefore would not be released unless for cash settlement.”

It is clear from the record of proceedings that this piece of evidence of PW1 was not impeached by the appellant at all.
There is also a telegraphic message sent by the manager of the Apapa branch of the appellant, Mr Farre, to the plaintiff/respondent which reads as follows:–

“We confirm that in accordance with banking practice we will handle the documents under our responsibility and make necessary arrangements to submit to Central Bank to remit foreign currencies. According to the present situation of the market the sale of about 70% of the cargoes should be sufficient to settle the bill, leaving a margin of 30% for bad quantity, shortage etc. . .”

From the evidence adduced in the case which the trial court received and the above-quoted telex and telegraphic messages and others contained in Exhibit A, I am of the view that the defendant, now appellant, in this appeal had undoubtedly taken full responsibility for collecting the document from the plaintiff/respondent and had also undertaken to release them to Exchange Fishing Industries Limited only upon the latter making full payment of the price of the commodity. The trial court was therefore right in believing such pieces of evidence and acting on them as it did. It is also apt to say that the respondent, relying on the unequivocal commitment by the appellant, it agreed to finance the transaction believing, of course, that the appellant would live up to its commitment and undertaking as a reputable bank. The trial court is therefore right in its finding that the appellant had entered into a definite commitment as regards the collection of the documents in trust from the plaintiff/respondent and not to hand them over except on receiving full payment of the cost of the commodity in naira or its dollar equivalent. With such unequivocal commitment I do not see any wisdom of insisting that there must exist any formal instructions from the plaintiff/respondent for the collection of the documents especially when one considers the fact that the appellant had remitted the larger part of the amount it received or collected leaving only the balance claimed in the suit even though it said it did so for another reason. I think in the circumstance of the case the trial court made a correct finding in this issue. Inevitably, I have to
answer the question raised on the issue in the affirmative and I do same.

The second issue is whether the trial court was right in finding that the plaintiff/respondent is a bank. The appellant in ground one of its amended notice of appeal raised this issue. This complaint by the appellant appears to me to be impertinent. In my view whether the respondent company was adjudged a bank or not it will not serve any purpose. The important thing is that it entered into a transaction with the appellant bank. The nature of the transaction is such that it could be entered into by a bank or any finance company. Even if the trial court did not adjudge it as a bank, I do not think it will change the conclusion the lower court arrived at or exonerate the appellant from liability once such has been established. In any case it is clear from Exhibit B which is the plaintiff’s memorandum of association in clause 3(a) that the plaintiff is among others:—

“...to carry on business in all parts of the world as bankers, investment bankers, merchant bankers, financiers, capitalists, financial advisers agent and consultant, etc.”

On this premise I feel the trial court is justified in regarding and finding that the plaintiff/respondent are bankers. I feel that it correctly so held. I am also of the opinion that, even if the trial court held that the plaintiff was not a bank, there had been no miscarriage of justice occasioned on the appellant.

The third issue for determination is whether the bills of lading on the consignment was sent directly to the defendant’s bank and were actually received by them as found by the trial court. It is the argument of the learned Senior Advocate of Nigeria representing the appellant that the trial court was wrong in finding that the shipping documents were sent to the appellant by the respondent as there was no such evidence as stated in Exhibit A. The evidence before the trial court is that the goods could not have been shipped before the 14/15 June, 1979. More so according to the
learned appellant’s Counsel, the proper method of despatching the shipping documents was not followed and that the arrival of Mr Parkins on or about 10 July, 1979 with shipping documents is a pointer that the necessary shipping documents had not been sent to the appellant. Responding to these arguments of the appellant, the learned S.A.N. for the respondent argued that the trial court was entitled to presume that the shipping documents were sent under section 149(c) of the Evidence Act, 1990 bearing in mind also the provisions of section 18 of the Evidence Act, 1990. Now let us consider the record of appeal and see whether there was evidence before the trial court to base its findings on this issue. In the first place, the first plaintiff witness, Mr Brian Raymond Bell, had this to say at 182 lines 1–3 of the record:

“I saw a copy of the documentary credit issued by the Bank (see pages 51–55 of Exhibit A). The credit was properly negotiated and paid. The amount due to be paid to the plaintiff company from Nigeria is $865,000:00 (US Dollars).”

Also the second plaintiff’s witness, Mr Robert Charles Parkins, in his testimony in court confirmed that he urged for the opening of the letter of credit and that by telex he also confirmed that a letter of credit had been issued. Also in his testimony at 189 of the record this same witness confirmed that the cargo of fish arrived in Lagos around 1 or 2 July, 1979. Similarly, the letter of credit the opening of which initiated by the respondent which is contained in Exhibit A partly reads thus:

“Certificate of shippers stating that they have mailed in two consecutive express airmail to Societe Generale, 29, Burma Road, Apapa, P.M.B. 12741, Lagos . . . 3/3 Clear on Board Bill of Lading, or Charter Bill of Lading, marked ‘freight prepaid’ showing amount paid and endorsed to order of Societe Generale Apapa and stating that they have instructed Societe Generale Apapa to hold said documents at the free disposal of Brema Holdings Limited London and that no mention of value of the goods has been made on the documents sent to Societe Generale, Apapa.”

From the evidence adduced before the lower court as contained in the record of appeal which I highlighted above
there is no doubt the commodity, i.e. frozen fish, was imported into this country and that the credit was negotiated and paid. From the contents of the amended statement of defence (paragraphs 24–28) and indeed the evidence of DW2 when he stated that the defendant bank endorsed the bill of lading brought to it by one Sakutu on behalf of Exchange Fishing Industries Limited, I feel the trial Judge ought to have acted on these pieces of evidence to presume as he did that the bill of lading was sent to Nigeria and in fact that it was done in accordance with the conditions specified in the letter of credit and that the bill of lading must have been addressed and sent to the defendant bank. Admittedly the lower court found that the bill had been sent to the defendant bank and received by the latter from the plaintiff and, thereafter, the latter released same to Exchange Fishing Industries Limited. The question then is that, is the trial court justified in making such presumption in this circumstance? I venture to answer this question in the affirmative. By virtue of the provisions of section 149 of the Evidence Act a trial court is empowered to presume the existence of fact having regard to the common course of natural events, human conduct and public business in their relation to the facts of the particular case before it. It must, however, be emphasised that in doing so it must take into consideration the totality of the case. In other words, in presuming the existence of any fact which a court thinks likely to have happened having regard to the common course of natural events, human conduct and public or private business, it must relate all those factors to all the facts of the case that are relevant to the facts, the existence of which was in question (see Dr Tunde Bamgboye v University of Ilorin and another (1999) 10 NWLR (Part 622) 290).

On the appellant’s contention that the bill of lading was sent to Exchange Fishing Industries Limited which later took it to the defendant bank which said suggestion the trial court rejected in its judgment, it is pertinent to refer to the
business practice among merchants which involves the issuance of documentary bills by the seller or his agent. In the 8th edition of Schmitthoff’s Export Trade at 326 the learned author had this to say on “Documentary bill”:

“The seller often attached to a bill of exchange which he has drawn on the buyer the Bill of Lading to the goods sold. Such a bill of exchange is known as a documentary bill. The purpose of issuing a documentary bill is mainly to ensure that the buyer shall not receive the bill of lading and therewith the right of disposal of the goods unless he has first accepted or paid the attached bill of exchange according to the arrangement between the parties. If the buyer fails to honour the bill of exchange, he has to return the bill of lading, and if he wrongfully retains the latter, the law presumes that the property in the goods sold has not passed to him.”

This practice is in keeping with the provisions of section 19(3) of the English Sale of Goods Act of 1893 which is applicable in Lagos State. By virtue of the above-quoted practice and the above-mentioned provisions, in my view, the court rightly presumed that the bill of lading was sent directly to the defendant bank and not to the defendant’s customer. Also I do not see how or why the defendant bank can exonerate itself from liability simply on the pretext that “proper procedure” was not followed.

On the contention by the appellant that the goods could not have been despatched before 14/15th of June, 1979, it is clear from Exhibit A that the goods were shipped to the defendant’s bank on 8 June, 1979. Although the appellant in his brief urged this Court to reject the court’s finding that the documents were not sent to the appellant in view of the evidence that Mr Parkins brought shipping documents on or about 10 July, 1979 the court, rightly in my view, rejected that suggestion in view of the fact that in the first place there was nobody that claimed that the bill of lading was despatched to Mr Sakutu. Secondly, it looks rather strange for a shipper or vendor or vendor’s agent to send document of title of goods to a purchaser who is yet to pay for the goods he purchased. Also the bills of exchange was issued on 10 July, 1979. Mr Parkins arrived in Nigeria on 10 July, 1979 or thereabouts, hence he could not have brought them along.
This transaction as I see it is an express, clear and unambiguous one to which the URC do not apply or govern.

The last issue poses a question whether the trial court was correct in its finding that Exchange Fishing Industries Limited paid the plaintiff/respondent fully through the defendant bank/appellant but the latter remitted only part of the money. In the appellant’s brief the learned Counsel argued that there was a discrepancy on the total amount claimed by the plaintiff. He argued that one of the witnesses for the plaintiff put the amount as $893,316 whereas $949,423 was reflected on the bill of exchange accepted by Exchange Fishing Industries Limited.

This issue of disparity in the amount was, however, never canvassed at the lower court. It was raised for the first time here and no leave was sought and obtained here. I shall therefore discountenance it and the argument related to it. The defendant bank/appellant denied that Exchange paid any amount. It is, however, in evidence before the trial court that the appellant remitted a sum of $650,000 (US Dollars) leaving a balance of $234,316 (US Dollars) (which was claimed in this suit) even though it said it made such payment out of sympathy. The trial court rejected that excuse and held that if the appellant had not any commitment to the plaintiff/respondent it would not have paid such a large amount. It is also in evidence from the testimony of PW1 that when he came to Nigeria and visited the defendant/appellant bank he saw a representative of Exchange paying some money into their account. The trial court made this finding in its judgment:–

“I am told that Exchange has no fund in their current account. If this were so, I expect the statement of account to be tendered to buttress that fact. When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. (see section 141 of Evidence Act).”

Considering the evidence adduced in the case, especially the one mentioned above and in the circumstance of the case,
the lower court is in my view justified in presuming under sections 141 and 148 of the Evidence Act (sections 142 and 149 of the Evidence Act of 1990 respectively) that the appellant did not tender a statement of account because it would be unfavourable to it and that it had the burden to tender the statement of account since it contained facts within its knowledge only. I am convinced that in making such presumption the lower court had taken into consideration the facts and evidence adduced in the case. I hold that it made a correct finding in that report.

It is trite that a trial court has the exclusive power of making findings of fact. There is also a rebuttable presumption that the trial court’s finding and conclusion on the facts are correct (see Sanni v State (1993) 4 NWLR (Part 285) 99). It is also trite that a finding of fact made by the trial court must be supported by evidence adduced before it because an Appellate Court can and indeed must interfere with and correct any trial court’s finding on fact made erroneously by a trial court or where the inference drawn and conclusion reached therefrom was not supported by evidence, especially where erroneous findings, conclusions or inference had weighed heavily and influenced the mind of the trial Judge and had led to miscarriage of justice (see Makanjuola v Balogun (1989) 3 NWLR (Part 108) 192; Onubogu v Queen (1974) 9 SC 1). In other words, the position of the law is that an Appellate Court in an appeal of findings of fact (as this case largely is) would not disturb the findings of fact of a trial Judge unless of course the trial Judge has misdirected himself or he did not use the advantage of having seen, heard and watched the witness (see Okwaranyia v Eke (1996) 3 NWLR (Part 436) 335).

As I said above, all the findings of facts made by the trial court complained of by the appellant in this appeal were correctly made and were supported by evidence adduced at the trial. The trial court in my view duly evaluated them and drew the correct necessary inference in reaching its conclusion. I do not see the need of interfering with or disturbing the findings it made.
From the foregoing and after careful consideration of the issues raised in this appeal, there is no merit and substance in the appeal by the appellant. I therefore dismiss the appeal as it is unmeritorious. I affirm the decision of the lower court. The respondent is entitled to costs which I assess at ₦5,000 and award same against the appellant.

**IGE JCA:** I have had the privilege of a preview of the judgment just delivered by my learned brother, Sanusi JCA.

I agree with my learned brother that the appeal lacks merit and should be dismissed.

I also dismiss the appeal with ₦5,000 costs in favour of the respondent.

**CHUKWUMA-ENEH JCA:** I have read in advance the judgment of my learned brother, Sanusi JCA, just delivered and I entirely agree that the appeal lacks merits and ought to be dismissed.

I am, however, obliged to make the following contribution to put emphasis on one or two salient aspects of the matter. I need not set out the facts which have been ably set forth in the leading judgment. They will suffice for this observation and I adopt them.

Save to restate that the court below found for the plaintiff (i.e. the respondent) and entered judgment for “the sum of US$243,316.00 being balance of monies received by the defendant bank (i.e. the appellant) to the use of the plaintiff with interest of 10% p.a. from 23 January, 1981”.

The court below also entered judgment in the alternative in the same amount at the same rate of interest for the same period being the loss caused to the plaintiff by the defendant bank in its capacity as the trustees of the bills of lading relating to the consignment of the frozen fish or as the plaintiff’s agent in dealing with the bills of lading.

The appellant has put much emphasis on the International Chamber of Commerce Uniform Rules for Collection...
otherwise referred to as Uniform Rules for Collection (URC for short) to raise the posers: Whether the requirements of law and banking practice for documentary collection by banks were fulfilled and whether there was evidence to support the judgment given. It needs to be noted early enough in this contribution that Uniform Rules for Collection (URC) apply only to the extent that there are no express agreements of the parties excluding the same. For ease of reference the salient requirement inherent in Uniform Rules for Collection have been whittled down to the following:–

(a) There must be a valid contract of international sale in respect of which the foreign seller/exporter (the principal) wishes to collect the purchase price in the country of the buyer; or some other valid contract which entitles the collection to be made.

(b) The parties must act in good faith.

(c) The collection is to be effected through banks (the remitting bank acting for the principal in the country of the seller, and the collecting/presenting bank acting in the country of the buyer).

(d) There must be a formal collection order from the remitting bank to the collecting/presenting bank, the contents of which are derived from the principal’s instructions, and which must specifically and formally state the instructions the collecting/presenting bank must follow.

(e) The remitting bank must send to the collecting/presenting bank with the collection order the necessary shipping documents.

It is the bridgehead of the appellant’s case that Uniform Rules Collection (URC) govern the contractual obligation between the appellant and the respondent. That is to say, one of the contracts that is envisaged in this deal of buying and selling of frozen fish from Argentina.

As found by the court below and which finding I have no reason to depart from or disagree with, there is a valid
contract between the appellant and the respondent upon which the documentary collection arrangement was indeed predicated. The court below so found in these clear terms thus:

“Reading through the list of telexes between both parties, it is established beyond doubt that according to internationally accepted standard of banking practice, the defendant Bank entered into a definite commitment with the plaintiffs that they would receive documents from the plaintiffs in trust and would not hand them over to their customer Exchange Fishing Industries Ltd (until or unless they received payment in Naira equal to $893,316 (US Dollar).”

The appellant has woefully failed to dislodge the foregoing solid findings of fact which can only be overridden if it is shown by the appellant to be perverse (see Adimora v Ajufọ (1988) 3 NWLR (Part 80) 1; Atolagbe v Shorun (1985) 1 NWLR (Part 2) 360 at 376).

Furthermore, the attempt by the appellant to foist Uniform Rules for Collection (i.e. URC) on the contractual obligation between the appellant and respondent has no basis. This is because of the clear and unambiguous express agreement between the parties as found by the court below, i.e. from the telex exchanges between the parties and as per the contents of the document/letter referred to at 181 lines 19–25 of the record reproduced thus:

“We confirm that in accordance with banking practice we will handle the documents under our responsibility and make necessary arrangements to submit to Central Bank of Nigeria to remit foreign currencies. According to the present situation of the market the sale of about 70% of the cargo should be sufficient to settle the bill, leaving a margin of 30% for bad quality shortage etc.”

The foregoing extract together with the findings of the court below referred to above on the outcome of the summation of the aforesaid telex messages leaves one in no doubt over the express agreement reached on their obligations thus excluding the application of the rules and conventions for documentary collection which the appellant has in his brief
conceded to be “subject to any other express agreement of the parties.” All told, the heavy weather made of the applicability of the Uniform Rules for Collection (URC) to the instant contractual obligation between the parties appear unsupportable on the peculiar facts and circumstances of this matter. Having reached this conclusion, I am not unaware that the instant contractual obligation between the parties present is but one of several interrelated contracts that resulted from the importation of frozen fish into this country from Argentina. In the case of *Akinsanya v U.B.A. Ltd* (1986) 4 NWLR (Part 35) 273; (1986) 2 NSCC (Vol. 17) 968 the Supreme Court in setting forth these contracts observed thus:–

“A commercial credit contract is a dealing in document *per se* and not in the goods they represent. This gives rise to four contracts in the transaction. First between the buyer and the seller. Secondly, between the buyer and the issuing bank. Thirdly, between the issuing bank and the confirming or correspondent bank and the seller. It is only the contract between the buyer and the seller that involves a carriage of goods transaction. Where the bill of lading is required in the contract between the issuing bank and the confirming bank or the contract between the confirming bank and the overseas supplier – seller, they are merely evidence necessary and requisite for effecting payment . . .”

The present contractual obligation being examined in this contribution without doubt falls within the third category of the above extract of the cited case. I have taken pains to set forth the extract of the cited case as I am not unmindful that the appellant has also raised the issue that the respondent not being a banker cannot in the circumstances contract with the appellant.

As rightly pointed out by Chief *Williams*, S.A.N., in answer to that issue, the obligation owed by the appellant to the respondent in this respect does not depend upon the status of the respondent. Besides, I have already reached the conclusion that Uniform Rules of Collection (URC) have no relevance or application to the obligation between the parties in this matter.
In furtherance of my conclusion that the Uniform Rules Collection (URC) can be expressly excluded is again amply supported by the stipulation in clause A of the Uniform Rules for Collection (URC) which reads thus:—

“These provisions and definitions and the following articles apply to all collections as defined in (B) below and are binding upon all parties unless otherwise expressly agreed or unless contrary to the provisions of a national, State or local law and/or regulation which cannot be departed from.”

The clear import of the foregoing provisions of the Uniform Rules for Collection (URC) is that, where parties as happened in this matter have expressly agreed as regards the appellant’s obligation to the respondent, it overrides the Uniform Rules for Collection (URC). In other words, the Uniform Rules for Collection (URC) do not apply. The obligation as created between the parties is grounded on the express agreement between them. And I so hold. Therefore, the appellant’s case collapses on this finding. Finally, evidence abound as contained and reflected in my reasoning above to justify and sustain the judgment given in favour of the respondent.

For all this and for much fuller reasons eloquently set forth on the lead judgment I am of the firm view that this appeal ought to be dismissed and it is dismissed accordingly. The judgment of the court below is hereby affirmed with the order as to costs as contained in the lead judgment.

Appeal dismissed.
Bank of the North Limited v Alhaji Bala Yau

SUPREME COURT OF NIGERIA

ACHIKE, AYOOLA, KARIBI-WHYTE, KUTIGI, MOHAMMED JSC

Date of Judgment: 11 November, 2000

Banking – Banker and customer relationship – Nature of contractual relationship between

Banking – Cheque – Consequences of receipt of by bank

Banking – Cheque received for collection – Where dishonoured – Effect – Whether banker entitled to debit customer’s account

Banking – Collecting bank – Obligation of to give notice of dishonour of bill – Failure to discharge the obligation – Remedy available to customer prejudiced thereby

Banking – Collecting bank – Responsibilities of

Banking – Customer drawing against uncleared cheque which was subsequently dishonoured – Course open to the bank


Bill of exchange – Bill – Notice of dishonour – Requirements of timeous notice – To whom given – Failure to give notice – Effect

Bill of exchange – Dishonoured cheque – Where cheque received

Estoppel – Doctrine of – Meaning and nature of – How it operates – Whether can be used as shield or sword

Practice and procedure – Action – Right of action

Practice and procedure – Waiver – Meaning of – Doctrine of – How it operates
Facts

Before the Maiduguri High Court, the appellant claimed against the respondent the sum of ₦494,593.39 being the debit balance as at 28 February, 1987 in the respondent’s account with the appellant bank. It also claimed 13% compound interest thereon from 28 February, 1987 till date of judgment and 10% simple interest per annum from the date of judgment until final payment. It further claimed a declaration that moneys secured by deed of legal mortgage dated 1 May, 1979 over property covered by Certificate of Occupancy No. BO/2167, created by the respondent to secure his borrowing from the appellants had fallen due for payment and that it was entitled to exercise its right of sale under the legal mortgage, in its capacity as unpaid mortgagee.

The respondent was at all material times a customer of the appellant. The main controversy between the parties arose from the appellant’s debiting the account of the respondent with the sum of ₦185,650 being the total value of the five cheques issued in favour of the respondent, which he paid into his overdraft account in Maiduguri and were dispatched in normal banking business by the appellant for payment by Kano City branch of the Bank of the North Limited, the drawee bank. The said cheques were alleged by the appellant to have been dishonoured and lost in transit but the respondent took benefit of the value of the said five cheques when neither the drawee bank in Kano paid the value of the said cheques nor was respondent’s account at Maiduguri credited with the value of the said five cheques.

The respondent’s defence, *inter alia*, was that he had waited for about two months before drawing against the cheques. He counter-claimed damages for negligence and alleged that it was utterly negligent of the appellant to have delayed for up to a year before informing him that the cheques were lost in transit and/or were presented for payment but dishonoured by the Kano branch. Despite this
contention, the respondent offered to repay the money and actually made part payment of ₦21,000.

Upon conclusion of the trial the learned trial Judge held that the respondent’s account was properly debited with the value of the five cheques. Dissatisfied, the respondent appealed to the Court of Appeal which allowed the appeal, and set aside the judgment of the trial court. The Court of Appeal held that the appellant had failed to establish that the five cheques paid in by the respondent were in fact dishonoured, and that it was not right and proper for the appellant to have debited the account of the respondent with the total of the said cheques.

Dissatisfied with the decision of the Court of Appeal, the appellant appealed to the Supreme Court. Before the apex court, the live issues were whether it was proper for the appellant to have debited the account of the respondent and whether the respondent had not waived his right to notice of dishonour of the cheques.

Held –

1. Under section 47 of the Bills of Exchange Act, a bill is dishonoured by non-payment of the value of money stipulated thereon.

2. Under section 48 of the Bills of Exchange Act, notice of dishonour must be given to the drawer and each endorser of the bill, and failure to do so, the right of a holder in due course subsequent to the omission shall not be prejudiced by the omissions.

3. Under section 49(1) of the Bills of Exchange Act, notice of dishonour of the bill must be given within a reasonable time thereafter. Undoubtedly, time is of the utmost importance in relation to giving notice of dishonour. What constitutes a reasonable time is a question of fact dependent upon the circumstances of the case. A delay in giving notice extending for a period of nearly one year, without any satisfactory explanation, cannot be but unreasonable.
4. Waiver may be implied from conduct that is inconsistent with the continuance of a right. The courts have readily inferred waiver from very minimum or slight evidence. In the instant case, even though appellant did not give due notice of dishonour of the five cheques, the respondent had before the action waived the requirement of the due notice.

5. Estoppel is an admission or something which the law views as equivalent to an admission. By its very nature it is so important, so conclusive, that the party whom it affects is not allowed to plead against it or adduce evidence to contradict it. Estoppel prohibits a party from proving anything which contradicts his previous acts or declaration to the prejudice of a party, who replying upon them has altered his position. It shuts the mouth of a party. In the instant case, the Court of Appeal was palpably in grave error when it failed to appreciate the overwhelming evidence, documentary and oral, showing in unmistakable terms, admission of liability by the respondent. In the light of such unchallenged piece of evidence of admission, surely the respondent was in law estopped from denying such admission, and to hold otherwise is to act prejudicially to the chagrin and detriment of the appellant.

6. It is well-settled law that waiver is an abandonment of a right. Two elements must co-exist to constitute a waiver. First, the party against whom the doctrine is involved must have knowledge or be aware of the act or omission which constitutes the waiver and, secondly, there must be on the part of the person against whom the doctrine is invoked, some unequivocal act adopting or recognising the act or omission.

7. The law is that where a person by words or conduct made to another a clear and unequivocal representation of a fact or facts either with knowledge of its falsehood, with intention that it should be acted upon, or has so conducted himself that another would as a reasonable
man in his full faculties, understand that a certain representation of fact was intended to be acted upon, and that another person in fact acted upon that representation whereby his position was thereby altered to his detriment, an estoppel arises against the person who made the representation and he will not be allowed to aver the contrary of what he presented it to be as in the case of the respondent.

8. It is important in an action between a bank and a customer to be clear which of the several contractual relationship forms or form the basis of the action. In the instant case, the four following relationships are pertinent:

(i) the relationship of creditor and debtor that arises in regard to the customer’s funds in the hands of the bank;

(ii) the relationship of creditor and debtor that arises when the bank loans money to the customer or allows him to overdraw his account;

(iii) the relationship that arises from the role of the bank as a collecting bank of cheques drawn on other banks or branches of the same bank by a third person; and

(iv) the possible role of the bank as a holder for value of a negotiable instrument.

9. In collecting cheques and other instruments for a customer a banker acts as a mere agent or conduit pipe to receive payment of the cheques from the banker on whom they are drawn and to hold the proceeds at the disposal of his customers. The character in which a banker receives a cheque is a matter of fact in each case; he may be a mere collecting agent, or he may take as a holder for value or in due course. The banker can be both an agent for collecting and a holder for value at the same time.
10. If a cheque is dishonoured on presentation, the collecting bank can debit the customer’s account with the amount. This is the universal custom of bankers.

11. Where cheques are credited as such prior to receipt of payment, the customer is entitled to draw on them at once only if there is an agreement, express or implied, to that effect. If a cheque received from collection is dishonoured or if the bank has to account to the true owner for the proceeds, the banker is entitled to debit the customer’s account accordingly.

12. The collecting bank has a duty to present a cheque within a reasonable time after it reaches him. He is liable to his customer for loss arising from delay.

13. A collecting bank which has allowed a customer to draw against the amount of a cheque received by him for collection before it is cleared may become a holder for value if there is a contract, express or implied, entitling the customer to draw against the amount. Mere indulgence would not amount to such a contract.

14. Under section 2 of the Bills of Exchange Act, “holder” means the payee or endorsee of a bill or note who is in possession of it, or the bearer thereof. Consequently, for the bank to claim to be or to be treated as a holder, it is not sufficient to show that it has permitted the customer to draw against an uncleared cheque pursuant to an express or implied contract, unless it has been shown in terms of section 2 that it had become an endorsee or a bearer, the cheque is payable to order.

15. As to whether or not a bank is a holder, it is not a matter of assumption at all. That fact must be averred and proved. As a rule of pleadings, where a bank claims on a bill, a statement of claim must allege the right within which the bank claims on the bill, that is whether as payee, holder or endorsee and whether as holder in due cause or holder for value.
16. A bank that has allowed a customer to draw on an uncleared cheque which was later dishonoured whereby the customer’s account becomes overdrawn, has a choice of action. If it is a holder for value, it can sue the drawer or the endorser on the bill and claim all the benefits of so doing under the Bills of Exchange Act. If it chooses, he can sue the customer on the debt. Where a customer paid a cheque to his banker and drew another for payment before the effect of the one he paid was cleared, he was only asking the bank for a loan.

17. Where a collecting bank has failed in its duty to give due notice of dishonour of a cheque delivered to it merely for collection to its customer within a reasonable time and the customer has suffered prejudice thereby, his action properly lies in damages for negligence.

Appeal allowed.

Cases referred to in the judgment

Nigerian

Adereti v A-G, Western Nigeria (1965) NSCC 193
Bassil v Honger 14 WACA 569
Iga v Amakiri (1976) 11 SC 1
Olatunde v Obafemi Awolowo University (1998) 5 NWLR (Part 549) 178
Oyerogba v Olaopa (1998) 13 NWLR (Part 583) 509
Yoye v Olubode (1974) 9 NSCC 409

Foreign

Cuthbert v Robarts, Lubbock and Co. (1909) 2 Ch. D. 226
Lombard Banking Ltd v Central Garage and Engineering Co. Ltd (1963) 1 QB 220
Peacock v Purssell (1863) 32 LJCP 266
Nigerian statutes referred to in the judgment
Bills of Exchange Act (Cap 35) Laws of the Federation of Nigeria, 1990, sections 2, 27(2), 47, 48, 49, 50 and 77(1)
Evidence Act (Cap 112) Laws of the Federation of Nigeria, 1990, sections 19, 20(1) and 151

Books referred to in the judgment
Bullen and Leake and Jacob’s Precedents on Pleadings (13ed)
Chitty on Contract Vol. 1 paragraph 1551 at 982
Halsbury’s Laws of England Vol. 3(1) (4ed) at 179 paragraph 212

Counsel
For the appellant: Kwaku
For the respondent: Williams

Judgment
ACHEKE JSC: (Delivering the lead judgment) The plaintiff/appellant, a banker, claimed against the defendant/respondent in Maiduguri High Court the sum of ₦494,593.39 being the debit balance as at 28 February, 1987 in the respondent’s account with the appellant bank plus 13% per annum compound interest on same from 28 February, 1987 to date of judgment and 10% simple interest per annum from the date of judgment until the whole judgment debt has been fully paid. The appellant also claimed a declaration that moneys secured by deed of legal mortgage dated 1 May, 1979 over property covered by the Certificate of Occupancy No. BO/2167, created by the respondent to secure his borrowing from the appellants have fallen due for payment and that the appellant as unpaid mortgagee was entitled to exercise its right of sale under the said deed of legal mortgage.

The main controversy between the parties arose from the appellant’s debiting the account of the defendant with the sum of ₦185,650 being the total value of the five cheques.
issued in favour of the respondent, which he paid into his overdraft account in Maiduguri and were despatched in normal banking business by the appellant for payment by the drawee bank, i.e. Kano City branch of the Bank of the North Limited. The said cheques were alleged by the appellant to have been dishonoured and lost in transit but the respondent took benefit of the value of the said five cheques when neither the drawee bank in Kano paid the value of the said cheques nor was respondent’s account at Maiduguri credited with the value of the said five cheques. After due trial, the learned trial Judge held that the respondent’s account was properly debited with the said sum in question, i.e. the value of the five cheques.

Dissatisfied, the respondent appealed to the Court of Appeal, which by its judgment dated 16 June, 1993, allowed the appeal. It set aside the judgment of the trial court and held as follows:–

“(a) The respondent has failed to establish before the court below that the five cheques paid in by the appellant were in fact dishonoured.

(b) Having regard to the facts and circumstances relating to the said five cheques, it was right and proper for the respondent to have debited the account of the appellant with the total of the said cheques.

(c) The respondent has failed to discharge the onus on it of proving if anything was owing to it by the appellant out of the overdraft of N50,000 granted to the said appellant.

(d) The mortgage was executed as security for the aforementioned overdraft of the said N50,000.

(e) In the premises, the decision that the appellant shall pay the sum of N494,593.39 to the respondent with interest and the declaration that the respondent is entitled to the mortgaged property is set aside.”

It may be observed that the word “not” is missing in (b) above between the words “was” and “right”. There is inherent power in this Court to correct its judgment or that of the lower court on appeal in order to avert any mischief that would otherwise arise in reading such judgment without the necessary correction. Therefore, suo motu, I effect this
amendment to the judgment of the lower court as may be found at 125 of the record in the manner hereinbefore stated.

The appellant’s learned Counsel, Fatima Kwaku, Esq., postulated three issues for determination, namely:

i. Whether the issue of the ‘dishonour and subsequent loss’ of the five cheques has been specifically pleaded.

ii. Whether by his conduct both passive and active the respondent has not waived his rights under sections 47, 48 and 49 of the Bills of Exchange Act Cap 35 Laws of the Federation of Nigeria, 1990 and whether the respondent is estopped from denying such waiver.

iii. Whether the learned Court of Appeal Justices ought not to have come to the same conclusion as the learned trial Judge that the respondent is in law estopped from denying liability in the sum claimed having regard to the several unequivocal written admissions of liability made by the respondent himself and his Counsel.”

Learned respondent’s Counsel, TE Williams, Esq., in turn, postulated the following two issues for determination, to wit:

“(i) Whether, having regard to all the facts and circumstances relating to the aforementioned five cheques, it was right and proper for the plaintiff to have debited the account of the defendant with the value of the said cheques.

(ii) In the light of the answers to the foregoing questions what final order should the court below have made on the various reliefs claimed by the plaintiff bank.”

I shall adopt the appellant’s issues for the purpose of determination of this appeal.

At the oral hearing, while appellant’s learned Counsel simply adopted her brief of argument, learned Counsel for the respondent also adopted respondent’s brief and submitted briefly that the admission in Exhibit C would not bind the respondent because the document contained no jurat. This was the decision of the trial Judge who in turn discountenanced Exhibit C in the course of preparing his judgment. Counsel further submitted that there was no appeal against this finding.
Issue 1

The first issue raises the question whether the issue of the “dishonour and subsequent loss” of the five cheques was specifically pleaded.

It may be recalled that one of the five main reasons given by the lower court for setting aside the judgment of the trial court was that the appellant herein failed to establish that the five cheques paid in by the respondent herein were in fact dishonoured. This is manifest from the lower court’s pronouncement when it said, through the leading judgment of Okezie JCA, as follows:–

“I am in agreement with the submission of the learned Counsel for the appellant which has not been faulted by Counsel for the respondent in his brief and oral argument before us that there is no averment that the cheques were presented to the drawer bank Kano City branch for payment and it dishonoured all of the cheques. Nor is there an allegation that the cheques got lost in transit. Such issues were not before the trial court.”

Referring to paragraphs 9, 13 and 14 of the statement of claim, as well as paragraphs 9 and 14 of the defendant’s counter-claim, and also paragraph 5 of the plaintiff’s reply to the defendant’s counter-claim, Counsel submitted that these clearly showed that the parties overwhelmingly pleaded the dishonour and loss of the five cheques, contrary to what the lower court had said.

The respondent did not make any input in respect of this issue in his brief of argument.

On this issue, the question is whether the lower court was justified in holding that the appellant failed to establish at the court of trial that the five cheques paid in by the respondent were in fact dishonoured. This is another way of
enquiring whether the issue of the “dishonour and subsequent loss” of the aforesaid cheques had been specifically pleaded in order to justify the finding in respect thereof made by the trial Judge. In this regard, appellant’s Counsel refers to paragraphs 9, 13 and 14 of the statement of claim. For ease of reference I reproduce them below:

“9. The defendant in or about December, 1978/June, 1979 paid the said 5 cheques into his account with the plaintiff at Maiduguri and the plaintiff in the course of its normal banking duties despatched the cheques for payment by the Drawee Bank – Kano City Branch of Bank of the North Limited, Kano . . .

13. The aforesaid 5 cheques, the total value of which amounted to *₦185,650* were in effect never paid by the drawee bank and the defendant’s account at Maiduguri was never credited with the said sum.

14. Having already taken the benefit of the total value of the 5 cheques valued at *₦185,650* and as the value of the said cheques were never received from the drawee bank the defendant’s enjoyment of direct credit of the said sum of *₦185,650* amounted to the granting of unauthorised facility by the plaintiff to the defendant.”

In turn, the respondent answered the above paragraphs of the statement of claim in some paragraphs of his statement of defence. Perhaps, it will be enough in this regard to reproduce only paragraph 13 of statement of defence:

“13. The defendant denies paragraph 13 of the statement of claim and puts plaintiff to the strictest proof of the fact that the *₦185,650* cheques were presented but not paid by the drawee bank. The plaintiff admits that his account No. 4A00219 was not credited with the said sum as the plaintiff had claimed that the cheques got lost in transit and he defendant had been informed of this fact only after about a year of paying in the first cheque No. 027510 of *₦30,000* on 8 December, 1978. The defendant shall rely on the said 5 cheques and hereby pleads same.”

It may be useful to refer also to paragraph 14 of the statement of defence although I need not reproduce it. Again, it is
a pertinent to reproduce paragraphs 9 and 14 of the counter-claim:

“9. It was only after about a whole year of the payment of the said cheques into the defendant’s account and only after the defendant had made use of the amount of the cheques by withdrawals of some from the plaintiff’s branch in Maiduguri that the defendant for the first time became aware of the fact that the said cheques had all got lost in transit while in possession and control of the plaintiff” (italics is mine).

“14. The defendant avers that having been informed of the lost (sic) of the cheques in transit, he could not be issued with new cheques to cover the said sum of ₦185,650 as the people who had paid him by those cheques did not believe that the cheques got lost in transit and so even if defendant can pay to the plaintiff the total sum of ₦185,650 then he the defendant cannot recover his money from the people who had issued him the cheques.”

Finally, it is pertinent to reproduce paragraph 5 of the plaintiff’s reply to the defendant’s counter-claim which runs as follows:

“5. With reference to paragraph 9 of the counterclaim the plaintiff while admitting that the defendant had made use of the said cheques amounting to ₦185,650 denies that the said cheques got lost in transit while in the possession and control of plaintiff and further denies that the defendant was only notified of the dishonour of the cheques after about one year of the payment of same into the defendant’s account. The plaintiff avers that the said cheques were on several occasions presented for payment to the paying bank but same were not honoured and the plaintiff advised the defendant accordingly within reasonable time” (italics mine).

The above reproduced paragraphs of the parties’ pleadings eloquently attest to the fact that the parties substantially joined issues on the vexed question of the dishonour and subsequent loss of the aforesaid cheques in their pleadings. Thus it is undoubted that the parties fully reacted on the dishonouring and loss of the controversial cheques lodged by the respondent in his account. What is, however, more
interesting is that the learned trial Judge made a finding in relation to the status of these cheques in terms of the parties’ pleadings and evidence led at the trial. This is how the trial Judge summarised the issue, and permit me for purposes of clarity, to reproduce the relevant excerpt of the judgment in extenso:

“There is ample evidence clearly showing that the five cheques in question were dishonoured and consequently his account was being debited with the sum of ₦185,650 as the proceed of the cheques were already paid to him. I believe the evidence of Yahaya Mahmud that on discovering that the cheques were dishonoured he invited the defendant and told him in an unequivocal terms that the cheques he paid in and collected the proceeds before they were cleared had been dishonoured and that unless he made good the amount involved by issuing a replacement cheque his account would be debited with the amount in question. Whether he took Yahaya Mahmud seriously or not is another matter but it is certain that he was put on notice that his account would be debited and in fact true to Yahaya Mahmud’s threat the account was debited.”

One is obviously in no doubt that both parties as well as the trial court fully addressed the issue of the “dishonour and subsequent loss of the five cheques” respectively in the parties’ pleadings and in the judgment of the trial court. Okezie JCA was therefore in grave error to have reached the decision, inter alia, to set aside the judgment of the trial Judge on the premises that the appellant at the trial court failed to establish in its pleadings and by evidence that the five cheques paid in by the respondent were in fact dishonoured. His decision based on this erroneous premise is a matter that goes to the root of the controversy between the parties and an Appellate Court cannot allow it to stand.

**Issue 2**

i. Whether the issue of the ‘dishonour and subsequent loss’ of the five cheques has been specifically pleaded.

ii. Whether by his conduct both passive and active the respondent has not waived his rights under sections 47, 48 and 49 of the Bills of Exchange Act Cap 35 Laws of the Federation.
of Nigeria, 1990 and whether the respondent is estopped from denying such waiver.

iii. Whether the learned Court of Appeal Justices ought not to have come to the same conclusion as the learned trial Judge that the respondent is in law estopped from denying liability in the sum claimed having regard to the several unequivocal written admissions of liability made by the respondent himself and his Counsel.”

It is common ground that both the respondent and the drawers of the vexed five cheques were not put on notice in good time with regard to the dishonoured cheques. Consequently, the respondent places reliance on sections 47, 48 and 50 of the Bills of Exchange Act which outline rules that govern giving of notice of dishonoured bills and the effect of not giving such notice. The appellant’s Counsel, however, submits that the respondent is by his conduct deemed to have waived whatever rights or remedies that have accrued to him by reason of the provisions of section 50(2)(b) of the said Act. Counsel further submits that the net effect of Exhibits C, F, G, J and K is that the respondent must be estopped from denying waiver of his rights under the provisions of sections 47, 48 and 49 of the Act. Counsel finally submits that it was the failure of the lower court to advert its mind to the legal implications of the doctrines of waiver and estoppel that led to the erroneous conclusion reached by the lower court that it was improper for the appellant to have debited the respondent’s account with the total value of those cheques.

For the respondent, it is submitted that on the facts of this case the five cheques were accepted by the appellant as absolute (as opposed to conditional) payment of cash to the bank. First, the cheques were drawn by a third party on another branch of the appellant bank and the respondent was not a party to the instrument. Secondly, there was an understanding, as attested to by one of the appellant’s witnesses, that the respondent was allowed to take the value of the cheques without waiting for the usual period for the clearance of the cheque as the respondent had convinced the
branch manager of the appellant bank that all five the cheques would be honoured promptly.

Arguing in the alternative, ie if the court does not accept the submission that the plaintiff bank accepted the cheques as absolute payments, the only other optional finding is that the cheques were accepted on condition that, when presented, they will be honoured. In that situation, the defendant adopts the opinion of the law as stated in Chitty on Contract Vol. 1 paragraph 1551 at 982. Put briefly, where the creditor, such as the plaintiff herein accepts a negotiable instrument upon which the debtor, such as the respondent herein, is not primarily liable, the creditor must present the instrument, the cheque herein, within a reasonable time. If he fails to do so, and the debtor is prejudiced, the creditor is deemed to be guilty of laches and therefore makes the cheque his own, and it amounts to payment of the debt. Again, the creditor must give due notice of dishonour and thereby preserve his remedies against other parties secondarily liable. Such notice is not necessary to be given to the debtor unless he is a party to making of the negotiable instrument. Finally on this issue, Counsel submits that under cross-examination of PW2, that witness admitted that a delay of a period of one year in informing a customer that his cheques were not paid was unreasonable.

It is pertinent to preface the discussion under this issue by observing that both the trial court and the Court of Appeal were of the same opinion, first, that the respondent lodged five cheques and took value for them at a time when he had no money in his account before the effects were cleared. Secondly, that the respondent knew that he had no money in his account when he lodged the said cheques. Thirdly, his account was in red when he asked for a further overdraft. However, as earlier noted, respondent’s Counsel then submitted that since the respondent was not put on notice of the dishonour of the cheques within a reasonable time, the respondent was no longer liable, relying on the cumulative effect of sections 47, 48 and 49 of the Act.
I have perused sections 47, 48 and 49 of the Act. The summary of the provisions of the three sections of the Act, as they are relevant to the parties’ case, may now be noted. Section 47 makes it clear that a bill is dishonoured by non-payment of the value of money stipulated thereon. Section 48 states that notice of dishonour must be given to the drawer and each endorser of the bill and failure to do so, the right of a holder in due course subsequent to the omission shall not be prejudiced by the omission. These two sections, in my view, are not relevant to the situation under consideration in this appeal. But section 49(1) stipulates that notice of dishonour of the bill must be given within a reasonable time thereafter. Undoubtedly, time is of the utmost importance in relation to giving notice of dishonour. There is no hard and fast rule in this matter save that it is common ground that what constitutes a reasonable time is a question of fact dependent upon the circumstances of the case. A delay in giving notice extending for a period of nearly one year, without any satisfactory explanation, as earlier observed, cannot be but unreasonable (see Lombard Banking Ltd v Central Garage and Engineering Co. Ltd (1963) 1 QB 220). In other words, if the matter rested there I would have had no compunction to hold that the delay has discharged the respondent from further liability under the five cheques. Indeed, my conclusion in this regard will be supportable from the angle that the five cheques were accepted by the appellant bank on condition “that when presented, they would be honoured”. This, in effect, is tantamount to accepting the view of the law on bills of exchange, ably and lucidly enunciated in Chitty on Contracts Volume 1 paragraph 1551 at 982. Such inevitable consequence of dilatory treatment of a bill of exchange was endorsed by Willes J in Peacock v Purssell (1863) 32 L.J.C.P. 266 at 267:–

“...The plaintiffs here (such as appellant herein) took the bill at first conditionally but having dealt with it in such a manner as to render it useless to the defendant (as the respondent herein) they must now be considered as having taken it absolutely” (the words in parenthesis are mine).
However, appellant’s Counsel disagreeing with this conclusion has, relying on the provisions of section 50(2) of the Act, submitted that even if there were laches in giving notice to the respondent within the provisions of section 49 of the Act, the court should infer waiver from the conduct of the respondent. Counsel further submits that the subsequent actions and steps taken by the respondent to repay the value of the five cheques serve as an estoppel against any denial by him of waiver of his rights under the Act. So, also, by virtue of actions taken by the respondent in Exhibits C, F, G, J and K, where he admitted his indebtedness and made proposals for repayment.

I shall start by first looking at the statutory provisions for excuse for delay or failure to give notice arising from waiver. The Act by its section 50(2) provides:

“(2) Notice of dishonour is dispensed with

(a) . . .

(b) by waiver express or implied and notice of dishonour may be waived before the time of giving notice has arrived, or after the omission to give due notice;

(c) . . .”

I shall first call attention to Exhibit C which the appellant heavily relies on as evidence of waiver of conduct on the part of the respondent. I am not prepared to look at Exhibit C. Suffice it to say that this was the document wherein the respondent agreed to provide replacement cheques covering the value of those lost in transit. Although this document was admitted in evidence, it was _suo motu_ discountenanced by the learned trial Judge on the rather flimsy ground that the agreement (otherwise referred to as Exhibit C), and which was _duly signed by the respondent_, but to which no jurat was subjoined; the trial court presumed that the respondent was illiterate. Against this decision, there is no appeal in respect thereof, as submitted by respondent’s Counsel. I entirely agree with this submission, it is well founded. Exhibit C having been discountenanced by the trial
Judge, it cannot now be directly or surreptitiously looked at by the Appellate Court.

Next is Exhibit F. It is a letter written and signed by the respondent, dated 22 December, 1981. In it, respondent acknowledged his indebtedness to the appellant and made a proposal for immediate down payment of ₦20,000 in January, 1982 and “a monthly instalment payment of ₦3,000 commencing from the 31 February, 1982” (sic). Exhibit G was an agreement between the parties wherein the respondent made new proposals and agreed to settle his indebtedness to the appellant. On the other hand, Exhibit J was a letter dated 6 February, 1985 written by respondent’s solicitor and along which he forwarded a cash payment of ₦21,000 and the request to be apprised of the respondent’s balance of indebtedness to the appellant. Finally, Exhibit K is a letter by respondent’s solicitor, dated 13 March, 1985 wherein the appellant was requested to treat the respondent’s indebtedness as a loan which was to be rescheduled for payment, allowing a moratorium of six months and with an additional security to be provided by the respondent.

In this case, it is certainly clear that the conglomeration of events borne out by the contents of Exhibits F, G, J and K (which have been summarised in the immediate preceding paragraph) provides ample and unquestionable evidence of conduct sought to infer waiver and made before action brought. As I had already held in this judgment, it cannot be doubted that there was failure on the part of the appellant to give due or reasonable notice of dishonour, nevertheless facts relevant to that delay were within the knowledge of the respondent as particularly set out in the aforesaid Exhibits F, G, J and K. It is unthinkable that if the respondent had not inferentially waived the requirement of due notice he would not have taken it earlier. This is so because waiver may be implied from conduct that is inconsistent with the continuance of the right. Furthermore, authorities are awash that the courts have readily inferred waiver from very minimum or slight evidence (see Lombard Banking Ltd v Central Garage
and Engineering Co Ltd (1963) 1 Q.B. 220). I have therefore reached the firm view without any hesitation whatsoever that, even though appellant did not give due notice of dishonour of the five cheques, the respondent had, before action brought, waived the requirement of due notice.

The lower court was clearly in error by its failure to advert to the consequence of waiver under section 50(2)(b) of the Act which was undoubtedly relevant in the resolution of the controversy between the parties. From all the above, issue 2 is accordingly resolved in favour of the appellant.

Issue 3

“Whether the learned Court of Appeal Justices ought not to have come to the same conclusion as the learned trial Judge that the respondent is in law estopped from denying liability in the sum claimed having regard to the several written admissions of liability made by the respondent himself and his Counsel.”

We had earlier in this judgment recaptured and reproduced the grounds of the decision of the Court of Appeal for setting aside the judgment of the trial court and in turn dismissing the appellant’s claim. Issue 3 seeks the determination of whether the respondent was rightly and properly saddled with the financial liability now claimed by the appellant. The relevant grounds of decision which are pertinent for the consideration of the issue under reference are (b), (c), (d) and (e). In summary, (b) states that it was wrong to fix the respondent with liability of the value of the five dishonoured cheques of which the appellant failed to give due notice to the respondent as required by law, while the cumulative effect of (c), (d) and (e) is that the liability of the respondent was limited to his overdraft of ₦50,000 granted him by the appellant wherein the mortgage of respondent’s property served as security for that overdraft and there was, therefore, no basis for the declaration made in respect of the mortgaged property.

The narrow question left in this appeal is whether from all the circumstances of this case the liability of the respondent is restricted only to the original overdraft of ₦50,000,
including the relevant interest accruing thereto or is it the larger amount comprising the overdraft with interest and the value of the five dishonoured cheques? It is common ground that the respondent by reason of the arrangement between the parties took sole benefit of the value of the said five dishonoured cheques which amounted to ₦185,650, even before the cheques were cleared. Again, the two lower courts were consensus ad idem that the account of the respondent before the five cheques were credited to him prematurely was in red. Below are some excerpts of the judgment of the trial Judge that I consider apposite for consideration in this regard:

“There is ample evidence clearly showing that the five cheques in question were dishonoured and consequently his account was being debited with the sum of ₦185,650 as the proceed (sic) of the cheques were already paid to him.”

Further down in the judgment, he continued:

“His conduct after he was served with demand letter does not give support or credence to the defendant’s contention that he was not aware that the amount with which his account has been debited attracted interest. He had made proposals for rescheduling the huge debits brought to his notice but his proposals were rejected. He then decided to pay in the ₦21,000 to appease his creditors. All these go to show that the defendant was aware of his indebtedness to the plaintiff.”

Finally, the learned trial Judge had this to say with regard to the stepping-up of the value of the property in the light of further financial commitment made in favour of the respondent:

“The defendant also seems to make capital out of the fact that initially he mortgaged his landed property for the loan of ₦50,000 and it was stamped ₦55,000. But Yahaya Mamud explained and I believed him that it is banking practice to up stamp the property if there are other commitments and hence his creditors up stamped mortgaged property.”

Additional to the above excerpts of the judgment of the learned trial Judge, the respondent’s various admissions of liability to the appellant featured vividly in Exhibits F, G, J and K. One should not lose sight of the respondent bank’s statement of account, Exhibits PI–19 and QI–4, that were
regularly sent to him. At the trial, and under cross-

a

b

c

d

e

f

g

h

i

j

examination, respondent’s attention was specifically drawn
to paragraph 2 of Exhibit K which was a letter written by
Ismail Gadzama and Co, of Counsel for the respondent
pleading with the appellant for a reschedule of respondent’s
indebtedness that then stood at N374,530.56. The respon-
dent said at that juncture:–

“I have seen paragraph 2 of Exhibit K. I wanted the bank to re-
schedule the money they claim I was owing them because I know
the bank had added to my account because unless I do that they
would persist in threatening to sell my house.”

All the above, including the Exhibits, the testimony of the
respondent, particularly under cross-examination, and the
letters of admission of indebtedness made by respondent’s
Counsel on his behalf are glaring admissions and awareness
on the part of the respondent of the fact of his financial
liability to the appellant. I am clearly of the view that the
various statements made on behalf of the respondent by his
Counsel through his correspondence with the appellant are
admissions within the purview of sections 19 and 20(1) of
the Evidence Act. It will be perfidious to allow the respon-
dent to get away with such financial accommodation he
obtained from the appellant bank. This is more disturbing
for, when it suited the respondent, he evoked the technical
rule of absence of jurat meant to protect illiterates to defeat
the admissibility and coerciveness of certain documents, eg
Exhibit C that would have unquestionably pinned him down
to his liability. Paradoxically, respondent did not deny nor
challenge the content or admissibility of Exhibit F which
was a letter dated 22 March, 1981 signed by him, and visi-
bly, this document was not accompanied by any jurat.

Certainly, it will be inequitable for anyone, such as the re-

spondent herein to enjoy the liberty of making statements by
himself or through his accredited agents or representatives,
which having been acted upon by another to his detriment in
the belief that the statements were true, is thereafter allowed
to renege from such statements. The law has accorded
reasonable protection to unsuspecting members of society who are misled by such statements because the maker thereof is absolutely estopped to contradict or deny the truth of such statements. Thus section 151 of the Evidence Act provides:

“When one person has by his declaration, act or omission, intentionally caused or permitted another person to believe anything to be true and to act upon such belief, neither he nor his representative in interest shall be allowed, in any proceedings between himself and such person or such person’s representative in interest, to deny the truth of that thing.”

Expatiating on the nature and the far-reaching effect of admissions and the plea of estoppel, Ibekwe JSC in *Yoye v Olubode and others* (1974) 9 NSCC 409 opined at 414:

“Estoppel is an admission, or something which the law views as equivalent to an admission. By its very nature, it is so important, so conclusive, that the party whom it affects is not allowed to plead against it or adduce evidence to contradict it.”

A similar illuminating view of the nature of estoppel was succinctly expressed in *Bassil v Honger* 14 W.A.C.A. 569 at 572, per Coussey JA:

“Estoppel prohibits a party from proving anything which contradicts his previous acts or declarations to the prejudice of a party, who relying upon them, has altered his position. It shuts the mouth of a party.”

The above propositions as to estoppel have become necessary if only to be stated to demonstrate how applicable they are to the facts and circumstances of this case. The lower court was palpably in grave error when it failed to appreciate the overwhelming evidence, documentary and oral, showing in unmistakable terms, admission of liability by the respondent. In the light of such unchallenged pieces of evidence of admission, surely, the respondent is, in law, estopped from denying such admission; to hold otherwise is to act prejudicially to the chagrin and detriment of the appellant.

From all the above, the third issue is again resolved in favour of the appellant.

Consequent upon the views I have expressed and the conclusions I have reached in the resolutions of the three issues
for determination, it is certainly clear that the judgment of
the Court of Appeal based on the five main reasons that the
court identified for its decision (reproduced in this judg-
ment) cannot be allowed to stand. The result is that the ap-
peal succeeds and is allowed. The judgment of the lower
court is hereby set aside, and the judgment of the trial court,
including the costs and the declaration that the appellant is
entitled to sell the respondent’s landed property covered by
the Certificate of Occupancy No. BO/2167 to settle the
judgment debt, is hereby restored.

The respondent will pay to the appellant the costs of this
appeal assessed at ₦10,000.

KARIBI-WHYTE JSC: I have read the lead judgment in this
appeal of my learned brother, Okay Achike JSC. I agree
entirely with his reasoning and conclusion allowing the
appeal.

The facts of the case have been stated comprehensively
and with clarity in the lead judgment. I only wish to make
some contribution to the reasoning and conclusion in respect
of issue 2 of the appellant’s issues for determination as to
whether the respondent has waived his rights under sections
47, 48 and 49 of the Bills of Exchange Act (Cap 35) Laws of
the Federation of Nigeria, 1990 and whether the respondent
is estopped from denying such waiver.

The facts relating to the circumstances giving rise to
waiver of conduct and estoppel are not in dispute. It is
common ground that the respondents and the drawers of the
cheques in issue were not put on notice within a reasonable
time with respect to the dishonoured cheques.

The respondent accordingly relies on the provisions of sec-
tions 47, 48 and 50 of the Bills of Exchange Act for the
effect of not giving due notice in respect of dishonoured
cheques in good time.

The appellant contends that the respondent had by his con-
duct to be deemed to have waived whatever rights or
The conduct relied upon by the appellant consists in a letter dated 22 December, 1981 written and signed by the respondent in which the indebtedness to the appellant was acknowledged and in which he made a proposal for the immediate payment of ₦20,000 in January, 1982, and a monthly instalment payment of ₦3,000 commencing from 31 January, (sic) February, 1982. This was tendered as Exhibit F. In Exhibit G also tendered in these proceedings, the respondent made new proposals and agreed to settle his indebtedness to the appellant. Exhibit J, a letter dated 6 February, 1985, was written by respondent’s solicitor and forwarded a cash payment of ₦21,000 with a request to be apprised of the balance of the indebtedness to the appellant. Again, the respondent’s solicitor wrote a letter dated 13 March, 1985, Exhibit K in these proceedings, wherein he requested appellant to treat respondent’s indebtedness as a loan to be rescheduled for payment and asking for a moratorium of six months, with an additional security to be provided by the respondent.

It was submitted that the net effect of the conduct referred to above was to estop the respondent from denying waiver of his rights under the provisions of sections 47, 48 and 49 of the Bills of Exchange Act. The appellant’s Counsel finally submitted that the failure of the court below to advert to the legal implications of the doctrine of waiver and estoppel led to the erroneous conclusions reached in the court below, that the appellant improperly debited the respondent’s account with the total value of those cheques.

On his part, learned Counsel for the respondent submitted that the cheques in issue were accepted by the appellant as absolute, as opposed to conditional, payment of cash to the bank. He argued, first, that the cheques were drawn by a third party on another branch of the appellant bank and the respondent was not a party to the instrument. Secondly, the understanding, attested to by one of appellant’s witnesses, was that respondent was allowed to take the value of the
cheques without waiting for the usual period of clearance of
the cheque, the respondent having convinced the branch
manager of the appellant bank that all five the cheques
would be honoured promptly.

In the alternative, the cheques were accepted on condition
that they would be honoured when presented. Reliance was
placed on the law as stated in Chitty on Contracts Volume 1,
paragraph 1551 at 982. Summarily stated, the law is that,
where the creditor accepts a negotiable instrument upon
which the debtor is not primarily liable, the creditor must
present the instrument within a reasonable time. If he fails to
do so and the debtor is prejudiced, the creditor is deemed to
be guilty of laches and therefore makes the cheque his own,
and it amounts to payment of the debt.

The creditor must give due notice of dishonour and thereby
preserve his remedies against other parties secondarily li-
able. Such notice need not be given to the debtor unless he is
a party to the making of the negotiable instrument. It was
finally submitted that witness admitted under cross-
examination of PW2 that a delay of a period of one year is
unreasonable in informing a customer that his cheque has
not been paid.

The above concisely stated are the summary of the conten-
tions of Counsel on issue 2.

It is helpful to accentuate the concurrent findings of facts
touching on the issue in the two courts below. First, the
respondent lodged the five cheques, took value for them at a
time he had no money in his account and before the cheques
were cleared. Secondly, the respondent knew he had no
money in his account when he lodged the cheques. Thirdly,
his account was in debit when he was asked for an overdraft.
Relying on the provisions of sections 47, 48 and 49 of the
Bills of Exchange Act, learned Counsel submitted that be-
cause the respondent was not put on notice of the dishonour
of the cheques within a reasonable time, he was no longer
liable.
The resolution of this issue depends on the proper construction of the provisions of sections 47, 48, 49 and 50 of the Bills of Exchange Act (Cap 35) Laws of the Federation of Nigeria, 1990. For ease of reference I set out the provisions verbatim:

“I find it necessary to set out the provisions of sections 47, 48 and 49 of the Bills of Exchange Act 1990 material to this case:

47(i) A bill is dishonoured by non-payment

(a) When it is duly presented for payment and payment is refused or cannot be obtained or where an advice is sent through the post office in pursuance of subsection (3) of section 45 of this Act, payment is not obtained.

(ii) in the case of a bill payable on demand, within ten days from the time the advice is posted.

48. Subject to the provisions of this Act, when a bill has been dishonoured by non-acceptance or by non-payment, notice of dishonour must be given to the drawer and each endorser, and any drawer or endorser to whom such notice is not given is discharged:

Provided that:

(a) where a bill is dishonoured by non-acceptance, and notice of dishonour is not given, the rights of a holder in due course subsequent to the omission shall not be prejudiced by the omission.

49. Notice of dishonour, in order to be valid and effectual, must be given in accordance with the following rules that is:

(i) the notice may be given as soon as the bill is dishonoured and must be given within reasonable time thereafter, and in the absence of special circumstances notice shall not be deemed to have been given within a reasonable time unless.”

A cursory construction of the provisions of sections 47, 48 and 49(1) as they are relevant to the facts of this issue can be summarily stated as follows. By virtue of section 47 a bill is dishonoured by non-payment of the value of money stipulated thereon. By section 48 notice of dishonour must be given to the drawer and each endorser of the bill, and failure to do so, the right of a holder in due course subsequent to the omission shall not be prejudiced by the omission.
Section 49(1) stipulates the giving of notice of dishonour within a reasonable time thereafter. Hence, time is clearly of the essence and is of critical importance in relation to the giving of notice of dishonour of a bill. 

Learned Counsel for the respondent has emphasised the delay in giving the notice of dishonour extending for a period of nearly one year. It is not disputed that what constitutes a reasonable time is a question of fact depending upon the circumstances of the particular case. A delay in the giving of notice for a period of about one year without any satisfactory explanation cannot be anything but unreasonable (see Lombard Banking Ltd v Central Garage and Engineering Co Ltd (1963) 1 Q.B. 200).

This however, is not the issue in this case as contended by learned Counsel for the appellant. Counsel has argued that the subsequent actions of the respondent in the steps taken to repay the value of the dishonoured cheques estops from denying any waiver of the exercise of his rights under the Bills of Exchange Act. Similarly the admissions of the respondent of his indebtedness to the appellant by virtue of actions taken in Exhibits C, F, G, J and K and his proposals for repayment.

It is helpful to refer to the relevant provisions of the Bills of Exchange Act. I have already summarised the effects of sections 48 and 49 of the Bills of Exchange Act. The legal consequences of dispensing with notice of dishonour is provided in section 50(2)(b) of the Bills of Exchange Act which states:–

“(b) by waiver express or implied; and notice of dishonour may be waived before the time of giving of notice has arrived. or after the omission to give due notice.”

Thus the conduct indicating waiver and precluding the requirement for giving notice of dishonour may result from conduct before the time of giving notice and indeed preclude the giving of notice after the omission to give due notice.
The appellant relied on Exhibit C as expressive of the conduct of waiver on the part of the respondent. Exhibit C was the document in which respondent agreed to replace the cheques covering those lost in transit. This document was admitted in evidence, but was discountenanced by the learned trial Judge on the ground that the agreement duly signed by the respondent who was presumed illiterate because no jurat was subjoined. The appellant has not appealed against this decision, and learned Counsel for the respondent has properly drawn attention to that fact. Exhibit C having been discountenanced by the trial Judge, the Court below cannot directly or surreptitiously look at it. Exhibit F is a letter written and signed by the respondent dated 22 December, 1981. The respondent therein acknowledged the indebtedness to the appellant and made concrete proposals for repayment. Again Exhibit G was an agreement by respondent with the appellant making new proposals for settling his indebtedness to the appellant. In Exhibit J, respondent’s solicitor had written a letter dated 6 February, 1985, and forwarding N21,000 requesting to be apprised of the balance of the indebtedness of the respondent to the appellant. Exhibit K is another letter dated 13 March, 1985 of respondent’s solicitor to appellant requesting that the respondent’s indebtedness be treated as a loan to be rescheduled for payment and seeking a period of moratorium of six months, with an additional security to be provided by the respondent.

The events catalogued above from Exhibits F, G, J, and K, provide unarguable evidence of conduct implied and express from which waiver of the notice of dishonour of the cheques can be inferred. It is well settled that waiver is an abandonment of a right. Two elements must co-exist to constitute a waiver. First the party against who the doctrine is invoked must have knowledge or be aware of the act or omission which constitutes the waiver and, secondly, there must be on the part of the person against whom the doctrine is invoked, some unequivocal act adopting or recognising the act or omission (see Olatunde v Obafemi Awolowo University and another (1998) 5 NWLR (Part 549) 178).
The failure of appellant to give due or reasonable notice of dishonour of the cheques is not disputed. However, the facts relevant to the delay were within the knowledge of the respondent as disclosed in the transactions in Exhibits F, G, J and K. It is obvious that respondent was aware of the situation when he was making the suggestions about rescheduling his indebtedness with appellant. He is accordingly estopped by his conduct from relying on the failure of appellant to give notice of dishonour of the bill within a reasonable time.

It is well accepted in our jurisprudence that where a person by words or conduct made to another a clear and unequivocal representation of a fact or facts either with knowledge of its falsehood, with intention that it should be acted upon, or has so conducted himself that another would as a reasonable man in his full faculties, understand that a certain representation of fact was intended to be acted upon, and that another person in fact acted upon that representation whereby his position was thereby altered to his detriment, an estoppel arises against the person who made the representation and he will not be allowed to aver the contrary of what he presented it to be (see Oyerogba v Olaopa (1998) 13 NWLR (Part 583) 509). The respondent in the instant case who had proceeded as if he had no rights against the appellant in respect of the dishonour of the cheques, is estopped from relying on any such rights.

It is obvious on the authorities that even though the appellant did not give due notice of dishonour of the cheques, the respondent had before action was brought waived the requirement of due notice, and is estopped from raising the issue. The court below was patently in error in its failure to consider the consequence of waiver under section 50(2)(b) of the Bills of Exchange Act which in my considered judgment was of crucial relevance in the resolution of the controversy between the parties. I therefore resolve issue 2 in favour of the appellant.
In addition to the fuller reasons in the judgment of my learned brother, Okay Achike JSC, in this appeal, I also hereby allow the appeal of the appellant, setting aside the judgment of the court below. The judgment of the trial court, including the costs and the declaration that the appellant is entitled to sell the respondent’s landed property covered by the Certificate of Occupancy No. BO/2167 to settle the judgment debt is hereby restored.

The respondent will pay to the appellant the costs of this appeal, which I assess at N10,000.

KUTIGI JSC: I read before now the judgment just delivered by my learned brother, Achike JSC. He has adequately covered the issues argued in the appeal. I agree with his reasoning and conclusions. I therefore allow the appeal. The judgment of the Court of Appeal is set aside while that of the trial High Court is restored in its entirety. The appellant is awarded costs of N10,000 against the respondent.

MOHAMMED, JSC: I agree that this appeal has merit and ought to be allowed. My learned brother, Achike JSC, has considered all the issues raised by the parties in this appeal and I concur with him that the respondent, from the facts of this case and by his conduct, had waived whatever rights or remedies accruing to him under section 50(2)(b) of the Bills of Exchange Act (Cap 35) Laws of the Federation of Nigeria, 1990.

After the attention of the respondent had been drawn to the fact that the five cheques he issued to the appellant totalling N185,650 had been dishonoured and that the cheques were lost in transit he signed an agreement in which he undertook to issue a replacement of the cheques in Exhibit C. The learned trial Judge discountenanced Exhibit C because of the absence of illiterate jurat on the document. The learned trial Judge however considered other pieces of evidence to establish that the respondent knew that his account was being debited with the sum of N185,650. In his judgment, the learned trial Judge opined thus:–

“But I must add that the fact Exhibit ‘C’ is discountenanced does not at all affect the case of the plaintiff. There is ample evidence
clearly showing that the five cheques in question were dishonoured and consequently his account was being debited with the sum of \( \mathbf{N}185,650 \) as the proceeds of the cheques were already paid to him. I believe the evidence of Yahaya Mahmud that on discovering that the cheques were dishonoured he invited the defendant and told him in an unequivocal terms that the cheques he paid in and collected the proceeds before they were cleared had been dishonoured and that unless he made good the amount involved by issuing a replacement cheque his account would be debited with the amount in question. Whether he took Yahaya Mahmud seriously or not is another matter but it is certain that he was put on notice that his account would be debited and in fact true to Yahaya Mahmud’s threat the account was debited."

In Exhibit F the respondent admitted his indebtedness to the appellant and made a proposal for payment of the outstanding debt against him. Again in Exhibits J and K the solicitor of the respondent admitted the indebtedness to the appellant. After all these admissions, it is amazing how the court below came to the conclusion that the appellant had failed to establish before the High Court that the five cheques paid in by the respondent were dishonoured. I believe that the court below had read the contents of those exhibits. There is evidence showing that the amount with which his account was debited attracted interest. The respondent was aware of the condition of his account. He even made a proposal for the rescheduling of his debt. It is very clear from the documentary evidence that he admitted liability to the bank. An admission voluntarily made by a party is enough to constitute estoppel against the denial of such admission (see *Iga v Amakiri* (1976) 11 SC 1).

For these reasons and the fuller reasons in the judgment of my learned brother, Achike JSC, I allow this appeal and set aside the judgment of the court below. I affirm the judgment of the learned Chief Judge of Borno State. I also award \( \mathbf{N}10,000 \) in favour of the appellant.

**AYOOLA JSC:** I have had the privilege of reading in draft the judgment delivered by my learned brother, Achike JSC. I...
agree with his conclusion that this appeal should be allowed. There are certain aspects of this appeal which I would like to comment on. I am content to adopt my learned brother’s detailed and lucidly put recital of the facts. I narrate the facts shortly only as far as it is necessary to put my comments in context.

The respondent (“the defendant”) was at all material times a customer of the plaintiff/appellant (“the bank”). As at 30 December, 1980 he had a debit balance of ₦54,928.58 in his current account. Sometime in 1979 he was granted overdraft facilities, initially in the sum of ₦50,000 with interest on the same at the rate of 11% per annum. The overdraft facilities were secured by a mortgage of the defendant’s landed property. Sometime between December, 1978 and June, 1979 the defendant paid into his account five separate cheques, four of which were issued to him by his brother, one Alhaji Ahmed Yau, and one of which was issued to him by another brother of his, one Alhaji Ali Tahir. These five cheques were all drawn on the Kano branch of the bank. It is common ground on the pleadings that these cheques in all to the value of ₦185,650 were paid “in or about December, 1978/June, 1979” into the defendant’s account at Maiduguri and that the bank in the course of its normal banking duties dispatched the cheques for payment by the Kano City branch. Without waiting for the usual period to ensure clearance of the cheques the defendant withdrew from his account the total value of the uncleared cheques. Eventually, the bank did not receive the total or any value of the five cheques even though the defendant had received the benefit of the total amount of the cheques. After abortive attempts to make the defendant perform the undertakings he had given to repay the sum of ₦185,650 being value he had received for the uncleared cheques, the bank debited the defendant’s account with that amount and so advised the defendant by a letter dated December 28, 1980. Claiming that the debit balance in the defendant’s account as at 28 February, 1987 was ₦494,593.39. The bank sued the defendant claiming that
sum with interest at the rate of 13½% per annum until judgment.

The defendant’s defence, among other things, was that he had waited for about two months before drawing against the cheques. He, in turn, counterclaimed for damages for negligence. He alleged by his counter-claim that, “It was utterly negligent of the plaintiff to have delayed for up to a year before informing the defendant” of the fact that the cheques were lost in transit or whether or not the cheques were presented for payment but were dishonoured by the Kano branch.

The High Court of Borno State (Kolo, Chief Judge) entered judgment for the bank. He treated the case as one of a loan made to the defendant. He said: “It is a case of direct loan accorded to the defendant dictated by inevitable circumstances”, and held that, although the defendant did not “apply for Loan in the conventional way but by lodging bogus checks (sic: cheques) which were later dishonoured after he had utilised the proceeds through the courtesy of the Manager, he cannot be heard to say that he did not ask for loan when he failed to make good the dishonoured cheques”. It is right to observe that there was neither averment nor evidence that any of the cheques in question was bogus. He held that the bank, “through normal banking practice rightly and properly debited the account of the defendant when it was clear that the cheques could not be honoured and nor the defendant was prepared to make a replacement”.

The Court of Appeal allowed the defendant’s appeal from the decision of the High Court. Okozie J, who delivered the leading judgment of that court, held that the defendant who took value for the five cheques which he lodged, before they were cleared, was, by doing so, only asking for an overdraft. Relying mainly on sections 47, 48 and 49 of the Bills of Exchange Act (“the Act”), he held that by failing to give notice of dishonour of the five cheques to the defendant pursuant to sections 47(1) and 48 of the Act, the bank made
the cheques their own and lost its remedy against the defendant. He held that “the laches of the respondent in not duly presenting the cheques or bills constituted thus a payment before the action”. Finally, he concluded that:

“... the learned trial Chief Judge was wrong in finding the appellant liable to the respondent when the respondent did not sue on the ground that the cheques were dishonoured and lost nor averred such in the pleadings and in the absence of any evidence adduced in that regard.”

On this appeal one of the three issues for determination submitted for consideration by learned Counsel for the bank is:

“Whether by his conduct both passive and active the respondent (the defendant) has not waived his rights under sections 47, 48 and 49 of the Bills of Exchange Act Cap 35 Laws of the Federation of Nigeria, 1990 and whether the respondent is estopped from denying such waiver.”

For his part, learned Counsel for the defendant set down as one of two issues for determination, the question whether it was right and proper for the plaintiff to have debited the account of the defendant with the value of the said cheques.

It is because of the issues submitted by Counsel on behalf of the bank and the argument proffered by Counsel on behalf of the defendant, that the applicability of the provisions of the Act, particularly sections 47 and 48, referred to by the court below, is the essential focus of this contribution.

Counsel for the parties and the Court of Appeal have proceeded on an assumption that sections 47, 48, 49 and 50 of the Act applied as if the bank were a holder for value suing on the cheques. It is necessary to examine that assumption having regard to the fact that the case as formulated on the statement of claim was not one founded on the dishonoured cheques.

In the course of carrying on the business of banking, a bank enters into several contractual relationships and performs various roles. It is important in an action between a bank and a customer to be clear which of the several contractual relationships forms or form the basis of the action.
In this case, it is pertinent to note only four of these possible relationships, namely; (i) the relationship of creditor and debtor that arises in regard to the customer’s funds in the hands of the bank; (ii) the relationship of creditor and debtor that arises when the bank loans money to the customer or allows him to overdraw on his account; (iii) the relationship that arises from the role of the bank as a collecting bank of cheques drawn on other banks or branches of the same bank by a third person, and (iv) the possible role of the bank as a holder for value of a negotiable instrument.

Of these several relationships the one that deserves close consideration in the instant case is the third one. The bank in regard to the five cheques is a collecting bank. The collecting bank is an agent of the customer for the purpose of receiving payment of the cheques from the banker on whom they are drawn. The law is clearly and succinctly put in Halsbury’s Laws of England Volume 3(1) (4ed) at 179 paragraph 212 thus:–

“In collecting cheques and other instruments for a customer a banker acts as a mere agent or conduit pipe to receive payment of the cheques from the banker on whom they are drawn and to hold the proceeds at the disposal of his customers.”

But then, the learned authors went on to say:–

“The character in which a banker receives a cheque is a matter of fact in each case; he may be a mere collecting agent, or he may take as a holder for value or in due course.”

The banker can be both an agent for collecting and a holder for value at the same time (see Halsbury’s (op. cit.) paragraph 212 at 179).

The law seems clear that if a cheque is dishonoured on presentation, the collecting bank can debit the customer’s account with the amount. The learned authors of Halsbury’s (op. cit.) described this as “the universal custom of bankers” (see Halsbury’s (op. cit.) paragraph 217 n. 1). There is also a
a statement of the law in Halsbury’s \textit{(op. cit.)} paragraph 216 that:--

“Where cheques are credited as cash prior to receipt of payment, the customer is entitled to draw on them at once only if there is an agreement, express or implied, to that effect. If a cheque received for collection is dishonoured or if the banker has to account to the true owner for the proceeds, the banker is entitled to debit the customer’s account accordingly.”

b The latter part of the above passage was cited with approval in \textit{First Bank of Nigeria Ltd v African Petroleum Ltd} (1996) 4 NWLR (Part 443) 438 at 447.

c As to the duties of the collecting bank, the law, again, is clear. The collecting bank has a duty to present a cheque within a reasonable time after it reaches him. He is liable to his customer for loss arising from delay. When a cheque is dishonoured the collecting bank’s duty is, in my opinion, prescribed by section 49(m) of the Act as follows:--

“Where a bill when dishonoured is in the hands of an agent, he may either himself give notice to the parties liable on the bill, or he may give notice to his principal; and if he gives notice to his principal he must do so within the same time as if he were the holder, and the principal upon receipt of such notice has himself the same time for giving notice as if the agent had been an independent holder.”

d The notice may be given as soon as the bill is dishonoured and must be given within a reasonable time thereafter (section 49(1)).

e The question whether a collecting bank, apart from being an agent, also becomes a holder for value of a cheque is one dependent on the facts. The mere fact of crediting the customer’s account before receipt of the proceeds of a cheque does not make the bank a holder for value. A bank becomes a holder for value of a cheque by virtue of section 27(2) of the Act as regards all parties to the cheque who became parties prior to such time. Any consideration sufficient to support a simple contract or an antecedent debt or liability is valuable consideration in terms of section 27(1) of the Act and is value in terms of section 2.
There is authority for the proposition that a collecting bank that has allowed a customer to draw against the amount of a cheque received by him for collection before it is cleared may become a holder for value if there is a contract, express or implied, entitling the customer to so draw. There must be a contract which entitles the customer to draw against the amount. It would appear that mere indulgence would not amount to such a contract. However, even if it does, as our law at present stands a collecting bank does not become a holder unless it is one in terms of section 2 or section 77(1) of the Act. Section 2 defines a “holder” as meaning “the payee or endorsee of a bill or note who is in possession of it, or the bearer thereof”. “Bearer” means “the person in possession of a bill or note which is payable to bearer”. Consequently, for the bank to claim to be or to be treated as a holder, it is not sufficient to show that it has permitted the customer to draw against an uncleared cheque pursuant to an express or implied contract, unless it has been shown in terms of section 2 that it has become an endorsee or a bearer, or in terms of section 77(1) that, although it is not an endorsee or bearer, the cheque is payable to order.

In my opinion, it is not a matter of assumption at all whether or not a bank is a holder. The fact must be averred and proved. As a rule of pleadings, where a bank claims on a bill, a statement of claim must allege the right in which the bank claims on the bill, that is, whether as payee, holder or endorsee and whether as holder in due course or holder for value (see, generally Bullen and Leake and Jacob’s Precedents on Pleadings (13ed). In the present case those facts were not pleaded, understandably because the bank’s claim was not on the cheques.

In my judgment, a bank that has allowed a customer to draw on an uncleared cheque which was later dishonoured whereby the customer’s account becomes overdrawn, has a choice of action. If it is a holder for value, it can sue the drawer or the endorser on the bill and claim all the benefits of so doing under the Act. If it chooses, he can sue the
customer on the debt. When a customer paid a cheque to his banker and drew another for payment before the effect of the one he paid was cleared, he was only asking the bank for a loan. The case of Cuthbert v Robarts, Lubbock and Co (1909) 2 Ch.D. 226 was cited with approval in support of this proposition in Adereti and another v Attorney-General, Western Nigeria (1965) NSCC 193 at 195.

In the present case the bank’s claim as finally stated in its statement of claim is for the amount reflected on the defendant’s statement of account as a debit balance. I do not immediately see the propriety of importing into the suit considerations which would have been appropriate had the bank sued on the cheques. The bank’s case as averred in paragraph 14 of the statement of claim was that the defendant had an “unauthorised direct credit granted to him”. The case proceeded at the trial on the main issue whether or not the bank had a right to debit the defendant’s account with the value of the unpaid cheques against which the defendant had already drawn. The trial Judge held that the bank rightly so debited the defendant’s account.

The question pursued by Counsel for the defendant on this appeal, as in the court below, by the bank in absolute is whether the five cheques were not received by the bank in absolute or conditional payment of the defendant’s indebtedness to the bank. The court below agreed with learned Counsel for the defendant that the five cheques were accepted by the bank as conditional payment and that by reason of the laches of the bank in “duly presenting” the cheques, they became money in the hands of the bank. Before us, Counsel for the defendant urged that we should hold that the cheques were given by way of absolute payment or, if not, as conditional payment. Cited in support of the alternative submission was a passage from Chitty on Contracts Volume 1 paragraph 1551 at 982 as follows:–

“Duties of creditor holding a negotiable instrument. Where a negotiable instrument, upon which the debtor is not primarily liable, is accepted by the creditor as conditional payment, he is bound to do all that a holder of such an instrument may do in order to get payment; thus it is his duty to present a cheque within a reasonable
time, and if he fails to do so, and the debtor is thereby prejudiced, the debtor is guilty of laches and makes the cheque his own, so that it amounts to payment of the debt. Similarly, the creditor must give due notice of dishonour and take other necessary steps to preserve his remedy against the other parties secondarily liable. It is necessary to give a notice of dishonour to the debtor only where he is a party to the negotiable instrument to whom such notice is required to be given.”

The principle of the above passage can only be relevant if the transaction had been between the defendant as debtor and the bank as creditor and if the bank had accepted the cheques as settlement of the defendant’s indebtedness. Whatever may be the duties of a collecting bank to its customer who has lodged a cheque for collection, it is not right to equate the collecting bank with a creditor, who has received a negotiable instrument as payment of debt without any allegation in the pleadings and proof by evidence of those facts. Notwithstanding that the bank was a creditor to the defendant at the time when the cheques were delivered to it by the defendant for collection, much more is needed to show that the cheques were delivered not merely for collection but with the intention that their proceeds should be utilised in payment of the defendant’s indebtedness to the bank. The inference from the facts points the other way, for how can one explain the immediate cashing of the value of the cheques were they paid in as settlement of indebtedness? I feel no hesitation in coming to the conclusion that the cheques were not delivered to the bank with the intention that they be accepted in payment, conditional or otherwise, of any indebtedness to the bank. There was no such averment for the pleadings of the parties. I venture to think that where the collecting bank has failed initially to give due notice of dishonour of a cheque, delivered to it merely for collection, to its customer within a reasonable time and the customer has suffered prejudice, thereby his action properly lies in damages for negligence. That was the basis of the defendant’s counterclaim which was dismissed by the trial
court and against which dismissal there had been no appeal to the court below.

Having regard to the case as pleaded and the issues that arose from the pleadings, I am not convinced that there is need to have recourse to the provisions of sections 47, 48, 49 and 50 of the Act as if the bank had sued on the cheques, in order to determine this appeal, even though some provisions of the Act apply to the bank as collecting bank. Those provisions may, of course, be useful in determining the liability of the bank in an action by the defendant for breach of duty owed him by the bank as a collecting bank. The defendant was not a drawer of the cheques and he has not been shown to be an endorser.

I am satisfied that on the bank’s case as pleaded, it is entitled to succeed even without the introduction of the doctrine of waiver and estoppel. Those doctrines are, rather, matters of defence than foundation for a cause of action. They are relevant as defence to the defendant’s counter-claim. It is in that light that I agree that on the evidence the defendant had waived his right to complain about any infraction of its duty by the bank as a collecting bank in regard to him and is estopped by his conduct from claiming against the bank for failure of the bank in its duty towards him. I am content to deal with the questions of estoppel and waiver under general equitable principles, rather than invoke section 50(2)(b) as Counsel for the bank has urged us to do. On the other matters raised in this appeal I agree with the reasoning and conclusions of my learned brother, Achike JSC. I too would therefore allow the appeal. I abide by the orders made by him and the order for costs he makes.

Apel allowed.