NIGERIAN BANKING LAW REPORTS

[2000 – 2001]

VOLUME 10 (PART II)

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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_
FOREWORD

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 N.B.L.R. 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 Report, 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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First African Trust Bank Ltd v Partnership Investment Co. Ltd

COURT OF APPEAL, LAGOS DIVISION
CHUKWUMA-ENEH, IGE, SANUSI JJCA

Date of Judgment: 14 NOVEMBER, 2000
Suit No.: CA/L/22/99

Banking – Bank draft – Duty of bank to pay at sight

Banking – Bill of exchange – Bank draft – Where procured by fraud – Effect on innocent holder

Facts

The respondent sued the appellant in the High Court claiming the value of a bank draft issued by the appellant in favour of the respondent and which draft the appellant had refused to honour. The appellant claimed that as a banker it had an understanding with one Alhaji Ladan that the Alhaji Ladan was to deposit a sum of USD500,000, while the bank was to pay a sum of ₦7,100,000 in favour of his nominee that is the respondent. The bank paid the draft to the nominee while the Alhaji Ladan did not pay the money into the bank account as agreed. The respondent through its banker presented the draft and was dishonoured.

The trial court granted the claim of the respondent and awarded interest. Dissatisfied, the appellant appealed to the Court of Appeal.

Held –

A bank draft subjected to certain stipulations is affected by the provisions applying to bills of exchange payable on demand. By virtue of the provisions of section 30(1) of the Act, therefore, the bank draft like any other bill of exchange is presumed to stand on the basis of a valuable consideration so that the *onus probandi* is on the person, in this matter the appellant, alleging want of consideration to prove it.

*Appeal dismissed.*
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Counsel
For the appellant: N.O. Olaiya, Esq.
For the respondent: A.A. Odunsi, Esq.

Judgment
CHUKWUMA-ENEH JCA: (Delivering the lead judgment)
This appeal is against the decision of Ade Alabi, of the Lagos High Court delivered on 7/7/98 in Suit No. LD.1375/95. The plaintiff (ie respondent in this Court) claimed the sum of ₦7100,000 being value of a bank draft issued by the defendant (ie appellant in this Court) in favour of the plaintiff and which draft the defendant has refused to honour. The court below gave judgment for the plaintiff as claimed; in addition awarded interest at the rate of 21½% per annum from 8/2/95 to judgment and 10% per annum thereafter until the judgment debt is finally paid. In reaching its conclusion
the court below held at page 88 lines 26–32 and page 89 lines 1–6 thus:–

“The contract was for the benefit of the plaintiff in this case. There was no privity of contract between the defendant and the plaintiff. It was never in the contemplation of the parties that the plaintiff would give value to the defendant. It was contract entered into between the defendant and Alhaji Ladan for the benefit of a third party. That third party is the plaintiff in this case. It is a well known principle of law that a third party who is a beneficiary of such a contract has the right to enforce such contract against a defaulting party. It is now trite that parties to a contract are bound by the clear words of a contract.”

The appellant has challenged the foregoing extract of the judgment of the court below as a misdirection in law and had made it its ground 1 amongst other grounds of appeal in this appeal. Totally dissatisfied with the judgment, the appellant has appealed to this Court on eight grounds on the whole. These grounds of appeal have been fully integrated in the issues for determination that I do not perceive for purposes of resolving this matter any need setting them out seriatim. The parties have also filed and exchanged their briefs of arguments. The appellant raised six issues for determination which are set out thus:–

“(a) Whether the respondent was required by law to show that it had given consideration for the draft before it could be paid.

(b) Whether the alleged fraud against Alhaji Tijani Ladan negated the presumption of value in favour of the respondent as per section 30(1) of the Bills of Exchange Act.

(i) Whether in the circumstances of this case the respondent was not required by law to give and show evidence of its value for the draft of N7.1 million or just entitled to the sum covered by the draft because the appellant as a banker was bound to honour its draft in any event and otherwise estopped from proving that the value had not been received for the draft.

(ii) If the answer to issue (i) is in the affirmative, whether the only witness for the respondent gave any credible evidence of value for the draft at the trial?

(iii) Whether the appellant had pleaded and led evidence of the fraud which the appellant alleged in this case.
(iv) Was the learned trial Judge right to have held the appellant absolutely bound to pay the value of the draft to the respondent and thus refused to apply the decision of the Court of Appeal in *A.C.B. Ltd v Alao* (1994) 7 NWLR (Part 359) 614 and section 30(2) Bills of Exchange Act Cap 35 Laws of the Federation of Nigeria, 1990?

(v) Whether the evidence of the only witness for the respondent was not contrary to its pleadings?

(vi) Whether the learned trial Judge could award a post-judgment interest of 10% p.a. on the judgment debt?”

The respondent on its part identified two issues for determination and they are:

“(a) Whether the respondent was required by law to show that it had given consideration for the draft before it could be paid.

(b) Whether the alleged fraud against Alhaji Tijani Ladan negated the presumption of value in favour of the respondent as per section 30(1) of the Bills of Exchange Act”.

Apart from Issue 6 in the appellant’s brief of argument on the award of post-judgment interest of 10% on the judgment debt, the two issues raised by the respondent would decide the main controversy in this appeal and I adopt them.

Excepting as to one or two areas on facts on which the parties differ (and this will become evident later in the course of this judgment) otherwise they are agreed on facts. The appellant’s story is that as a banker it struck a deal with one Alhaji Ladan for the sale to it of foreign exchange of US $500,000.00. In furtherance of the deal Alhaji Ladan instructed the appellant to raise a bank draft for ₦7,100,000 in favour of his nominee the respondent. The said draft marked exhibit “P1” at the trial was drawn and delivered to Alhaji Ladan on condition, as alleged by the appellant, of first paying the said foreign exchange of US$500,000.00 into the appellant’s foreign account ie before presentment of the draft for payment. However, the respondent through its banker presented the draft for payment. It was returned by the appellant marked “represent” “value not received” as the aforesaid foreign exchange had not been paid into the
appellant’s foreign exchange account by Alhaji Ladan as agreed. On a subsequent representation of the draft for payment it was dishonoured by the appellant and was returned marked on it “payment stopped”. Hence this action to recover the amount on the draft from the appellant.

Having adopted its brief of argument, appellant contended strenuously firstly, want of consideration for the draft, secondly, a charge of fraud practised on the appellant by Alhaji Ladan. As regards the first limb of its submission the appellant relied on section 30(1) to allude to the rebuttable presumption in favour of the respondent that the value had been given. He however contended that Alhaji Ladan in actual fact gave no value for the draft as no foreign exchange of $500,000.00 was after all paid into the appellant’s account as agreed. It urged the court to regard the respondent’s story that the draft was for certain transactions between the respondent and Alhaji Ladan as a ruse and an afterthought.

On the issue of fraud the appellant argued that the instant fraud was pleaded in paragraph 9 and the particulars set out in paragraphs 4–8 of the statement of defence. He relied on the cases of Adimora v Ajufo (1988) 3 NWLR (Part 80) 1 and Nwobodo v Onoh (1984) 1 SCNLR 1, (1984) All NLR 1 to argue that, as no specific head of crime was used to characterise Alhaji Ladan’s dishonesty in transferring exhibit “P1” to the respondent without first paying in the foreign exchange, the standard of proof on the appellant was not one of proof beyond a reasonable doubt. See Omidiora v Ademiluyi (1997) 6 NWLR (Part 508) 294 at 305G–H. It also submitted that the award of 10% p.a. instead of 7½% p.a. on the judgment debt was erroneous as not complying with the provisions of Order 38 Rule 7 of the High Court of Lagos State (Civil Procedure) Rules, 1994. The appellant urged the court to allow the appeal and set aside the judgment of the court below.

The respondent on its part relied on section 30(1) and (2) of the Bills of Exchange Act to submit that the value had to be presumed in its favour. Furthermore, that it was a holder
a in due course. And that nothing short of proving fraud would suffice to rebut the presumption under section 30(1) and (2) of the Act. He also referred to section 151 of the Evidence Act to urge that the appellant was estopped by its conduct from denying it received value for the draft.

b Expatiating on the issue of fraud it denied that the defence would avail the appellant in the circumstances as the fraud was neither pleaded nor particularised in the statement of defence as envisaged by section 30(2) of the Act and Order 17 Rule 5(1) of the High Court of Lagos State (Civil Procedure) Rules, 1994. Besides, that the alleged condition relating to when the draft was to be presented for payment was not endorsed on the draft, nor otherwise communicated to the respondent. The respondent then urged the court to dismiss the appeal and affirm the decision of the court below.

c Having set out above the state of the case of each of the parties, the first question to consider relates to the lower court’s perception of the law of privity of contract as contained in the extract from its judgment quoted above. With great deference to the very learned Judge from whom this claim comes, I think that the law of privity of contract is not accurately stated in his judgment. The law of privity of contract is to the effect that a stranger to a contract is precluded from suing on it as nothing is of

jus quaesitum tertio
arises by way of contract; see Dunlop v Selfridge (1915) AC 847 and Beswick (1968) AC 58. Locally this principle has been restated in a similar context in the case of L.S.D.P.C. v N.L.

and S.F. Ltd (1992) 5 NWLR (Part 244) 653 where Olatawura JSC said:—

“Generally, only parties to a contract can enforce the contract. A person who is not a party to it cannot do so even if the contract is made for his benefit and purports to give the right to sue upon it. Ilkeazu v ACB (1965) NMLR 374; Lagos State Development and Property Corporation and Others v Nigeria Land and see Food Ltd and Union Beverages Ltd v Pepsi Cola International Ltd (1994) 3 NWLR (Part 330) 1.”

Furthermore, the true position of the matter was that the
respondent did not even rest its case upon the alleged con-
tract between the appellant and Alhaji Ladan ostensibly
made for its benefit. Nor did it add an alternative claim on
the alleged consideration or a claim on an account stated as
would be the case to suggest it was suing in contract. Rather
it had sued on the draft ie exhibit “P1”. All the same the ap-
pellant’s exception to the error respecting ground 1 is well
taken but I must hasten to add nonetheless that it is not every
slip or error as the instant one that may overturn a decision.
Such a mistake must be substantial in the sense that it affects
the decision appealed against. See Ezeoke v Nwagbo (1988)
1 NWLR (Part 72) 616; Mora v Nwalusi (1962) 2 SCNLR
73, (1962) 1 All NLR (Part 4) 681; Udeze v Chidebe (1990)
1 NWLR (Part 125) 141. It is not the case here. The error in
this regard was not substantial nor did it occasion a miscar-
riage of justice and therefore could not without more affect
the decision.

That said, I have to observe from the onset that the rights
and obligations of the parties with regard to the draft, exhibit
“P1”, in this matter have to be determined by the rules of
common law relating to the bills of exchange and the provi-
sion of the Bills of Exchange Act Cap 35 Laws of the Fed-
eration of Nigeria, 1990 herein referred to as the Act. See
Union Bank Nigeria Plc v Scpok (Nig.) Ltd (1998) 12
NWLR (Part 578) 439 at 468E. The other pertinent reason
for so holding is that a draft subject to certain stipulations is
affected by the provisions applying to bills of exchange pay-
able on demand. By virtue of the provisions of section 30(1)
of the Act, therefore, the instant draft ie exhibit “P1” like
any other bills of exchange is presumed to stand on the basis
of a valuable consideration so that the onus probandi is on
the person, in this matter the appellant, alleging want of con-
sideration to prove it. A similar heavy burden is on a party
alleging fraud as per the provisions of section 30(2) of the
Act which stipulates thus:–

“... If in an action on a bill it is admitted or proved that the accep-
tance, issue or subsequent negotiation of the bill is affected with
fraud, duress or force and fear, or illegality, the burden of proof is shifted unless and until the holder proves that . . . Value has in good faith been given the bill.”

One of the implications of the provisions of section 30(1) and (2) of the Act with regard to the issues raised in this matter is that on the appellant rested squarely the *onus probandi* on the issues of want of consideration as well as its allegation of fraud. Failure to discharge that burden would be fatal. It therefore follows that the pleadings and evidence tendered before the trial court had to be resorted to to ascertain the burden and if it was discharged. The appellant as defendant in the lower court raised the issues of want of value for the draft exhibit “P1” and fraud in paragraphs 3, 4, 5, 6, 8 and 9 of the statement of defence and they are reproduced for ease of reference thus:–

“3. The defendant in particular response to paragraphs 3 and 7 of the statement of claim denies ever receiving value or consideration for the banker’s cheque; the subject matter of this suit, and avers that it stopped payment of the same to prevent fraud on itself.

4. Further to the immediate preceding paragraph the defendant states that sometime in February, 1995 while in the course of training, a man called Alhaji Tijani Ladan offered to sell US$500,000.00 to the defendant in the presence of one Alhaji Abubakar of Damco Bureau de Change and another.

5. The defendant further states that part of the conditions precedent to concluding and transferring the money was that part payment must be made in drafts as evidence of the defendant’s ability to pay before the transfer can be effected.

6. The defendant states that based on the aforesaid agreement in paragraph 5 it issued two cheques for ₦15 million Naira as follows:–

(a) Nigeria Universal Bank ₦7,900,000.00

(b) Partnership Investment ₦7,100,000.00

Total = ₦15,000,000.00

7. Contrary to the said agreement the banker’s cheque the subject matter of this suit came in through clearing. The defendant immediately threatened to stop payment but were prevailed upon by the aforesaid persons to return the cheque
marked ‘represent’ to enable the defendant to receive value for the foreign exchange purchased.

8. However, the said cheque was represented without receipt of the foreign exchange and at this stage the defendant stopped payment to prevent loss of the Naira sum of ₦7,100,000.

9. The defendant states that the said attempted fraud was reported to the police authorities, and some of the said persons involved were arrested.”

The respondent as the plaintiff in the lower court had set forth its case in paragraphs 3, 4, 5 and 6 of the statement of claim; they are reproduced as follows:–

“3. On 8 February, 1995 the defendant issued a bank draft No. 40622 062150011 for ₦7,100,000 in favour of the plaintiff for services rendered.

4. That on presentation the cheque was first returned and marked ‘represent’ ‘value not received’.

5. That when the cheque was again represented it was returned and marked ‘payment stopped’.”

The foregoing represents the state of the pleadings of both parties upon which issues were joined in the lower court. No reply was filed by the respondent (ie the plaintiff in the court below) on the new issues of want of consideration and allegation of fraud. Perhaps it did not feel obliged in the circumstances that one was necessary. I do not intend to expatiate on the point.

The respondent (as plaintiff) had strenuously argued that the appellant was estopped from denying that it had received value for exhibit “P1”. Besides, that as a holder in due course he was obliged to give value.

It went on to assert that the draft was for shares taken in the respondent’s company; in another breath that it was given to meet the credit facilities of ₦26 million given to Alhaji Ladan. The trial court upheld the respondent’s case that value was given.

Before coming to the appellant’s evidence in rebuttal let me correct an obvious misapprehension in the respondent’s case. On the authority of *Ayres v Moore* (1939) 4 All ER
the respondent being the original payee it could not be
heard to contend that he was a holder in due course. See also
Jones v Waring and Gillow (1926) AC 670 at 687. This is
further buttressed by the fact that the draft had not been ne-
gotiated in the ordinary sense of the word, that is to say, as
contemplated by section 31 of the Act. On the question of
estoppel in pais again taken by the respondent was desired to
say that over and above the presumption raised in its favour
by section 30(1) of the Act that the appellant was estopped
by its conduct from denying that value was given; it was
clearly necessary for the respondent to plead those further
facts with particularity and to give evidence in support
thereto. It didn’t do so hence the plea was not available to it.

The crux of the appellant’s case on the pleading and evi-
dence in the court below, if I may recap in brief, that exhibit
“P1” was issued and delivered to Alhaji Ladan on condition
that the draft would not be presented for payment unless and
until the foreign exchange was paid into the appellant’s ac-
count. The foreign exchange was not paid before exhibit
“P1” was presented for payment hence it was dishonoured.

Two witnesses were called to support the averments in the
pleadings. It was suggested that the respondent prevaricated
as to the nature of the transaction it alleged between it and
Alhaji Ladan as it was not clear whether it ie the draft was
for shares taken up in the respondent or to meet the credit
facilities granted Alhaji Ladan. And also that neither could
server as consideration for the draft exhibit “P1”. However,
it was conceded by the appellant that the condition for the
delivery of the draft, albeit the focal point of the appellant’s
case in this matter, was not endorsed on the draft nor was it
as much as communicated to the respondent. I have already
alluded to the trial court’s attitude to these pieces of evi-
dence. It totally rejected them hence it found against the ap-
PELLANT on both issues of wanted consideration and fraud.
 Quite clearly, the appellant before the trial court had found
its case of want of value and fraud on the same averments as
per paragraphs 3–8 of its pleadings and evidence on the same. I am therefore, impelled to hold the opinion that on the particular facts of this matter that for the appellant to succeed in this appeal it was obliged to prove want of consideration together with fraud on the part of Alhaji Ladan so as to establish that there was no contract at all i.e. ab initio.

If I may further observe, as the issues of want of consideration and fraud appear founded on the same substratum it is beyond conjecture that failing to establish either would completely collapse the appellant’s case. The question that naturally follows is whether the appellant succeeded in this exercise.

To attend to the foregoing issues exhaustively I have firstly to examine the two important decisions cited to this Court and which formed the bedrock of the respondent’s case and they are *U.B.A. Ltd v Ibhafidon* (1994) 1 NWLR (Part 318) 90 and *Lagricom Co. Ltd v U.B.N. Ltd* (1996) 4 NWLR (Part 441) 185. In both cases this Court (Benin Division) considered and acknowledged drafts as equivalent to and as good as cash and payable at sight. Though it is important to acknowledge that in each of the two cited cases value was in fact given and significantly also the drafts in question in the two cited cases were not crossed. In the instant case as alleged no value was given and it had endorsed on it “A/C payee only, Not Negotiable” thus making it also a certified cheque.

In the *Ibhafidon*’s case Ejiwumi JCA (as he then was) held thus:

“It is common knowledge that while a banker may refuse to honour an ordinary cheque on the ground that the drawer has no money in his account to cover the amount in the cheque, a banker draft on the other hand is payable at sight regardless of whether the person on whose behalf the draft was issued had money in his account at the material time or not.”

*Lagricom Co. Ltd v U.B.N. Ltd* (supra) followed the decision in *Ibhafidon*’s case, the appeal to the Supreme Court against the decisions in the two cited cases are still being
awaited. The above views appear obliquely supported by Iguh JSC in the case of Union Bank of Nigeria Ltd v Ifeatu Augustine Nwoye (1996) 3 NWLR (Part 435) 135 where he stated thus:–

“. . . There can be no doubt that the said draft exhibit 51, as between A.C.B. Asaba and A.C.B. Benin City was, on the evidence cash but, certainly, not as between the defendant bank and A.C.B. Asaba until the draft was cleared at the Central Bank of Nigeria Benin City.”

What seems to have emerged from all this is that the enduring issue of whether a banker is absolutely obliged to pay a draft at sight in all circumstances (including as happened in the instant matter) where want of value and even fraud were in issue cannot be regarded as settled. The two decisions that are weighty decisions of this Court are now on appeal. Both Counsels in this matter have rightly in my view canvassed the issues in this matter on the basis that drafts are subject to the Bills of Exchange Act. However, speaking for myself, I venture to say but without deciding the same that a draft as any bill of exchange payable on demand stands on the same pedestal like any other bills of exchange and that wise the provisions of the Act applicable to bills of exchange payable on demand ought to apply to it. It follows from that reasoning, therefore, that an adverse party like the appellant in this matter alleging want of value and fraud for exhibit “P1” could under section 30(1) and (2) of the Act be obliged to defend an action on exhibit “P1” on those grounds as is the case against any other bills of exchange. Furthermore, the presumption that the appellant received value for exhibit “P1” on the peculiar facts of this matter would be rebuttable not conclusive. See Metalimpex v A-G Leventis and Co. (Nig.) Ltd (1976) NCLR 20 at page 26 paragraphs 16–20, (1976) 2 SC 91.

Coming back to the mainstream of this matter I have endeavoured in the immediate foregoing paragraphs of this judgment to review, as it were, the material facts and the law proffered in this appeal as they are generally relevant for resolving the instant matter. Against that backdrop I now
proceed to further examine with much particularity the bones of contention as they affect the parties \textit{inter se} and Alhaji Ladan on the other hand. In this respect I have to consider them from the perspectives of, firstly, as between Alhaji Ladan and the respondent; secondly, as between the appellant and the respondent and, thirdly, as between the appellant and Alhaji Ladan.

Firstly, as between Alhaji Ladan and the respondent, their connection with the said draft exhibit “P1” was pleaded as \textit{per} paragraph 3 of the statement of claim. The draft was alleged to be issued and delivered to the respondent as the nominee of Alhaji Ladan for “services rendered” to him. Although the nature of the services so rendered were not specifically pleaded, the respondent was allowed in the court below to adduce evidence that the draft was for the purchase of shares of the respondent and in another breath that it was for the credit facilities of N26 million, allowed Alhaji Ladan. I agree with the appellant that the detailed testimony of DW1 as to “some transactions” between the respondent and Alhaji Ladan not having been specifically pleaded went to no issues. See \textit{Metalimpex v A-G Leventis (Nig.) Ltd} (1976) NCLR 20 \textit{as per} Idigbe JSC. I had earlier on made mention that the respondent did not react to the allegations of want of value for exhibit “P1” and fraud in its defence. However, failure to react to the issues it would be seen did not prove fatal to the respondent’s case.

Secondly, as between the appellant and Alhaji Ladan, it is common ground that the draft exhibit “P1” was drawn at the instance of Alhaji Ladan. This raised the presumption under section 30(1) of the Act in the respondent’s favour that the value was given for the draft. The appellant had alleged that exhibit “P1” was delivered to Alhaji Ladan on condition that the foreign exchange of US$500,000.00 was first paid into the appellant’s account before presentment of the draft for payment. The condition was not kept hence the appellant had raised the issue of want of value and fraud. I agree with
the court below that the presumption under section 30(1) of the Act was not rebutted.

The onus probandi as to whether the alleged stipulation that the foreign exchange of US$500,000.00 was to be paid into the appellant’s account clearly a condition precedent in which the parties to the contract were either not bound or bound subject to their resiling from their obligations depending on the condition happening or not was squarely on the appellant. And as will become obvious I am not, for reasons adduced herein, disposed to agree with the appellant that it discharged the onus. The court below found against it on the issues.

As between the appellant and Alhaji Ladan, the appellant had contended it pleaded want of value for exhibit “P1” and fraud and particularised the said fraud in paragraphs 4–8 of the statement of defence as set out above.

The appellant asserted that it had to stop the draft exhibit “P1” for want of consideration from Alhaji Ladan and to prevent fraud on itself. Fraud, if I may reiterate, vitiates every contract in which it enters and an instrument, the consideration for which is fraudulent even in part is voidable at the option of the party defrauded. See Halsbury’s Laws of England (4ed) paragraph 385. There can be no doubt that a charge of fraud could be maintained against Alhaji Ladan and by extension against the respondent his nominee. Any semblance of hesitation or doubt in my mind as to whether the alleged fraud could operate against the respondent as a third party to the transaction between the appellant and Alhaji Ladan if proved, was put to rest by the dicta in the case on Ayres v Moore (1939) 4 All ER 351 at 358A–D where Hallet J (in view of the reliance placed on the dicta I have quoted in extenso) in addressing a similar circumstance concluded thus:—

“It is a point not entirely free from difficulty. It is strenuously contended that the fact that the acceptance was procured by the fraud of a third party is not sufficient to entitle the defendant to repudiate his obligation as against the plaintiff. . . . If that were the
position, if it were necessary for an immediate party to be personally tainted by the fraud in order that he might be deprived of his rights under the bill then a great many of the provisions which the legislature have thought fit to enact, and a great deal of discussion and argument in the cases would be superfluous.

In my view, it is precisely because a holder of a bill may be affected, although personally innocent of fraud, that there are these provisions for protecting a holder in due course. I do not think that the immediate party is likewise protected.”

The main plank of the appellant’s complaint of fraud in this regard was hinged on the breach of the alleged aforesaid condition regarding the issue and delivery of the bank draft exhibit “P1” to Alhaji Ladan. It was not to be presented for payment unless and until the foreign exchange of US $500,000.00 was paid into the appellant’s account. As I said earlier on, the appellant called evidence from two witnesses to buttress the averments. The respondent contended that the alleged fraud was neither properly pleaded as envisaged by section 30(2) of the Act nor particularised as provided in Order 17 Rule 5(1) of the High Court of Lagos State (Civil Procedure) Rules, 1994. On the question that the draft exhibit “P1” was not to be presented for payment until US$500,000.00 was paid into the appellant’s account, the respondent had countered rather forcefully that the draft was not so endorsed. And so it was not affected. It must be emphasised that the facts and circumstances of the fraud committed in the case of A.C.B. Ltd v Alao (1994) 7 NWLR (Part 358) 614 relied on by the appellant are miles removed from the ones alleged in the instant matter. The draft in the cited case was tainted with illegality arising out of the breach of sections 3(1) and 7(c) of the Exchange Control Act and the Exchange Control (Anti-Sabotage) Act sections 1(1)(c) and 1(d)(iii). The dissimilarities are clear.

I must confess that the averments in paragraphs 3–8 of the statement of defence were not traversed by way of a reply nor was the evidence tendered in support seriously challenged. However, it is trite law that the mere fact that averments in the pleadings are not traversed or that the evidence...
adduced thereon has remained more or less uncontroverted is not necessarily conclusive proof of the averments. In this matter the issue of fraud has to be proved up to the hilt as it is not sufficient to prove mere suspicious circumstances. Bearing in mind that pleadings should not plead evidence but facts and that fraud in equity is wider than fraud at common law in that in equity misrepresentation, undue influence, fraud, duress, shade off into one another, I agree with the court below that the averments as per paragraphs 4–8 had insufficiently particularised its allegation of fraud in this matter. The appellant’s contention that particulars of fraud would otherwise be found in the allegation of fraud that is to say, inherent in the transaction itself, thus making it unnecessary to give particulars, though an ingenuous way to circumventing the clear onus on it, with respect, does not hold water on the peculiar facts and circumstances of this matter. Indeed, if a spade must be called a spade there is some element of force in the respondent’s argument that if the appellant had not received value for exhibit “P1” it would not have issued the draft as it is the practice of banks to receive value before drafts are raised. The case of Alhaji Nurudeen Olufunmise v Falana (1990) 3 NWLR (Part 136) at 191D–E and Atuyeye v Ashamu (1987) 1 NWLR (Part 49) 264 cited in support of the postulation by the appellant are not with respect directly in point. Order 17 Rule 5(1) of High Court of Lagos State (Civil Procedure) Rules, 1994 has clearly stipulated how to plead fraud where it provides thus:

“In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, willful default or undue influence and in all other cases in which particulars may be necessary, particulars (with dates and items if necessary) shall be stated in the pleadings.”

Assuming, but without conceding, that my views are wrong and that the fraud in issue was properly alleged and particularised the appellant was still bound to fail. The appellant had raised the issue of the standard of proof required in
circumstances where the fraud alleged as here had not been characterised as crime. I agree that, on the authority of the cases of *Nwobodo v Onoh* and *Adimora v Ajufo*, in such circumstances the onus of proof is not proof beyond a reasonable doubt. Whether raising a triable issue of the fraud in question in the circumstances would have sufficed is another matter. On this aspect of the issue of fraud, again, I have no hesitation in agreeing with the court below that the appellant also faltered. The onus was not discharged. In my view, one piece of material evidence that would have strengthened the appellant’s case, that is to say, the police investigation with its report on the fraud was not tendered in evidence thus the appellant merely proved mere suspicious circumstances. Besides why Alhaji Ladan was sidelined throughout the trial even as a witness deserved to be noted. The appellant having failed to raise even a triable issue of the fraud it alleged was liable to fail.

The next point is the question of the aforesaid condition the appellant had made much heavy weather of. Obviously the poser here is assuming but without conceding that the appellant had extracted the condition precedent from Alhaji Ladan could it be said it attached to the respondent without notice of it. I doubt it. Again, if there were any such condition no reasons were preferred why it was not endorsed on the draft. And finally if indeed the alleged condition were to create the obligations as clearly contemplated by the appellant in this matter it ought to have been communicated to the respondent so, at least, to put the respondent on due notice of the alleged obligation as it was extracted behind its back. I do not buy the argument that the draft in the hands of the respondent was delivered subject to the alleged condition. It is simply not sustainable on the facts; it is a ruse and clearly an afterthought. So that the respondent’s right to present the draft for payment was not affected by the alleged condition. The court below was in my view correct in discountenancing that contention.
On the question of section 132(1) of the Evidence Act, 1990 raised by the respondent firstly, I do not see the essence of raising the issue to the effect that as the draft was in writing it could not be varied by oral evidence under section 132(1) of the Evidence Act, 1990. Surely this defence appears to me misplaced. As there was no evidence by the appellant before the court below of any attempt to vary the contents of the draft exhibit “P1” by oral evidence.

On the issue of the post-judgment interest I agree with the appellant that clearly on the ipsissima verba of Order 38 Rule 7 High Court of Lagos State (Civil Procedure) Rules, 1994 that the rate of interest payable has been stipulated to be 7½% and not 10%. The rules of court are meant to be obeyed. The court below was therefore in error to have awarded 10% post-judgment rate of interest. It is my view that short of evidence that the parties adverted their attention to the issue ie by evidence a higher post-judgment rate of interest rate on the judgment sum would not be sustainable. I therefore set aside the 10% post-judgment rate of interest on the judgment sum and in its place order 7½% on the post-judgment sum until liquidated. Having agreed that the court below was wrong, the error is sufficient to affect the judgment of the court below.

On the whole, having, as it were, dealt with all the issues raised in this appeal I uphold the conclusion reached by the court below that the draft exhibit “P1” was otherwise payable at sight since as found by the court below and confirmed by this Court the alleged fraud had not negatived the presumption of value as per section 30(1) of the Act. In the result the appeal fails excepting as to the post-judgment rate of interest and it is hereby dismissed with N3,000 costs to the respondent. The trial court’s decision is hereby affirmed.

IGE JCA: I have had a preview of the judgment delivered by my learned brother, Chukwuma-Enah JCA.

I agree with his reasoning and conclusions. I also agree with the consequential orders of my learned brother including his orders as to costs.
SANUSI JCA: I have had the advantage of reading in draft the judgment just delivered by my learned brother, Chukwuma-Eneh JCA. All the issues relevant to this appeal have been thoroughly and painstakingly dealt with in the leading judgment to which I have nothing to add. I agree with the reasons and conclusion of my learned brother. I adopt them as mine. I abide by the consequential orders made including that on costs.

Appeal dismissed.
P.A.C. Agwaramgbo v Union Bank of Nigeria

COURT OF APPEAL, CALABAR DIVISION

EKPE, EDOZIE, OPENE JJCA

Date of Judgment: 23 NOVEMBER, 2000

Suit No.: CA/E/82/96

Banking – Banker and customer relationship – Bank refusing to honour cheque in respect of funds being disputed in court – Whether wrongful

Banking – Banker and customer relationship – Nature of – Wrongful dishonour of customer’s cheque where customer’s account is in credit – Consequences of

Equity – Doctrine of lis pendens – How it operates – When can be invoked – Purport of

Facts

The appellant was a Chartered Surveyor and Valuer carrying on business in Nigeria under the name and style of “Agwaramgbo, Otu-Udofia and Partner”, having formed a partnership with one Rev Bassey Inyang Otu Udofia (for short Otu Udofia) who was a Chartered Surveyor and Valuer of 45/46 Atu Street, Calabar, by virtue of the partnership agreement dated 1 May, 1978. The partnership agreement was admitted in evidence at the trial as exhibit 12. The appellant has his registered office at No. 49 Zik Avenue, Enugu, while Otu Udofia had his own registered office at No. 45/46 Atu Street, Calabar.

In 1984, the Federal Government of Nigeria acquired land situate at Atimbo Road, in Ekagha, Ekong Village, Calabar, whereon the Nigerian Navy constructed barracks for Navy ratings and workshop. Before the death of Otu Udofia on 21 September, 1991, the villagers of Ekagha Ekong as claimants for payment of compensation in respect of the said acquired land had donated a power of attorney dated 15 October, 1978 to Otu Udofia appointing him their attorney to demand and receive on their behalf the compensation money from the Nigerian Navy/Ministry of Defence for payment to
the claimants. The power of attorney was admitted in evi-
dence as exhibit 8. After the death of Otu Udofia, the appel-
12rant in 1992, in the course of his business collected from the
Ministry of Defence a Central Bank of Nigeria cheque no.
0065180238 dated 11 September, 1992 for the sum of
₦2,022,022.60 being compensation due to the said claimants
from Ekagha Ekong village for the acquired land. Before re-
leasing the cheque to the appellant, he was made to sign an
indemnity certificate for the said amount.

The appellant paid the cheque into the bank account of the
partnership of Agwaramgbo, Otu Udofia and Partners No.
1581977197 with the respondent bank at its Calabar branch.
The cheque was cleared by the respondent. Before the appel-
lant could issue any cheque to withdraw money from the ac-
count for payment of compensation to some of the claim-
ants, one Winston Effom Nakanda filed an action by way of
originating summons in the Calabar High Court in Suit No.
C/272/92 against the appellant as the first defendant, the son
of the late Otu Udofia as the second defendant and the re-
spondent bank as the third defendant claiming for a declara-
tion that he (Winston Nakanda) was the proper person to act
for and on behalf of the said villagers of Ekagha Ekong for
collecting the compensation money due to the villagers from
the Ministry of Defence, and for an order compelling the de-
fendants in that suit to pay over to him the said sum of
₦2,022,022.60 compensation collected by the appellant for
the Ekagha Ekong villagers.

Upon instituting the said Suit No. C/272/92 Winston Na-
kanda as the plaintiffs, obtained from the High Court two
orders. The first was an ex parte order of interim injunction
(exhibit 2) made on 3 November, 1992 restraining the defen-
dants (ie the appellant and the respondent in this appeal
and one other) from withdrawing, releasing or otherwise
dealing in any manner whatsoever with the proceeds from
the Central Bank of Nigeria’s cheque no. 0065180238 of 11
September, 1992 for the sum of ₦2,022,022.60 and made
out in the name of Messrs Agwaramgbo, Otu Udofia and
Partners, pending the determination of the motion on notice for interlocutory injunction. Then on 24 June, 1993, the court made the second order (exhibit 3) placing the said compensation money in an interest yielding account in the respondent bank.

However, on 14 December, 1993, the court that made the two orders (exhibits 2 and 3) discharged them by another order (exhibit 4). It was the case of the appellant that the said orders (exhibits 2 and 3) made by the court having been discharged, the parties in the suit returned to the status quo prior to the making of the said orders and, therefore, there was no longer any impediment against the appellant from withdrawing part of the compensation money to pay some of the claimants. Therefore, following the discharge of the said ex parte order of interim injunction, the appellant drew cheques in favour of some individual claimant in payment of the compensation due to them. The branch Manager of the respondent refused to honour the cheques and variously endorsed on some of them the word “Order not to pay” and also the words “Drawers attention required” as in exhibits 5(a) to 5(f). Following the refusal of the respondent to honour the said cheques drawn by the appellant, the appellant sued the respondent claiming the following reliefs:

- N20 million aggravated damages for the injury to the plaintiff’s business and reputation in Calabar and beyond which are inseparable by reason of the defendants’ Calabar and branch Manager while acting in the course of his employment persistently refusing to honour cheques drawn by the appellant on his firm’s account no. 1581977197 maintained in the said branch which had sufficient funds to meet payment.

- Simple interest at the rate of 36% per annum on the said sum of N2,022,022.60 from September ending 1992 until the end of December, 1993 and at the rate of 21% per annum from January, 1994 until judgment, and further interest on the judgment debt at the
rate of 10% per annum from the date of judgment until payment.

The trial court in its judgment held that the appellant, lacked *locus standi* to commence the action on the basis that no contract was subsisting between the appellant as a person and the respondent, and that the only contract proved was the one subsisting between the respondent and the partnership which partnership was automatically dissolved on the death of one of the partners.

Aggrieved, the appellant appealed to the Court of Appeal.

**Held**

1. Generally, the doctrine of *lis pendens* prevents the effective transfer of rights in any property which is the subject matter of an action pending in court during the pendency in court of the action. In its application against any purchase of such property the doctrine in not founded on the equitable doctrine of notice, whether actual or constructive, but upon the fact that the law does not allow any litigant parties or give to them, during the pendency of a litigation involving any property, rights in such property so as to prejudice any of the litigant parties. In the instant case, the doctrine of *lis pendens* applied and availed the respondent’s refusal to honour the appellant’s cheques drawn against the compensation money while the suit against the appellant in respect of the compensation was pending in court.

2. The relationship between a bank and its customer is that of a debtor and creditor. The receipt of the customer’s money by the bank for payment into his account constitutes the bank into a debtor of the customer. The bank undertakes to pay any part of the money so received from the customer to pay the person so named on the cheque as the payee against the written orders of the customer, so long as there are sufficient funds in the customer’s account to meet the payment.
3. The wrongful refusal of a bank to honour a customer’s cheque when the customer’s account in the bank is in credit is not only actionable in contract, it is also actionable in the tort of defamation. In the instant case, the respondent was justified in refusing to honour the cheques while Suit No. C/272/92 was pending in court. The fact that the order of injunction, exhibit 2, was later discharged did not make any difference to the situation since the suit was all along pending in the court and until the suit was disposed of, it was not proper in law to destroy the subject matter of the suit.

4. It is settled law that when a matter is pending before a court nobody should act in such a manner as to render the decision of the court nugatory. Therefore, once parties had turned their dispute over to the courts for determination, the right to resort to self-help ends. So it is not permissible for one of the parties to take any steps during the pendency of the suit which may have the effect of fostering upon the court a situation of complete helplessness, or which may give the impression that the court is being used as a mere subterfuge to tie the hands of one party while the party helps himself extra judicially.

Appeal dismissed.

Cases referred to in the judgment

Nigerian

A-G Anambra State and others v Eboh (1992) 1 NWLR (Part 218) 491

Abhulimen v Namme (1992) 8 NWLR (Part 258) 202

Abraham v Olorunfunmi (1991) 1 NWLR (Part 165) 53

Adefulu v Oyesile (1989) 5 NWLR (Part 122) 377


Adewummi v Aduroja (1975) 1 NMLR 125
Allied Bank of Nigeria Ltd v Akubueze (1997) 6 NWLR (Part 509) 374
Balogun v National Bank of Nigeria Ltd (1978) 3 SC 155
Barclays Bank of Nigeria Ltd v Ashiru (1978) 6–7 SC 99/
Barclays Bank of (Nig.) Ltd v Alhaji Ashiru and Others
Bello v Governor of Kogi State (1997) 9 NWLR (Part 521) 496
Bolaji v Rev Bamgbose (1986) 4 NWLR (Part 220) 699/(Part 37) 632
Doma v Ogiri and others (1997) 1 NWLR (Part 481) 322/(1998) 3 NWLR (Part 541) 246
Eleso v Government of Ogun State (1990) 2 NWLR (Part 133) 420
Ikwuemesi and another v Cameron Cole and another (1962) 2 All NLR 43
Incar Nigeria Ltd v Adegboye (1985) 2 NWLR (Part 8) 453
Majekodunmi v Co-operative Bank Ltd (1997) 10 NWLR (Part 524) 198
Mallam Mohammed Bello v Gov, Kogi State and 2 others (1997) 9 NWLR (Part 521) 496
Military Governor of Lagos State and 2 others v Chief Eneka Odumegwu Ojukwu and another (1986) 1 NWLR (Part 18) 621; (1986) 2 SC 277
Mogaji v Odofin and others (1978) 4 SC 91
Momoh v Olotu (1970) 1 All NLR 117
N.E.P.A. v Alli (1992) 8 NWLR (Part 259) 279
Nsirim v Nsirim (1990) 3 NWLR (Part 138) 285
Ntiaro and another v Ibok Etok Akpan (1910) 3 All NLR 10
Nwabueze v Okoye (1988) 4 NWLR (Part 91) 664
Ogundiani v Araba and another (1978) 6–7 SC 55
P.A.C. Agwaramgbo v. Union Bank of Nigeria

a) Oloriode v Oyebi (1984) 1/2 SCNLR 390
   Onuoha v The State (1988) 3 NWLR (Part 83) 460; (1988) 7 SCNJR 20

b) Osagie v Oyeyinka and another (1987) 3 NWLR (Part 39) 144, (1987) 6 SCNJR 94
   Owodunni v Registered Trustees of Celestial Church of Christ and Others (2000) 10 NWLR (Part 675) 315

c) Praying Band of C and S v Udokwu (1991) 3 NWLR (Part 182) 716
   Queen v Uche (1994) 6 NWLR (Part 350) 329

d) Registered Trustees of Apostolic Church v Olowoleni (1986) 6 NWLR (Part 158) 514/(1990) 6 NWLR (Part 158) 514
   Thomas v Olufoysoye (1986) 2 SC 325; (1986) 1 NWLR (Part 18) 669

e) U.B.A. Ltd v Ibhafidon (1994) 1 NWLR (Part 318) 90
   U.T.C. (Nig.) Ltd v Pamotei (1989) 2 NWLR (Part 103) 244

f) Union Bank of Nigeria v Ifeatu Nwoye (1990) 2 NWLR (Part 130) 69
   Vaswani Trading Co. Ltd v Savalakh and Co. (1972) 12 SC 77

g) Williams v Dawodu (1988) 4 NWLR (Part 87) 189
   Yesufu v A.C.B. (1981) 1 SC 74

h) Foreign
   Agbor v Metropolitan Police Commissioner (1969) 1 WLR 703
   Back-House v Charlton (1878) 8 Ch. D. 444

i) Bellamy v Sabine (1857) 26 LJ (NS) Equity Reports 797
   Cumming v Shand 29 L.J. Exch. 129, 5 HRN 95
   Daniel v Ferguson (1891) 2 Ch. D. 27

j) Foley v Hill (1848) 2 HL case 27
J. Edwards Jones v Securities and Exchange Commission 80
L. Ed. 1015, 298 U.S. 1–33

King v Smith (1829) 4 C and P 108; (1824) All ER 391

Re Clough, Bourne v Bourne (1906) 2 Ch. D. 427

Tassel v Cooper (1850) 9 CB 508

Wigram v Buckley (1894) 3 Ch. D. 483

**Foreign statute referred to in the judgment**
Partnership Act, 1890, sections 33(1), 38

**Counsel**
For the appellant: CJ Anyamene-Ezeugwu (Mrs.)
For the respondent: A Ekong-Bassey, (S.A.N.) (with him AA Inyang, Esq.)

**Judgment**

**EKPE JCA:** *(Delivering the lead judgment)* This appeal is a sequel to the judgment of Effanga J (as he then was) delivered on 5 February, 1996, in Suit No. C/44/94, filed by the plaintiff at the High Court Calabar of Cross River State. In the amended statement of claim in the suit, the plaintiff (now appellant) claimed against the defendant (now respondent) the following reliefs:–

“(a) N20 million aggravated damages for the injury to the plaintiff’s business and reputation in Calabar and beyond which are inseparable by reason of the defendant’s Calabar branch Manager while acting in the course of his employment persistently refusing to honour cheques drawn by the plaintiff on his firm’s account no. 1581977197 maintained in the said branch which had sufficient funds to meet payment.

(b) Simple interest at the rate of 36% per annum on the said sum of N2,022,022.60 from September ending 1992 until the end of December, 1993, and at the rate of 21% per annum from January, 1994, until judgment; and further interest on the judgment debt at the rate of 10% per annum from the date of judgment until payment.”
The respondent filed its statement of defence with the leave of the court out of time and later also filed an amended statement of defence with the leave of the court. The case later proceeded to trial.

After hearing evidence, the learned trial Judge delivered a considered judgment and dismissed the suit. It is against this judgment that the appellant has now appealed to this Court on 12 grounds of appeal. For easy appreciation, I shall of necessity state at this stage the facts of the case. The appellant is a Chartered Surveyor and Valuer carrying on business in Nigeria under the name and style of “Agwaramgbo, Otu Udofia and Partners”, having formed a partnership with one Rev Bassey Inyang Otu Udofia (for short Otu Udofia) who was a Chartered Surveyor and Valuer of 45/46 Atu Street, Calabar, by virtue of the partnership agreement dated 1 May, 1978. The partnership agreement was admitted in evidence at the trial as exhibit 12. The appellant has his registered office at No. 49 Zik Avenue, Enugu, while Otu Udofia had his own registered office at No. 45/46 Atu Street, Calabar.

In 1984, the Federal Government of Nigeria acquired land situate at Atimbo Road in Ekagha (sometimes spelt as Ekaha) Ekong Village, Calabar, whereon the Nigerian Navy constructed barracks for Navy ratings and workshop. Before the death of Otu Udofia on 21 September, 1991, the villagers of Ekagha Ekong as claimants for payment of compensation in respect of the said acquired land, had donated a power of attorney dated 15 October, 1978 to Otu Udofia appointing him their attorney to demand and receive on their behalf the compensation money from the Nigerian Navy/Ministry of Defence for payment to the claimants. The power of attorney was admitted in evidence as exhibit 8. After the death of Otu Udofia, the appellant in 1992, in the course of his business collected from the Ministry of Defence a Central Bank of Nigeria cheque no. 0065180238 dated 11 September, 1992, for the sum of ₦2,022,022.60 being compensation due to the said claimants from Ekagha Ekong Village for the acquired land. Before releasing the
cheque to the appellant, he was made to sign an indemnity certificate for the said amount.

The appellant paid the cheque into the bank account of the partnership of Agwaramgbo, Otu Udofia and Partners no. 1581977197 with the respondent bank at its Calabar branch. The cheque was cleared by the respondent. Before the appellant could issue any cheque to withdraw money from the account for payment of compensation to some of the claimants, one Winston Effiom Nakanda, an Estate Surveyor (hereinafter simply referred to as Winston Nakanda) filed an action by way of originating summons in the Calabar High Court in Suit No. C/272/92 against the appellant as the first defendant, the son of late Otu Udofia as the second defendant and the respondent bank as the third defendant claiming for a declaration that he (Winston Nakanda) was the proper person to act for and on behalf of the said villagers of Ekagha Ekong for collecting the compensation money due to the villagers from the Ministry of Defence, and for an order compelling the defendants in that suit to pay over to him the said sum of ₦2,022,022.60 compensation collected by the appellant for the Ekagha Ekong villagers.

Upon instituting the said Suit No. C/272/92 Winston Nakanda as the plaintiffs, obtained from that High Court two orders. The first was an ex parte order of interim injunction (exhibit 2) made on 3 November, 1992, restraining the defendants (ie the appellant and the respondent in this appeal and one other) from “withdrawing, releasing or otherwise dealing in any manner whatsoever with the proceeds from the Central Bank of Nigeria cheque of 11 September, 1992, for the sum of ₦2,022,022.60 and made out in the name of Messrs Agwaramgbo, Otu Udofia and Partners, pending the determination the motion on notice for interlocutory injunction”. Then on 24 June, 1993, the court made the second order (exhibit 3) placing the said compensation money in an interest yielding account in the respondent bank.

However, on 14 December, 1993, the court that made the two orders (exhibits 2 and 3) discharged them by another
order (exhibit 4). It was the case of the appellant that the said orders (exhibits 2 and 3) made by the court having been discharged, the parties in the suit returned to the status quo prior to the making of the said orders and therefore there was no longer any impediment against the appellant from withdrawing part of the compensation money to pay some of the claimants. Therefore, following the discharge of the said ex parte order of interim injunction, the appellant drew cheques in favour of some individual claimants in payment of the compensation due to them. The branch Manager of the respondent refused to honour the cheques and variously endorsed on some of them the words “Order not to pay”, and also the words “Drawer’s attention required” as in exhibits 5(a) to 5(f). Following the refusal of the respondent to honour the said cheques drawn by the appellant, the appellant sued the respondent claiming the reliefs already set out at the beginning of this judgment.

The parties through their Counsel filed their briefs of argument for the determination of this appeal. The appellant’s Counsel also filed a reply brief. The appellant formulated six issues or questions as arising for the determination of the appeal, namely:

(i) Was the trial court right in holding that the plaintiff (ie appellant) had no locus standi to institute this suit.

(ii) Was the trial court right in holding that no contract subsisted between the plaintiff/appellant and the defendant/respondent in respect of the said compensation money paid into account no. 1581977197.

(iii) Was the trial court right in holding that with the death of Rev Bassey Inyang Otu Udofia neither the appellant alone, nor the appellant and the respondent acting together, nor the appellant and the personal representative of the deceased Rev Bassey Inyang Otu Udofia acting together could legally disburse the compensation paid into account no. 1581977197.

(iv) Was the trial court right in dismissing the appellant’s suit based on its application of the doctrine of lis pendens.

(v) Was the trial court right in holding that at all events the appellant was not entitled to damages as he suffered and
proved none. And as a corollary, was the plaintiff right in claiming interest on the amount deposited.

(vi) Was the judgment of the court not against the weight of evidence.”

In the respondent’s brief of argument, the learned Counsel objected to ground 1 of the grounds of appeal on the ground that it does not qualify as a misdirection and contended that it should be struck out and the issue formulated on it be also ignored. Subject to the above objections the learned Counsel adopted the issues formulated by the appellant for the determination of the appeal and in addition proposed more issues as arising for determination to wit:–

“1. With or without the application of the doctrine of *lis pendens*, whether it is legally permissible for any of the parties in litigation in a pending suit to destroy the subject matter of the suit or to do anything to frustrate or make nonsense of a possible court order.

2. Whether the respondent in this case did any wrongful act entitling the appellant to claim damages either by way of defamation or breach of contract when it refused to pay the cheques issued to deplete the disputed sum of ₦2,022,022.60 and when it, or evidence tendered, preferred to await the judgment and any orders of the court in the then pending Suit No. C/272/92.”

Before addressing the issues for the determination of the appeal, I shall quickly dispose of the objection by the learned Counsel for the respondent in his brief of argument in respect of grounds 1 and 3 of the grounds of appeal for being incompetent. In the reply brief, the learned Counsel for the appellant did not concede that the two grounds of appeal are improper or incompetent. In my view, the objection by the learned Counsel for the respondent is in the nature of preliminary objection against the competence of those two grounds of appeal. That being so, the objection contravenes Order 3 Rule 15(1) of the Court of Appeal Rules, 1981 as amended. It is settled law that a preliminary objection to the competence of a ground of appeal should be by motion on notice before the hearing of the appeal so that argument on it can be heard by the court and, although notice of objection
May be given in the brief, it does not dispense with the need for the respondent to move the court at the oral hearing for the relief prayed for. See *Nsirim v Nsirim* (1990) 3 NWLR (Part 138) 285 at 297. The non-compliance by the respondent with Order 3 Rule 15(1) aforesaid is fatal and renders the objection incompetent. See also *Okolo v U.B.N. Ltd* (1998) 2 NWLR (Part 539) 618 at 639; *Mallam Mohammed Bello v Gov, Kogi State and 2 others* (1997) 9 NWLR (Part 521) 496.

However, the defects highlighted in grounds 1 and 3 of the grounds of appeal; were cured by the amendment granted by the court on 14 March, 2000, pursuant motion on notice for amendment filed by the appellant’s Counsel which was not opposed by the respondent’s Counsel. Thus, ground 1 was amended by deleting, the offending words “misdirected itself law” “misdirected and misapplied the law” and substituting therefor, the words “erred in law in applying the principles”.

It must also be mentioned here that on 20 September, 2000, the appellant brought an application on notice dated 18 September, 2000 for leave to amend the appellant’s reply brief dated 12 April, 1997 and filed on 14 April, 1997, by withdrawing the reply brief and substituting therewith a new reply brief dated 18 September, 2000. The application was supported by an affidavit of seven paragraphs. The respondent on its part filed a counter-affidavit of eight paragraphs in opposition to the application. On 27 September, 2002, when the appeal came up for hearing the application was also heard and the ruling was reserved to incorporated in the judgment appeal now being delivered. I now deliver the ruling of this Court on the application for leave to amend the appellant’s reply brief dated 12 April, on 14 April, 1997. In the affidavit in support, the appellant/applicant relied on paragraphs 2, 3, 4 and 5 of the affidavit, while the respondent relied on paragraphs 3, 4 and 6 of the counter-affidavit.

After a careful consideration of the application the question that arises is whether the appellant/applicant can in law
amend his reply brief at the stage the appeal was ripe and adjourned for hearing. In my view, the court has discretionary power to grant the amendment sought if it can be done without prejudice to the other party. In paragraph 5 of the supporting affidavit, which I consider relevant, the appellant/applicant deposed as follows:

“I am advised by my Counsel whom I verily believe that it is necessary to amend my reply brief to reflect the judgment of this Court in the said Appeal No. CA/C/72/97 against the judgment of court in Suit No. C/272/92. The amended appellant’s reply brief is filed at the time with this application.”

This is the purpose of the amendment sought and I do not see how any reflection or discussion of the said judgment in the amended reply brief will be prejudicial to the respondent. The counter-affidavit of the respondent has not prof ered any serious reason for opposing the amendment sought. This application is therefore granted. The amended reply brief dated 18 September, 2000 and filed on 20 September, 2000, is hereby deemed to be duly filed and served. No order as to costs.

I now come to the issues identified by the appellant’s Counsel and accordingly, adopted by the respondent’s Counsel with the additional issues for determination of the appeal. The learned Senior Advocate of Nigeria argued in the appellant’s brief Issues 1 and 2 together which arose from grounds 2, 7 and 9 of the grounds of appeal. In proffering his argument in Issues 1 and 2 he attacked the trial court’s decision that the appellant lacked the *locus standi* to institute the action based on the court’s finding that no contract was subsisting between the appellant (plaintiff) as a person and the respondent (defendant) but only between the partnership and the defendant which partnership was automatically dissolved on 21 September, 1991, with the death of the second member of the partnership. He submitted that it is not a correct statement of the law that a partnership fizzles out automatically with the death of a member and referred to sections 33(1) and 38 of the Partnership Act, 1890. He also referred to clause 6 of the partnership agreement,
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[140x764]

10 N.B.L.R. (PART II) (COURT OF APPEAL, CALABAR DIVISION)

Ekpe JCA

P.A.C. Agwaramgbo v. Union Bank of Nigeria

[140x764]

exhibit 12, in support of the appellant’s action. It was the contention of the learned Senior Advocate that the combined effect of sections 33(1) and 38 of the Partnership Act, 1890 and clause 6 of the partnership agreement, exhibit 12, is that they clothed the appellant with *locus standi* to institute the suit in the court below and that the appellant was in a contractual relationship with the respondent in respect of the said sum of ₦2,022,022.60 he paid into account no. 1581977197 with the respondent in September, 1992. He submitted further that it is the law that a bank is obligated to pay a customer’s cheque drawn on his bank account which has sufficient funds to meet payment even though a third party lays claim to the said funds. He cited *Tassel v Cooper* (1850) 9 CB 508.

In his response in the respondent’s brief of argument the learned Counsel for the respondent contended that going by the appellant’s evidence, the account on which the cheques were drawn was a partnership account and therefore the appellant could not maintain an action as a sole plaintiff. The learned Senior Advocate also contended that there is a difference between the appellant as an individual and the same appellant as one of two or more partners. He said that the appellant as plaintiff sued in his own name as PAC Agwaramgbo and merely described himself in parenthesis as a person carrying on business under the name and style of Agwaramgbo, Otu Udofia and Partners. The phrase in parenthesis being merely descriptive of the appellant, he did not sue in the name of the partnership nor did he sue for and on behalf of the partnership and therefore the appellant had no *locus standi* to sue. He referred to section 38 of the Partnership Act, 1890 and submitted that the appellant did not plead nor give evidence at the trial that the action he filed was necessary to wind up the affairs of the partnership or to complete the transactions begun during the partnership but unfinished at the time of the dissolution by the death of Otu Udofia, the other partner, so as to bring the action within
section 38 of the Partnership Act, 1890. On the effect of section 33 of the Partnership Act, it was his submission also that the partnership agreement, exhibit 12, is the overriding consideration which will guide the court in deciding whether or not the appellant had locust standi and whether there was any contractual relationship between the appellant and the respondent bank. He referred to clauses 2, 4, 5, 6 and 9 of the partnership agreement, exhibit 12, and submitted that as at 1992, when the appellant collected the cheque for the payment of the compensation due to Otu Udofia pursuant to the power of attorney, exhibit 8, the partnership between the appellant and Otu Udofia had been dissolved following the death of Otu Udofia in September, 1991. It therefore follows that the appellant should not have involved himself with the funds due to Otu Udofia’s office at No. 45/46 Atu Street, Calabar, except he was acting pursuant to clause 6 of the partnership agreement, exhibit 12, for the sole benefit of the staff and the deceased’s family, but that was not the case as the appellant did not plead so nor lead evidence in that respect. He contended that account no. 1581977197 at the respondent bank belonging to Otu Udofia’s Calabar office of the partnership was not a separate or deposit account under clause 5 of exhibit 12 and the appellant had no authority or capacity to deal with it. The learned Senior Advocate also pointed out that the power of attorney, exhibit 8, was issued to Otu Udofia in his personal name and not in the name of the partnership nor even in the name of the appellant to enable him to collect and disburse the compensation money. He submitted that Ikwuemesi and another v Cameron Cole and another (1962) 2 All NLR 43 does not apply to the present case.

The main thrust of the argument is whether the appellant had the locust standi to institute the action. The term locust standi or standing denotes the legal capacity to institute proceedings in a court of law. See Williams v Dawodu (1988) 4 NWLR (Part 87) 189 at 192. The fundamental aspect of
a  *locus standi* is that it focuses on the capacity of the party seeking to get his complaint before the court and not on the issues he wishes to have adjudicated. To decide that a person has no *locus standi* is to send him out of court on the ground that he has no right to appear or be heard in the particular proceedings. See *Attorney-General Anambra State and others v Eboh* (1992) 1 NWLR (Part 218) 491 at 505. Failure by a plaintiff to disclose his *locus standi* in an action is as fatal to the action as failure to disclose any reasonable cause of action and the result is that the action stands to be dismissed by the court. See *Thomas v Olufosoye* (1986) 2 SC 325, (1986) 1 NWLR (Part 18) 669. The law is that the issue of *locus standi* can be raised at any stage or time in the course of a trial or even on appeal in view of the fact that it is an indirect way of questioning the jurisdiction of the court to adjudicate on the case. See *Oloriode v Oyebi* (1984) 2 SCNLR 390 at 401.

b  Now, it is settled law that to determine whether or not the appellant as the plaintiff in this case had *locus standi* to sue the respondent, is a matter to be determined on the state of the appellant’s pleadings i.e. the statement of claim filed by the appellant. In *Owodunni v Registered Trustees of Celestial Church of Christ and others* (2000) 10 NWLR (Part 675) 315 at 354–355, (2000) 1 WRN (Vol. 2) 29 at 72, Iguh JSC had this to say:—

"It cannot be disputed that the question whether or not a plaintiff has *locus standi* in a suit is determinable from a totality of all the averments in his statement of claim. See *Bolaji v Rev Bamgbose* (1986) 4 NWLR (Part 37) 632; *Momoh v Olotu* (1970) 1 All NLR 117 at 123; *Adefulu v Oyesile* (1989) 5 NWLR (Part 122) 377. In dealing with the *locus standi* of a plaintiff, it is his statement of claim alone that has to be carefully scrutinised with a view to ascertaining whether or not it has disclosed his interest and how such interest has arisen in the subject matter of the action. Where the averments in a plaintiff’s statement of claim disclose the rights or interests of the plaintiff which have been or are in danger of being violated, invaded or adversely affected by the act the defendant complained of, such a plaintiff would be deemed to have shown
sufficient interest to give him the *locus standi* to litigate over the subject matter in issue. See *Adesanya v President of the Federal Republic of Nigeria* (1981) 5 SC 112; *Eleso v Government of Ogun State* (1990) 2 NWLR (Part 133) 420 at 444; *Oloriode v Oyebi* (1984) 1 SCNLR 390 at 401.”

It is from the above principle of law that I shall now consider the arguments urged on the issue of the *locus standi* of the appellant. I have carefully scrutinized the averments in the (plaintiff’s) appellant’s statement of claim particularly paragraphs 1–9 thereof, to ascertain whether or not they disclosed sufficient interest in the appellant to give him *locus standi* to institute the action. The appellant pleaded in those paragraphs of the statement of claim that he is a Chartered Surveyor and Valuer carrying on business under the name and style of Agwaramgbo, Otu Udofia and Partners in Calabar within the jurisdiction of the court and other places within Nigeria, and in the course of such business he collected from the Ministry of Defence Central Bank of Nigeria cheque no. 0065180238 dated 11 September, 1992, for the sum ₦2,022,022.60, as compensation money due to the claimants from the Ekagha Ekong Village whose land along Atimbo Road, Calabar, was compulsorily acquired for construction of barracks for Navy ratings and Naval workshop. He also pleaded that before the said cheque was released to him, the Ministry of Defence obtained confirmation from the Governor of Cross River State that his said partnership firm was the authorised agent to receive the compensation money on behalf of the aforesaid claimants, and that he also personally gave the Ministry of Defence a personal indemnity for the full payment of the said compensation, to the knowledge of the respondent. The appellant further pleaded that he lodged the said Central Bank of Nigeria cheque for the compensation into his partnership firm’s bank account no. 1581977197 with the (defendant) respondent at its Calabar branch and the amount was accordingly credited in the said bank account, and as a result he drew some cheques which were dishonoured by the respondent. The appellant therefore contended in his pleading that the relationship between...
himself as the person operating the said partnership account and the respondent was that of creditor and debtor to the full amount of the said cheque so that the respondent was obliged at all times to pay any cheque drawn by him on the said bank account so long as the account was in credit.

Certainly, in my view, in the face of those averments in the statement of claim, it cannot be controverted that the appellant disclosed sufficient interest in the subject matter of his claim to accord him the *locus standi* to institute this action. It is settled law that *locus standi* is not dependent on the success or merits of a case, but on the showing of the plaintiff’s case in his statement of claim. It is therefore a condition precedent to a determination on the merits, and it follows that if the plaintiff has no *locus standi* or standing to sue, it is not necessary to consider whether there is a genuine case on the merits, as his case must of necessity be struck out as being incompetent. See *Momoh v Olotu* (supra); *Adelfulu v Oyesile* (supra); *Owodunni v The Registered Trustees of Celestial Church of Christ* (supra). The learned trial Judge in his judgment appeared to have determined the issue of *locus standi* of the appellant by reference to the partnership agreement, exhibit 12, which he held automatically ceased to exist on the death of the other partner, Rev Otu Udofia, and therefore the appellant had no *locus standi* to sue. In doing so, the learned trial Judge, in my respectful opinion, fell into a very grave error. Also the learned Counsel for the respondent, *Ekong-Bassey*, Esq. S.A.N., in the respondent’s brief of argument fell into the same error by arguing that the appellant had no *locus standi* to sue. As I have already stated, the appellant had *locus standi* to bring the action. I therefore agree with the learned Senior Advocate, AN *Anyamene* Esq., Counsel for the appellant in this regard.

This settles or disposes in the appellant’s favour the issue of *locus standi* of the appellant to institute the action.

The next question is whether there was a contract between the appellant and the respondent in respect of the ₦2,022,022.60 held by the respondent in account
no. 1581977197. This deals with question 2 in the appellant’s brief. To determine this question it is necessary to critically consider the evidence adduced before the trial court in conjunction with the partnership agreement, exhibit 12, which forms the fulcrum on which the case of each party revolves. Both parties relied on exhibit 12, the partnership agreement. The trial court even found as a fact that the partnership of Agwaramgbo, Otu Udofia and Partners was regulated by the partnership deed (exhibit 12) in line with which the partnership account no. 1581977197 was opened and operated by both partners, either or both of which were mandated to sign cheques drawn thereon. As can be recollected, the argument of the respondent is that upon the death of Otu Udofia the other principal partner on 21 September, 1991, the partnership was automatically dissolved with the result that the partnership agreement, exhibit 12, became extinct.

The partnership agreement, exhibit 12, was made on 1 May, 1978. I shall reproduce clauses 6 and 9 thereof as follows:

“Clause 6: In case of death of one partner, the other partner shall take over and manage the deceased partner’s office, to the sole benefit of the staff and the deceased family.

Clause 9: Dissolution of Partnership: This principal Partnership Agreement may be determined only if one of the principal partners dies, and in such event either party shall give to the other six months notice in writing of that party’s intention to determine the agreement.”

The operative question here is whether the partnership agreement, exhibit 12, was automatically dissolved upon the death of Otu Udofia on 21 September, 1991. Section 33(1) of the Partnership Act, 1890 provides that subject to any agreement between the partners, every partnership is dissolved as regards all the partners by the death or bankruptcy of any partner. It can therefore be seen that under the law by reference to section 33(1) of the Partnership Act, a partnership is not automatically dissolved by the death of any partner as the dissolution is subject to any agreement between
the partners in the partnership agreement to the exclusion of the Partnership Act, 1890. Indeed many provisions of the Partnership Act, 1890 apply only in the absence of any agreement to the contrary in the partnership agreement.

In the instant case the provisions of section 33(1) of the Partnership Act, 1890 must be read subject to clause 9 of the partnership agreement, exhibit 12, which provides for the dissolution of the partnership. Clause 9 of the partnership agreement is inelegantly couched or drafted, and it is not free from ambiguity because in the event of death of one of the partners, it is not possible and practicable for “either party to give to the other six months notice in writing of that party’s intention to determine the partnership agreement”. The dead party or partner cannot give the surviving party or partner six months’ notice in writing of his intention to determine the partnership agreement. Similarly the reverse is also the case as the living partner or party cannot give the dead partner or party similar notice to determine the partnership agreement. In my view therefore, the literal interpretation to be placed on clause 9 of the partnership agreement, exhibit 12, in order to reflect the intention of the partners (or parties) thereto is that in the event of death of one partner, the surviving partner shall give to the deceased partner’s family (or legal personal representative) six months’ notice in writing of his intention to determine the partnership agreement. In accordance with this interpretation, therefore I hold the view that the partnership agreement in the instant case was not terminated by the death of Rev Otu Udofia as there was no evidence before the trial court that the notice stipulated in clause 9 of the partnership agreement had been complied with. Accordingly, in my candid view, the partnership in this case was not automatically dissolved by the death of Otu Udofia.

However, assuming without conceding that I am wrong in my view that by the death of Otu Udofia the partnership was not automatically dissolved, then it seems to me that section 38 of the Partnership Act, 1890 availed the appellant to
enable him wind up and complete the transaction in respect of the payment of the compensation to the claimants of Ekagha Village that was begun by the partnership in the lifetime of Rev Otu Udofia but was unfinished at the time of the dissolution of the partnership by the death of Rev Otu Udofia. Section 38 of the Partnership Act, 1890 provides thus:

“After the dissolution of a partnership the authority of each partner to bind the firm and the other rights and obligations of the partners, continue not withstanding the dissolution so far as may be necessary to wind up the affairs of the partnership, and to complete transaction begun but unfinished at the time of the dissolution, but not otherwise . . .”

The authority of partners to do acts after dissolution of the partnership, pursuant to section 38 of the Partnership Act, 1890, has been upheld in the following instances or cases: receipt of debts due to the partnership even though the terms of dissolution provided otherwise as in King v Smith (1829) 4C and P 108, (1824) All ER 391; creation of security on partnership property for money required to complete a contract entered into before dissolution as in Re Clough, Bourne v Bourne (1906) 2 ChD 427; the drawing of cheques upon the partnership account as in Back-House v Charlton (1878) 8 ChD 444. Moreover, clause 6 of the partnership agreement, exhibit 12, goes further to strengthen the case of the appellant that the partnership was not dissolved by the death of Rev Otu Udofia. Obviously in the face of the provision in clause 6 of the partnership agreement, the appellant cannot remain unconcerned in any matter affecting the partnership after the death of Rev Otu Udofia. Hence the appellant took steps to realise and actualise the payment of the compensation money, the exercise which was started by the partnership, pursuant to the power of attorney, exhibit 8, donated to Rev Otu Udofia on 15 October, 1987, by the claimants of the compensation. It is noteworthy that the partnership agreement had come into force on 1 May, 1978, prior to the donation of the power of attorney, exhibit 8. Now, a look at the evidence before the trial court. There is evidence from the appellant that his firm (ie the partnership) had an account
with the respondent in its Calabar Road branch and that in
the course of his banking with the respondent, he lodged into
the said account the said Central Bank of Nigeria cheque of
₦2 million plus on behalf of Ekagha Ekong Community in
Calabar, being compensation money from the Federal Gov-
ernment in respect of the land acquired for use of the Gov-
ernment. There is also evidence from DWI called by the re-
ponent to show that account no. 1581977197 in the re-
spondent’s bank, Calabar branch, is in the name of the part-
nership of Agwarangbo, Otu Udofia and Partners and that
the said sum of ₦2,022,022.60 was lodged into that account
by the appellant. The defence witness further testified that
the operators of the account no. 1581977197 gave the re-
spondent mandate and that the appellant was a signatory to
the said account.

In view of the foregoing and the findings of fact by the
learned trial Judge with which I agree that (1) the partner-
ship was regulated by the partnership deed (exhibit 12) in
line with which account no. 1581977197 was opened and
operated by both partners, either or both of which were
mandated to sign cheques drawn thereon, and (2) that
though the Rev Otu Udofia died before the cheque was is-
issued the plaintiff obtained the said cheque which was writ-
ten in the firm’s name and paid same into the firm’s account
with the defendant in September, 1991, I hold the view that
there was a contractual relationship of customer and banker
existing between the appellant and the respondent in respect
of the sum of ₦2,022,022.60 paid by the appellant into the
said partnership account no. 1581977197 in the respondent
bank. The learned trial Judge was wrong to have held other-
wise in spite of the abundant evidence before him and his
findings of facts. Again this issue or question is resolved in
favour of the appellant.

On Issue 3, my answer without any hesitation is in the
negative. It has been clearly shown that the partnership was
not automatically dissolved by the death of Rev Otu Udofia.

Even if it was so dissolved (though not conceded) the
appellant alone was empowered under section 38 of the Partnership Act, 1890, to carry on the affairs of the partnership with regard to the disbursement of the compensation money paid into account no. 1581977197 of the partnership with the respondent.

On Issue 4, the question is whether the court below was right in holding that *lis pendens* operated against the plaintiff (appellant) to defeat his claim. This issue is related to ground 1 of the ground of appeal. The learned Senior Advocate in the appellant’s brief argued that the doctrine of *lis pendens* only applies to litigation involving recovery of or assertion of title to specific or real property and has no application to personal property. He made reference to the following authorities: *Ogundiani v Araba and another* (1978) 6–7 SC 55 at 78; *Barclays Bank of (Nig.) Ltd v Alhaji Ashiru and Others* (1978) 6–7 SC 99; *Osagie v Oyeyinka and another* (1987) 6 SCNJ 94, (1987) 3 NWLR (Part 39) 144. He asserted that *Abhulimen v Namme* (1992) 8 NWLR (Part 258) 202 at 211 applied by the learned trial Judge is inapplicable as the facts are dissimilar because that case was dealing with personal property, to wit; a motor vehicle. He also submitted that the dispute in the instant case at the court below did not involve title to any real property or transfer of title to any person as what was involved was only money. He finally submitted that the application by the trial court of the doctrine of *lis pendens* to this case was misconceived and led to an injustice.

In his reply the learned Senior Advocate for the respondent argued this issue together with Issue 1 proposed in the respondent’s brief. He contended that the real issue is not whether the doctrine of *lis pendens* applies to personal as against real property, but whether the subject matter of litigation can validly be destroyed by a party to a suit during the pendency of that suit on the ground that it is personal and not real property. He submitted that the doctrine of *lis pendens* was tapped in this case to support the principle that when a suit is pending in the court none of the parties should
be permitted to overreach or to destroy the subject matter of the suit. He was of the view that the learned trial Judge correctly adopted the ratio in Ezegbu v F.A.T.B. Ltd (1992) 1 NWLR (Part 220) 699 but whether that amounted to the application of the doctrine of *lis pendens* does not in the least matter as it should not affect the judgment in this case. He referred to Nwabueze v Okoye (1988) 4 NWLR (Part 91) 664; Praying Band of C and S v Udokwu (1991) 3 NWLR (Part 182) 716 at 731; The Registered Trustees of Apostolic Church v Olowoleni (1986) 6 NWLR (Part 158) 514; Military Gov, Lagos State v Ojukwu (1990) 1 NWLR (Part 18) 621, where the courts condemned any action by any party to a litigation aimed at destroying the subject matter of the suit during the pendency of the suit. He finally urged this Court to apply the blue pencil rule and dismiss the appeal as the decision of the lower court that *lis pendens* applied to this case has not led to any miscarriage of justice. He referred to N.E.P.A. v Alli (1992) 8 NWLR (Part 259) 279.

The narrow point that calls for decision here is whether the doctrine of *lis pendens* on which the court below relied for its decision applies only to real or specific property as against personal property. The doctrine of *lis pendens* is of common law origin, it derives from the latin maxim “*pendente lite nihil innovetur*” which means that nothing should change during the pendency of an action. In Bellamy v Sabine (1857) 26 LJ (NS) Equity Reports 797, Turner L.J. stated the aim of the doctrine at page 803 when he said:—

“It is a doctrine common to the courts of both law and equity, and rests upon this foundation, that it would be plainly impossible that any action or suit would be brought to a successful termination if alienation *pendente lite* were permitted to prevail.”

It must be mentioned that the learned Senior Counsel for the appellant heavily relied on the passage from the judgment of Idigbe JSC in the case of Barclays Bank Nig. Ltd v Ashiru and Others (1978) 6–7 SC 99, to stress the point that the doctrine of *lis pendens* applies only to real or specific
property. In that case, Idigbe JSC delivering the judgment of the Supreme Court, cited Wigram v Buckley (1894) 3 ChD 483 at 386 and 492–493, and stated at page 128 of his judgment thus:–

“In passing, however, we think that it should be mentioned that the doctrine of *lis pendens* does not apply to every suit. It applies to a suit in which the object is to recover or assert title to a specific property; the property, however must be real property for the doctrine has no application to personal property.”

However, in *Ogundiani v Araba and others* (1978) 6–7 SC 55 the Supreme Court at page 78 also *per* Idigbe JSC clearly and concisely stated the aim and scope of the doctrine of *lis pendens*. There he said that the doctrine of *lis pendens* events the effective transfer of right in any property which is the subject matter of an action pending in court during the pendency in court of the action. In its application against any purchase of such property the doctrine is not founded on the equitable doctrine of notice actual or constructive but upon the fact that the law does not allow to any litigant parties or give to them, during the currency of the litigation involving any property rights in such property (ie the property in dispute) so as to prejudice any of the litigating parties. It is important to note that in that case, the Supreme Court did not draw any distinction between real or specific property and personal property for the application of the doctrine of *lis pendens* as it was concerned with any property which is the subject matter of an action pending in the court. See also *Osagie v Oyeyinka and another* (1987) 6 SCNJ 94 at 106, (1987) 3 NWLR (Part 59) 144; *Abhulimhen v Namme* (1992) 8 NWLR (Part 258) 202.

If the doctrine of *lis pendens* is aimed at the preservation of the *res*, the subject matter of the litigation from being destroyed by any of the litigating parties during the pendency of the suit in the court, it therefore seems to me that in the present day approach by the courts towards doing substantial justice rather than insisting on technicalities the difference between real and personal property should disappear into insignificance or obscurity in the application of the doctrine.
of *lis pendens* by the courts. In *Majekodunmi v Co-operative Bank Ltd* (1997) 4 NWLR (Part 524) 198 it was held by the Court of Appeal that the doctrine of *lis pendens* is aimed at preserving the subject matter of the litigation by either of the parties to the said litigation and it applies to both tangible and intangible *res* or property. See *Doma v Ogiri and others* (1997) 1 NWLR (Part 481) 322.

At this juncture, it is also pertinent to bring into focus the rule of law which frowns against self-help the resolution of the pending dispute in the court. This rule of law is akin to the doctrine of *lis pendens* and indeed both aim at the same objective, namely, the preservation of the *res*, the subject matter of the dispute in the court pending the determination of the suit. The rule against self-help or do anything to suggest an attempt to destroy the *res* in dispute or through some other improper methods abort the proceedings before the court. See *Praying Band of C and S v Udokwu* (1991) 3 NWLR (Part 182) 716; *Registered Trustees of the Apostolic Church v Olowoleni* (1990) 6 NWLR (Part 158) 514. This rule of law has been applied in many cases by the courts. See *Military Governor Lagos State and 2 others v Ojukwu and another* (1986) 1 NWLR (Part 18) 621; *Abhulimhen v Namnze* (supra); *Ezegbu v First African Trust Bank Ltd* (1992) 1 NWLR (Part 220) 699; *Vaswani Trading Co. Ltd v Savalak and Co.* (1972) 12 SC 77 at 82. Going through the judgment of the learned trial Judge at pages 118–120 of the record of appeal it is clear that the learned trial Judge in a painstaking manner discussed both the doctrine of *lis pendens* and the rule for law against self-help and cited some relevant authorities which have also been referred to in this judgment. The fact that he applied both principles of law in the determination of the case is highly commendable. I agree with him that having regard to the facts of the case, the doctrine of *lis pendens* applied and availed the respondent.

The preponderance of judicial authorities by both the Supreme Court and the Court of Appeal shows beyond doubt that the doctrine of *lis pendens* applies to real property and
personal property as in the instant case. Therefore, this issue is hereby resolved in favour of the respondent.

The issue to be resolved in question (v) in the appellant’s brief is whether or not the trial court was right in holding that the plaintiff (appellant) was not entitled to damages. The learned Senior Advocate for the appellant has in the appellant’s brief of argument attacked the judgment of the trial court for holding that the appellant was not defamed because the entity to complain of the breach of contract or of the defamation was the partnership/firm and not the appellant in his personal capacity and also that the beneficial owners of the money ascertained from the respondent’s Manager that the appellant did not misappropriate their money. He submitted that the position of the law in Nigeria regarding damages for the dishonour of a customer’s cheque who has sufficient funds in his account to meet payment is stated in the locus classicus case of Balogun v National Bank of Nigeria Ltd (1978) 3 SC 155, where the Supreme Court held that the dishonour of the cheque of a trader, or of a professional like a legal practitioner or estate valuer gives rise to damages per se both in defamation and in breach of contract. He referred to U.B.A. Ltd v Ibhafidon (1994) 1 NWLR (Part 318) 90 at 98–99; Union Bank of Nigeria Ltd v Ifeatu Nwoye (1990) 2 NWLR (Part 139) 69. He contended that the respondent never denied dishonouring the appellant’s cheques drawn on the said account with the respondent which was in credit. He therefore submitted that the defences of the respondent are not sustainable in law. It is also his argument that it is not a defence to a claim in defamation that a person or persons who heard or read the defamatory remarks knew or found out that the imputation was not true, and that the essence of defamation is that the words complained of were calculated to lower the reputation of the complainant in the eyes of right thinking members of the society. He said that it is for the Judge and not for the witnesses to say whether the words complained of were capable of bearing a defamatory
a meaning. He further contended that this case calls for exemplary damages and cited legal authorities in support of his contention.

b On question or issue VI, which is whether the judgment of the trial court was not against the weight of evidence, the learned Senior Advocate for the appellant submitted that there was no evaluation of evidence known to law by the learned trial Judge who began his judgment by stating in a nutshell what he believed to be the facts of the case and followed by making his findings without addressing his mind to the issues joined by the parties in the suit. He referred to *Adewummi v Aduroja* (1975) 1 NMLR 125 at 127, and *Mogaji v Odofin and others* (1978) 4 SC 91 at 96. Furthermore, the Senior Counsel contended that the learned trial Judge did not consider the provisions of sections 33(1) and 38 of the Partnership Act, 1890, nor did he consider clause 5 of the partnership agreement, exhibit 12. It was also argued by the learned Senior Counsel that the learned trial Judge failed to consider that any *damnum* to a partnership is *damnum* to the individual members since a partnership is not a juristic person but a collection of legal persons.

c In his response, the learned Senior Advocate for the respondent argued questions or issues V and VI together with issue 2 in the respondent’s brief of argument. He submitted that the trial court was right in holding that the appellant was not entitled to damages because the respondent not having been found liable by the trial court in relation to any of the heads of claim of the appellant, therefore the respondent could not be condemned to pay damages. He contended that while Suit No. C/272/92 was pending, the law did not authorise the appellant to take away or deal with the funds, the subject matter of that Suit No. C/272/92. He further contended that all the arguments in the appellant’s brief concerning defamation and breach of contract in respect of a customer with sufficient funds whose cheque has been dishonoured by a bank is not relevant as there is no contract existing between a person who pays money into the bank and

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the bank. He asserted that the proper position is that such contractual relationship only exists between the bank and the account holder because any person who may not even be the account holder can pay money into the account of another person in the bank. On the issue of defamation, he submitted that for the purpose of establishing whether a particular word is capable of defamatory meaning, the test is objective i.e. what a reasonable man would think of the word. And as to the question whether a particular plaintiff has been defamed or not he submitted that the question would depend on the pleadings and evidence; if the evidence, as in the instant case, does not support defamation in fact, it is immaterial that the word is capable of defamatory meaning. He submitted that the evidence of the appellant himself is clear on the absence of liability on the part of the respondent bank and he referred to page 84 of the record of appeal. On the complaint made by the appellant that there was no evaluation of the evidence by the learned trial Judge, it is submitted for the respondent that the complaint is misplaced. In his contention the learned Senior Advocate for the respondent pointed out that the appellant did admit that the learned trial Judge summarised the evidence adduced by both parties and thereafter stated that “he had carefully considered the evidence adduced by both sides”, and he wondered why this should be a ground of complaint by the appellant because this is how a judgment should be. He cited *Onuoha v The State* (1988) 7 SCNJ 20, (1988) 3 NWLR (Part 83) 460 and submitted that judgment writing is an art and there is more than one way of going about it. He finally urged the court to dismiss the appeal.

Under our law the relationship between a bank and its customer is that of a debtor and creditor. The receipt of the customer’s money by the bank for payment into his account constitutes the bank into a debtor of the customer. The bank undertakes to pay any part of the money so received from the customer to any person so named on the cheque as the
payee against the written orders of the customer, so long as there are sufficient funds in the customer’s account to meet the payment. The wrongful refusal of the bank to pay the cheque of the customer amounts to a breach of contract of which the bank is liable in damages to the customer. See Folley v Hill (1848) 2 HL case 28. In Cumming v Shand 5 HRN 95 or 29 LJ Exch 129, Martin B. put it bluntly thus:–

“The relationship between banker and customer is that of a debtor and creditor with a super added obligation on the part of the banker to honour the customer’s cheques so long as there are any assets of his in the banker’s hands.”

See also Balogun v The National Bank of Nigeria Ltd (1978) 3 SC 155 at 163–164; Union Bank of Nigeria Ltd v Nwoye (1990) 12 NWLR (Part 130) 69; Yesufu v A.C.B. (1981) 1 SC 74; U.B.A. Ltd v Ibha bidon (1994) 1 NWLR (Part 318) 90; Allied Bank of Nigeria Ltd v Akubueze (1997) 6 NWLR (Part 509) 374. The wrongful refusal of a bank to honour a customer’s cheque when the customer’s account in the bank is in credit is not only actionable in contract, it is also actionable in the tort of defamation. See Balogun v National Bank of Nigeria (supra). But the pertinent question is whether the respondent wrongfully dishonoured the appellant’s cheques in question. From the evidence adduced at the trial, learned trial Judge found as a fact that Suit No. C/272/92 was instituted by Winston Nakanda against the appellant and the respondent herein with one other claiming inter alia that he (Winston Nakanda) and not the appellant was the rightful person to collect the said compensation money, that during the pendency of that suit, three orders were made by the court ie exhibits 2, 3 and 4. Exhibit 2 was an injunction restraining the defendants in that suit (ie the appellant and the respondent in this appeal) and their privies from withdrawing, releasing or otherwise dealing with the said compensation money in the respondent’s bank. Exhibit 3 was an order transferring the compensation money, the subject matter of Suit No. C/272/92, into an interest yielding account in the respondent’s bank and exhibit 4 was an order
discharging the earlier order of injunction in exhibit 2; that also during the pendency of that suit the appellant herein sought to draw cheques on the partnership firm’s account with the respondent herein but the respondent refused to honour the same, preferring to abide the outcome of the pending Suit No. C/272/92. In my opinion, even though Winston Nakanda, the plaintiff in Suit No. C/272/92 lost on appeal in this Court in Appeal No. CA/E/72/97, the fact is that during the pendency of Suit No. C/272/92 in the High Court, Calabar, the respondent was protected by the doctrine *lis pendens* and its failure to honour the appellant’s cheques, exhibits 5(a) to 5(f), was not wrongful in law. The respondent was justified in refusing to honour the cheques while Suit No. C/272/92 was pending in the court. The fact that the order of injunction, exhibit 2, was later discharged did not make any difference to the situation since the suit was all along pending in the court and until the suit was disposed of, it was not proper in law to destroy the subject matter of the suit. Besides, the appellant himself conceded under cross-examination at page 84 lines 30–34 of the record of appeal that it would be wrong to disburse money when a suit is pending in the court in respect of the money. In his own words under cross-examination he said:—

“If I were a bank Manager and a suit was pending in court in respect of disbursement of money, I would not pay the money to one of the contestants to the suit.”

In my view, therefore, the action of the appellant against the respondent for breach of contract for dishonouring the cheques, exhibits 5(a) to 5(f), and also for defamation cannot be validly sustained by the appellant in view of the respondent’s solid defence of *lis pendens*. In the circumstances, therefore, the issue of liability of the respondent to the appellant in damages is to my mind misconceived.

The appellant furthermore attacked the judgment of the court below on the ground that it was against the weight of evidence and there was no proper evaluation of the evidence by the learned trial Judge. A complaint that a judgment is
against the weight of evidence postulates that there was no evidence which if accepted would support the findings of the trial Judge, or the inference which he had made. In Queen v Uche (1994) 6 NWLR (Part 350) 329 at 357 it was stated that when an appellant complains that a judgment is against the weight of evidence, all that he means is that when the evidence adduced by him is balanced against the evidence adduced by the respondent, the judgment given in favour of the respondent is against the weight which should have been given to the totality of the evidence. See Mogaji v Odofin (1978) 4 SC 91 at 93–95. A ground of appeal based on the weight of evidence is really an appeal on facts and where the questions involved are purely on facts, an appellate court will not interfere with the decision of the lower court unless such decision is shown to be perverse or not the result of a proper exercise of judicial discretion. See Ntiaro and another v Ibok Etok Akpan (1910) 3 All NLR 10. Appraisal and evaluation of evidence which have gained prominence in appeals against the judgments of the trial courts involve mental exercise by a trial Judge leading to the findings of fact by him. Where there are conflicting assertions by the parties to a proceeding, the trial Judge in order to resolve such conflicts puts the evidence offered by either party on an imaginary scale of justice and weighs them together to see which side of the evidence the scale tilts before preferring the weightier side of the scale in relation to the evidence. The trial Judge is not bound to state expressly in his judgment that he has complied with the rule as to evaluation of evidence as laid down in Mogaji v Odofin (1978) 4 SC 91, ie that he has placed the evidence offered by the parties on an imaginary scale of justice, as this can be discerned from the terms of his judgment. See Mogaji v Odofin (supra); Incar Nigeria Ltd v Adegboye (1985) 2 NWLR (Part 8) 453 at 463; Doma v Ogiri (1998) 3 NWLR (Part 541) 246 at 267. The appellant is unhappy with the style of writing of the judgment by the learned trial Judge. The position of the law is
that there is no set standard of how a judgment of a court
should be written and that each Judge should adopt an ap-
proach or style peculiar to him, but the overriding considera-
tion is that the trial Judge in writing his judgment should
show a clear understanding of the facts of the case, the is-
sues involved, the law applicable and from all these he
should be able to draw the right conclusion and make correct
findings on the evidence before him. See Doma v Ogiri (su-
pra) per Edozie JCA at 267; Onuoha v The State (1988) 3
NWLR (Part 83) 460, (1988) 7 SCNJ 20. In Abraham v Olo-
runjummi (1991) 1 NWLR (Part 165) 53 at 79 the Court of
Appeal held that although a judgment should have certain
vital features and characteristics, a trial Judge must not be
regimented to a strictly laid down pattern beyond which he
can only go on pain of punishment by way of setting his
judgment aside on appeal. In the judgment of the learned
trial Judge in the instant case, apart from the erroneous con-
nclusions that the appellant had no *locus standi* and no con-
tractual relationship with the respondent bank with which I
disagree and do hereby set aside, I find nothing wrong with
that judgment. Indeed the issue of *lis pendens* alone, which
was ably considered by the trial Judge in favour of the re-
spondent was enough to dispose of this case against the ap-
PELLANT in the court below.

In the circumstances therefore, the inevitable conclusion
that I reach is that this appeal lacks merit and should be dis-
missed. Accordingly, it is hereby dismissed with ₦5,000
costs against the appellant.

**Edozie JCA:** I had the advantage of reading in draft the
lead judgment just read by my learned brother, Ekpe JCA,
and I agree with his reasoning and conclusion for dismissing
the appeal.

The appellant’s suit in the court below the subject matter
of this appeal was predicated on the alleged wrongful dis-
honour of cheques, exhibits 5(a) to 5(f), drawn on his ac-
count with the respondent bank when the account was in
credit. It is unarguable and indeed common ground on both sides that at the material time the cheque were drawn and presented for payment there was a suit, to wit, Suit No. C/272/92 pending in the High Court, Calabar, arising from a dispute between the appellant and others on the one hand and Winston Nakanda on the other as to who was the rightful party to disburse the account in question. It seems to me that it was out of deference to the court and to avoid the destruction of the subject matter in dispute that the respondent bank Manager refused to honour the cheques. In my humble view, the action of the respondent’s bank Manager in the circumstances is anything but rightful or wrongful. The state of law in this country, Nigeria, seems to be that when parties to a dispute have referred their dispute for adjudication by the law court, the hands of the parties are tied pending the hearing and determination of the dispute. In the case of Military Governor of Lagos State and others v Chief Eneka Odumegwu Ojukwu and another (1986) 1 NWLR (Part 18) 621, (1986) 2 SC 277 at 282–283 the Supreme Court adopted with approval the opinion of Mr Justice Sutherland of the Supreme Court of the United States of America in J. Edwards Jones v Securities and Exchange Commission 80 L. Ed. 1015, 298 US 1–33 at 102 as follows:–

“... The rule is well settled both by the courts of England and of this country, that where a suit is brought to enjoin certain activities for example, erection of a building or other structures, of which the defendant has notice, the hands of the defendant are effectually tied pending a hearing and determination even though no restraining order or preliminary injunction be issued.”


Consistent with the principles enunciated in the above cases, it is my view that until the pending suit was determined it was not proper for the appellant to draw cheques on the disputed account and having improperly done so, the
respondent bank acted legitimately in dishonouring the cheques.

Learned Counsel for the appellant relying on the case of *Tessel v Cooper* (1850) GCB 508, submitted in his reply brief that a banker has an obligation to pay cheques drawn by a customer on his account which was in credit even if someone else laid claim to the money. It must be appreciated that decisions of English courts are not binding on Nigerian courts; at best, they are of persuasive effect: See *U.T.C. (Nig.) Ltd v Pamotei* (1989) 2 NWLR (Part 103) 244 at 301–302. I am unable to lay my hands on the authority cited to determine whether the circumstances in that case and the present one are the same. If the claim to an account in the bank is a sham, the bank will be justified to ignore it and honour cheques drawn by the holder of that account.

In the instant case, the claimant communities had donated a power of attorney to Winston Nakanda to act as their agent in respect of the compensation money after the death of Rev Otu Udofia.

It was on the strength of that power of attorney that he, Winston Nakanda, asserted his right to the disbursement of the money to the beneficiaries. His claim cannot, in my humble view, be disregarded as frivolous.

It was strenuously canvassed in the reply brief that there was never a conflicting claim as to the beneficial ownership of the funds in the account under consideration. That may be so, but if the funds were paid out as contemplated by the appellant, that would have rendered nugatory Nakanda’s claim of right to their disbursement and possibly the agency fees incidental thereto.

Again our attention was drawn to our judgment in Appeal No. CA/C/72/97 in which the decision of the Calabar High Court in the pending Suit No. C/272/92 was set aside and Nakanda’s suit dismissed. If this is to show that the respondent bank Manager ought not to have dishonoured the appellant’s cheques, it seems inconceivable that the bank
Managers are expected to resolve the intricate points of law raised in the suit. And who knows what would be the outcome of the case were there to be a further appeal to the Supreme Court. It is my view that from all the circumstances of this case, the respondent bank acted prudently in refusing to honour the appellant’s cheques drawn on the account against which there was a pending suit.

It is for these and the more comprehensive reasons stated in the lead judgment that I also dismiss the appeal with the same orders as were made 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 entirely agree with him that the appeal is devoid of merit and that it should be dismissed and I will only add some few words of my own solely for the purposes of emphasis.

It is settled law that in determining whether or not a plaintiff has a *locus standi* to institute an action that it is the statement of claim that should be thoroughly examined to ascertain whether or not it has disclosed the plaintiff’s interest and how much interest he has in the subject matter. See: *Owodunni v Registered Trustees of Celestial Church of Christ and others* (2000) 10 NWLR (Part 675) 315; *Bolaji v Bamgbose* (1986) 4 NWLR (Part 37) 632; *Momoh v Olotu* (1970) 1 All NLR 117; *Adesanya v President of Federal Republic of Nigeria* (1981) 2 NCLR 358, (1981) 5 SC 112; *Eleso v Government of Ogun State* (1990) 2 NWLR (Part 133) 420 and *Oloriode v Oyebi* (1984) 1 SCNLR 390.

On a careful and critical examination of the statement of claim, it shows that the appellant averred that a cheque for the sum of N2,022,022.60 was collected by the appellant from the Ministry of Defence as compensation money due to the people of Ekagha Ekong Village for acquisition of their land, that he gave the Ministry of Defence an indemnity for the full payment of the said compensation money and that he lodged the said compensation money in the partnership account in the respondent’s bank.
From the foregoing, it cannot be said that the appellant had not disclosed sufficient interest in this matter and that he has a *locus standi* to bring this action and this of course is not dependent on the success or merits of the case.

As regards the question whether the doctrine of *lis pendens* applies in this case, Mr Anyamene S.A.N., had very strongly submitted that the doctrine applies only to real or specific property and that it does not apply to the present case. The case of *Barclays Bank (Nig.) Ltd v Ashiru and others* (1978) 6–7 SC 99 was cited in support of his contention but another latter decision of the Supreme Court in *Ogundiani v Araba and others* (1978) 6–7 SC 55 does not appear to support that contention.

However, it is settled law that when a matter is pending before a court that nobody should act in such a manner as to render the decision of the court nugatory.

In *Military Governor Lagos State v Ojukwu* (1986) 1 NWLR (Part 18) 621, it was observed as follows:–

“No doubt, common sense demands that once there is a dispute that none of the parties should do anything which would destroy the *res* in dispute.

In the instant case, the respondent is a stakeholder, it is its duty to keep and preserve the subject matter or *res* in dispute pending the determination of the case pending in the court as regards the rightful person to whom the money should be paid to, for disbursement to the people entitled to the compensation money. If it pays the money to the appellant and it later turns out that the money was paid to the wrong person it must be held liable for such an action.
The fact that this Court recently delivered a judgment in favour of the appellant is very irrelevant as nobody would have foreseen that this Court would enter judgment in the appellant’s favour. Further, there is nothing to show that the other side may not appeal to the Supreme Court and that if they do so that the appellant will still win in that court.

The respondent had acted wisely and prudently by refusing to honour the appellant’s cheque, if not the res in dispute would have been destroyed.

His action is not wrongful and the appellant is therefore not entitled to the claim for damages.

For this and the fuller reasons given in the leading judgment, I am of the view that the appeal is unmeritorious and it is accordingly dismissed by me with ₦5,000 costs in the respondent’s favour.

*Appeal dismissed.*
Ivory Merchant Bank (Nig.) Limited v Cappa and D’Alberto Nigeria Plc

COURT OF APPEAL, LAGOS DIVISION
IGE, CHUKWUMA-ENEH, SANUSI JJCA
Date of Judgment: 30 NOVEMBER, 2000
Suit No.: CA/L/215M/94

Banking – Banker and customer relationship – Nature of – When does it come into existence

Banking – Conversion and money had and received

Banking – Negligence – Section 2(2) Bills of Exchange Act – When not availing a banker

Banking – Negligence – Test of

Facts

This is an appeal against the Lagos High Court judgment delivered on 10 June, 1994 in a suit filed by the respondent as plaintiff in the court below against the appellant as the defendant. By its amended writ of summons the plaintiff company claimed against the defendant bank the sum of ₦3,121,446k being the total sum on the crossed cheques collected by the defendant bank knowing fully well that the plaintiff company did not maintain any account with them. In addition the respondent company claimed interest at the rate of 25% per annum from 27 March, 1990 until the whole judgment is fully paid and at the same rate from date of judgment until final liquidation of the judgment. In another head of claim the respondent also claimed the sum of ₦10,000 as general damages for negligence in clearing the crossed cheques and for not making proper investigation.

Pleadings were filed and exchanged. At the trial the respondent company called four witnesses to establish its case while only one witness gave evidence on behalf of the appellant bank.

At the end of the trial the learned trial Judge entered judgment in favour of the respondent company against the
a  appellant bank in the sum of N3,121,446 with interest at the rate of 25% per annum from 27 March, 1990 till date of judgment and thereafter at the rate of 21% per annum until the final liquidation of the judgment debt with costs. The appellant bank is dissatisfied with the said judgment and has appealed to this Court by filing six grounds of appeal. The respondent company also filed a respondent’s notice with regard to the award of general damages.

b  Section 2(2) of the Bills of Exchange Act, 1964 provides thus:

"2. Where a banker in good faith and without negligence
   (a) receives payment for a customer of a prescribed instrument to which the customer has no title or a defective title or
   (b) having credited the customer’s account with the amount of such a prescribed instrument, receives payment of the instrument for himself, the banker does not incur any liability to the true owner of the instrument by reason only of his having received payment of it; and a banker is not to be treated for the purpose of this subsection as having been negligent by reason only of his failure to concern himself with the absence of, or irregularity in, endorsement of a prescribed instrument of which the customer in question appears to the payee."

c  Held –

1. The relationship between a banker and its customer is that of a debtor and creditor. It is also a relationship of principal and agent. If the principal draws a cheque on the banker, the agent is expected to pay out on behalf of the principal the amount written on the cheque.

2. The relationship of banker and customer comes into existence only if both parties have an intention that it should be established. The respondent in this case did not at any time hold itself out to the defendant/appellant as a customer of its bank. On the other hand, the appellant collected six cheques from some people who purported to be opening an account in the name of Cappa
and D’Alberto. This puts the responsibility on the bank to observe strictly the norms and practice in banking transaction of opening and operating an account.

3. In this case the respondent did not of its own enter into a contract with the appellant hence the learned trial Judge was right in holding that the relationship of banker and customer did not exist between the parties.

4. The test of determining whether a bank is negligent in paying a cheque which is a question of fact is whether the transaction of paying any given cheque was done out of the ordinary course that it ought to have aroused doubt and suspicion in the mind of the banker so as to cause the banker to make inquiry.

5. **Per Curiam**

   “In the instant case the appellant/bank saw all the imperfections and irregularities some of which I have enumerated above with regard to the opening of the account no. 45–00187 with crossed cheques and soon after made cash payments to its fake customers. To borrow the words of Sulu-Gambari, JCA as he then was in *NBN Ltd v Mobil Oil Nig. Ltd’s case* (supra).

   This is an act which has the inevitable and ostensible appearance of a perfected trick or fraud, the bank cannot claim protection of the statute and should not be absolved of the resulting liability.”

6. The appellant/bank cannot be entitled to the protection of the section 2(2) of the Bills of Exchange Act, 1964 in view of its neglect in handling the opening of the account coupled with the unnecessary haste in disbursing such large amounts of money, a sum over ₦3 million in cash within a few months of the opening of the account. Section 82 of the Bills of Exchange Act, 1882 will also not avail the appellant.

7. The appellant/bank had opted to deal with the cheques in a manner which is inconsistent with the right of the plaintiff/respondent – the true owner and not “Cappa Ltd” – and therefore they are liable to the respondent for
the conversion of the sum of ₦3,121,446 which belongs to the respondent.

Appeal dismissed.

Cases referred to in the judgment

Nigerian

c  A.C.B. Ltd v A-G, Northern Nigeria (1967) All NLR 76
  A.C.B. v Obmiami Brick and Stone Ltd (1990) 5 NWLR (Part 149) 230

d  Alade v Olukade (1976) 2 FNLR 10
  Balogun v National Bank of Nigeria (1978) 3 SC 155
  Ebueku v Amola (1988) 2 NWLR (Part 75) 128

e  N.B.N. Ltd v Mobil Oil (Nig.) Ltd (1994) 2 NWLR (Part 328) 534
  U.B.A. Ltd v Louis (1994) 4 NWLR (Part 336) 110
  United Nigerian Insurance Co. Ltd v Muslim Bank (1972)
  All NLR 318
  Yesufu v A.C.B. (1981) 1 SC 74

Foreign

g  Commissioner of Taxation v English, Scottish and Australia Bank (1920) AC 683
  Donoghue v Stevenson (1932) AC 562

h  Lloyds Bank Ltd v Savory and Co. (1933) AC 201
  Royal British Bank v Turquand (1955) 5 E and B 248
  Stoney Station Supplies v Midland Bank Ltd (1966) 2 LLR 373

Nigerian statutes referred to in the judgment

Bills of Exchange Act, 1882, section 82

Bills of Exchange Act, 1964, section 2(2)
This is an appeal against the Lagos High Court judgment delivered on 10 June, 1994 in a suit filed by the respondent as plaintiff in the court below against the appellant as the defendant. By its amended writ of summons the plaintiff company claimed against the defendant bank the sum of N3,121,446 being the total sum on the crossed cheques collected by the defendant bank knowing fully well that the plaintiff company did not maintain any account with them. In addition the respondent company claimed interest at the rate of 25% per annum from 27 March, 1990 until the whole judgment is fully paid and at the same rate from date of judgment until final liquidation of the judgment. In another head of claim the respondent also claimed the sum of N10,000 as general damages for negligence in clearing the crossed cheques and for not making proper investigation.

Pleadings were filed and exchanged. At the trial the respondent company called four witnesses to establish its case while only one witness gave evidence on behalf of the appellant bank.

At the end of the trial the learned trial Judge entered judgment in favour of the respondent company against the
appellant bank in the sum of ₦3,121,446 with interest at the rate of 25% per annum from 27 March, 1990 till date of judgment and thereafter at the rate of 21% per annum until the final liquidation of the judgment debt with costs. The appellant bank is dissatisfied with the said judgment and has appealed to this Court by filing six grounds of appeal. The respondent company also filed a respondent’s notice with regard to the award of general damages. The appellant has submitted three issues for determination as follows:

1. Was the appellant liable in negligence for the loss by the respondent of the proceeds of the subject crossed cheques?
2. Whether the Judge was entitled to find in favour of the respondent on any cause apart from negligence, in particular in conversion or for money had and received.
3. Whether the court was entitled to award interest at 27% or any other rate as damages without any pleading, proof or submission in the question by the respondent.”

The respondent in its own brief of argument also submitted three issues for determination. The issues read thus:

1. Was the appellant liable in negligence or gross negligence for the loss suffered by the respondent arising from the loss of the proceeds of the subject matter – crossed cheques?
2. Was a claim for conversion and or money had and received properly made out by the respondent?
3. Was the award of general damages in tune with evidence before the court and could the court have fairly and properly awarded aggravated damages in the circumstances of this case?”

This appeal is better considered on the issues settled by the appellant and I shall do so accordingly. The respondent’s cross appeal will be treated upon the issues formulated by the respondent. As a matter of fact the first and second issues of the appellant are the same as those of the respondent.

In dealing with the first issue as formulated by the appellant, Counsel for the appellant referred to the three elements that must exist in order to establish liability in the tort of negligence. These three elements are duty of care, breach of that duty and damages suffered as a result of that breach. It
is the argument of Counsel that the common law does not impose a duty of care on a bank towards every member of the public on the basis that each is a potential customer. The bank only owes a duty of care to its customer. Counsel also referred to portions of the judgment of the lower court where the learned trial Judge held that by the documents tendered in the case the defendant bank at least was able to establish the presumption that the plaintiff company was its customer and in doing that he also held that the bank owes the plaintiff company a duty of care in the process of opening an account in the name of the plaintiff company. According to him, from the facts found by the court and the legal implication thereof, there is no relationship of banker/customer between the plaintiff/respondent and the defendant/appellant.

Counsel proceeded to cite a passage in the book by GA Penn and Others *The Law and Practice Relating to Domestic Banking* Vol. 1 (1987) at 31 and the case of *Stoney Station Supplies v Midland Bank Ltd* (1966) 2 LLR 373. With regard to burden of proof, Counsel submitted that the onus of proof rests squarely on the plaintiff to establish all the elements of a cause of action and that it was wrong of the court below to place any part of that onus on the appellant as he did when he stated as follows:–

“It is thereafter my humble view that the onus is on the defendant bank to establish such a relationship having regard to the evidence of PW1 that no such relationship exists.”

Moreover, Counsel said the plaintiff did not plead the existence of a bank/customer relationship, hence the substance upon which an action in negligence can be found did not exist. To buttress this point Counsel cited the case of *African Continental Bank Ltd v Obmiami Brick and Stone Ltd* (1990) 5 NWLR (Part 149) 230.

He went further to submit that the learned trial Judge has committed a misdirection in his reasoning and findings of liability by relying heavily on the case of *United Nigerian Insurance Co. Ltd v Muslim Bank* (1972) All NLR 318. He distinguished between a defence based on section 82 of the
Bills of Exchange Act, 1882 and the formulation and proof of a cause of action pleaded in negligence upon which the onus lies on the plaintiff. Counsel referred to liability for the tort of conversion which requires strict liability on the part of the defendant. Section 2(2) of the Bills of Exchange Act, 1964 he says is identical to section 82. Counsel also cited the case of ACB Ltd v Attorney-General Northern Nigeria (1967) All NLR 76 and National Bank of Nigeria Ltd v Mobil Oil Nigeria Ltd (1994) 2 NWLR (Part 328) at 534 and distinguished the latter from the present case. The plaintiff in the Mobil Oil case sued in conversion which resulted in a defence under section 2(2). Also the relationship of banker/customer existed in the Mobil Oil case hence there is also a contractual duty of care.

On the issue of standard of care, Counsel for the appellant submitted that the standard of care of a banker to its customer is that of an ordinary prudent banker and a banker is not expected to be an insurer of the occurrence of an event in respect of which it has not bound itself by contract per Oguntade JCA in A.C.B. v Obimiami Brick and Stone Co. Ltd (1990) 5 NWLR (Part 149) 230 at 254.

On the question of factual analysis of the alleged breach, Counsel has criticised the learned trial Judge for failure to apply the dictum of Lord Dunedin in the case of Commissioner of Taxation v English, Scottish and Australian Bank (1920) AC 683. According to Counsel there is no evidence of a general standard of bankers against which to measure the appellant’s conduct.

With regard to the steps for opening a bank account which the defendant bank failed to observe or comply with in respect of the plaintiff’s cheques, Counsel said the steps were there for the benefit of the banks themselves and could not be a necessity on behalf of any third party. Mere failure to do any act in a claim leading to a loss, Counsel says, does not constitute negligence.
According to Counsel for the appellant, the learned trial Judge had made contradictory findings which cannot result in a valid conclusion. This he submitted in respect of the evidence of PW1 which the learned trial Judge used in finding that no relationship of banker/customer existed. The learned trial Judge also used the evidence of DW1 to conclude that a relationship in fact existed. See the case of United Bank for Africa Ltd v Louis (1994) 4 NWLR (Part 336) 110 at 127. On the issue of analysis of the claim of causation, it is the argument of the appellant that the employees of the respondent were responsible for the missing cheques which resulted in the loss sustained by the respondent. If the learned trial Judge had done a proper analysis he would have apportioned blame equally between the parties and found the respondent contributorily negligent.

On the question of negligence, the respondent has submitted that the appellant was negligent in opening or purporting to open an account in the name of the respondent. Also that the appellant bank was grossly and questionably negligent in paying the proceeds of the cheques, granting unsolicited credit facilities and paying both sums to fictitious faceless and unidentifiable persons in a questionable and unjustifiable manner.

Counsel for the respondent has expatiated on the essential elements of the duty of care as stated in the famous case of Donoghue v Stevenson (1932) AC 562. Respondent’s argument is that the appellant owed the respondent a duty of care when it decided to open an account in the respondent’s name. This duty of care has been allegedly breached by the appellant when it decided to open a fake account without complying with the laid down rules and principles of opening a genuine account. He went into the details of the matter. He referred to several exhibits tendered in the case such as exhibits B, CJ–JI and K among others which should have put the appellant upon an inquiry that the applicants from the company of Cappa and D’Alberto were not genuine in their transaction with the bank and did not have the consent
a of the bank authorities. He referred the court to the evidence of DW1 who sought to contradict the contents of exhibit B by asserting that the documents were irrelevant. This he said is inadmissible in law and should be expunged from the record. He cited two Supreme Court cases of *Ebueku v Amola* (1988) 2 NWLR (Part 75) 128, (1988) 3 SCNJ 207 at 210 and *Alade v Olukade* (1976) 2 FNLR 10, (1976) 2 SC 183. The Companies and Allied Matters Act under sections 40 and 41 limits the extent to which a company can be held liable or to have given an implied consent for the conduct of any Director or member of its staff. See the rule in *Royal British Bank v Turquand* (1955) S E and B 248. The rule enumerated clearly the documents which an outsider must inspect to ensure the regularity or correctness of the action proposed. These documents include the memorandum and articles of association, special and extraordinary resolutions, particulars of Directors and any changes therein, Form C07 and register of charges.

Counsel has further submitted that the appellant having accepted the respondent’s crossed cheques and cashed them, the appellant owes the respondents who are the owners of the crossed cheques a duty of care to ensure that the respondents will on demand receive back the value of their cheques. According to the respondent, the appellant bank has breached all precautionary merchant banking norms for paying out money by hastily paying faceless persons. They paid out in cash as opposed to the rule of merchant banks who are supposed to issue crossed cheques to their customers and not usually in cash.

Counsel made reference to exhibits Q1 and Q16 to show that the appellant decided to pay out a large sum of ₦190,000 while the documentation was yet in the process of completion.

The question posed in Issue 1 is to me a question of fact whether or not the appellant bank had acted in this case negligently in the transaction of opening an account with five crossed cheques which were written in the name of the
respondent company the proceeds of which constituted a loss to the respondents. The respondent company has stated in no mistaken facts that they had no intention of opening a bank account with the appellant bank because they had their own bankers. When the appellant now received an “application” from the respondent company to open an account with the bank, there lies the duty on the bank to observe the rules and norms expected of a prudent bank. It is true that banks have varied rules and practice depending upon their status etc.

In the present case the appellant bank had a current account no. 45010087 opened with it in the name of Cappa and D’Alberto Nigeria Limited. This account turned out to be a fake one as it was not authorised by the proper persons from the plaintiff company.

According to their pleadings and evidence before the court the cheques used in opening the account were:

(a) NIB cheque no. 396026 of 21 March, 1990 in the sum of ₦971,446;
(b) UBN cheque no. 284265 of 27 March, 1990 in the sum of ₦450,000;
(c) ICON cheque no. 009963 of 21st May, 1990 in the sum of ₦100,000;
(d) ASTB cheque no. 81010016 of 22nd May, 1990 in the sum of ₦500,000;
(e) FBN cheque no. 038162 of 29 March, 1990 in the sum of ₦200,000;
(f) FBN cheque no. 385587 of 30 March, 1990.

The total amount involved in these crossed cheques was ₦3,121,446 (Three Million, One Hundred and Twenty-one Thousand, Four Hundred and Forty-six Naira) which were lodged, received and cleared by the defendant bank. It was through the help of their bank UBA that the plaintiff/respondent were able to trace five of the cheques which the defendant/appellant bank cleared through the Central Bank of Nigeria. The appellant bank did not deny receiving...
those cheques into their bank but their plea was that they were not liable at all.

The relationship between a banker and its customer is that of a debtor and creditor. See the case of Yesufu v A.C.B. (1981) 1 SC 74. It is also a relationship of principal and agent. If the principal draws a cheque on the banker, the agent is expected to pay out on behalf of the principal the amount written on the cheque. See the case of Balogun v National Bank of Nigeria (1978) 3 SC 155.

In this case the respondent did not of its own enter into a contract with the appellant hence the learned trial Judge was right in holding that the relationship of banker and customer did not exist between the parties. The relationship of banker and customer comes into existence only if both parties have an intention that it should be established. The respondent in this case did not at any time hold itself out to the defendant/appellant as a customer of its bank. On the other hand, the appellant collected six cheques from some people who purported to be opening an account in the name of Cappa and D’Alberto. This puts the responsibility on the bank to observe strictly the norms and practice in banking transaction of opening and operating an account. Assuming without conceding that there is a *quasi* contract between Cappa and D’Alberto and the appellant bank in respect of the cheques, did the appellant bank observe and adhere to the rules and procedure expected of a merchant bank?

In this case the respondent company is supposed to be Cappa and D’Alberto Limited but exhibit M–M2 which contained the board resolutions referred to the respondent company as Cappa Limited. There are many other defects and irregularities contained in some other exhibits tendered in the case. For example in exhibit K, which was supposed to be a letter of introduction emanating from the plaintiff to the defendant bank, the company stated that the decision to appoint the bank (defendant) as one of its bankers was taken at the board meeting held on 26 February, 1990, whereas the letter was dated 16 February, 1990.
Does it mean that the letter was written in anticipation of the board meeting yet to be held? This is impossible. The appellant bank did not take steps to verify the correctness of the certificate of incorporation involved in the opening of a corporate account. PW1’s evidence, which was not contradicted, said the names of two of their Directors were wrongly spelt and the signatures were forged.

The third PW, who later became the only witness for the defence as DW1, could not have given untainted testimony. The learned trial Judge was right in holding that one Patrick Ekwenta was a tainted witness. This witness with his 11 years in a commercial bank and four years in a merchant bank stated that there are no statutory or specific requirements for documents to open an account. How does one reconcile this statement with exhibit B, a letter from the defendant company requesting for the following documents to enable the defendant bank to complete the documentation on the account allegedly maintained by the plaintiff/company with them. The following are the documents:

1. Completed reference forms
2. Memo and articles of association
3. Signed letter of set off
4. Signed agreement for foreign exchange

According to this same witness if a customer had not completed the application forms or given mandate on the operation of the account, the money had to be deposited in a suspense account pending the production of these requirements.

Instead of observing the above rules and procedure the defendant/appellant bank opened account no. 45–100187 and allowed funds to be withdrawn in cash from it. The cheque being crossed cheques coming from a customer who is opening an account with the bank for the first time required careful and special handling.

In the case of *Lloyds Bank Ltd v Savory and Co.* (1933) AC 201 bearer cheques drawn by a firm of stockbrokers in the city of London were paid to the credit of a housewife’s...
private account at Redhill. The bank was held negligent because it had failed to inquire of the housewife when she opened an account in the name of her husband’s employers. If it had done so, it would have discovered that he was a clerk employed by the stockbrokers.

It was held in the case of *N.B.N. Ltd v Mobil Oil Nig. Ltd* (1994) 2 NWLR (Part 328) 534 that the test for determining whether a bank is negligent in paying a cheque, which is a question of fact, is whether the transaction of paying any given cheque was done out of the ordinary course that it ought to have aroused doubt and suspicion in the mind of the banker so as to cause the banker to make inquiry.

In the instant case the appellant/bank saw all the imperfections and irregularities, some of which I have enumerated above, with regard to the opening of account no. 45–100187 with crossed cheques and soon after made cash payments to its fake customers. To borrow the words of Sulu-Gambari JCA (as he then was) in *NBN Ltd v Mobil Oil Nig. Ltd*’s case (*supra*).

“This is an act which has the inevitable and ostensible appearance of a perfected trick or fraud, the bank cannot claim protection of the statute and should not be absolved of the resulting liability.”

Section 2(2) of the Bills of Exchange Act, 1964 provides thus:–

2. Where a banker in good faith and without negligence

1. receives payment for a customer of a prescribed instrument to which the customer has no title or a defective title or

2. having credited the customer’s account with the amount of such a prescribed instrument, receives payment of the instrument for himself, the banker does not incur any liability to the true owner of the instrument by reason only of his having received payment of it; and a banker is not to be treated for the purpose of this subsection as having been negligent by reason only of his failure to concern himself with the absence of, or irregularity in, endorsement of a prescribed instrument of which the customer in question appears to the payee.”
The appellant bank cannot be entitled to the protection of section 2(2) of the Bills of Exchange Act in view of its neglect in handling the opening of the account coupled with the unnecessary haste in disbursing such large amounts of money, a sum over N3 million in cash within a few months of the opening of the account. Section 82 of the Bills of Exchange Act, 1882 will also not avail the appellant. See the case of United Nigeria Insurance Company v Muslim Bank (1972) 2 All NLR 318. Will the defendant bank be liable in tort of conversion? Or, in other words, was a claim for conversion and/or money had and received properly made out by the respondent.

In the plaintiff’s amended statement of claim it claims in the alternative as follows in paragraph 22:

“(a) The sum of N3,121,446 as special damages for gross negligence against the defendant.

or in the alternative – the sum of N3,121,446 as special damages for conversion against the defendant.

or in the further alternative – the sum of N3,121,446 as special damages against the defendant for money had and received by the defendant from the plaintiff’s servant that is not meant for the defendant.

(b) Interest at the rate of 26% per annum from 27 March, 1990 till the judgment is given and the same rate from the date of judgment until the whole debt is finally liquidated by the defendant.

(c) The sum of N10,000,000 (Ten Million Naira) for general damages and/or aggravated damages representing the interest the N3,121,446 would have yielded if placed in a deposit account for the period the transaction took place and at the going interest rate as at that time against the defendant.

(d) Such costs as may be expended by the plaintiff in instituting this action.

Dated this 21st May, 1991.”

The respondent did not only plead conversion and money had and received but led evidence of its losses through negligent payments made by appellant to fake persons who could not be traced. The appellant has submitted that the
mere failure to do any act in a chain leading to loss does not constitute negligence. I seem to differ with this submission of Counsel in the light of the many acts done and omitted by the appellant bank re-operation of account no. 45–100187 in this case. The appellant/bank had opted to deal with the cheques in a manner which was inconsistent with the right of the plaintiff/respondent (the true owner) and not “Cappa Ltd” and therefore they were liable to the respondent for the conversion of the sum of \( N3,121,446 \) which belongs to the respondent.

The learned trial Judge was right when he held that the defendant/bank was negligent in opening account no. 45–100187 and having the cheques of the plaintiff/company paid into account no. 45–100187. The defendant/bank was therefore negligent in the payment of the said sum of \( N3,121,446 \) and was liable to pay same back to the respondent. The appellant has failed to prove contributory negligence against the respondent hence that plea cannot hold.

With regard to Issue 3 of the respondent’s issues which, to my mind, forms the basis of the cross appeal on the question of award of general damages and whether or not the court had fairly and properly awarded aggravated damages in the circumstances of this case. The plaintiff was dissatisfied with the quantum of damages awarded by the learned trial Judge in his judgment.

It seems to me that the submission of the respondent in the cross appeal is more acceptable in the light of the enabling provisions of the law regarding a tort judgment. I agree with the cross-respondent’s Counsel that the plaintiff cannot vary that part of the judgment on damages by a mere respondent’s notice. The cross-appellant ought to have filed a cross appeal. Moreover, the cross-appellant did not raise any claim for aggravated damages in the statement of claim. Also the learned trial Judge cannot grant more than 4% interest on the judgment sum. That part of the judgment is therefore reduced to 4% interest up till day of judgment and 4% after the judgment until final liquidation.
The learned trial Judge in my view was right in not award-
ing the plaintiff additional damages under the head of gen-
eral damages as that would amount to “double compensation
which the courts frown at”. It would not have been better
put.

On a final analysis the appeal fails and the cross appeal
also fails. Appellant is to pay ₦5,000 costs to the respondent
while the respondent/cross-appellant is to pay ₦4,000 costs
to the appellant/cross-respondent.

CHUKWUMA-ENEH JCA: I have had the advantage of read-
ing in advance the judgment just read by my learned brother,
Ige JCA, and I agree with the reasoning and conclusions
reached therein. There is no merit in the appeal and the cross
appeal. I also will dismiss both appeals and they are hereby
so dismissed. I abide by the order as to costs.

SANUSI JCA: I had the opportunity of reading before now
the judgment delivered by my learned brother, Ige JCA. My
Lord has thoroughly and painstakingly dealt with all the is-
issues raised in the appeal. I entirely agree with her reasons
and the conclusions she reached. I adopt them as my own. I
also agree that both the appeal and cross appeal are lacking
in merit. I endorse the orders she made on cost.

Appeal dismissed.
National Bank of Nigeria Plc v Alhaji Umaru Muhammadu

FEDERAL HIGH COURT, BENIN DIVISION

ADAH J

Date of Judgment: 5 DECEMBER, 2000

Banking – Collateral – Bank unilaterally substituting one for another – Whether permissible section 15(7) Failed Banks Decree No. 18 of 1994 (as amended)

Banking – Interest – Bank charging – Principles governing

Banking – Overdraft – Definition of

Banking – Overdraft – Repayment of – When right of action accrues

Evidence – Unchallenged – Not discredited – Trial court to believe

Words and phrases – Overdraft – Definition of

Facts

The defendant obtained a loan from the plaintiff which he failed to liquidate. Hence the bank brought this action claiming as follows:

(a) The payment of the sum of (Two Million, One Hundred and Seventy-Six Thousand, Five Hundred and Sixty-Six Naira, Ninety-Six Kobo N2,176,566.96).

(b) The payment of 21% interest per annum on the said sum of N2,176,566.96 from 1 June, 1999 until the entire sum is liquidated.

(c) An order of court that the defendant property at No. K77, Karaworo Street, Lokoja, Kogi State be sold in satisfaction of the said debt N2,176,566.96 if the defendant fails to pay within the stipulated time, the collateral security of contract proceeds having been rendered worthless.”

The defendant did not contest the action. The bank in its claim asked the court to substitute the defendant’s property at Lokoja for the one offered in the contract as security
because the one offered had over the years proved worthless, and relied on section 15(7) of the Failed Banks Decree No. 18 of 1994 (as amended). It provides:—

“(7) If the money obtained from the sale of properties under subsection (6) of this section is still not sufficient to offset the outstanding loan and interest thereon, the court may subject to section 290 of the Companies and Allied Matters Act, 1990, levy execution on the personal properties of the Directors of the body corporate; partners of the partnership or individuals of the association, as the case may be, which shall be sold and applied in satisfaction of the outstanding debts, in accordance with the provisions of this section.”

Held—

1. An overdraft is money lent. A payment by a bank under an arrangement by which the customer has an overdraft, is a lending by the bank to the customer. A banker is not obliged to let his customer overdraw from his account unless he has agreed to do so. Such an agreement need not be express. It is sufficient and valid if it were inferred from the course of business. Borrowing and lending are matters of contract not necessarily premeditated but possibly spontaneously.

2. It is an implied term in the relationship between a banker and his customer that there should be no right of action for the repayment of an overdraft until there has been a demand or notice given. The cause of action does not arise until the demand is made or given. When therefore there is no specific date agreed upon for the repayment of an overdraft, as in the present case, a demand should be made or notice given.

3. Banks are empowered to charge interest on loans or other advances granted to a customer even where there is no express agreement on the rate of interest to be charged. This is because the customer must be taken to impliedly consent to an interest to be charged on his account.
By virtue of section 15 of the Banking Act Cap 28 Laws of the Federation of Nigeria, 1990, charging of interest rates by banks is regulated by guidelines to the banks by the Central Bank of Nigeria. Banks do not fix the interest rates arbitrarily, or interest rates are no longer a matter of mutual consultation between a bank and its customers except in very limited situations. The necessary guidelines on the rates of interest on loans are given by the Central Bank from time to time generally and not to a particular bank or in relation to a particular loan transaction.

4. By the universal custom of banking, a banker has the right to charge interest at a reasonable rate on all overdrafts. It is usual and a perfectly legitimate mode of dealing between the bank and the customer for a bank to secure for itself the benefit of a compound interest in debiting interest on an overdraft account.

5. Section 15(7) of the Failed Banks Decree No. 18 of 1994 (as amended) does not by its direct provision or contemplation authorise a unilateral substitution by the plaintiff of one collateral security with another in a loan or overdraft transaction without the formal agreement of the parties to the transaction.

6. What the Failed Banks Decree allowed is to impound any other available property of a debtor defendant whose assets or properties sold could not meet up with the demands of the indebtedness or where the proceeds of sale of the defendant debtor’s properties used as security could not pay up the debt.

7. A trial court can validly rely on evidence when that evidence unchallenged is oral evidence establishing clearly the claim of the plaintiff against the defendant in terms of his writ and such evidence was not rebutted by the defence. In other words, evidence that is not controverted or discredited or challenged ought to be accepted as proving an existing or alleged fact. Once it is relevant to
the issues joined, it ought to be accepted as the true facts sought to be proved.

Finding for plaintiff in part.

Cases referred to in the judgment

Nigerian

Abdullahi v Waje Commercial Bank (2000) 7 NWLR (Part 663) 9

I.B.W.A. Ltd v Unakalamba (1998) 9 NWLR (Part 565) 245

Ishola v S.G.B. (Nig.) Ltd (1997) 2 NWLR (Part 488) 405

Ivienagbor v Bazuaye (1999) 9 NWLR (Part 620) 552

Okonkwo v Onoro (1999) 4 NWLR (Part 597) 110


Nigerian statute referred to in the judgment

Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree No. 18 of 1994, section 15(7)

Counsel

For the plaintiff: Chief AB O Salami, Esq.

Judgment

ADAH J: The plaintiff, National Bank of Nigeria Plc, has brought this action under the Failed Banks Decree No. 18 of 1994 (as amended) claiming as follows:

1. The payment of the sum of (Two Million, One Hundred and Seventy-Six Thousand, Five Hundred and Sixty-Six Naira, Ninety-Six Kobo N2,176,566.96).

2. The payment of 21% interest per annum on the said sum of N2,176,566.96 from 1 June, 1999 until the entire sum is liquidated.

3. An order of court that the defendant’s property at No. K77, Karaworo Street, Lokoja, Kogi State, be sold in satisfaction of the said debt N2,176,566.96 if the defendant fails to pay within the stipulated time, the collateral security of contract proceeds having been rendered worthless.”
a The plaintiff called one witness and tendered nine exhibits. The defendant filed a memorandum of appearance but never appeared physically in this proceeding. The defendant also made an effort and filed an application seeking for leave to file and serve his statement of defence out of time. He abandoned this application and did not show up to present his application, which was appropriately struck out.

b The plaintiff’s witness Adesoji Atanda testified that he is the Acting Area Manager of National Bank (EAST). He said that the defendant is one of the bank’s customers at the Okene Branch of the bank. That the defendant has been a long-standing customer of the bank running two separate accounts, which are account nos. 1150 and 1694. He identified the copies of the mandate forms with which the defendant opened the accounts. Certified copies of these mandate forms were later tendered and marked exhibits 4 and 4A. The witness testified further that as at 3 May, 1999 the balance of the defendant’s indebtedness was ₦2,176,566.96. The defendant he said got the facility by overdraft with the goal of executing some building contracts for Ajaokuta Steel Housing Complex. That the agreement was for the defendant to pay the proceeds of the contract into his accounts with the bank to liquidate the indebtedness. That the defendant diverted the paid contract sum to other places and left his accounts unserviced. He testified further that the defendant has acknowledged the debt. He tendered the statement of account for the two accounts, which are exhibits 1 and 2. That the bank sent many demand notices to the defendant. A copy of such notices was tendered and marked exhibit 3. That the interest rate charge was 21% as fixed by the Central Bank. That on 26/3/1997, the defendant paid in a sum of ₦15,000 which he said was nothing compared to the amount owed. He testified also that the bank became distressed in 1992. That they did not stop their operations but that the defendant refused to pay his debt thereby contributing to the distress of the bank. He alleged that the defendant offered a property at
Okene but that the asset was not properly used to secure the loan because it was supposed to be a short term overdraft. The letters the defendant wrote requesting an overdraft is exhibit 8. The warning letter the plaintiff sent to the defendant over the non-payment of the debt is exhibit 9. The witness finally requested that the court should order the defendant to pay the amount and the interest till the date of the judgment and until the amount is fully liquidated. The plaintiff ended his case on this note.

The defendant was given an opportunity of defence but he did not enter any defence. The plaintiff’s Counsel then addressed the court.

In his address Counsel focused on jurisdiction, payment of interest, and collateral securities. On the issue of jurisdiction, Counsel contended that by virtue of section 5 of Decree No. 62 of 1999, this Court has jurisdiction to hear this matter and that the matter is properly before the court. On the issue of interest, Counsel submitted that an overdraft facility, like any other bank loan, attracts interest. He said interest may be awarded as of right where it was contemplated in the agreement between the parties or in a mercantile custom or principle of equity. He relied on the case of Owena Bank Nig. Plc v Adedeji (2000) 7 NWLR (Part 666) 609, ratio 11, pages 662–663 G–B. That by a universal custom of banking, a banker has a right to charge interest at a reasonable rate over all overdrafts. That it is usual and legitimate for the bank to secure for itself the benefit of charging simple or compound interest. He relied on the cases of Abdullahi v Waje Community Bank (2000) 7 NWLR (Part 663) 9 ratio 8, 9, 10 and 11 and UBN v Ayoola (1998) 11 NWLR (Part 573) 339. He contended further that the interest rate chargeable is regulated by the Central Bank of Nigeria’s guidelines. He relied on the case of NBCI v Sparkles Dry Cleaning (Nig.) Ltd (1998) 13 NWLR (Part 580) 12 ratio 2. On the issue of collateral securities, Counsel asserted that the defendant put in the proceeds from the contract work he was doing at Ajaokuta Housing Estate. That the loan was not repaid and
a that the security has now turned out to be worthless. He urged the court to levy execution on any personal property of the debtor they can identify to satisfy the debt. He relied on section 15(7) of the Failed Banks Decree No. 18 of 1994.

b That the plaintiff has identified a house at K77, Karaworo Street, Lokoja, Kogi State as that of the defendant. That the court should order to authorise them to search the Land Registry to locate and attach the landed property of the defendant to satisfy the debt. Counsel asserted that the money has grown from ₦2,176,566.96 in September, 1999 to ₦2,818,000.96. He urged the court to enter judgment for the plaintiff. He relied on the cases of: Omoregbee v Lawani (1980) 3–4 SC; Ivienagbor v Bazuaye (1999) 9 NWLR (Part 620) 552; Okonkwo v Onoro (1999) 4 NWLR (Part 597) 110 ratio 2; Afortirin Ltd v Attorney General (Federation) (1996) 9 NWLR (Part 475) 634 ratio 3.

c In this case, the claim of the plaintiff is for the recovery of debt which accrued as a result of the overdraft. In the case of I.B.W.A. Ltd v Unakalamba (1998) 9 NWLR (Part 565) 245 ratio 4, the Court of Appeal defined overdraft as follows:—

\[\text{“An overdraft is money lent. A payment by a bank under an arrangement by which the customer has an overdraft, is a lending by the bank to the customer. A banker is not obliged to let his customer overdraw from his account unless he has agreed to do so. Such an agreement need not be express. It is sufficient and valid if it be inferred from the course of business. Borrowing and lending are matters of contract not necessarily premeditated but possibly spontaneously.”}\]

d Although there is no formal defence put in by the defendant to afford the court the opportunity of hearing his own side, I will, having regard to the nature of this case, look into the evidence adduced by the plaintiff to see whether the claim of the plaintiff has been proved on the balance of probabilities. It is trite that the law requires that in a case of this nature there must be a clear evidence of the fact that the plaintiff has made a demand or given the notice for the repayment of the overdraft or loan. In the case of Ishola v S.G.B. (Nig.)
Adah J


[*Ltd* (1997) 2 NWLR (Part 488) 405 *ratio* 2, the Supreme Court set a guide on when the bank overdraft is repayable as follows:–

“It is an implied term in the relationships between a banker and his customer that there should be no right of action for the repayment of an overdraft until there has been a demand or notice given. The cause of action does not arise until the demand is made or given. When therefore there is no specific date agreed upon for the repayment of an overdraft, as in the present case, a demand should be made or notice given.”

Exhibit 3 is the letter of demand dated 12 August, 1992. In this exhibit 3, titled DEMAND FOR PAYMENT OF OUTSTANDING DEBT, the plaintiff wrote the demand in the first paragraph as follows:–

“National Bank of Nigeria Ltd having its registered office at 82/86 Broad Street, Lagos, Nigeria, hereby gives you formal notice that you are required to pay forthwith to the bank the sum of ₦348,041.98k (Three Hundred and Forty-Eight Thousand, Forty-one Naira and Ninety-Eight Kobo) in respect of the indebtedness outstanding on your account nos. 1150 and 1694 as at 31 July, 1992. It is very disturbing to note that the bank’s past efforts to recover the outstanding debt from you have yielded no positive result.”

This notice, no doubt, is to my mind a valid notice which has given rise to this cause of action. From the evidence before the court, the overdraft facilities were from the two accounts kept by the defendant in the branch of the plaintiff at Ajaokuta. By exhibits 1 and 2, the overdraft started in respect of account no. 1150 on 5 December, 1980 with a cumulative overdraft of ₦13,302.40 on that day with account no. 1694, the overdraft facilities. It is therefore not in doubt that the defendant in this case overdrew his accounts with the plaintiff’s branch at Ajaokuta. It is also clear from the facts available in this case that the said overdraft facilities have not been repaid till now. In view of the fact that there is no challenging the evidence adduced by the plaintiff, the court has no option but to rely on this evidence in coming to a just decision of this matter. The position of the law is very
clear on this aspect. In the case of Okonkwo v Onoro (supra), the Court of Appeal in ratio 2 thereof held:–

“A trial court can validly rely on an evidence when that evidence is unchallenged is an oral evidence establishing clearly the claim of the plaintiff against the defendant in terms of his writ and such evidence was not rebutted by the defence. In other words, evidence which is not controverted or discredited or challenged ought to be accepted as proving an existing or alleged fact. Once it is relevant to the issues joined, it ought to be accepted as the true facts sought to be proved.”

The same position was expressed in the cases of Ivienagbor v Bazuaye (supra) and Alfortrin Ltd v Attorney General of the Federation (supra). There is therefore no intricacies or difficulties in accepting the submission of the learned Counsel for the plaintiff that the plaintiff, having proved her case as required, is entitled to judgment. This fact does not require any exercise that will be calculated to be academic in substance and in nature. The only necessity that is placed on the court in the circumstances of this case is to see through the evidence as offered by the plaintiff and determine whether the plaintiff has duly established his claim.

The issue of interest claimed in this case is not strange. I have read through all the authorities cited by the learned Counsel for the plaintiff and they are all in agreement that interest is recoverable on bank loans and overdrafts. In the case of UBN v Ayoola (supra), the Court of Appeal held in ratio 1 and 2 that:–

1. Banks are empowered to charge interest on loans or other advances granted to a customer even where there is no express agreement on the rate of interest to be charged. This is because the customer must be taken to impliedly consent to an interest to be charged on his account.

2. By virtue of section 15 of the Banking Act Cap 28 Laws of the Federation of Nigeria, 1990, charging of interest rates by banks is regulated by guidelines to the banks by the Central Bank of Nigeria. Banks do not fix the interest rates arbitrarily, or rates of
Interest rates are no longer a matter of mutual consultation between a bank and its customers except in very limited situations. The necessary guidelines on the rates of interest on loans are given by the Central Bank from time to time generally and not to a particular bank or in relation to a particular loan transaction.

In the case of *Abdullahi v Waje Commercial Bank* (*supra*), it was held in *ratio* 10 specifically that by universal custom of banking, a banker has the right to charge interest at a reasonable rate on all overdrafts. It is usual and a perfectly legitimate mode of dealing between the bank and customer for a bank to secure for itself the benefit of a compound interest in debiting interest on an overdraft account. It is therefore without dereliction to conclude in the instant case that it is perfectly legitimate for the plaintiff to claim the interest he is claiming on the debt of the defendant. The plaintiff in his evidence said the interest rate was 21%. There is no counter or controversy from the defendant on this and on all issues in this case since there is no defence validly filed by the defendant as I have already indicated. It follows invariably that the interest rate on the debt is nothing but the 21% claimed in the instant case by the plaintiff.

The only issue that requires attention is whether the claim on the building that was not originally used as a security for the overdraft could be taken over to settle the debt as contemplated by the plaintiff. The plaintiff’s prayer on this is that the defendant’s property at No. K77, Karaworo Street, Lokoja be sold in satisfaction of the debt because the collateral security of contract proceeds has been rendered worthless. The learned Counsel relied on section 15(7) of the Failed Banks Decree No. 18 of 1994 (as amended). This section of the law provides:—

"7. If the money obtained from the sale of properties under subsection (6) of this section is still not sufficient to offset the outstanding loan and interest thereon, the court may subject to section 290 of the Companies and Allied Matters Act, 1990, levy execution on the personal properties of the
Directors of the body corporate; partners of the partnership or individuals of the association, as the case may be, which shall be sold and applied in satisfaction of the outstanding debts, in accordance with the provisions of this section.”

This law does not by its direct provision or contemplation authorise a unilateral substitution by the plaintiff of one collateral security with another in a loan or overdraft transaction without the formal agreement of the parties to the transaction. What the plaintiff is calling on the court to do is akin to substituting “the collateral security of ‘contract proceeds’ having been rendered worthless” with the defendant’s property at No. K77, Karaworo Street, Lokoja, Kogi State. There is no law, practice or custom in this era of modernity that allows such a substitution. What the Failed Banks Decree allowed is to impound any other available property of a debtor defendant whose assets or properties sold could not meet up with the demands of the indebtedness or where the proceeds of the sale of the defendant debtor’s properties used as security could not pay up the debt. At this stage of the proceedings it is premature and void to dabble into taking that course without waiting for the period and process of enforcement. I hold therefore that the third claim cannot be granted at this stage and it is hereby rejected.

The other reliefs from the foregoing consideration have been established and I have no hesitation in finding for the plaintiff in respect of the first and second claims of the plaintiff. The plaintiff accordingly succeeds on the first and second legs of the claim while the third leg of the claim is struck out on the reason already given in this judgment.
Afribank Nigeria Plc v Kokatex Commerce General (Nig.) Limited

COURT OF APPEAL, BENIN DIVISION
IBIYEYE, AKAAHS, BA’ABA JJCA

Date of Judgment: 12 DECEMBER, 2000
Suit No.: CA/B/84/98


Facts

This case was on the interpretation of section 230(1)(d) of the 1979 Constitution as modified by Decree No. 107 of 1993.

The provisions of the section provides:–

“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 an Act of the National Assembly or a Decree, the Federal High Court shall have and exercise jurisdiction to conclusion of any other court in civil causes and matter arising from:–

(a) . . .
(b) . . .
(c) . . .
(d) banking, banks, other financial institutions, including any action between one bank and another, 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 notes 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.” (Italics mine for emphasis)
a Held –

1. The words “shall not” in the proviso to section 230(1)(d) does not connote the exclusion of the Federal High Court from entertaining matters set out in paragraph (d) of section 230(1). Instead all the proviso has done is to whittle down the exclusive jurisdiction conferred on the Federal High Court in subsection (1) by opening up the seemingly closed shop in its paragraph (d) to any other court of co-ordinate jurisdiction.

2. The negative connotation of the words “shall not” in the provision does not entirely remove the Federal High Court from entertaining matters arising from the banker/customer relationship. The connotation is instead accommodating.

Appeal dismissed.

Cases referred to in the judgment

Nigerian


Maiwada v F.B.N. Plc (1997) 4 NWLR (Part 500) 497
Oamen v Oweman (1993) 8 NWLR (Part 311) 358

Olanrewaju v Gov. Oyo State (1992) 9 NWLR (Part 265) 335

Onyenucheya v Military Administrator Imo State (1997) 1 NWLR (Part 482) 429


Nigerian statute referred to in the judgment

Constitution of the Federal Republic of Nigeria, 1979 (as amended), section 230(1)(d)
Counsel

For the appellant: E Akhigbe, Esq.

For the respondent: OM Anyachebelu, Esq.

Judgment

IBIYYE JCA: (Delivering the lead judgment) This appeal arose from the decision of Abutu J of the Federal High Court, Benin in Suit No. FHC/B/12/97 filed by the plaintiff (now respondent) against the defendant (now appellant) wherein the respondent seeks a number of reliefs including a declaratory order, injunction, special and general damages.

Sequel to the finding of the writ of summons and the statement of claim by the respondent, the appellant on 7th May, 1997 filed a motion on notice praying the trial court for an order transferring the said suit from its court to the State High Court which has jurisdiction. The learned trial Judge in a reserved ruling delivered on 26 September, 1997 dismissed the application.

The appellant was dissatisfied with this ruling and appealed to this Court on two grounds of appeal. Briefs of argument were filed and exchanged between the parties in compliance with the rules of this Court. The appellant identified only one issue from its two grounds of appeal. The issue reads, in material part, as follows:–

“...Whether the learned trial Judge misdirected himself in law in holding that the court had jurisdiction to entertain the suit taking into consideration the proviso to section 230(1)(d) of the 1979 Constitution as modified by Decree No. 107 of 1993.”

The respondent on its part did not formulate any issue. It instead adopted the sole issue identified by the appellant.

At the hearing of this appeal both learned Counsel for the appellant and the respondent adopted and relied on their respective briefs of argument without any elaborate amplification but each of them sought the court’s favour in its judgment.
E. Akhigbe Esq., the learned Counsel for the appellant submitted that the crux of this appeal is the interpretation of section 230(1)(d) of the 1979 Constitution as modified by Decree No. 107 of 1993 with specific regard to the proviso to the section. He pointed out that there is consensus by the parties that the subject matter of the suit arose out of a banker/customer relationship but differed in their views as regards the interpretation of the section in point.

The learned Counsel, having reproduced section 230(1)(d) (supra) extensively, submitted that the operative words in the proviso to the said section are “shall not” and went on to argue that their effect is that any matter arising from a dispute between an individual customer and his bank in respect of transactions between them cannot be entertained by the Federal High Court. He relied on the cases of Olanrewaju v Governor of Oyo State (1992) 9 NWLR (Part 265) 335 at 368 and Maiwada v F.B.N. Plc (1997) 4 NWLR (Part 500) 497 at 507 in the interpretation that the word “shall” does not leave room for discretion.

Learned Counsel equally referred to the decision of this Court in the case of Nigeria Deposit Insurance Corporation v Federal Mortgage Bank of Nigeria (1997) 2 NWLR (Part 490) 735 and said that the trial Judge placed much reliance on the interpretation of the section in point that both the Federal High Court and the State High Court have concurrent jurisdiction to entertain disputes arising from the banker/customer relationship. He instead submitted that the true import of section 230(1) of the 1979 Constitution does not give the Federal High Court concurrent jurisdiction with the State High Court but exclusive jurisdiction. He referred to the cases of Ali v Central Bank of Nigeria (1997) 4 NWLR (Part 498) 192 at 203; Oamen and Owenan (1993) 8 NWLR (Part 311) 358 at 366–368 and Onyemucheya v Military Administrator Imo State (1997) 1 NWLR (Part 482) 429 at 442 on the issue of limited and unlimited jurisdiction of the two courts. He finally submitted that the learned trial Judge was in error to have held that both courts have
concurrent jurisdiction as that opinion is in conflict with section 230(1)(d) of the 1979 Constitution and the decision in *Ali v Central Bank of Nigeria* (*supra*). He therefore urged the court to allow the appeal and order the transfer of the substantive matter to the appropriate State High Court.

In reply, OM *Anyachebelu* Esq., the learned Counsel for the respondent is *ad idem* with the appellant on what is the crux of this appeal. He too reiterated that the dispute which prompted the substantive action arose out of the banker/customer relationship and contended that is the interpretation placed on section 230(1)(d) (*supra*) that would dispose of the appeal. He submitted that, as regards the *proviso* to section 230(1)(d) (*supra*), both the Federal High Court, Benin and the State High Court, Benin City have concurrent jurisdiction to deal with matters on the banker/customer relationship and placed considerable reliance on the decision in the case of *Nigeria Deposit Insurance Corporation v Federal Mortgage Bank of Nigeria* (otherwise entitled *N.D.I.C. v FMBN*) (*supra*) at page 755 where this Court held, *inter alia*, that a *proviso* does not set out to allocate powers or jurisdiction but to create exceptions or relax limitations and that in circumstances under the said *proviso* both the Federal High Court and the State High Court can exercise concurrent jurisdiction in such circumstances. He apparently found a complete booster in the fact that the appeal on the issue, among others, against the decision of the Court of Appeal in that case had gone to the Supreme Court and that the decision of the Court of Appeal had been affirmed in *F.M.B.N. v NDIC* (1999) 2 NWLR (Part 591) 333 particularly at pages 362–363 to the effect that in situations falling under the *proviso* to section 230(1)(d) of Decree No. 107 of 1993 the exclusive jurisdiction of the Federal High Court will be exempted by way of *proviso* to section 230(1)(d) of the 1979 Constitution.

As regards the case of *Ali v Central Bank of Nigeria* (*supra*) relied upon by the appellant, the learned Counsel for the respondent argued that it was paragraph (r) and not paragraph (d) of section 230(1) of the 1979 Constitution.
paragraph (d) of section 230(1) (supra) that was interpreted. The contention in that case was on the use of limited and unlimited jurisdiction that was resolved in favour of the Federal High Court which had overall arm of the claim as opposed to the limited arms of the claim over which the State High Court had jurisdiction. He finally submitted that the learned trial Judge was right when it held that the Federal High Court, Benin City has jurisdiction to entertain the suit in point. He accordingly urged the court to dismiss the appeal and affirm the decision of the court below.

I agree with both learned Counsel for the parties in this appeal that the crux of this appeal on the interpretation of paragraph (d) of section 230(1) of the 1979 Constitution as amended by Decree No. 107 of 1993.

It will be elucidating to reproduce the provision of section 230(1)(d) (supra). It 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 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 matter arising from:–

(a) . . .
(b) . . .
(c) . . .
(d) banking, banks, other financial institutions, including any action between one bank and another, 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 notes 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.” (Italics mine for emphasis)

The foregoing provision relates to the jurisdiction of the Federal High Court as stipulated in the 1979 Constitution as amended.
It will be recalled that the learned Counsel for the appellant, in an attempt to strengthen his argument that the matter before the trial court should be heard in the State High Court, Benin, submitted thus:–

“...that the operative words are ‘shall not’ with the effect that any matter arising from a dispute between an individual customer and the bank cannot be entertained by the Federal High Court.”

I do not, with due regard to the learned Counsel for the appellant, share his view that the words “shall not” in the proviso to section 230(1)(d) (supra) connote the exclusion of the Federal High Court from entertaining matters set out in paragraph (d) of section 230(1) (supra). I instead share the view of the learned Counsel for the respondent that all the said proviso has done is to whittle down the exclusive jurisdiction conferred on the Federal High Court in subsection (1) by opening up the seemingly closed shop in its paragraph (d) to any other court of co-ordinate jurisdiction. The negative connotation of the words “shall not” in the proviso does not entirely remove the Federal High Court from entertaining matters arising from the banker/customer relationship. The connotation is instead accommodating.

It is further observed that the learned Counsel for the appellant relied on the cases of Ali v Central Bank of Nigeria (supra); Oamen v Owenan (supra) and Onyenucheya v Military Administrator Imo State (supra). The first case dealt with the interpretation of paragraph (r) of section 230(1) (supra) with the second and third cases dealing with the limited jurisdiction of the Federal High Court and the unlimited jurisdiction of the State High Court respectively. There is consensus by both learned Counsel that the crux of this appeal is the interpretation of paragraph (d) of section 230(1). Since those cases relate to other aspects of section 230(1), I am of the view that they are of no moment to the issue for determination.

It is common ground culled from the statement of claim filed by the plaintiff/respondent that the nature of the transaction between the plaintiff and the defendant is a dispute
touching on the banker/customer relationship. The proviso to paragraph (d) of section 230(1) of 1979 Constitution as amended has singled out matters on the banker/customer relationship from the exclusive jurisdiction of the Federal High Court and has allowed any other court to assume jurisdiction in civil matters. I am therefore fortified by the decision of the Supreme Court to hold that the instant dispute is triable in the Federal High Court. See *FMBN v NDIC* (supra) at 362. I accordingly resolve the only issue in this appeal against the appellant.

In the final analysis, the appeal lacks merit and it is dismissed. The ruling of the learned trial Judge is affirmed. The matter shall continue to finality in the Federal High Court, Benin City. I award costs of ₦2,000 in favour of the respondent.

**Ba’aba JCA:** I had a preview of the leading ruling prepared by my learned brother, Ibiyeye JCA. I must explain that when I wrote the leading ruling of *U.B.N. Plc v I.T.P.P. Ltd* (2002) 12 NWLR (Part 680) 99, I was not aware of the decision of the Supreme Court of Nigeria, in *F.M.B.N. v N.D.I.C* (1999) 2 NWLR (Part 591) 333, cited and relied upon by my learned brother in the leading ruling. Now, having realised that the decision in *U.B.N. (supra)* was given *per incuriam*, I must depart from that decision as this Court is bound by the decision of the Supreme Court of Nigeria. I, therefore, entirely agree with the reasoning and conclusion of my learned brother, Ibiyeye JCA, in the leading ruling. I abide by all the orders including costs.

**Akaahs JCA:** I was privileged to have read in draft the ruling prepared by my learned brother, Ibiyeye JCA. In *U.B.N. Plc v I.T.P.P. Ltd* (2000) 12 NWLR (Part 680) 99 we interpreted that the jurisdiction of the Federal High Court in banking matters as it affects the customer/banker relationship was ousted by virtue of section 230(1)(d) of 1979 Constitution as amended by Decree No. 107 of 1993. The decision was reached *per incuriam* in view of the decision of the Supreme Court in *F.M.B.N. v N.D.I.C* (1999) 2 NWLR (Part
591) 333 which vests concurrent jurisdiction in the State High Court and the Federal High Court. Consequently, I agree with the reasoning and conclusion reached by my brother, Ibiyeye JCA. I abide with the consequential orders including costs made in the leading ruling.

*Appeal dismissed.*
In the Matter of the Companies and Allied Matters Act, 1990 and the Banks and Other Financial Institutions Act, 1991 (As Amended) and in the Matter of A Winding Up Petition Brought by Nigeria Deposit Insurance Corporation v In the Matter of Rims Merchant Bank Limited

FEDERAL HIGH COURT, LAGOS DIVISION
UKJE J
Date of Judgment: 18 JANUARY, 2001 Suit No.: FHC/L/CP/5/2001

Banking – Winding up – Competence of Nigeria Deposit Insurance Corporation to present petition and to be appointed liquidator

Facts

The petitioner, Nigeria Deposit Insurance Corporation sought the following reliefs:–

1. An order granting leave pursuant to section 425 of the Companies and Allied Matters Act, 1990 to the N.D.I.C. to institute the winding up proceedings herein for itself and on behalf of the RIMS Merchant Bank Limited (the company).

2. An order for the winding up petition herein dated 4 January, 2001 which has already been filed to be deemed as having been properly filed;

3. An order for leave to advertise the said winding up petition pursuant to and in the manner prescribed pursuant to Rule 19 of the Companies Winding Up Rules, 1983.

4. An order upon grant of reliefs 1, 2 and 3 above, for the appointment of the Nigeria Deposit Insurance Corporation as the provisional liquidator to wind up the affairs of the company.

5. Such further or other orders as the court may deem fit to make in the circumstance.
The grounds upon which the application is brought are *inter alia* as follows:–

(1) The company was licenced by the Central Bank of Nigeria (C.B.N.) to carry on the business of banking.

(2) The company is and was at all material times to this a financial institution within the meaning of and sub-
ject to the provisions of the Banks and Other Financial Institutions Decree No. 25 of 1991 (B.O.F.I.D.) as amended.

(3) The Central Bank of Nigeria has, pursuant to its powers under the Banks and Other Financial Institutions Decree (B.O.F.I.D.), revoked the banking li-
ence of the company.

(4) The Nigeria Deposit Insurance Corporation is em-
powered by B.O.F.I.D. to institute winding up pro-
ceedings before this Court in respect of any bank (such as the company), whose banking licence has been revoked by the Central Bank of Nigeria.

Section 38(1)(c) of the Banks and Other Financial Institu-
tions Decree No. 25 of 1991 provided that:–

“Where the governor makes an order revoking the licence of a bank and requiring that the business of the bank should be wound up, the bank shall within 14 days of the date of the order apply to the Federal High Court for an order winding up the bank; and the Federal High Court shall hear the application in priority to all other matters.”

Section 23C(3) of the Nigeria Deposit Insurance Corpora-
tion (Amendment) Decree No. 5 of 1997 it is provided that where a bank’s licence is revoked

“(3) The corporation shall, pursuant to the provisions of subsec-
tion (2) of this section be deemed to have been duly ap-
pointed the liquidator for the purpose of liquidation of the insured institution.”

Again, by section 38(3) of the Banks and Other Financial Institution Decree No. 25 of 1991 it is provided that:–

“(3) If the Governor is satisfied that it is in the public interest to
do so; he may appoint the Nigeria Deposit Insurance
a Corporation or any other person as the Official Receiver or as a provisional liquidator and the corporation or such other person shall have the power conferred by or under the Companies and Allied Matters Act, 1990; and shall be deemed to have been appointed a provisional liquidator by the High Court for the purpose of the Act.”

b Held –

c 1. The combined reading of section 38(l)(c) of the Banks and Other Financial Institutions Decree and section 23(C)(1)(b) of the Nigeria Deposit Insurance Corporation Act, 1997 and the administrative directive in GN 1904 – Exhibit L0l, all imbue the Nigeria Deposit Insurance Corporation with statutory authority and an administrative duty to present a petition to the Federal High Court for the winding up of a bank whose licence has been revoked by the Central Bank of Nigeria. To further strengthen the hand of the petitioner (Nigeria Deposit Insurance Corporation) in this regard, the Governor of the Central Bank, in exercise of the powers conferred upon him by section 12 of the Banks and Other Financial Institutions Act, 1991, as substituted by the Banks and Other Financial Institutions Act, 1999 (1999 No. 40), specifically did direct the Nigeria Deposit Insurance Corporation to apply to the Federal High Court for an order to wind up the affairs of the bank, herein.

d 2. Where the banking licence of a bank has been revoked, the Nigeria Deposit Insurance Corporation is a statutory liquidator by virtue of the combined effect of section 23C(3) of the Nigeria Deposit Insurance Corporation Decree, 1997 and section 38(3) of the Banks and Other Financial Institutions Decree, 1991, and the court is enjoined to recognise the corporation as such; and to deem the corporation as if appointed by the court.

i j Leave granted.
Nigerian statutes referred to in the judgment

Banks and Other Financial Institutions Decree No. 25, 1991, section 38(1)(c), 38(3)  
Companies and Allied Matters Act (Cap 59) Laws of the Federation of Nigeria, 1990, section 422  
Nigeria Deposit Insurance Corporation (Amendment) Decree No. 5, 1997, section 23(C)(1)(b), 23C(3)

Counsel

For the petitioner: MD Belgore (with him Sikiru Adewoye) holding the brief of L Fagbemi, S.A.N.

Judgment

UKEJE J: This ruling relates to a motion ex parte filed in a winding up petition brought by the Nigeria Deposit Insurance Corporation pursuant to the provisions of the Companies and Allied Matters Act, 1990 (Cap 59 Laws of the Federation of Nigeria) and the Banks and Other Financial Institutions Act, 1991 as amended.

The petition seeks the following reliefs:

(i) That RIMS Merchant Bank Limited may be wound up by the court under the provisions of the Companies and Allied Matters Act, 1990; or  
(ii) that such other order may be made up in the premises as to the court shall seem just.

It is averred in paragraphs 7, 8 and 9 of the petition as follows, (in a nutshell):

7. The company has insufficient assets to meet its obligations to its depositors and creditors. Accordingly pursuant to the said statutory powers of the Central Bank of Nigeria, the company’s banking licence was revoked by the Central Bank of Nigeria on 22 December, 2000 and that revocation was published in the Official Gazette No. 91 Vol. 87 of 22 December, 2000.
8. Following upon the revocation of a banking licence of a financial institution, the Nigeria Deposit Insurance Corporation (N.D.I.C.) is the body empowered pursuant to section 18 of the Banks and Other Financial Institutions Decree No. 25 of 1991, as amended and other enabling statutes, to wind up that institution.

9. Accordingly, this winding up petition is brought pursuant to the above powers.

The petition was not intended to be served on any person.

The petition is supported by a two paragraph verifying affidavit.

Specifically, this ruling relates to an *ex parte* motion dated and filed on 4 January, 2001 and seeks the following five reliefs:–

1. An order granting leave pursuant to section 425 of the Companies and Allied Matters Act, 1990 to the Nigeria Deposit Insurance Corporation to institute the winding up proceedings herein for itself and on behalf of the RIMS Merchant Bank Limited (the company).

2. An order for the winding up petition herein dated 4 January, 2001 which has already been filed to be deemed as having been and properly filed.

3. An order for leave to advertise the said winding up petition pursuant to and in the manner prescribed pursuant to Rule 19 of the Companies Winding Up Rules, 1983.

4. An order upon grant of reliefs 1, 2 and 3 above, for the appointment of the Nigeria Deposit Insurance Corporation as the provisional liquidator to wind up the affairs of the company.

5. Such further or other orders as the court may deem fit to make in the circumstance.
The ground upon which the application is brought are *inter alia* as follows:–

1. The company was licenced by the Central Bank of Nigeria (C.B.N.) to carry on the business of banking.
2. The company is and was at all material times to this a financial institution within the meaning of and sub-
   ject to the provisions of the Banks and Other Financial Institutions Decree, 1991 (B.O.F.I.D.) as ame-
3. The Central Bank of Nigeria has, pursuant to its powers under B.O.F.I.D., revoked the banking li-
   cence of the company.
4. The Nigeria Deposit Insurance Corporation is em-
   powered by B.O.F.I.D. to institute winding up pro-
   cedings before this Court in respect of any bank (such as the company), whose banking licence has been revoked by the Central Bank of Nigeria.

The motion is supported by an eight paragraph affidavit.

Annexed are two documentary exhibits of which one is exhibit L01, a copy of an *Official Gazette* GN No. 1904, dated 22 December, 2000 stating that the Governor of the Central Bank of Nigeria has revoked the banking licence of banks including RIMS Merchant Bank, the respondent herein.

There is annexed as exhibit L02, a sample advertisement of petition, filed by the petitioner’s Counsel.

Those were the processes filed in support of the motion *ex parte*.

The issue for determination, directly flow from the reliefs which the petitioner seeks, that is whether this is a proper case in which:–

(1) To grant leave to the petitioner pursuant to section 425 of the Companies and Allied Matters Act to in-
    stitute the winding up petition herein for itself and on behalf of RIMS Merchant Bank.
a  (2) An order deeming the winding up petition herein as properly filed.

b  (3) To grant leave to the petitioner to advertise the petition.

c  (4) To grant an order, upon the granting of reliefs 1, 2 and 3 *supra*, to appoint the Nigeria Deposit Insurance Corporation as provisional liquidator to wind up the affairs of RIMS Merchant Bank.

d  (5) To make consequential orders.

Belgore, learned Counsel on behalf of the petitioner/applicant argued the motion reiterating the antecedent of the motion.

Learned Counsel contended that reliefs 1 and 4 were statutory and were added to the motion paper out of caution. Learned Counsel urged the court to grant the application.

I shall treat the issues raised *seriatim*.

1. Whether Nigeria Deposit Insurance Corporation can properly institute and maintain the suit herein.

By section 38(1)(c) of the Banks and Other Financial Institutions Decree, 1991 (1991 No. 25) it is provided that:–

“Where the Governor makes an order revoking the licence of a bank and requiring that the business of the bank should be wound up, the bank shall within 14 days of the date of the order apply to the Federal High Court for an order winding up the bank and the Federal High Court shall hear the application in priority to all other matters.”

Again, section 23(C)(1)(b) of the Nigeria Deposit Insurance Corporation Act, as inserted by the Nigeria Deposit Insurance Corporation (Amendment) Act, 1997 (1997 No. 5) enjoins the Nigeria Deposit Insurance Corporation to apply to the Federal High Court for a winding up order, where it has become necessary to revoke the banking licence of a bank.

The combined reading of section 38(1)(c) of the Banks and Other Financial Institutions Decree and section 23(C)(1)(b) of the Nigeria Deposit Insurance Corporation Act, 1997 and the administrative directive in GN 1904 exhibit L01, all
imbue the Nigeria Deposit Insurance Corporation with statutory authority and an administrative duty to present a petition to the Federal High Court for the winding up of a bank whose licence has been revoked by the Central Bank of Nigeria. To further strengthen the hand of the petitioner (Nigeria Deposit Insurance Corporation) in this regard, the Governor of the Central Bank, in exercise of the powers conferred upon him by section 12 of the Banks and Other Financial Institutions Act, 1991, as substituted by the Banks and Other Financial Institutions Act, 1999 (1999 No. 40), specifically did direct the Nigeria Deposit Insurance Corporation to apply to the Federal High Court for an order to wind up the affairs of the bank, herein, *inter alia* *(vide exhibit L01 annexed to the affidavit in support of this motion Government Notice No. 1 of 1904 of 22 December, 2000 titled “revocation of banking licence”)*.

Accordingly, relief 1 succeeds. And leave is hereby granted to Nigeria Deposit Insurance Corporation to institute and prosecute the winding up petition in respect of RIMS Merchant Bank already filed and pending.

2. Following upon the answer to Issue 1 *supra*, I hereby hold that the winding up petition already filed is properly filed by virtue of the divers statutory provision and the administrative directive in GN 1904 of 22 December, 2000.

Accordingly, relief 2 also succeeds.

3. *Leave to advertise the petition.*

By section 53(1) of the Banks and Other Financial Institutions Act, it is provided that

“Application of the Companies and Allied Matters Decree, 1990

The provisions of this Decree shall apply without prejudice to the provisions of the Companies and Allied Matters Decree, 1990 in so far as they relate to banks and to winding up by the Federal High Court”.
Further, section 38(4) of the Banks and Other Financial Institutions Decree, 1991 provides inter alia, as follows:

“(4) This section shall have effect and section 408 of the Companies and Allied Matters Act shall be construed as if the revocation of the licence of a bank under this Decree had been included as a ground for winding up by the Federal High Court under that section.”

For its part, section 408(f) of the Companies and Allied Matters Act provides that:

“Circumstances in which companies may be wound up by court order:–

(f) Central Bank revokes a bank’s licence”.

By force and operation of law, RIMS Merchant Bank is liable to be wound up, its banking licence having been revoked by the Central Bank, per exhibit A, annexed to the affidavit.

Now Order 19 of the Companies Winding Up Rules (Cap 59) Laws of the Federation of Nigeria, 1990) provides as follows:

“No petition shall be advertised until the Judge hearing the petition or a Judge before whom the petition is first mentioned in open court so orders”.

Accordingly, advertisement of the petition is a mandatory step in a winding up process. The third relief also succeeds and leave is hereby granted to the petitioner to advertise the petition herein.

As provided in Order 19 Rule 2(b), the petition shall be advertised once in the Gazette of the Federal Republic of Nigeria; and shall be also advertised in one edition each of the Guardian Newspaper and also in THIS DAY Newspaper, respectively.

The advertisement shall be as in Form 9 in the appendix to the winding up rules.
The exhibit L02 sample advertisement substantially complies with Form 9, supra.

4. To appoint the Nigeria Deposit Insurance Corporation as the provisional liquidator of the RIMS Merchant Bank Limited.

By section 23(C)(3) of the Nigeria Deposit Insurance Corporation (Amendment Decree) 1997 (1997 No. 5) it is provided that where a bank’s licence is revoked:

“(3) The corporation shall, pursuant to the provisions of subsection (2) of this section be deemed to have been duly appointed the liquidator for the purpose of liquidation of the insured institution.”

Again, by section 38(3) of the Banks and Other Financial Institutions Decree, 1991 (1991 No. 25) it is provided that:

“(3) If the Governor is satisfied that it is in the public interest to do so, he may . . . appoint the Nigeria Deposit Insurance Corporation or any other person as the Official receiver or as a provisional liquidator and the corporation or such other person shall have the power conferred by or under the Companies and Allied Matters Act, 1990; and shall be deemed to have been appointed a provisional liquidator, by the High Court for the purpose of that Act.”

Where the banking licence of a bank has been revoked, the Nigeria Deposit Insurance Corporation is a statutory liquidator by virtue of the combined effect of section 23(C)(3) of the Nigeria Deposit Insurance Corporation Decree, 1997 and section 38(3) of the Banks and Other Financial Institutions Decree, 1991, and the court is enjoined to recognise the corporation as such; and to deem the corporation as if appointed by the court.

I therefore appoint the Nigeria Deposit Insurance Corporation as the provisional liquidator of RIMS Merchant Bank by virtue of section 38(3) of the Banks and Other Financial Institutions Decree, 1991 in terms of section 422 of the Companies and Allied Matters Act (Cap 59 Laws of the Federation of Nigeria, 1990).

Again, this head of relief succeeds.
I hereby therefore appoint the Nigeria Deposit Insurance Corporation as the provisional liquidator of the RIMS Merchant Bank in terms of section 422 of the Companies and Allied Matters Act (Cap 59 Laws of the Federation of Nigeria, 1990).

5. Consequential orders

From the foregoing, it is clear that the application has succeeded in its entirety. And accordingly:

1. Leave is hereby granted to the Nigeria Deposit Insurance Corporation to institute and maintain this petition, notwithstanding that the petitioner has statutory authority so to do was also specifically in that regard mandated by the Governor, administratively pursuant to section 12 of the Banks and Other Financial Institutions Act, 1991 (as shown in exhibit L01 annexed to the motion paper herein).

2. Leave is hereby granted to the petitioner to advertise the petition as required by Order 19 of the Companies Winding Up Rules, 1990 (Cap 59 Laws of the Federation of Nigeria). The advertisement to be in Form 9 in the Annex to the Rules. The petition shall be advertised once in the Federal Gazette and once in the Guardian and THIS DAY Newspapers, respectively.

3. The Nigeria Deposit Insurance Corporation is hereby appointed the provisional liquidator of RIMS Merchant Bank Ltd, in terms of section 38(3) of the Banks and Other Financial Institutions Decree, 1991 and in terms of section 422(2) of the Companies and Allied Matters Act (Cap 59).

4. Upon the advertisement the petition as herein ordered the petition itself shall be granted a speedy hearing in priority to all other cases as enjoined by section 38(1) of the Banks and Other Financial Institutions Act, 1991 (1991 No. 25).
Alhaji Lawal Sarkin Tasha v Union Bank of Nigeria Plc

SUPREME COURT OF NIGERIA
BELGORE, KALGO, OGWUEGBU, ONU, UWAIFO JJSC
Date of Judgment: 29 JANUARY, 2001
Suit No.: SC.17/1996

Banking – Agricultural Credit Guarantee Scheme – Operation of – Default by borrower – Who to sue and be sued – Procedure therefor

Banking – Agricultural Credit Guarantee Scheme – Operation of – Rights of lending bank – Scope of

Facts

It was common ground that the loan given by the respondent bank to the appellant was under the Agricultural Credit Guarantee Scheme Fund Decree, 1977. The Decree (now an Act) can be found in Cap 13 of the Laws of the Federation of Nigeria, 1990. Section 15 of that Act provides that when there is default in repaying the loan (whether principal or interest thereon) by the borrower, any legal proceedings arising therefrom shall be by or against the Agricultural Board set up by law to oversee the loan.

Following a default in repayment of the loan, the respondent bank sued the borrower (i.e. the appellant) instead of the board. The suit was placed on the undefended list and judgment given against the appellant. The lower court affirmed the judgment even though its attention was drawn to section 15 of the said Act.

Sections 12 and 15 of the Agricultural Credit Guarantee Scheme Fund Cap 13 of the Laws of the Federation of Nigeria, 1990 read as follows:

“12(1) Where there has been a default in the repayment of the interest or principal of any loan guaranteed under this Act, the bank concerned shall in the first instance endeavour to recover the amount outstanding from the
borrower or his sureties, if any, and may for that purpose dispose of any security obtained in respect of the loan.

15. All legal proceedings of a civil nature arising from the failure of any borrower to repay a loan granted by a bank and guaranteed under this Act or arising from matter pertaining to any guarantee given pursuant to this Act shall be instituted and conducted by or against the board.”

Held –

c 1. By section 15 of the Agricultural Credit Guarantee Scheme Fund Act, 1990, all legal proceedings of a civil nature arising from the failure of any borrower to repay a loan granted by the bank or guaranteed under the Act or arising from any matter pertaining to any guarantee given pursuant to the Act shall be instituted and conducted by or against the “board”.

d 2. The cause of action giving rise to the proceedings falls within section 15 of the Act. In the circumstance, the respondent bank has no standing whatsoever to institute the proceedings against the appellant having regard to the state of the law at the time the cause of action arose.

e The courts below were in gross error in not giving section 15 of Cap 13 Laws of the Federation of Nigeria, 1990 its plain and unambiguous meaning.

Appeal allowed and case struck out.

Nigerian statute referred to in the judgment

Agricultural Credit Guarantee Scheme Fund (Cap 13) Laws of the Federation of Nigeria, 1990, sections 12, 15

Counsel

For the appellant: Miss UN Agomoh (with her DD Dimong)

For the respondent: Mrs IS Yerima

Judgment

BELGORE JSC: (Delivering the lead judgment) The Agricultural Credit Guarantee Scheme Decree (now in Cap 13 of the Laws of the Federation of Nigeria, 1990) sets out clearly
how the loan under the agricultural scheme was to be administered. The law empowers the minister responsible for the scheme to fix the rate of interest from time to time. In the case of default by the borrower/farmer to pay the debt, section 12 sets out the procedure for demand. But in the case of suing to recover the loan, section 15 is very clear; it is the board of the scheme that must be sued. Though the amendment to the Decree (now Act) in 1993 allows the bank to sue the debtor directly, this case arose before the amendment and at the time the suit was filed the board was not sued. This is an incompetent action and the court ought not to have welcomed the suit, irrespective of being placed on the undefended cause list. The court is to decide on cases legally placed before it. This appeal therefore succeeds. The appeal is allowed, the decision of the court below is set aside and the verdict of striking out the suit entered. ₦10,000 costs to the appellant.

OGWUEGBU JSC: There is merit in this appeal. By section 15 of the Agricultural Credit Guarantee Scheme Fund Act Cap 13 Laws of the Federation of Nigeria, 1990, all legal proceedings of a civil nature arising from the failure of any borrower to repay a loan granted by the bank or guaranteed under the Act or arising from any matter pertaining to any guarantee given pursuant to the Act shall be instituted and conducted by or against the “board”. The cause of action giving rise to the proceedings falls within section 15 of the Act. In the circumstance, the respondent bank has no standing whatsoever to institute the proceedings against the appellant having regard to the state of the law at the time the cause of action arose. The courts below were in gross error in not giving section 15 of Cap 13 Laws of the Federation of Nigeria, 1990 its plain and unambiguous meaning. The appeal succeeds. The action was incompetent. It is accordingly struck out. ₦10,000 costs to the appellant.

OUNU JSC: Since the respondent in the instant case in the prosecution of which the provisions of sections 12(1) and 15 of the Agricultural Credit Guarantee Scheme Fund Act Cap
13 Laws of the Federation of Nigeria, 1990 were not resorted to, but rather it was the undefended list procedure that was applied to give judgment to the respondent, both the trial court and the Court of Appeal were wrong in the method they adopted. The two sections provided:

“12(1) Where there has been a default in the repayment of the interest or principal of any loan guaranteed under this Act, the bank concerned shall in the first instance endeavour to recover the amount outstanding from the borrower or his sureties, if any, and may for that purpose dispose of any security obtained in respect of the loan.

15 All legal proceedings of a civil nature arising from the failure of any borrower to repay a loan granted by a bank and guaranteed under this Act or arising from any matter pertaining to any guarantee given pursuant to this Act shall be instituted and conducted by or against the board.”

Since the latter section was ignored by the respondent, the action brought at its instance must perforce be incompetent and unmaintainable against the appellant.

It is for these reasons and those contained in the judgment of my learned brother Belgore JSC that I too allow this appeal and set aside the decisions of the courts below. I strike out the suit filed by the respondent on the undefended list and award ₦10,000 costs to the appellant.

Kalgo JSC: This appeal is meritorious and ought to succeed. The issue of locus of the respondent to sue in the first instance was well taken and this denies the trial court and the Court of Appeal the power to entertain and adjudicate on the matter. The loan was granted under the Agricultural Credit Guarantee Scheme Act (Cap 13 of the Laws of the Federation of Nigeria, 1990) and by section 15, any default by the borrower to repay the loans falls on the board and so only the board of the scheme should be sued and not the borrower. It was therefore clearly wrong here to sue the borrower (the appellant). Section 12 of the law did not give the respondent the total right to sue but only “to endeavour to recover the amount outstanding” at first instance. This
section must be read together with section 15 of the said Act, and in so doing only section 15 allowed the respondent to sue the board to recover the outstanding amount of the loan. The respondent’s Counsel quite properly conceded to the correct legal position in the matter.

For this reason, I allow the appeal, set aside the decision of the Court of Appeal and strike out the suit filed by the respondent in the trial court in the undefended list.

I award ₦10,000 costs to the appellant.

UWAIFO JSC: It is common ground that the loan given by the respondent bank to the appellant was under the Agricultural Credit Guarantee Scheme Fund Decree, 1977. The Decree is now an Act to be found in Cap 13 of the Laws of the Federation of Nigeria, 1990. Section 15 of that Act provides that when there is default in repaying the loan (whether principal or interest thereon) by the borrower, any legal proceedings arising therefrom shall be by or against the Agricultural Board set up by law to oversee the loan. In the present case, it would appear there was such default to repay. The respondent bank sued the borrower (ie the appellant) instead of the board. The suit was placed on the undefended list and judgment given against the appellant. The lower court affirmed the judgment even though its attention was drawn to section 15 of the said Act.

There can be no argument that the action was improperly constituted. The parties ought to have been the respondent bank and the board. Not having been properly constituted, the suit was incompetent. I therefore allow this appeal on that issue alone and set aside the judgment of the lower court. I accordingly strike out the suit. I award ₦10,000 costs to the appellant.

Appeal struck out.
First Bank of Nigeria Plc v Odaudu Uwada

COURT OF APPEAL, ABUJA DIVISION

ODUYEMI, BULKACHUWA, MUNTKA-COOMASSIE JJCA

Date of Judgment: 14 FEBRUARY, 2001

Suit No.: CA/A/1/2000

Action – Account stated – What must be proved


Banking – Interest on overdraft – No formal agreement on terms – Bank claiming interest rate not agreed upon – Propriety of

Banking – Overdraft – No formal agreement on terms – Bank claiming interest – Customer averring no interest rate was agreed upon – Attitude of court

Facts

By a writ of summons issued out of the High Court of Justice of Kogi State, the appellant as plaintiff claimed from the defendant as follows:–

1. An award of the sum of Fifty-eight Thousand, Thirty Naira, Eighty-four Kobo (₦58,030.84k) being the defendant’s outstanding overdraft balance as at 31 January, 1994.

2. An order calculating the interest at the rate of 21% on the said Fifty-eight Thousand, Thirty Naira, Eighty-four Kobo (₦58,030.84k) from the said 31 January, 1994 till the date of judgment in this case and award same to the plaintiff.”

The respondent denied the claim in his statement of defence, averring that no rate of interest was agreed upon.

At the end of the trial, the learned trial Judge in his judgment dismissed the claim of the plaintiff and entered judgment in favour of the defendant.

It is against that judgment that the plaintiff has appealed.
Held –

1. At common law, there is no right by a banker to charge his customer even simple interest on an overdraft but the claim could be supported on the ground of universal custom of bankers or on the basis of implied agreement.

2. Per Curiam

“Furthermore, section 15 of the Banking Act which came into operation on 7 February, 1969 mandates all licensed banks to charge as the rate of interest on advances, loans, credit facilities or paid on deposits only rates linked to minimum rediscount rate of the Central Bank subject to stated minimum and maximum rates of interest which were approved shall be the same for all banks subject to the proviso in subsection (i). This is what is commonly called the Central Bank guidelines.

PW2 testified that the rate of interest was in accordance with Central Bank guidelines but failed to give evidence of what the rates were during the period covered by the overdraft the subject of the suit. Furthermore, it is a matter of common knowledge, which this Court is entitled to take judicial notice of that the rates approved in the Central Bank guidelines vary from time to time. This is consistent with the evidence of PW1 but not consistent with that of PW2 who stated in cross-examination that a constant rate of ₦21% per annum was charged by the appellant on the overdraft since it was given in August, 1980 to 31 January, 1994 when the action in this suit was commenced and to 5 December, 1994 the date on which he testified a period of 14 years.

It is clear that not only had the appellant failed to show that it had a right to charge the interests which it charged on the overdraft, it is obvious that whatever rate was being charged by the appellant on the overdraft has not been linked to the Central Bank guidelines rate of interest as required by law. The charge of interest was accordingly unlawful. The circumstances in this case negative the application of custom or of an implied agreement to charge interest enunciated in U.B.N. Ltd v Ayoola (1998) 11 NWLR (Part 573) 338.”

3. To succeed in a claim of account stated, the plaintiff must plead and show by evidence that one or other of the documents which he relies upon exhibits 1–20 or the
oral agreement between itself and the respondent contains the particulars of the date, form and material contents of the account stated.

There must also be an absolute acknowledgment (or admission) made by the defendant (or his agent) to the plaintiff (or its agent) of a debt or sum due from the defendant to the plaintiff at the time of the action brought.

4. By section 38 of the Evidence Act, entries in books of account regularly kept in the course of business, are relevant whenever they refer to matter into which the court has to inquire, but such statements shall not alone be sufficient evidence to charge any person with liability.

5. **Per Curiam**

   “It is clear that exhibits 1–20 were based on exhibit 21 which statute law says shall not alone be sufficient to charge respondent with liability. There is no evidence before the court that respondent acknowledged the correctness of any of the exhibits 1–21. There is also no evidence that he acknowledged or admitted his liability in respect of any of them. Therefore, I hold that none of the exhibits can be taken as evidence of the account between the parties having been stated and admitted. I hold also that there is no evidence upon which the lower court could have found that the respondent was aware that the overdraft account had a debit balance of ₦58,030.84k against him as claimed by the appellant.”

Appeal dismissed.

**Cases referred to in the judgment**

**Nigerian**

- *Eholor v Osayande* (1992) 6 NWLR (Part 249) 524
- *Elias v Omo-Bare* (1982) 5 SC 25
- *Olaoye v Balogun* (1990) 5 NWLR (Part 148) 24
- *Progress Bank of Nigeria Ltd v Ugonna (Nig.) Ltd* (1996) 3 NWLR (Part 435) 202
U.B.N v Ayoola (1998) 11 NWLR (Part 573) 338
U.B.N v Ozigi (1994) 3 NWLR (Part 333) 385

Foreign
Day v William Hill (Park Lane) (1949) 1 KB 632
Hughes v Thorpe ER Vol. 151 278
Kleinberg v Morris (1937) 183 LTJ 107

Nigerian statute referred to in the judgment
Evidence Act Cap 112 Laws of the Federation of Nigeria, 1990, sections 38, 96, 132

Books referred to in the judgment
Bullen and Leake and Jacobs Precedents of Pleadings (13ed) pages 7–8
Paget’s Law of Banking (8ed) page 133

Counsel
For the appellant: PA Akubo, Esq. (with him JA Akubo, Esq.)
For the respondent: PO Okolo, Esq.

Judgment
ODUYEMI JCA: (Delivering the lead judgment) By a writ of summons issued out of the High Court of Justice of Kogi State, the appellant as plaintiff claimed from the defendant as follows:–

“1. An award of the sum of Fifty-eight Thousand, Thirty Naira, Eighty-four Kobo (₦58,030.84k) being the defendant’s outstanding overdraft balance as at 31 January, 1994.

2. An order calculating the interest at the rate of 21% on the said Fifty-eight Thousand, Thirty Naira, Eighty-four Kobo (₦58,030.84k) from the said 31 January, 1994 till the date of judgment in this case and award same to the plaintiff.”

The respondent denied the claim in his statement of defence.
At the end of the trial, the learned trial Judge in his judgment dismissed the claim of the plaintiff and entered judgment in favour of the defendant.

It is against that judgment that the plaintiff (who shall in this judgment hereinafter, where necessary, be referred to as the “appellant”) has appealed.

With the leave of this Court, the appellant on 19 January, 2000 filed an amended notice and grounds of appeal containing seven grounds.

The grounds of appeal, shorn of their respective particulars, read as follows:—

“The judgment is against the weight of evidence.

The lower court erred in law in outrightly dismissing the appellant’s claim notwithstanding that the appellant had discharged the onus of proof upon it thereby occasioning miscarriage of justice.

The learned trial Judge misdirected himself on the facts when he disregarded exhibits 1–20 on the pretext that the defendant (now respondent) was not served with same as claimed and thereby occasioned a miscarriage of justice.

The learned trial Judge misdirected himself on the facts when he held thus:—

‘The lack of cohesiveness in the evidence of PW1 and PW2 in relation to the rate of interest applicable to the transaction and the failure on their part especially evidence adduced by PW1 explaining how the interest alleged to have accrued on the overdraft was earned only lend credence to the case put up by the defence as one transaction which did not attract any interest.’

The learned trial Judge misdirected himself in law in respect of exhibit 21 when he held thus:—

‘I should think that an explanation is necessary over a document such as this . . . they can by no means serve as conclusive proof of the liability of the party against whom action was brought on the authority of Oguma Associated
Companies (Nig.) Limited v International Bank for West Africa (1988) 1 NWLR (Part 73) 658, 678.’

and thereby occasioned a miscarriage of justice.

Ground Six
The lower court misdirected itself in fact in holding that ‘those aspects of this transaction which the plaintiff through their witnesses claim are in writing and as embody the terms by which the facility was secured is itself not before this Court in evidence’ hence caused a miscarriage of justice.

Ground Seven
The lower court erred in law in failing to act on the uncontroverted evidence of PW2 which supported the ‘appellant’s claim’.

From the seven grounds of appeal, the appellant has distilled for resolution in this appeal three issues thus:

1. Whether upon a careful evaluation of the totality of evidence adduced before the trial court, which was largely uncontroverted, the appellant did not discharge the onus of proof upon it so as to entitle it to the reliefs sought. (Grounds 1, 2, 6 and 7 of the grounds of appeal as amended).

2. Whether there was any lack of cohesiveness between the evidence of PW1 and PW2 so as to disentitle the appellant to the reliefs sought (Ground 4).

3. Whether the trial court was right in disregarding exhibits 1–20 as well as exhibit 21 without giving them their due probative weight and value on the ground that the former (exhibits 1–20) were not delivered to the respondent and that an explanation was necessary in the case of the latter to wit: exhibit 21 said not to be conclusive proof of liability. (Grounds 3 and 5 of the amended grounds of appeal).

The respondent has distilled from the grounds of appeal only two issues for resolution viz:–

1. Whether the appellant/plaintiff proved its case on the balance of probability as required by law and thus entitled to judgment of the lower court.

2. Whether upon careful evaluation of all the evidence adduced by the parties before the lower court, the judgment of the lower court could be said to be against the weight of evidence as to entitle it to be set aside by this Honourable Court."
The appellant filed a reply brief on 14 July, 2000.

It is my view that the three issues formulated by the appellant as well as the two issues formulated by the respondent respectively cover all seven grounds of appeal as each of the seven grounds of appeal in the end result, is concerned with the question of evaluation by the trial Judge, of the evidence adduced at the trial court.

For this reason although I shall in this judgment adopt the three issues formulated by the appellant, nevertheless, I shall treat them together.

The arguments advanced in the briefs and the oral address for the appellant of the issues in this appeal are:

(i) It is common ground between the parties that in furtherance of their banker/customer relationship, the appellant at the request of the respondent granted an overdraft facility to the respondent in the sum of ₦40,000 about the month of August, 1980 for the purpose of performing a contract between the respondent and a third party – the Ministry of Education of the then Benue State.

(ii) There is evidence from PW1 (an official of the plaintiff) that the overdraft of ₦40,000 attracted variable interest periodically which made the total sum of indebtedness of the respondent as at 31 January, 1994 to be ₦58,030.84k. That PW1 also tendered exhibits 1–19 which were the letters of demand addressed to the respondent at various dates to intimate the respondent of the amount of his indebtedness at the respective times indicated in each letter while exhibit 20 was a letter of “demand before action” from the solicitors of the appellant dated 1 December, 1993. It calls for the settlement of the then outstanding debt of ₦53,024.00k.

There is also exhibit 21, the statement of account of the respondent, which shows the alleged debt
balance against the respondent on account of unpaid interest.

(iii) Reference is made to the evidence of PW2 which not only confirms the grant of the overdraft of ₦40,000 but also indicated that the account attracted interest of 21% per annum in accordance with the Central Bank guidelines. It is the further contention of the appellant that as PW2 was not cross-examined on behalf of the respondent his evidence should have been treated as uncontroverted and used in favour of the appellant.

(iv) It was also contended that the learned trial Judge was in error to conclude that the evidence of PW1 and PW2 was contradictory as to the rate of interest; it is the submission of the appellant that both PW1 and PW2 were consistent in maintaining that the applicable interest was 21%. That the seeming disparity in their evidence was in PW1 saying that the rate of interest was variable while PW2 said it was 21% at all times during the transaction.

It is contended that the seeming difference was not material but consistent with the contents of exhibit 21 also tendered by PW1.

It is now the submission of the appellant that a banker has the right to charge interest at a reasonable rate on an overdraft. It is therefore contended that it was erroneous for the lower court to find that the transaction did not attract any interest since the respondent had admitted under cross-examination that the banks charge interest on loans and overdrafts.

It is also contended that it was wrong for the lower court to insist on written evidence of the transaction since the respondent himself gave evidence that the transaction was oral; that if any document in evidence of the transaction was needed, that was supplied by exhibit 21.
It is contended that although the respondent denied receiving exhibits 1–19, this should not be believed on account of the evidence of the respondent that he took the appellant to the site of the contract for which he took the loan and explained to the appellant that he had not been paid for the job.

It is contended that the learned trial Judge has failed to appropriately evaluate the evidence before him, the injustice has thus occurred which this Court is now called upon to redress.

The arguments advanced in the brief and the oral address for the respondent are as follows:

That the respondent took an overdraft of N40,000 from the appellant is not in dispute.

The real dispute between the parties is on the alleged rate of interest; that while the appellant contended that the condition of the grant of the overdraft was that it would attract interest at the rate of 21% per annum, the contention of the respondent was that there was no agreed rate of interest, but that the sum of N35,000 standing to his credit in another account with the appellant was to be appropriated towards the repayment of the overdraft in the event of default by the respondent.

That since it is the appellant who claims that the overdraft was chargeable with interest, it is for him to prove that fact.

That in its attempt to establish the rate of interest, the appellant called two witnesses PW1 and PW2 who failed to prove the alleged agreed interest rate in that PW1 stated in evidence that the agreement between the parties was in writing but the appellant failed to tender before the court the written agreement; that on account of such failure the appellant cannot prove the contents of the written document by oral evidence – sections 96 and 132 of the Evidence Act Cap 112 Laws of the Federation of Nigeria, 1990.

It is submitted that the appellant had failed to discharge the burden of proof on it that the overdraft attracted interest at the rate of 21% per annum.
Respondent relies on the provision of section 149(d) in respect of the failure of the appellant to produce the written agreement.

It is submitted that the following findings made in the judgment of the lower court were after an appropriate evaluation of the evidence adduced at the trial and should therefore not be disturbed by this Court. The facts are:

1. The transaction was in writing.
2. The document which embodied the rates were not before the lower court.
3. There was no proof of service of exhibits 1–20 on the respondent.
4. There was no cohesiveness in the evidence of PW1 and PW2 as to the rate of interest applicable to the transaction.
5. That the failure of PW1 and PW2 to explain how the interest alleged due on the overdraft was arrived at tended to support the case put forward by the respondent that the transaction did not attract any interest.
6. That the ₦35,000 in the respondent’s deposit account was appropriated by the appellant to reduce his debt.

It is further submitted that the evidence of PW2 though unchallenged by cross-examination does not make it uncontested since it was in a very material respect in contradiction with that of PW1 who also was a witness for the appellant ie on whether the interest rate of 21% varied during the period of the overdraft in accordance with the Central Bank guidelines or it was static throughout.

It is contended that the learned trial Judge was right in not using exhibits 1–20 in that the respondent gave evidence that he was never served with any of the letters which constituted exhibits 1–20. The appellant was unable to prove service of any of the letters on the respondent and there was nothing to show any acknowledgment of service, it is therefore
a contended that even though exhibits 1–20 were admitted in evidence the lower court was right in rejecting it.

In order to have a clear focus of the issues in controversy between the parties at the lower court, it is necessary to advert one’s mind to some averment in the pleadings of the parties.

In his statement of claim the appellant made the following material averments:

(a) An overdraft facility of ₦40,000 was granted to the respondent about 16 August, 1980 – paragraph 5. This was admitted by the respondent in paragraph 5 of the statement of defence.

(b) That the respondent was aware of the state of accounts but he abandoned it to the financial detriment of the appellant – paragraph 8. This was denied by the respondent in paragraph 8 in his averment that he was not aware of the state of his accounts – that he approached the appellant for the same but on each occasion the appellant refused because it had something to hide.

(c) Paragraph 9 – The plaintiff pleads and shall at the hearing of this case rely on the defendant’s statement of account prepared by the plaintiff and the following letters addressed to the defendant by the plaintiff. Letters dated 25/11/85, 16/12/85, 16/1/86, 28/2/86, 28/5/86, 13/1/87, 20/3/87, 21/4/87, 30/4/87, 2/6/87, 28/10/87, 22/6/88, 18/7/88, 9/11/88, 14/12/88, 16/1/89, 15/3/90 and the solicitor’s letter dated 1 December, 1993. Notice is hereby given to the defendant to tender the originals of the above stated letters at the hearing of this case.

(d) That because of the respondent’s failure to pay back the overdraft the balance in the account stood at ₦58,030.84k as at 31 January, 1994 – paragraph 10. The respondent denied these averments in paragraphs 9 and 10. By paragraph 9 of the defence he asserted in answer that
the appellant never sent any bank teller or notice of account to him and so the issue of his knowledge of the account having a debit balance did not and could not arise. In fact the respondent specifically put the appellant to the strictest proof of their normal delivery procedures and receipts of same by the defendant.

In addition the respondent in the statement of defence raised the following issues:–

(e) Paragraph 3 – that he lodged the sum of ₦35,000 in a savings account on which interest accrued with the appellant which by the consent of both was transferred to the current account of the respondent to offset part of the loan.

(f) Paragraph 4 – that the loan or overdraft was never made an issue of usual banking practice in that there was no formal agreement or term of the loan spelt out by both parties. The appellant were specifically put to the strictest proof of the fact of formal request and agreement and/or confirmation of the bank or their parent bodies.

(g) Paragraph 11 – whereof, the defendant denied the plaintiff’s claim in its activity (sic) and that if anything the interest on the savings of the defendant so far has offset the loan of ₦40,000 since there was no agreed term of interest and so the sum of ₦58,030.84k or further sums till judgment does not arise and would urge upon the court to dismiss same.

There was no reply by the appellant to the new issues raised by the defence. Therefore, in accordance with the rules of civil procedure, it becomes clear that apart from the overdraft of ₦40,000 admitted by the respondent, the parties had joined issues on the following:–

(i) whether the terms of the repayment of the overdraft was in writing and in particular whether the overdraft attracted the payment of any interest thereon and at what rate;
(ii) whether the respondent was aware of the state of his accounts, in particular, whether the respondent was aware that the debit balance in the overdraft account stood at ₦58,030.84k as at 31 January, 1994;

(iii) strict proof of the receipt by the respondent of the several letters pleaded including strict proof of the normal delivery procedures of the appellant and receipts of same with respect to the letters.

(iv) whether the amount of ₦35,000 standing in the credit of his short deposit or saving accounts with the appellant had been used to offset part of the overdraft of ₦40,000;

(v) whether the respondent is still indebted to the appellant in respect of the overdraft of ₦40,000 or in respect of any interest.

Having regard to the provision of section 135 of the Evidence Act Cap 112 Laws of the Federation of Nigeria, 1990, it is clear that of the five issues which are stated to have arisen before the lower court, only in respect of item (iv) ie the utilisation of ₦35,000 with interest of the respondent in the short deposit or savings account of the appellant, was there any burden of proof on the respondent. The burden of proof of the other items (i), (ii), (iii) and (v) are placed on the appellant since it was the appellant who alleged that the facts establishing his claim to the rights which he claimed before the lower court exist and it would be the party who would fail in the action if no evidence at all were given on either side.

At this stage I should confess that I am somehow at a loss to understand the purport of an argument in the appellant’s brief or to be carried along with it. The argument is to be found in paragraph 4.4 at page 5 of the appellant’s brief and it is repeated in the oral address of the appellant’s Counsel in this Court, it is to the effect that the mere admission of the respondent in both the pleading and in evidence of the receipt by him of the overdraft of ₦40,000 from the appellant
ought, *per se*, to have entitled the appellant to judgment on the reliefs which it claimed. This argument, with respect, fails to take cognisance of the other issues posed in the pleadings and which under the law of evidence and the rules of civil procedure, the appellant was obliged to prove before the question of his entitlement to judgment could be considered. With respect, the submission in that argument has no basis in law whatsoever and I reject it.

I now turn to the other issues enumerated above for a consideration of the evaluation of the evidence thereon by the lower court:–

(i) Whether the terms of the repayment of the overdraft was in writing and if it attracted interest, at what rate.

The respondent claimed in his pleading that the overdraft was not made an issue of the usual banking practice and there was no formal agreement on the terms of the loan except that it was agreed that the amount of ₦35,000 standing to the credit of his short deposit or savings account with the appellant would be transferred to the current account to offset the loan. His testimony was to the same effect. He did not apply in writing for the loan and did not sign any document in respect of it. He stated further that he was not informed at the verbal negotiations that the overdraft would attract interest and none was agreed upon.

Under cross-examination he admits knowing that the banks do charge interest on loans and overdraft.

The evidence of PW1 admitted that the ₦35,000 in the short deposit account of the respondent was the collateral security accepted from the respondent in respect of the overdraft that the amount was realised on 15 May, 1994 in part settlement of the overdraft with H more than ₦5,000 left outstanding.

Under cross-examination PW1 maintained that there was a written agreement for the loan between the parties which was not executed in his (witness) presence; that the
transaction between the parties was all in writing particularly the offer and acceptance and it had the approval of the regional office of the appellant in Kaduna.

He stated further that the respondent signed the appropriate forms of the appellant on the transaction.

Neither PW1 nor PW2, the other witness of the appellant, produced any of the documents said to have been executed by the parties in respect of the overdraft transaction. The offer and acceptance of the sum of ₦40,000 as overdraft is not in dispute. However, while the respondent says that the agreement was that it was entirely without a charge of interest, the respondent’s witnesses claim that the overdraft attracted interest.

PW1 testified that the interest varied from time to time but did not specify the rate. However, he claimed interest on behalf of the appellant at the rate of 21% per annum on the amount of ₦58,030.84 claimed as the respondent’s indebtedness on 31 January, 1994 the date of the issue of the writ until judgment.

PW2 on his part testified on the ₦40,000 overdraft. With regard to interest, his testimony was that the overdraft attracts interest at the rate of 21% in accordance with the Central Bank guidelines and that interest was being charged on the account at 21% since the date the respondent was granted the overdraft.

At common law, there is no right by a banker to charge his customer even simple interest on an overdraft but the claim could be supported on the ground of universal custom of bankers or on the basis of implied agreement.

See Paget’s *Law of Banking* (8ed) Megrah and Ryder at page 133.

In this case, the appellant contends that it has a right under a written agreement to charge interest on the overdraft. Its claim is not based on commercial custom. The respondent denied it insisting that under the term of the oral transaction, since his short term deposit of ₦35,000 with interest was the
collateral security for the overdraft it was agreed that the overdraft would not attract interest.

The appellant has failed to produce in evidence the instrument which it claimed evidenced the transaction. The appellant is accordingly precluded by section 132(1) of the Evidence Act from adducing secondary evidence in proof of the contents of the alleged written agreement on the terms of repayment or of the contents of the alleged written agreement on the terms of repayment or of interest. See also *Union Bank of Nigeria Ltd v Professor Albert Ojo Ozigi* (1994) 3 NWLR (Part 333) 385, 389, 400 and *Olaoye v Balogun* (1990) 5 NWLR (Part 148) 24.

Furthermore, section 15 of the Banking Act which came into operation on 7 February, 1969 mandates all licensed banks to charge as the rate of interest on advances, loans, credit facilities or paid on deposits only rates linked to minimum re-discount rate of the Central Bank subject to stated minimum and maximum rates of interest which were approved shall be the same for all banks subject to the proviso in subsection (i). This is what is commonly called the Central Bank guidelines.

PW2 testified that the rate of interest was in accordance with the Central Bank guidelines but failed to give evidence of what the rates were during the period covered by the overdraft, the subject of the suit. Furthermore, it is a matter of common knowledge, which this Court is entitled to take judicial notice of, that the rates approved in the Central Bank guidelines vary from time to time. This is consistent with the evidence of PW1 but not consistent with that of PW2 who stated in cross-examination that a constant rate of 21% *per annum* was charged by the appellant on the overdraft since it was given in August, 1980 to 31 January, 1994 when the action in this suit was commenced and to 5 December, 1994 the date on which he testified – a period of 14 years.

It is clear that not only had the appellant failed to show that it had a right to charge the interests which it charged on the overdraft.
overdraft, it is obvious that whatever rate was being charged by the appellant on the overdraft has not been linked to the Central Bank guidelines rate of interest as required by law. The charge of interest was accordingly unlawful. The circumstances in this case negative the application of custom or of an implied agreement to charge interest enunciated in *U.B.N. Ltd v Ayoola* (1998) 11 NWLR (Part 573) 338.

For this reason and the additional reason given by the learned trial Judge, that the evidence of PW1 and PW2 on behalf of the appellant lacked cohesion and did not adequately explain how the interest on the overdraft was earned.

I too agree that the appellant was not entitled to the charges for interest which it made on the overdraft.

This finding should have disposed of the appeal but I shall answer the other questions which have been posed as necessary for the determination of the issues relating to the evaluation of evidence which arose in this appeal.

The next question is –

(ii) “whether the respondent was aware of the state of accounts, in particular whether respondent was aware that the debits balance in the overdraft account stood at ₦58,030.84k as at 31 January, 1994.”

This question is linked with the next further question which is:

(iii) “whether the appellant has in evidence before the lower court strictly proved the receipt by appellant of the several letters pleaded by appellant including strict proof of the normal delivery procedures of appellant and his solicitor and of the receipts of the letters by the respondent – exhibits 1–20.”

The respondent did not deny that the appellant made personal contact with him to pay into the account additional monies from the proceeds of the contract for which he took the loan to offset his indebtedness.

He explained that that was the reason why, in addition to the use of the ₦35,000 with interest standing to his credit in
his short term deposit account, he paid additional monies into his current account.

The issue for consideration was whether the appellant could justify his claim that the account which supports the claim had been “stated” between the appellant and the respondent by the letters (exhibits 1–20) which were pleaded in paragraph 9 of the statement of claim and by the statement of account (exhibit 21) which was pleaded in paragraph 8.

By its nature, the form of the claim of the appellant was for the account stated.

To succeed in such a claim, the plaintiff must plead and show by evidence that one or other of the documents which he relies upon, exhibits 1–20, or the oral agreement between itself and the respondent contains the particulars of the date, form and material contents of the account stated. *Kleinberg v Morris* (1937) 183 LTJ 107.

There must be an absolute acknowledgment (or admission) made by the defendant (or his agent) to the plaintiff (or its agent) of a debt or sum due from the defendant to the plaintiff at the time of the action brought. See *Day v William Hill (Park Lane)* (1949) 1 KB 632 at 641; *Hughes v Thorpe* (1839) 5 M and W 656 (now reported in English Reports Vol. 151 page 278). See also Bullen and Leake and Jacobs *Precedents of Pleadings* (13ed) (Sweet and Maxwell) pages 7–8.

It is trite law that the basis of admissibility of evidence is its relevance to the issues for trial before a court of law.

Having pleaded the statement of accounts in paragraph 8 and the letters in paragraph 9 respectively of the statement of claim they become relevant to the proceedings hence their respective admission in evidence as exhibits.

The weight to be attached to each exhibit would however depend upon its satisfying the provisions of section 95 of the Evidence Act.
Each of exhibits 1–20 was intended by the pleading in paragraph 9 to be used as proof by the appellant of the amount stated in the letter as owing by the respondent having its origin in exhibit 21, all of which were claimed in paragraph 8 of the statement of claim to have been brought to the knowledge of the respondent.

Respondent denies receipt of each document, exhibits 1–20, and so denying that he was in the know of their respective contents. He insisted upon strict proof of such knowledge by production in evidence of the normal delivery procedures of the appellant and receipts by him. The appellant failed at the trial to produce evidence of either despatch by the appellant or receipt by the respondent of any of the letters or accounts.

Furthermore, it is provided by section 38 of the Evidence Act (ibid) that:

“Entries in books of account, regularly kept in the course of business, are relevant whenever they refer to matter into which the court has to inquire, but such statements shall not alone be sufficient evidence to charge any person with liability.”

It is clear that exhibits 1–20 were based on exhibit 21 which statute law says shall not alone be sufficient to charge the respondent with liability. There is no evidence before the court that the respondent acknowledged the correctness of any of the exhibits 1–21. There is also no evidence that he acknowledged or admitted his liability in respect of any of them. Therefore, I hold that none of the exhibits can be taken as evidence of the account between the parties having been stated and admitted. I hold also that there is no evidence upon which the lower court could have found that the respondent was aware that the overdraft account had a debit balance of N58,030.84k against him as claimed by the appellant.

In the circumstance, I find no reason to disagree with the learned trial Judge who received exhibits 1–20 in evidence when he rejected them as proof of the alleged receipt of the documents by the respondent and as the account stated by
the parties. Consequently, I too reject them as proof of li-
ability or of acknowledgment by the respondent of their re-
spective contents. In addition, as to exhibit 21, I have al-
ready agreed with the learned trial Judge that there is no jus-
tification for the charges of interest which were made in the
account. In the circumstance, if the amounts of interest
charged during the period 1980 to 31 May, 1984 (which by
my reckoning amount to $16,146.82) are added to the pro-
ceeds of $35,000 and interest of $912.86 thereon standing
to the credit of the respondent in the short deposit account
on 15 May, 1984 together with an amount of 762 realised on
another savings passbook all transferred to exhibit 21 on the
same day, the amounts to the credit of the respondent apart
from the amount of $35,000 would be $16,821.68. There is
no doubt that the respondent has more than satisfied his jus-
tifiable liability of $35,000 under the overdraft.

I have now disposed of the two other questions viz on the
$35,000 in the short deposit or savings bank account as well
as on the possible outstanding indebtedness of the respon-
dent to the appellant on the overdraft.

In all, I find that the learned trial Judge has properly and
adequately evaluated the evidence before him and was justi-
fied when he found for the defendant and dismissed the ac-
tion of the plaintiff. I have no reason to interfere with the
judgment of the learned trial Judge.

In the circumstance I dismiss this appeal in its entirety as
lacking in merit. I affirm the judgment of the lower court.

I award costs of $6,000 in favour of the respondent.

MUNTAKA-COOMASSIE JCA: I have been privileged of
reading in advance the lead judgment of my noble Lord,
Oduyemi JCA, just read and delivered. I am in total agree-
ment with his Lordship’s reasons and conclusions. I have
nothing more useful to add, since his Lordship did not leave
any stone unturned in his treatment of the facts and issues
canvassed before us. I too dismiss this appeal. I endorse the
order as to costs.
BULKACHUWA JCA: I have had the privilege of reading in draft the lead judgment just delivered by my learned brother, Oduyemi JCA. I agree entirely with the reasoning and conclusion reached therein and adopt them as mine.

I will further stress that in civil cases the onus of proof is always on the party who asserts. He has to prove his case on credible and cogent evidence. *Elias v Omo Bare* (1982) 5 SC 25; *Eholor v Osayande* (1992) 6 NWLR (Part 249) 524; *Progress Bank of (Nig.) Ltd v Ugonna (Nig.) Ltd* (1996) 3 NWLR (Part 435) 202.

In the instant case the plaintiff/appellant has not discharged that burden and can therefore not be entitled to judgment.

I too dismiss the appeal and abide by the consequential orders in the lead judgment including the order as to costs.

*Appeal dismissed.*
ACB Limited and others v B.B. Apugo

SUPREME COURT OF NIGERIA

EJIWUNMI, KALGO, MOHAMMED, OGUÉGBU, WALI JJSC

Date of Judgment: 23 FEBRUARY, 2001
Suit No.: SC.165/95

Banking – Security for banker’s advance mortgage – Property of third party pledged as collateral – Owner of property not a customer or debtor of the bank – Bank instructing auctioneer to advertise property for sale – Auctioneer advertising property in third party’s name and not customer’s name – Bank liable for defamation

Damages – Award of – Interference and reduction of by appellate court – Interference rightly done based on circumstance

Defamation – Libel – Defence of justification – Bank advertising for sale through auctioneer property of third party deposited as collateral for facility in third party’s name portraying him a debtor – Third party not a customer or debtor of the bank – Defence of justification not available to bank

Mortgage – Bank authorising auctioneer to sell property deposited as collateral – Auctioneer puts up notice published in newspaper – Notice turns out libelous – Bank not auctioneer is liable for libel

Facts

The first defendant (now the appellant/cross-respondent) African Continental Bank Limited gave a facility to its customer B.B. Apugo and Sons Limited, the second defendant. As a collateral for the facility, the freehold and leasehold properties of BB Apugo, the plaintiff (now the respondent/cross-appellant) were given. BB Apugo is also the chairman and managing Director of B.B. Apugo and Sons Limited. B.B. Apugo and Sons Limited defaulted in making good the facility. The first defendant obtained judgment in Suit No. HU/14179 in the High Court and had perfected
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A legal mortgage of the properties given as collateral which it wanted to sell to satisfy the judgment. The first defendant therefore instructed the third defendant, a licensed auctioneer, to sell the properties even though the letter of instruction did not mention the name of the plaintiff, that is B.B. Apugo.

The auctioneer (third defendant) advertised the properties which publication was made in the Nigerian Statesman and Sunday Statesman Newspapers owned by the second defendant on 20 and 21 August, 1983. The advertisement stated that “A written instruction has been received from the mortgagee, THE AFRICAN CONTINENTAL BANK LIMITED to the licensed auctioneer (sic) C.C. MOJEKWU, ESQ. to sell by public auction a leasehold and freehold properties of B.B. Apugo”. B.B. Apugo was not a customer of the bank and was not indebted to the bank.

The plaintiff (now the respondent/cross-appellant) brought an action at the High Court Umuahia in Suit No. HU/99/83 claiming against the defendants (now the appellants/cross-respondents) jointly and severally the sum of ₦10 million as general damages for the publication of a libelous matter concerning him.

The defendants (the appellants/cross-respondents) in a joint statement of defence pleaded the defence of justification contending that the plaintiff (the respondent/cross-appellant) was the same person carrying on business under the name of B.B. Apugo and Sons Limited. It contended further that the auction sale notice did not mean what the plaintiff alleged but merely reflected the true nature of the properties which were the subject of the sale. It was also their contention that the third defendant was an independent contractor for whose actions the first defendant is not responsible.

After taking evidence and the address of Counsel in the matter, the learned trial Judge delivered a well considered judgment and found in favour of the plaintiff (the
respondent/cross-appellant) and awarded general damages in his favour in the sum of ₦2 million against all the defendants jointly and severally.

Being very dissatisfied with the judgment, the defendants (now the appellants/cross-respondents) appealed to the Court of Appeal. They lost the appeal with regard to whether the trial court was right to have found them liable upon the claim for libel. The finding of the trial court was therefore affirmed. However, they succeeded partially with respect to the quantum of damages awarded by the court. This is because the Court of Appeal reduced the sum of ₦2 million awarded by the trial court to the sum of ₦250,000.

The first appellant was dissatisfied with that judgment of the Court of Appeal and so filed another appeal to the Supreme Court. The plaintiff (now the respondent/cross-appellant) was not also satisfied with the judgment and so filed a cross appeal to the Supreme Court.

**Held** –

1. That since the respondent did not take any loan from the appellant bank and he is not even a customer of the appellant bank, he cannot be said to be indebted to the bank, consequently it is defamation of the respondent to publish or cause to be published in and other places that the properties of the respondent would be auctioneed to liquidate the debt he owed to the appellant.

2. That liability for libel depends not on the intention of the defamer, but on the fact of the defamation. It was the duty of the appellant bank to have ensured that the notice to the public in respect of the matter reflected the person or persons who were owing the bank and lead evidence accordingly.

3. That for the defence of justification to absolve the appellant from liability for libel, the appellant must prove that the respondent was truly indebted to the appellant. Such evidence was not available save the evidence that a company known as B.B. Apugo and Sons Limited was
the corporate body that was granted the loan and not the respondent. Since the respondent did not take any loan from the appellant, it is libelous to hold him out as one who was indebted.

4. That the contention of the cross-appellant that the lower court (Court of Appeal) reduced the award of damages on wrong principles cannot be wholly right. That there was a careful assessment of all the circumstances of the case by the Court of Appeal to show that the award of the sum of ₦2 million to the cross-appellant was ridiculously high. The reduction by the lower court was therefore rightly done.

Appeal and cross appeal dismissed.

Cases referred to in the judgment

Nigerian

Agaba v Otubusin (1961) 2 SCNLR 13
Bardi v Maurice (1954) 14 WACA 414
Din v African Newspaper (1990) 2 NWLR (Part 139) 392
Dumbo v Idugboe (1983) 1 SCNLR 29
Ejabulor v Osha (1990) 5 NWLR (Part 148) 1
Ezekwe v Otomewo, Lessor and God’s Kingdom Society (1957) WRNLR 130
Harold Shodipo and Co. Limited v Daily Times (Nig.) Limited (1972) 11 SC 69
James v Mid Motors (Nigeria) Limited (1978) 11–12 SC 31
Nsirim v Nsirim (1990) 2 NWLR (Part 138) 285
Nwizuk v Eneyok (1953) 14 WACA 354
Obere v Board of Management, Eku Baptist Hospital (1978) 6–7 SC 15
Ojeme v Momodu (1994) 1 NWLR (Part 323) 685
Omokhafe v Esekhome (1993) 8 NWLR (Part 309) 58
Registered Trustees of Amorc (Nig.) v Awoniyi (1991) 3 NWLR (Part 178) 245

Udofia v Udo-Afia (1940) 6 WACA 216

Uwa Printers (Nig.) Ltd v Investment Trust Co. Limited (1988) 5 NWLR (Part 92) 110

Weideman and Walters (Nig.) Ltd v Oluwa In Re: Intra Motors (Nigeria) Limited (1968) 1 All NLR 383

Williams v Daily Times (1990) 1 NWLR (Part 124) 1

Foreign

Belt v Lawes (1882) 51 LJQB 361

Cassidy v Daily Mirror Newspapers Ltd (1929) 2 KB 331; (1929) All ER 117

Flint v Lovell (1935) 1 KB 354

Hulton and Co. v Jones (1909) 2 KB 444

Kerr v Force (1826) 3 Crunch CC 8

Peter v Bradlaugh (1884) 4 TLR 467

Ratcliffe v Evans (1892) 2 ABD 519

Sutherland v Stopes (1925) AC 62, 63, 75

Nigerian statute referred to in the judgment

Evidence Act Cap 112 Laws of the Federation of Nigeria, 1990, section 74

Nigerian rules of court referred to in the judgment

Supreme Court Rules, 1985 (as amended), Order 6 Rule 8(6), Order 8 Rule 12(2) and (5)

Book referred to in the judgment

Gatley on Libel and Slander (7ed) page 152, paragraph 351

Counsel

Appellants absent and unrepresented

Respondents absent and unrepresented
Judgment

EJIWUNMI JSC: (Delivering the lead judgment) The proceedings leading to this appeal commenced from the High Court of Umuahia in Suit No. HU/99/83. In that suit the plaintiff, who is also a cross-appellant in this Court claimed against the defendants, the appellants/cross-respondents, jointly and severally the sum ₦10 million as general damages for the publication of a libelous matter concerning him in the *Nigerian Statesman* of 20 August, 1983 and the *Sunday Statesman* of 21 August, 1983.

Following the order for pleadings, the parties filed and exchanged their pleadings. They were further amended with the leave of the trial court. The plaintiff finally settled his pleadings with a further amended statement of claim. By his pleadings, the plaintiff averred that he is the chairman and managing Director of B.B. Apugo and Sons Limited and also Director or chairman of other companies named in his further amended statement of claim. He further pleaded that the said B.B. Apugo and Sons Limited is a limited liability company duly registered and incorporated in Nigeria. The plaintiff also pleaded that the defendant is a limited liability company duly registered to carry on banking operations throughout Nigeria and has an office at Okigwe Road, Umuahia Ibeaku. The second appellant was also referred to in the pleadings as a limited liability company, and the printers and publishers of the “*Nigerian Statesman*”, group of newspapers with an office at Umuahia Ibeaku. The plaintiff also pleaded that the third defendant claimed to be a licensed auctioneer with an office at No. 93 St. Finbarr’s College Road, Akoka, Yaba, Lagos.

The plaintiff in paragraphs 5, 6, 7, 8 and 10 of his further amended statement of claim pleaded the alleged libel thus:

“Para. 5 On Saturday, August 20, 1983, at page five of the *Nigerian Statesman* and on or about 21 August, 1983, the 3rd defendant at the instance of the 1st defendant published or caused to be published at page 14 of *Sunday
Statesman Newspapers of 21 August, 1983 the following:

Auction! Auction! Auction!
Sales of Land Properties
Going! Going!! Gone!!!

A written instruction has been received from the Mortgagees, THE AFRICAN CONTINENTAL BANK LIMITED to the Licensed Auctioneer C.C. MOJEKWU, Esq. To sell by public auction a leasehold and freehold properties of B.B. Apugo.

In subparagraphs (a), (b) and (c) the three properties which formed the subject of the sale were then described. This was followed by this clause ‘Sale is subject to the consideration and approval of the mortgages at their absolute discretion’. C.C. Mojekwu, Esq., A.C.B. Umuahia Branch.

Para. 6 The ‘Nigerian Statesman’ and the ‘Sunday Statesman’, newspapers owned and published by the Imo Newspapers Limited at Owerri have wide circulation throughout Nigeria.

Para. 7 The plaintiff at all times material to the publication is not indebted to the 1st defendant, a limited liability company incorporated in Nigeria. B.B. Apugo and Sons Limited was that customer of the 1st defendant. The said company and the 1st defendant are in court over the account of the company with the bank. The judgment of Umuahia High Court in Suit No. HU/14/79 A.C.B. Limited v B.B. Apugo and Sons Limited has been set aside by the Court of Appeal, Enugu and the case was sent back for retrial . . .

(a) . . .
(b) . . .
(c) Judgment of the Court of Appeal, Enugu.

Para. 8 The said words in their natural and ordinary meaning meant and were understood to mean that the plaintiff is indebted to the 1st defendant and could not meet up his financial obligations to the bank.

Para. 9 Further or in the alternative the said words meant and were understood to mean that the plaintiff who is a successful businessman is insolvent.
Para. 10  By reason of the premises the plaintiff who is the managing Director of several limited liability companies and a successful businessman has been greatly injured in his credit character and reputation and in his occupation and has been brought into hatred, ridicule and contempt.”

Undaunted by the plaintiffs’ claim, the defendants filed a joint amended statement of defence. The defendants by their pleading denied that the plaintiff was at all material times the managing Director of about three limited liability companies. They, however, claimed that the plaintiff is nothing but a businessman and carried on business in the name of B.B. Apugo and Sons Limited. They then went on to plead inter alia, in their amended statement of defence, in the following paragraphs:

“3. Defendants deny paragraph 5 of the Further Amended Statement of Claim, and state that the defendant retained the services of 3rd defendant permits (sic) letter No. SEC/BR.22 of 11 August, 1983 which may be founded upon at the trial. 3rd defendant, an independent contractor, for whose acts 1st defendant is not responsible, in the course of performing his duties as an auctioneer by way of paid advertisement caused the notice of sale complained of to be inserted in the 2nd defendant’s newspaper, and 2nd defendant merely published what was given to it by 3rd defendant without any negligence or malice.

5(i) Defendants deny paragraph 7 of the Further Amended Statement of Claim, and state that B.B. Apugo and Sons Limited at all material times was indebted to the 1st defendant and that the plaintiffs’ three landed properties advertised in the publication complained of were given to the said B.B. Apugo and Sons Limited to secure the sum of N300,000 under a mortgage agreement with 1st defendant. When the loan could not be repaid, and by way of foreclosure, the mortgagee referred the proposed sale of the mortgaged properties to the auctioneer (3rd defendant) who caused the notice of the sale of the mortgaged properties to be advertised on account of the unpaid loan. The auctioneer published no more than was necessary. The mortgage debt is still outstanding as the said B.B. Apugo and Sons Limited fully utilised the entire facility. It is the plaintiff
who carries on business in the name of B.B. Apugo and Sons Limited and he produced the title deeds of properties to secure the loan for the so-called B.B. Apugo and Sons Limited.

5(ii) The said B.B. Apugo and Sons Limited, was found by the Umuahia High Court to be indebted to the 1st defendant in the sum of ₦1,236,938.66k with interest at the rate of 10% per annum from March, 1979 to 25 July, 1983 and thereafter at the rate of 4% until complete payment. The decision of Court of Appeal did not absolve the B.B. Apugo and Sons Limited from the debt but set aside the High Court judgment on the technical question of joinder and sent the case back for retrial.

5(iii) The defendants shall contend at the trial the said B.B. Apugo and Sons Limited so called which is just plaintiff’s business name, has no distinct legal personality from the plaintiff its alter ego and had incurred heavy debts to the 1st defendant in its said business name. Any purported certificate of incorporation of B.B. Apugo and Sons Limited was made up and brought into existence after 9 June, after two written confirmations to the contrary by the Companies Registry. The 1st defendant shall found on letter No. CAD/MISC/Vol.1/58 of 27/3/84 and letter No. CAD/MISC/1/ 59 of 9/6/87. The defendants shall contend that the purported existence of such certificate is contrary to the result of the searches and inquiries made from the Companies Registry, Lagos and Abuja . . .

6. Defendants deny paragraph 8 of the Further Amended Statement of Claim, and state that Auction Sale Notice inserted in the 2nd defendant’s newspaper does not mean what plaintiff alleged but merely reflected the true nature of the properties which were the subject matter of the projected sale which was being effected by 3rd defendant for the mortgagee in exercise of its legal right of sale of the mortgaged properties. Defendant deny that the said word mean to bear were understood to bear or were capable of bearing or being understood the meaning set out in paragraph 8 of the Further Amended Statement of Claim, or any meaning defamatory of plaintiff.

7. Defendants deny the alternative meaning pleaded by plaintiff in paragraph 9 of the Further Amended Statement of Claim. Defendants did not know anything about plaintiff
During the trial, the plaintiff gave evidence on his own behalf; and called four other witnesses in support of his case. The defendants for their defence called two witnesses in support of their case. The learned trial Judge following addresses of the learned Counsel, delivered a well considered judgment. By that judgment, the learned trial Judge found in favour of the plaintiff and awarded general damages in his favour in the sum of ₦2 million against all the defendants jointly and severally.

Being very dissatisfied with the judgment, the defendants (now appellants) appealed to the lower court. In that court, the appellants lost their appeal with regard to whether the trial court was right to have found them liable upon the claim for libel. The finding of the trial court was therefore affirmed. However, the appellants succeeded partially with respect to the quantum of damages awarded by the court. This is because the lower court reduced the sum of ₦2,000,000 awarded by the trial court to the sum of ₦250,000.

As the first appellant was dissatisfied with that judgment of the lower court, a further appeal was filed in this Court. The respondent, who was not also satisfied with the judgment, has also appealed to this Court. For the first appellant, five grounds of appeal were filed by its learned Counsel. And for the respondent, his learned Counsel filed three grounds of appeal. Subsequently briefs of arguments were filed and exchanged by the parties.

In the brief of argument filed for the first appellant by his learned Counsel, GI Ikoku Esq., four issues were identified for the determination of the appeal. They are:

(i) Whether the first appellant proved the truth of the publication made by them concerning the respondent, and if so whether the plea of justification was available to them?
(ii) Whether the auctioneer was an independent contractor having regard to the instructions, and if he had been employed to do something unlawful thereby making the appellant vicariously liable?

(iii) Whether the damages awarded were excessive in the circumstances of this case?

(iv) Was the Court of Appeal right to hold that the preliminary objection raised to the respondent’s brief is incompetent?

The respondent on whose behalf his learned Counsel CO Akpamgbo, Esq., S.A.N., filed the respondent’s brief of argument in which has set up the following issues for the determination of the appeal:–

“(i) Is the defence of justification available to the appellant?

(ii) Did the court evaluate properly the evidence oral and documentary, the latter to wit the High Court suit at Umualhia and Suit No. CA/E/133/83 in dismissing the issue of non-liability of the applicant?

(iii) Was the Court of Appeal right in holding that the service of the notice of the grounds of appeal was enough to warn the appellant not to proceed with the advertisement of sale explicit in exhibit F when an appeal was still pending?

(iv) Was the further reduction of damages awarded prayed for justifiable?”

As I have observed earlier, the respondent also appealed against certain aspects of the judgment of the court below. Pursuant thereto grounds of appeal were filed, and in accordance with the rules of the court, the learned Senior Advocate, CO Akpamgbo Esq., filed an appellant’s brief. The appellant in the main appeal did not respond to that brief by filing a respondent’s brief.

However, before considering the issues raised in this appeal, I must note that when the appeal was called for hearing, Counsel did not appear for either of the parties. The parties were not also present. But as the briefs have been filed and served as indicated above, the appeal was deemed
argued and heard on the said briefs. See Order 6 Rule 8(6) of the Rules of the Supreme Court, 1985 (as amended).

I will now consider the arguments proffered in respect of the main appeal. And it would be considered upon the issues formulated for the appellant in the appellant’s brief.

On Issue 1, which is whether the plea of justification was available to the appellant, the main contention made for the appellant in the appellant’s brief on this issue was that the liability of the appellant ought to be viewed strictly on the basis of the publication and not on imputations which do not expressly arise from it. It was therefore argued for the appellant that the auction notices (exhibits A and A1) alone that the court should construe to determine liability of the appellant. He then submitted that the auction notices are innocuous. In his view, all that they contained are the cardinal truths in the publications. These are: (a) the existence of a mortgage with the appellant bank, and (b) the ownership of the mortgaged properties advertised by the respondent B.B. Apugo. Learned Counsel then submitted that the learned trial Judge and the Court of Appeal were wrong to have accepted the innuendo pleaded by the respondent in respect of the publications in exhibits A and A1.

It is his further submission that it is immaterial whether the liability is personal or that of a third party provided the owner’s property was used as security or collateral. And also submitted that the publication did not say that the respondent owned personally or had a personal account with the appellant, but that his property was to be sold pursuant to a mortgage transaction with the appellant. It is of interest to observe that for the proposition of learned Counsel, no authority was cited in support for our consideration. Upon the basis of this proposition, learned Counsel then described as prevarication the view of the Court of Appeal, where it said that “the point in controversy here concerns the evaluation of exhibit F which is the written instruction by the appellant bank to the third appellant auctioneer to sell the mortgaged properties of the respondent”. For the appellant, the view of
learned Counsel appears to be that if exhibit F has been properly considered, the Court of Appeal ought to have held that as the appellant did not direct the auctioneer, per exhibit F, to publish the name of the respondent, then the appellant cannot be liable for the libel that resulted by the publications. More so, where the appellant had proved by the judgment in Suit No. HU/14/79 that the respondent was owing the appellant the sum of ₦1,236,938.66 when the publications were made. Upon that premise the learned Counsel for the appellant then argued that the Court of Appeal erred in failing to admit as proved the debt owed to the appellant by the respondent. Hence, he argued that the court below misdirected itself when it held that:

“To succeed in a plea of justification, the appellants ought to lead evidence to show that the respondent was at the material time indebted to the appellant bank.”

He further argued that with regard to the judgments pleaded, one of which was admitted by the court below, and also admitted by the parties in their pleadings, it became unnecessary by virtue of section 74 of the Evidence Act to prove the judgments strictly. He cited in support of that submission, the following cases: *A.O. Udofia and Others v O.A. Udo Afia* (1940) 6 WACA 216; and *Chief Baron Nwizuk v Chief Waiytco Eneyok* (1953) 14 WACA 354. He therefore urged that Issue 1 be resolved in favour of the appellant.

With the arguments proffered for the appellant copiously set out, I will now consider the issue in the light of the argument offered for the respondent by his learned Counsel and the judgment of the court below. The first point made for the respondent is that a plea of justification in libel, if sustained, is a complete defence. But if it fails, it aggravates damages. In support of this submission, reference was made to the case of *Ezekwe v Otomewo, Lessor and God’s Kingdom Society* (1957) WRNLR 130; and he further submitted that it is the defendant that has the burden of establishing the plea. The following cases were cited in support of that

b It is also the submission of learned Counsel for the respondent in the respondent’s brief, that if a publication is found to be libelous and actionable the intention of the defamer is not relevant. It is inadvertence a fact which must be pleaded and to which evidence must be part of the case of the defamer. And then invited our attention to the case of Cassidy v Daily Mirror (1929) 2 KB 331; 1929 ALL E. Rep. 117.

c I have earlier in this judgment set out what I considered to be the relevant paragraphs of the pleadings that formed the basis of this appeal. It is evident from a careful study of the pleadings that as part of their defence, the appellant sought to avoid liability for the defamatory publications upon the plea of the truth of the publication in exhibits A and A1. In other words, the appellant is claiming that the publications represent the truth of the transactions between the parties.

d Put briefly, the contention of the appellant is that the publication has only shown that the respondent’s properties were to be sold by public auction. That this only meant that the respondent’s properties were to be sold by public auction as the respondent was indebted to the appellant and had been unable to liquidate the said debt. On the other hand, the respondent’s case is that he has never been indebted to the appellant. And that for that reason, the publication gave the false impression that he was indebted to the appellant, and was to all reasonable persons impecunious, and could not fulfil his financial obligations.

Before the court below, it was argued for the appellant that the plea of justification was established in that it was established against the respondent that he owed the bank, and his properties which he pleaded to the appellant for the loan granted to B.B. Apugo and Sons Limited were properly put up for sale. That argument was duly considered and rejected
by the court below. In the course of its judgment, per Edozie JCA, who read the leading judgment said:

“To succeed in a plea of justification, the appellants ought to lead evidence to show that the respondent was at the material time indebted to the appellant bank. This they failed to do for on their own showing, the DW1 the Advances Officer of the Bank confirmed in evidence under cross-examination that it was not the respondent but the company B.B. Apugo and Sons Limited which was its customer and by implication ‘that the respondent was not indebted to the bank’.”

It is manifest that though it has been argued for the appellant in this Court that the judgment of the lower court be set aside, there has been no appeal to challenge this finding of the court below. The finding as a matter of fact is a confirmation of the conclusion of the trial court that the appellant did not establish by any evidence that the respondent was a customer of the appellant nor was he shown to have been indebted to the bank. Hence the court below, like the trial court, came to the conclusion that the appellant did not establish the plea of justification.

In the context of this appeal, I think it is desirable or indeed helpful to consider the effect and the meaning of the plea of justification by a defendant in a case of defamation. In other words, what advantage or effect would the plea of the truth of the words complained of be for a defendant as in the instant appeal.

May I therefore refer to what the learned authors of Gatley on *Libel and Slander* (7ed) had to say on the questions I have raised above. At page 152 of their work, paragraph 351, the principle germane to the question is put thus:

“The plaintiff establishes a *prima facie* cause of action as soon as he has proved the publication of defamatory words. It is no part of the plaintiff’s case in an action of defamation to prove that the defamatory words are false, for the law presumes this in his favour. *Belt v Lawes* (1882) 51 LJQB 361. It is, however, a complete defence to an action of libel or slander that the defamatory imputation is true. *The truth of the imputation is an answer to the action, not because it negates malice, but because the plaintiff has no right to a character free from that imputation, and if he had no
right to it, he cannot in justice recover damages for the loss of it, it is damnum absque injuria. M`pherson v Daniels (1892)."

But for the defendant to be entitled to this defence he has a burden which he had to discharge. This burden that rests on the defendant was in Dumbo v Idugboe (1983) 1 SCNLR 29 at 51, per Obaseki JSC put thus:–

“To establish a plea of justification the defendant must prove that the defamatory imputation is true. The defendant must justify the precise imputation complained of. In other words, strict proof is demanded. At common law, under a plea of justification, the defendant must prove the truth of all the material statements in the libel. There must be substantial justification of the libel. To make a good plea of the whole charge, the defendant must justify everything that the libel contains which is injurious to the plaintiff. A plea of justification means that the libel is true, not only in its allegation of fact, but also in any comments made thereon. The defendant therefore has the onus to prove not that only the facts are truly stated but also that any comments on them are correct. See Peter v Bradlaugh (1884) 4 TLR 467; Kerr v Force (1826) 3 Crunch C.C.8 at 24; Truth (N.Z.) v Holloway (1960) 1 W.L.R. 996 (p.c.); Wernher Bart v Markham (1901) 18 TLR 143, 763; John v Gittings (1959) Cro Eliz 239; Clarkson v Lawson (1926) 6 Bing 266; 3 MOO. and P; Cooper v Lawson (1938) 8 A & E 746; Sutherland v Stopes (1925) AC at 62, 63, 75.”

It is manifest from the above quoted passage from the judgment of Obaseki JSC in Dumbo v Idugbe (supra) that a defendant who is relying on a plea of justification to avoid liability in respect of an allegation of defamation against such a defendant has, indeed, an uphill task. To succeed he must prove, and that very strictly, the truth of every allegation of fact made in the libel. Although, it is not necessary to prove the truth of every word in the libel, the defendant is however obliged to prove that the main charge or gist of the libel is true. He need not justify the statements or comments which do not add to the sting of the charge. See Sutherland v Stopes (supra).

It follows then that the question that has to be answered in this appeal is whether the appellant has proved the “main charge” or the gist of the libel. The appellant has argued that
it has established that burden. The argument in support of
that contention is similar to that which was rejected by the
court below. And I have not been shown any reason that
should dissuade me from upholding the judgment of the
court below on this question.

I think it must be noted that the gist of the libel in the in-
stant appeal is that the respondent was indebted to the ap-
pellant and was unable to pay this debt, hence his properties
which he had mortgaged to the appellant as security for the
loan had to be sold. For that defence of justification to ab-
solve the appellant from liability for this libel, the appellant
must prove that the respondent was truly indebted to the ap-
pellant. The evidence in this regard was not available. The
only evidence led and which the courts below had accepted,
and rightly too, is that a company known as B.B. Apugo and
Sons Limited was the corporate body that was granted the
loan, and not the respondent. If the respondent did not take
any loan from the appellant and was not even found to be a
customer of the appellant, it must follow that he cannot be
properly described as a person indebted to the appellant.
And if he is not indebted to the appellant it must be libelous
to hold him out as one who was indebted. It is also defama-
tory of the respondent to publish or cause to be published in
and other places that the properties of the respondent would
be auctioned to liquidate the debt he owed to the appellant.

Having reached the conclusion that the appellant has failed
to persuade me to overturn the decision of the court below
that the appellant is liable for defaming the respondent by
the publication concerning the respondent, I must now con-
sider whether that conclusion could be affected by the con-
duct of the auctioneer. The auctioneer has not appeared in
this appeal, but he was the third appellant in the court below.
However, it is contended for the appellant that the authority
given to an auctioneer does not extend so as to make the
vendor liable for injury caused by the auctioneer’s negli-
gence to a person attending the sale; unless the vendor had
instructed the auctioneer to do any unlawful act or thing
whereby injury was caused. The response of the respondent to this contention is to the effect that the appellant cannot absolve himself of liability by hiding under the auctioneer.

Earlier in this judgment reference was made to the bidding principle governing obligations of a plaintiff and a defendant in an action in defamation, particularly, where as in the instant case, the defendant is pleading justification as its defence. The principle in this kind of case, if I may repeat, is that where a plaintiff has established that he was defamed by words published or caused to be published by the defendant, the onus lies on the defendant to prove the truth of ones words so published. If, as it is now argued for the appellant, the defamatory words were wrongly published due to the auctioneer, the question then is whether that is a defence that could absolve the appellant from liability. Going by the argument of learned Counsel for the appellant, the auctioneer should be regarded as an independent contractor, though he was instructed to sell the properties of the respondent by virtue of the instructions he received from the appellant, via exhibit F.

In the consideration of this question, I find apposite the statement of Farwell, LJ in *Hulton and Co. v Jones* (1909) 2 KB 444 at 378:-

“The rule is well settled that the true intention of the writer of any document whether it be contract, will or libel is that which is apparent from the natural and ordinary interpretation of the written words, and this, when applied to the description of an individual, means the interpretation that would be reasonably put upon those words by persons who know the plaintiff and the circumstance.”

In the circumstance, it must be regarded as settled that liability for libel depends, not on the intention of the defamer, but on the fact of defamation. A person is liable for the reasonable inferences to be drawn from the words he used, whether he foresaw them or not, and if he scatters two-edged and ambiguous statements broadcasts without knowing or making inquiry about facts material to the statements he makes and the inferences which may be drawn from the words he
publishes. A statement, which on the face of it is not defamatory, may become so when published to persons who know the facts which enabled persons to whom the libel was published to draw an inference defamatory of the plaintiff. See *Cassidy v Daily Mirror Newspapers Limited* (1929) ALL ER Rep. 117.

Accordingly, when a newspaper published that written instruction had been received from the mortgagees, the African Continental Bank Limited, to the licensed auctioneer, CC Mojekwu Esq., to sell by public auction a (sic) leasehold and freehold properties of BB Apugo, that notice to those who knew BB Apugo meant that the said BB Apugo was indebted to the bank, and as he was unable to fulfil his financial obligations to the bank, his properties have to fall by the hammer of the auctioneer.

The respondent, the said BB Apugo, gave evidence and called witnesses who so testified. The evidence so given was accepted by the trial court and the court below. In my respectful view, I find nothing in the contention of the appellant to upset these concurrent findings of the courts below. Moreover it must be observed it was the duty of the appellant to have ensured that the notice to the public in respect of this matter reflected the person or persons who were owing the bank, and lead evidence accordingly. I therefore must hold that this issue also lacks merit.

The appeal in respect of damages would now be considered. The lower court, though it upheld the decision of the trial court, thought that the sum of ₦2 million awarded as damages was on the high side, and reduced it to the sum of ₦250,000. The appellant has also appealed against this award of ₦250,000 and would want this Court to reduce it to the sum of ₦10,000. The contention of learned Counsel for that downward review is that the respondent is not entitled to more than nominal damages. I do not think that that argument has merit and it is hereby rejected.
More importantly, however, the respondent as I have said above filed a cross appeal against the reduction by the Court of Appeal of the sum of ₦2 million awarded by the trial court. It is the contention of the learned Senior Advocate, CO Akpamgbo Esq., that the lower court was wrong to have interfered with the award made by the trial court.

It is no doubt eminently right that the respondent/cross-appellant be awarded general damages. This right flows from his success in establishing his claim for libel against the appellant/cross-respondent. See *Ratcliffe v Evans* (1892) 2 ABD 519 at 529; *Williams v Daily Times* (1990) 1 NWLR (Part 124) 1; *Dumboe v Idugboe* (1983) 1 SCNL 29.

However, what has always been the cause of considerable argument in several cases is whether an appellate court ought to interfere with the award of damages made by a trial court. Now it is a basic principle that an appellate court ought not to upset the award of damages by a trial court merely because if it had tried the matter it would have awarded a lesser amount. See *Flint v Lovell* (1935) 1 KB 354 at 360; *James v Mid Motors (Mg.) Limited* (1978) 12 SC 31. However, an appellate court may properly intervene where it is satisfied that the Judge in assessing the damages applied a wrong principle of law such as taking into account some irrelevant facts or leaving out of the account some relevant factors, or that the amount awarded is either so ridiculously low or so ridiculously high that it must have been a wholly erroneous estimate of the damage. See *Harold Shodipo and Co. Limited v Daily Times (Nig.) Limited* (1972) 11 SC 69; *Uwa Printers (Nig.) Limited v Investment Trust Co. Ltd* (1988) 5 NWLR (Part 92) 110; *Obere v Board of Management, Eku Baptist Hospital* (1978) 6-7 SC 15; *Agaba v Otubusin* (1961) 2 SCNL 13; *Weideman and Walters (Nig.) Limited v Oluwa In Re: Intra Motors (Nig.) Limited* (1968) 1 All NLR 383.

It has been argued very vehemently in the instant appeal that the court below was wrong to have intervened in the award of ₦2 million to the cross-appellant by reducing it to
the sum of ₦250,000. Learned Senior Advocate, CO Akpamgbo Esq., argued that as the lower court proceeded mostly on the wrong premises in reducing the damages awarded, though he conceded that the court was right to have also considered the diminishing value of the Naira in making the award.

I have before now set down the principles that an appellate court ought to follow before it may intervene in the award of damages made by a trial court.

In the instant appeal, the cross-appellant’s contention that the lower court reduced the award on wrong principles cannot be wholly right. A careful reading of that judgment of the lower court where it dealt with the reduction of damages was a careful assessment of all the circumstances of the case to show that the award of the sum of ₦2 million to the cross-appellant was ridiculously high. After a careful consideration of the argument advanced for the cross-appellant, I have come to the conclusion that the court below was right to have reduced the award to the sum of ₦250,000.

In the result, for the reasons given above, the main appeal is devoid of any merit and it is dismissed. The cross appeal is also dismissed as explained above.

The respondent/cross-appellant is awarded costs in the sum of ₦10,000. There is no order for costs in favour of the appellant/cross-respondent.

WALI JSC: I am privileged to have read before now, the lead judgment of my learned brother, Ejiwunmi JSC, and I agree with his reasoning for dismissing both the main appeal and the cross appeal. I also hereby dismiss the main appeal and the cross appeal. I abide by the consequential orders made in the lead judgment.

OGWUEGBU JSC: I have had the advantage of a preview of the judgment of my learned brother, Ejiwunmi JSC. I agree with his reasoning and conclusions. I accordingly dismiss the defendant’s appeal and the plaintiff’s cross appeal. There
a will be costs of ₦10,000 in favour of the plaintiff in the main appeal.

MOHAMMED JSC: I agree that both the main appeal and the cross appeal have failed. My learned brother, Ejiwunmi JSC, has considered the facts and the law and reached a conclusion which I agree with entirely. I therefore dismiss both the main appeal and the cross appeal. I abide by the order made in the lead judgment on costs.

KALGO JSC: I have had the opportunity of reading in draft the judgment of my learned brother, Ejiwunmi JSC, in this appeal and I am in full agreement with him that the appeal lacked merit and should be dismissed.

Before making any point in emphasising what my learned brother considered in the said judgment, let me deal with the preliminary objection raised by the respondent’s Counsel on page 8 of his brief. This objection concerned the issue of the notice of preliminary objection which was discussed by the appellant’s Counsel on page 16 of his brief. The main objection of the respondent’s Counsel was that this issue was not related to any ground of appeal, and should therefore be struck out. But in the notice of appeal filed by the appellant to this Court, see page 269 of the record, the issue of the preliminary objection was specifically made ground 1 of the notice on page 270 of the record. The appellant was perfectly justified in discussing this issue in paragraph 9 at page 16 of his brief. This objection is therefore overruled.

The second objection raised by the respondent’s Counsel was in the “conclusion” at the end of the appellant’s brief. In my view this has nothing to do with any ground of appeal and it only contains the final prayers the appellant was asking for in the light of the contents of his brief and the circumstances of the case. In any case this Court has wide powers to deal with any appeal before it and make any order as it thinks just to ensure the determination on the merits of the real issues in controversy between the parties. See Order 8 Rules 12(2) and (5) in particular of the Rules of Supreme Court,
1985 (as amended) and the case of Omokkafe v Esekhomo (1993) 8 NWLR (Part 309) 58. Under the general powers of the court mentioned above, it can even order a retrial where it considered it just and in the best interest of the parties. This objection has no merit and it is also overruled.

The main and the substantive issue to be considered in this appeal is whether the respondent was in any way indebted to the appellant to justify the publication, as per exhibits A and A1, that his leasehold and freehold properties be sold by public auction to settle the debt.

By a letter dated 11 August, 1983, the appellant through its secretary/chief legal adviser wrote the auctioneer, Mr CC Mojekwu, informing him that the appellant had obtained judgment against B.B. Apugo and Sons Ltd for ₦1,236,938.66 in case no. HU/14/79 in the High Court and that the appellant had perfected legal mortgage of certain properties which should immediately be sold to satisfy the judgment. The letter, which instructed the auctioneer to proceed to sell the mortgaged property, was admitted in evidence as exhibit F. It is significant to observe that exhibit F did not specifically mention the name of the respondent. Unfortunately the auctioneer on receipt of exhibit F decided to advertise the auction and so by publications, which appeared in the Nigerian Statesman and the Sunday Statesman newspapers on 20 and 21 August, 1983, admitted in evidence as exhibits A and A1 respectively. The paragraph of exhibits A and A1, which formed the basis of this action, reads:

“A written instruction has been received from the mortgagee, THE AFRICAN CONTINENTAL BANK LIMITED to the Licensed Auctioneer (sic) C.C. MOJEKWU, ESQ. to sell by public auction a leasehold and freehold properties of B.B. Apugo.”

At the trial the respondent called evidence, which was believed by the learned trial Judge, that he was never indebted to the appellant and that the publication has shown in the eyes of the public that the auction sale of his landed properties was to satisfy the debt he owed to the appellant. There
was also evidence, which the court believed, to the effect that the respondent was insolvent and unable to pay his debts and, as a big businessman, his business prospects were destroyed and his image completely damaged. There is no doubt, therefore, that the respondent was defamed and the publications in exhibits A and A1 constituted the tort of libel. See *Nsirim v Nsirim* (1990) 2 NWLR (Part 138) 285.

In the case of libel of defamation, justification, fair comment or the proof of the truth of the publication complained of is a complete defence to the action. See *Din v African Newspapers* (1990) 2 NWLR (Part 139) 392 at 409. The onus of such proof lies squarely on the appellant in this case but unfortunately, from the evidence on record, the appellant has failed completely to prove any justification for or the truth of what was published against the respondent in exhibits A and A1. I therefore agree with the trial court and the Court of Appeal that the appellant was liable in damages for the tort of libel in favour of the respondent.

On the quantum of damages, I am of the view that in assessing the damages in this case, the Court of Appeal has taken into consideration relevant matters in arriving at the sum of ₦250,000 awarded to the respondent in the circumstances of this case. See *Ejabulor v Osha* (1990) 5 NWLR (Part 148) 1 at 16. The cross appeal by the respondent on the award of damages by the Court of Appeal therefore fails.

Finally, for the above reasons and all those given in detail by my learned brother, Ejiwunmi JSC, in the leading judgment, this appeal and the cross appeal fail. I abide by the order of costs made in the said judgment.

*Appeal dismissed.*
Unity Life and Fire Insurance Co. Limited v International Bank of W.A. Limited

SUPREME COURT OF NIGERIA
IGUH, AYOOLA, BELGORE, EJIWUNMI, KATSINA-ALU JJSC
Date of Judgment: 9 March, 2001

Banking – Entry in a banker’s book – Section 96(1)(h) and (2)(e) Evidence Act Cap 62 Laws of the Federation of Nigeria, 1958 – Admissibility of – Principles governing

Evidence – Entry in a banker’s book – Section 96(1)(h) and (2)(e) Evidence Act Cap 62 Laws of the Federation of Nigeria, 1958 – Admissibility of – Principles governing

Facts
Imano Nigeria Limited applied for and was granted some loan/overdraft facility by the plaintiff bank to the tune of ₦140,000 with interest at the rate of 11½% per annum to purchase a jetty at Warri. The defendant/appellant agreed to and duly guaranteed the overdraft extended by the plaintiff to the company. The company utilised the said facility and as at 28 February, 1982 became indebted to the plaintiff in the sum of ₦238,203.27 as claimed. Both the company and the defendant/appellant having failed or neglected to liquidate the debt in spite of repeated demands, the plaintiff was obliged to file an action in the High Court. The defendant’s position was a general denial of the plaintiff’s claim.

At the subsequent trial, one witness testified on behalf of the plaintiff and tendered several documentary exhibits. These included the company’s statement of account with the plaintiff bank, exhibit 5; exhibit 5 was tendered by the plaintiff without any objection by the defendants and was accordingly admitted in evidence by consent.

At the close of the plaintiff’s case, both Counsel for the defendants elected not to call any evidence. It must also be pointed out that both defendants had earlier declined to cross-examine the plaintiff’s sole witness even though his
The testimony was strictly in line with the averments in the plaintiff’s statement of claim. Accordingly, learned Counsel for the plaintiff at the close of the case for both parties addressed the court.

In their reply, learned Counsel for the defendants submitted that there was no proof of the amount claimed by the plaintiff as exhibit 5, the first defendant’s statement of account with the plaintiff was inadmissible in evidence for non-compliance with the provisions of sections 96(1)(h) and 96(2)(e) of the Evidence Act Cap 62 Laws of the Federation of Nigeria and Lagos, 1958. This contention found favour with the learned trial Chief Judge, Johnson CJ, who was of the view that there was failure on the part of the plaintiff to establish that exhibit 5 was examined with the original entry in the plaintiff’s ledger. He therefore held that this lacuna in the evidence of the plaintiff rendered the document inadmissible.

He, however, proceeded on the basis of the other documentary evidence before the court to hold that the plaintiff had established its claim against both defendants in the sum of ₦139,351.39.

Dissatisfied with the judgment of the trial court, both parties appealed against the same to the Court of Appeal, Lagos Division. On 4 July, 1989, the court below in a unanimous judgment dismissed the main appeal of the defendants but the plaintiff’s cross appeal was allowed. The judgment of the learned trial Chief Judge was set aside and, in substitution thereof, judgment was entered for the plaintiff against the defendants jointly and severally in the sum of ₦238,203.27 together with interest at the rate of 11½% per annum from 12 February, 1982 until the liquidation of the judgment debt.

Aggrieved by this decision of the Court of Appeal, the defendants have further appealed to the Supreme Court. The plaintiff did also appeal against that part of the decision of
the court below which dismissed its objection that there was no valid appeal filed by the defendants in the suit.

Sections 96(1) and (2) of the Evidence Act provide as follows:

"96(1) Secondary evidence may be given of the existence, condition and contents of a document in the following cases . . .

(h) when the document is an entry in a banker’s book.

96(2) The secondary evidence admissible in respect of the original documents referred to in the several paragraphs of subsection (1) is as follows:

(e) In paragraph (h) the copies cannot be received as evidence unless it be first proved that the book in which the entries copies were made was at the time of making one of the ordinary books of the bank, and that the entry was made in the usual and ordinary course of business, and that the book is in the custody and control of the bank, which proof may be given orally or by affidavit by a partner or officer of the bank, and that the copy has been examined with the original entry and is correct, which proof must be given by some person who has examined the copy with the original entry and may be given orally or by affidavit.”

Held –

1. Under section 96(1)(h) of the Evidence Act, secondary evidence may be given of the existence, condition and contents of a document when, inter alia, the document is an entry in a banker’s book. Although that section of the law does not state what form of secondary evidence is admissible thereunder, it is clear under section 96(2)(e) of that Act that it is a copy of an entry in a banker’s book that is admissible. Such a copy may not, however, be received of the entry in the relevant banker’s book unless it is first established:

(i) that the book in which the entries copies were made was at the time of making one of the ordinary books of the bank;
(ii) that the entry was made in the usual and ordinary course of business;
(iii) that the book is in the custody and control of the bank; and
(iv) that the copy has been examined with the original entry and is correct.

2. It is not the length of evidence given in tendering a copy of entries in a banker’s book that determines its admissibility or otherwise under the said section 96(2)(e) of the Evidence Act. What matters is whether the substance of such evidence, broadly speaking, covers the requirements set out in that section of the relevant Act. In this regard, it ought to be pointed out that such evidence needs not be in the precise language of section 96(2)(e) of the Evidence Act so long as it is in substance in compliance with the provisions of the subsection. Provided the evidence adduced before the court substantially covers the requirements of subsection 2(e) of the relevant section of the Evidence Act, the secondary evidence in question will become admissible in proof of the existence, condition and contents of the entries in the banker’s book.

3. It is also sufficient to satisfy the requirements of the said section 96(2)(e) if, from the totality of the evidence tendered on the matter, necessary and natural inference can be made which would amount to compliance with the section.

4. By section 2 of the Evidence Act, a ledger is one of the ordinary books of the bank.

5. A court of law is expected in all proceedings before it to admit and act only on legal evidence. Accordingly, where a trial court inadvertently admits evidence which is absolutely inadmissible, it has a duty generally not to act upon it but rather to discountenance it. So, too, if a document is unlawfully received in evidence in the trial court, an appellate court has inherent jurisdiction to
exclude and discountenance the document even though
learned Counsel at the trial court did not object to its ad-
mission in evidence. Although, therefore, a document is
unlawfully received in evidence in the trial court without
objection by or on behalf of an appellant, it would still be
open to such appellant in the appellate court, particularly
where a miscarriage of justice is hereby occasioned, to
object to it since it is the duty of the appellate court to ex-
clude inadmissible evidence which was erroneously re-
ceived in evidence during the trial.

6. Where, however, a party to a civil proceeding consented
to a procedure at the trial which procedure is neither un-
constitutional nor amounts to a nullity but is merely
wrong or irregular and he in fact suffered no injustice
and no miscarriage of justice is thereby occasioned, it
would be too late to complain on appeal about such
wrong procedure having been adopted simply because
that party lost the case in the trial court.

7. In the case of documentary evidence in a civil case, for-
mal proof thereof can always be waived by a party to the
proceeding where the document is not absolutely inad-
missible in law for all purposes.

8. Where, therefore, inadmissible evidence is tendered, it is
the duty of the other party or Counsel on his behalf to
object immediately to the admissibility of such evidence.
If, however, such other party fails to raise any objection
as aforesaid or consents to the admissibility of such evi-
dence, the trial court in civil cases may (and in criminal
cases must) reject such evidence *ex proprio motu*. On
appeal, however, and provided the evidence complained
of is one which by law is admissible albeit under certain
conditions and the party complaining did not object to or
consented to its admissibility at the trial although the
conditions precedent to its admissibility were not shown
to have been satisfied, he cannot be allowed to raise any
objection as to its admissibility in the appellate court.
9. In the present case, it is section 96(2)(e) of the Evidence Act which governs the admissibility or otherwise of exhibit 5, a certified true copy of a bank’s statement of account which, pursuant to the said section of the law, is expressly declared to be admissible if certain conditions therein stipulated are satisfied. Exhibit 5 is not therefore a document which by law is absolutely inadmissible in all courts of law in any event and in all circumstances. That being so and the appellant not having objected to its admissibility in evidence at the time it was tendered but rather consented thereto and, therefore, waived formal proof before the trial court, it may not now raise the question of the inadmissibility of the document before this Court or in the court below.

10. The learned trial Chief Judge having admitted exhibit 5 in evidence by consent and without any objection to its admissibility and the said exhibit 5 not being a document that was inadmissible in law in any event and in all circumstances, erred in law by expunging the same from the proceedings.

Appeal dismissed.

Cases referred to in the judgment

Nigerian

Ajayi v Fisher (1956) SCNLR 279
Akanbi v Alao (1989) 3 NWLR (Part 108) 118
Akhiwu v The Principal Lotteries Officer, Mid-Western State of Nigeria (1972) 1 All NLR (Part 1) 229
Akunne v Ekwuno 14 WACA 59
Alashe v Olorillu (1964) 1 All NLR 390
Ayanwale v Atanda (1988) 1 NWLR (Part 68) 22
Esso West Africa Incorporated v Alli (1968) NMLR 414
Etim v Ekpe (1983) 1 SCNLR 120
F.C.D.A. v Naibi (1990) 2 NWLR (Part 138) 270
Idahosa v Oronsaye (1959) SCNLR 407
Imana v Robinson (1979) 3–4 SC 1
Insurance Brokers of Nigeria v A.T.M. Co. Ltd (1996) 8 NWLR (Part 466) 316
Ipilaiye II v Olukotun (1996) 6 NWLR (Part 453) 148
Kassen (Nig.) Ltd v Savannah Bank (1995) 9 NWLR (Part 420) 439
Nigerian Maritime Services Ltd v Afolabi (1978) 2 SC 79
Oguma v International Bank for West Africa Ltd (1988) 1 NWLR (Part 73) 658
Okeke v Obidife (1965) 1 All NLR 50; (1965) 4 NSCC 36
Okwechime v Igbinador (1964) NMLR 132
Olukade v Alade (1976) ANLR (Part 1) 67
Owonyin v Omotosho (1961) 1 All NLR 304
Yaya v Mogoga (1947) 12 WACA 132
Yassin v Barclays Bank D.C.O. (1968) All NLR 171
Yesufu v A.C.B. Ltd (1976) 1 NMLR 83

Foreign
Jacker v International Cable Co. Ltd (1888) 5 TLR 13
Gilbert v Endean (1878) 9 Ch.D. 259

Nigerian statute referred to in the judgment
Evidence Act Cap 62 Laws of the Federation of Nigeria, 1958, section 96(1)(h), 96(2)(e)

Counsel
For the appellant: Chief TA Ezeobi
For the respondent: Onyeabo C Obi, Esq.

Judgment
IGUH JSC: (Delivering the lead judgment) In the Lagos Judicial Division of the High Court of Lagos State, the
plaintiff instituted an action claiming, jointly and severally, against the defendants the sum of N238,203.27. This amount was said to be due and payable by the defendants to the plaintiff as at 28 February, 1982 as per the plaintiff’s amended statement of claim. The said amount comprised the principal amount lent, interest at the rate of 11½% per annum and other bank charges outstanding against the first defendant as at 25 February, 1982 as reflected in the first defendant’s statement of account with the plaintiff bank. The transaction was secured by a Deed of Guarantee executed by the second defendant in favour of the plaintiff.

Pleadings were ordered in the suit and were duly settled, filed and exchanged.

The brief facts of the case are that the first defendant applied for and was granted some loan/overdraft facility by the plaintiff bank to the tune of N140,000 with interest at the rate of 11½% to purchase a jetty at Warri. The second defendant agreed to and duly guaranteed the overdraft extended by the plaintiff to the defendant. The first defendant utilised the said facility and as at 28 February, 1982 became indebted to the plaintiff in the sum of N238,203.27 as claimed. Both defendants having failed or neglected to liquidate the debt in spite of repeated demands, the plaintiff was obliged to file this action.

The defendant’s position was a general denial of the plaintiff’s claim.

At the subsequent trial, one witness testified on behalf of the plaintiff and tendered several documentary exhibits. These included the first defendant’s statement of account with the plaintiff bank, exhibit 5. Exhibit 5 was tendered by the plaintiff without any objection by both defendants and was accordingly admitted in evidence by consent.

At the close of the plaintiff’s case, both Counsel for the defendants elected not to call any evidence. It must also be pointed out that both defendants had earlier declined to cross-examine the plaintiff’s sole witness even though his
testimony was strictly in line with the averments in the plaintiff’s statement of claim. Accordingly, learned Counsel for the plaintiff at the close of the case for both parties addressed the court.

In their reply, learned Counsel for the defendants submitted that there was no proof of the amount claimed by the plaintiff as exhibit 5, the first defendant’s statement of account with the plaintiff was inadmissible in evidence for non-compliance with the provisions of sections 96(1)(h) and 96(2)(e) of the Evidence Act Cap 62 Laws of the Federation of Nigeria and Lagos, 1958. This contention found favour with the learned trial Chief Judge, Johnson CJ, who was of the view that there was failure on the part of the plaintiff to establish that exhibit 5 was examined with the original entry in the plaintiff’s ledger. He therefore held that this lacuna in the evidence of the plaintiff rendered the document inadmissible. Said he:—

“There is in this case no evidence of the requisite examination of the copy made with the original and a confirmation of its correctness. This failure to my mind is fatal to the admission of exhibit 5 which is hereby rejected.”

He, however, proceeded on the basis of the other documentary evidence before the court to hold that the plaintiff had established its claim against both defendants in the sum of ₦139,351.39. Referring to the said documentary evidence, the learned Chief Judge commented:—

“The above correspondence in my considered view constitute an admission by both defendants of their indebtedness to the plaintiff, at least, in the sum of ₦139,351.39. Exhibit 4, the guarantee executed by the 2nd defendant and not disputed or challenged in any way, covers the sum of ₦140,000 up to 24.8.81. The balance of ₦139,351.39k represents the total indebtedness up to 11.6.81 as shown in the series of correspondence earlier referred to.

It is therefore my conclusion that there is enough admissible evidence establishing the indebtedness of both defendants to the plaintiff jointly and severally in the sum of ₦139,351.39k. I hereby enter judgment in favour of the plaintiff jointly and severally against both defendants, in the sum of ₦139,351.39k with costs to be assessed.”
No finding or award was made in respect of the plaintiff’s claim for interest and other bank charges. Dissatisfied with the judgment of the trial court, both parties appealed against the same to the Court of Appeal, Lagos Division. On 4 July, 1989, the court below in a unanimous judgment dismissed the main appeal of the defendants but the plaintiff’s cross appeal was allowed. The judgment of the learned trial Chief Judge was set aside and, in substitution thereof, judgment was entered for the plaintiff against the defendants jointly and severally in the sum of ₦238,203.27 together with interest at the rate of 11½% per annum from 12 February, 1982 until the liquidation of the judgment debt.

Aggrieved by this decision of the Court of Appeal, the second defendant has further appealed to this Court. The plaintiff did also appeal against that part of the decision of the court below which dismissed its objection that there was no valid appeal filed by the defendants in the suit. I may, in passing, observe that the first defendant, the principal debtor, has not appealed against this decision of the Court of Appeal.

Five grounds of appeal were filed by the second defendant against this decision of the Court of Appeal. The plaintiff, for its own part, filed three grounds of appeal against the same decision of the court below. It is unnecessary to reproduce them in this judgment. It suffices to state that the second defendant pursuant to the rules of this Court filed its brief of argument in which five issues were identified for the determination of this Court. These are framed thus:–

1. Whether the court below was not right in holding that there was a valid appeal before it.

2. Whether in all the circumstances of this case the court below was right in treating the 2nd defendant/appellant’s amended statement of defence filed out of time with leave of court as void and thereby deemed all the averments in the amended statement of claim as admitted by the appellant entitling the plaintiff/respondent to judgment in terms of its said amended statement of claim.
(3) Whether on all the facts and circumstances of this case the court below was right in holding that there was compliance with section 96(2)(e) of the Evidence Act and therefore that exhibit 5 in the proceedings (the respondent bank’s statement of account) was, in the first instance, rightly admitted in evidence at the trial but subsequently wrongly rejected, by the learned trial Chief Judge, in his judgment.

(4) Whether the court below was right in entering judgment against the 2nd defendant/appellant when no liability of the 1st defendant to the plaintiff/respondent for which the appellant was answerable was established by legal evidence.

(5) Whether the court below was right in entering judgment against the appellant for ₦238,203.27 together with interest thereon from 12/2/82, or at all, when by the relative guarantee, the amended statement of claim and other facts on the record, the appellant’s liability (if any) as especially endorsed on the said guarantee and claimed by the appellant was for a fixed and determined sum of ₦140,000 and no more.”

The plaintiff, for its own part, similarly identified five issues for resolution in these appeals. These issues are set out in the second respondent’s brief of argument as follows:

“(1) Whether the Court of Appeal erred in law in discountenancing the amended statement of defence of the 2nd defendant (appellant herein) dated 4 October, 1985 filed on 8 October, 1985 (one year outside time and without any extension of time).

(2) Whether the Court of Appeal erred in law in overruling the decision of the High Court which in its judgment rejected the statement of the defendant’s account with the plaintiff (exhibit 5) for non-compliance with section 96(2)(e) of the then Evidence Act Cap 62 Laws of Nigeria, 1958 edition which the High Court had earlier admitted in evidence without any objection by the two defendants.

(3) Whether the Court of Appeal erred in holding that, even excluding the statement of account (exhibit 5), the plaintiff was entitled to judgment for the full amount of ₦238,203.27 together with interest at 11.5% claimed based on (a) the pleadings and/or (b) the oral and documentary evidence adduced at the trial.

(4) Whether the Court of Appeal erred in law in giving judgment against the appellant in the sum of ₦238,203.27 with
At the oral hearing of the appeal on 2 December, 2000, learned Counsel for the second defendant/appellant, Chief TAEzeobi adopted his brief of argument and proffered oral arguments in amplification of the submissions therein contained. He sought the leave of the court to abandon the first two issues formulated in his brief of argument. The application not having been opposed was granted and the two issues were accordingly struck out. This left the appellant with only Issues 3, 4 and 5.

A close study of the appellant’s remaining three issues reveals that they substantially correspond with Issues 2, 3 and 4 in the respondent’s brief of argument. However, having regard to the grounds of appeal filed and the arguments of Counsel in their respective briefs of argument, it seems to me that Issues 2, 3 and 4 as formulated in the respondent’s brief of argument are more germane for my consideration of this appeal than the appellant’s Issues 3, 4 and 5. I therefore propose in this judgment to adopt Issues 2, 3 and 4 as formulated in the respondent’s brief of argument for my resolution of this appeal.

The main thrust of the submissions of learned Counsel for the appellant under issue 2 is that with the first defendant’s statement of account, exhibit 5, being inadmissible in evidence under section 96(2)(e) of the Evidence Act, there is no other legal evidence on record to sustain any indebtedness on the part of the principal debtor, the said first defendant, and that there is therefore no consequential liability on the part of the appellant. He stressed that in the absence of
evidence that exhibit 5 was “examined” and compared with the “original entry” and found to be “correct”, the statement of account cannot be admissible in evidence. He invited this Court to hold that exhibit 5 was therefore rightly rejected by the trial court and that the court below was in grave error to have interfered with this finding. On Issues 4 and 5, which concern the question of liability, learned Counsel contended that the award of ₦238,203.27 against the appellant with interest at the rate of 11½% per annum from 12 February, 1982 is outside the guarantee contract and beyond the claim of the respondent against the appellant which, although this was not conceded, did not exceed the fixed sum of ₦140,000.

Learned Counsel for the respondent, Onyeabo C. Obi Esq., in his reply pointed out that exhibit 5 was tendered by the plaintiff/respondent at the trial without any objection by the appellants. He submitted that exhibit 5 was properly admitted in evidence by the trial court and that there was sufficient evidence in compliance with the requirements prescribed under the provisions of section 96(2)(e) of the Evidence Act. He cited a number of decided cases to buttress his contention that, in order to comply with the requirements of section 96(2)(e) of the Evidence Act, the words of the section need not be strictly adhered to. It is sufficient if the relevant conclusions can be inferred from proved facts. He referred to the decisions of this Court in Ibrahim Yassin v Barclays Bank D.C.O. (1968) NMLR 380, 1 All NLR 171 and Abolade Alade v Salawu Olukade (1976) 2 SC 183, (1976) 10 NSCC 34 and submitted that in-as-much-as exhibit 5 was admissible under certain conditions and not inadmissible in evidence in any event, and the same was tendered and admitted in evidence without objection at the trial, it was no longer open to the appellant to challenge its admissibility in the court below having regard to all the evidence led in respect thereto at the trial.

One witness testified for the plaintiff at the trial in this case. He is one Ademola Sunday Moronkeji who described
himself as a banker and a credit officer with the plaintiff bank. His evidence with regard to exhibit 5 reads as follows:–

“Defendant has not repaid the outstanding sum. I have a prepared statement of account. It was prepared by me, copied out from the ledger kept by the plaintiff bank. This is the account. Tendered. No objection by Sagoe. No objection by Akinosho. Admitted, marked exhibit 5. The balance outstanding as at February, 1982 is ₦238,203.27k.” (Italics supplied)

I will now examine the relevant section of the law under which the court below held that the statement of account, exhibit 5, was properly admitted in evidence by the trial court in compliance with the provisions of section 96(2)(e) of the Evidence Act but wrongly rejected by the same trial court in its judgment.

Section 96(1) of the Evidence Act provides as follows:–

“96(1) Secondary evidence may be given of the existence, condition and contents of a document in the following cases:–

(h) When the document is an entry in a banker’s book.”

There is then section 96(2) of the same Act which goes thus:–

“96(2) The secondary evidence admissible in respect of the original documents referred to in the several paragraphs of subsection (1) is as follows:–

(e) In paragraph (h) the copies cannot be received as evidence unless it be first proved that the book in which the entries copies were made was at the time of making one of the ordinary books of the bank, and that the entry was made in the usual and ordinary course of business, and that the book is in the custody and control of the bank, which proof may be given orally or by affidavit by a partner or officer of the bank, and that the copy has been examined with the original entry and is correct, which proof must be given by some person who has examined the copy with the original entry and may be given orally or by affidavit.”
It is indisputable that under section 96(1)(h) of the Evidence Act, secondary evidence may be given of the existence, condition and contents of a document when, inter alia, the document is an entry in a banker’s book. Although that section of the law does not state what form of secondary evidence is admissible thereunder, it is clear under section 96(2)(e) of that Act that it is a copy of an entry in a banker’s book that is admissible. Such a copy may not, however, be received as evidence of the entry in the relevant banker’s book unless it is first established:

(i) that the book in which the entries copies were made was at the time of making one of the ordinary books of the bank;

(ii) that the entry was made in the usual and ordinary course of business;

(iii) that the book is in the custody and control of the bank; and

(iv) that the copy has been examined with the original entry and is correct.

It is, however, necessary to point out that it is not the length of evidence given in tendering a copy of entries in a banker’s book that determines its admissibility or otherwise under the said section 96(2)(e) of the Evidence Act. What matters is whether the substance of such evidence, broadly speaking, covers the requirements set out in that section of the relevant Act. In this regard, it ought to be pointed out that such evidence need not be in the precise language of section 96(2)(e) of the Evidence Act so long as it is in substance in compliance with the provisions of the subsection. Provided the evidence adduced before the court substantially covers the requirements of subsection 2(e) of the relevant section of the Evidence Act, the secondary evidence in question will become admissible in proof of the existence, condition and contents of the entries in the banker’s book. See Ibrahim Yassin v Barclays Bank D.C.O. (1968) All NLR 171 and Festus Yesufu v A.C.B. Ltd (1976) 1 NMLR 83. It is
also sufficient to satisfy the requirements of the said section 96(2)(e) if from the totality of the evidence tendered on the manner, necessary and natural inference can be made which would amount to compliance with the section. So, in Yassin’s case, the witness at the trial did not expressly or specifically testify that the books he examined were in the custody and control of the bank. It was urged on appeal that this constituted non-compliance with the provisions of section 96(2)(e) of the Evidence Act. Dismissing this contention, this Court per Lewis JSC stated:–

“Finally, though we agreed that Mr Perrit never specifically said the books he examined were in the custody and control of the bank, this was the only natural inference to be derived from his evidence as an officer of that bank . . .”

Learned Counsel for the appellant has urged this Court to hold in the present case that there was no evidence of the requisite examination of the copy made with the original and a confirmation of its correctness and that this failure is fatal to the admission of exhibit 5 in evidence by the court below.

It cannot be doubted that, under section 96(2)(e) of the Evidence Act, secondary evidence of entries in a banker’s book may be given and received in any proceeding in proof thereof if the four requirements, I have already set out above, are complied with by one seeking to establish such facts. However, in resolving this submission of learned appellant’s Counsel, it is pertinent to point out, in the first place, that the witness who tendered the statement of account, exhibit 5, and whose testimony in this regard I have already reproduced was not cross-examined at all by the appellant on any issue concerning its correctness or accuracy. This witness who is a banker and an officer of the plaintiff bank testified in clear terms that he copied the statement of account, exhibit 5, from the plaintiff’s ledger. By section 2 of the Evidence Act, a ledger is one of the ordinary books of the bank and it is from those original books of the bank that the witness copied exhibit 5. From the oral evidence of this witness, as confirmed by exhibit 5, the outstanding balance
in respect of the first defendant’s account with the plaintiff as at February, 1982 was ₦238,203.27k. This is the amount claimed by the plaintiff against the defendants. As I have already stated, this witness was not cross-examined in any way on the accuracy of any of the entries in exhibit 5. I think I am inclined, in these circumstances, to agree with the court below that in the absence of any issue having been joined on the question of the accuracy or correctness of the entries in exhibit 5 and in further absence of any evidence from the defendants to the contrary, it may reasonably be presumed that the entries in exhibit 5 were correctly copied from the original bank ledger.

In the second place, and certainly more importantly, it must be observed that no objection whatsoever was raised by either of the two learned Counsel for the defendants to the admissibility of the statement of account, it is right to say that the appellant, by implication, consented to the admissibility of exhibit 5 although the conditions precedent or the necessary requirements for its admissibility were not established.

It cannot be over-emphasised that a court of law is expected in all proceedings before it to admit and act only on legal evidence. Accordingly, where a trial court inadvertently admits evidence, which is absolutely inadmissible, it has a duty generally not to act upon it but rather to discountenance it. So, too, if a document is unlawfully received in evidence in the trial court, an appellate court has inherent jurisdiction to exclude and discountenance the document even though learned Counsel at the trial court did not object to its admission in evidence. See Mallam Yaya v Mogoga (1947) 12 WACA 132 at 133. Although, therefore, a document is unlawfully received in evidence in the trial court without objection by or on behalf of an appellant, it would still be open to such appellant in the appellate court, particularly where a miscarriage of justice is thereby occasioned, to object to it since it is the duty of the appellate court to
exclude inadmissible evidence which was erroneously received in evidence during the trial. See Ajayi v Fisher (1956) SCNLR 279; Esso West Africa Incorporated v Alli (1968) NMLR 414 at 423.

Where, however, a party to a civil proceeding consented to a procedure at the trial which procedure is neither unconstitutional nor amounts to a nullity but is merely wrong or irregular and he in fact suffered no injustice and no miscarriage of justice is thereby occasioned, it would be too late to complain on appeal about such wrong procedure having been adopted simply because that party lost the case in the trial court. See Oba Ipinlaiye II v Chief Julius Olukotun (1996) 6 NWLR (Part 453) 148; Akhiwu v The Principal Lotteries Officer, Mid-Western State of Nigeria and Another (1972) 1 All NLR (Part I) 229 at 238; Ayanwale and Others v Atanda and Another (1988) 1 NWLR (Part 68) 22; Okwechime v Philip Igbinador (1964) NMLR 132, etc. This is because in the case of documentary evidence in a civil case, formal proof thereof can always be waived by a party to the proceeding where the document is not absolutely inadmissible in law for all purposes. See Okeke v Obidife and Others (1965) 1 All NLR 50, (1965) 4 NSCC 36. Where, therefore, inadmissible evidence is tendered, it is the duty of the other party or Counsel on his behalf to object immediately to the admissibility of such evidence. If, however, such other party fails to raise any objection as aforesaid or consents to the admissibility of such evidence, the trial court in civil cases may (and in criminal cases must) reject such evidence ex proprio motu. On appeal however, and provided the evidence complained of is one which by law is admissible albeit under certain conditions and the party complaining did not object to or consented to its admissibility at the trial although the conditions precedent to its admissibility were not shown to have been satisfied, he cannot be allowed to raise any objection as to its admissibility in the appellate court. See Gilbert v Endean (1878) 9 ChD 259 at 269; Salau
Olukade v Abolade Alade (1976) 1 All NLR (Part 1) 67; Chief Bruno Etim and others v Chief Okon Udo Ekpe and another (1983) 1 SCNLR 120.

A distinction must, however, be drawn between where the evidence complained of is one which by law is *prima facie* admissible albeit under stipulated conditions as against where such evidence is by law inadmissible in any event and in all circumstances. In the latter class of cases, such evidence ought never to be acted upon by any court of law, whether of first instance or of appeal, and it is immaterial that its admission in evidence was by the default or consent of the party complaining in failing to raise the necessary objection at the appropriate time. In other words, where the evidence complained of is by law inadmissible in any event and all circumstances, the evidence cannot be acted upon by any court of law even if the party complaining failed to raise any objection or consented to the admission of such evidence in the proceeding. The appellate court in such circumstance is duty bound to entertain a complaint on the admissibility of such evidence by the trial court, reject it if it finds it absolutely inadmissible in any event and in all circumstances and decide the case on the legal evidence before the court. See Alashe v Olori-Ilu (1964) 1 All NLR 390 at 397; Jacker v International Cable Co. Ltd (1888) 5 TLR 13. See Salau Olukade v Abolade Alade (supra), Owonyin v Omotosho (1961) 1 ANLR 304, (1961) 2 SCNLR 57; Yassin v Barclays Bank DCO (supra); Alashe v Olori Ilu (1964) 1 All NLR 390 at 397.

In the present case, it is section 96(2)(e) of the Evidence Act which governs the admissibility or otherwise of exhibit 5, a certified true copy of a bank’s statement of account which, pursuant to the said section of the law, is expressly declared to be admissible if certain conditions therein stipulated are satisfied. Exhibit 5 is not therefore a document which by law is absolutely inadmissible in all courts of law in any event and in all circumstances. That being so and the appellant not having objected to its admissibility in evidence...
at the time it was tendered but rather consented thereto and, therefore, waived formal proof thereof before the trial court, it may not now raise the question of the inadmissibility of the document before this Court or in the court below. I think the appellant is estopped both in the court below and before this Court from asserting that the said exhibit 5 was and remains inadmissible by virtue of the failure on the part of the plaintiff to testify that the document was examined with the original entries in the bank ledger and found to be correct.

So in *Chukwura Akunne v Matthias Ekwunno and Others* (1952) 14 WACA 59, Foster Sutton P. explained this proposition of law as follows:–

“Appellant’s Counsel argued that the evidence of witnesses 5 and 6 for the defence was inadmissible. We declined to allow him to argue that point: *The evidence was not objected to, it was cross-examined and its admissibility was not put in question at any stage of the trial.* It was also argued that exhibits 4, 5, 6 and 8 were inadmissible, not being relevant to any issue in the case. *As we pointed out to Counsel for the appellants, no exception was taken to exhibits 5, 6 and 8 at the trial,* but apart from the consideration, in my view, the evidence was clearly admissible under the provisions of subsection (b) of section 12 of the Evidence Ordinance.” (Italics supplied)

Similarly in *Salau Olukade v Abolade Alade (supra)* Idigbe JSC succinctly put the matter thus:–

“In a trial by a Judge alone as in the case in hand, *a distinction must be drawn between those cases where the evidence complained of is in no circumstances admissible in law and where the evidence complained of is admissible under certain conditions.* In the former classes of cases the evidence cannot be acted upon even if parties admitted it by consent and the Court of Appeal will entertain a complaint on the admissibility of such evidence by the lower court (although the evidence was admitted in the lower court without objection); *in the latter class of cases, if the evidence was admitted in the lower court without objection or by consent of parties or was used by the opposite party (e.g. of the purpose of cross-examination) then it would be within the competence of the trial court to act on it and the Court of Appeal will not entertain any complaint on the admissibility of such evidence.*” (Italics supplied)
In *Okeke v Obidife and Others* (*supra*) at page 38, Brett JSC on the same issue had this to say:—

“Secondly, the appellant submits that the Judge ought not to have treated the statement contained in the police’s file as admissible evidence, on the ground that the officer to whom it was made was not called as a witness. In a criminal case this would be a valid objection, but in a civil case formal proof of a document can always be waived. One of the first questions which a lawyer instructed for the defence in a running-down case might be expected to ask his client is whether he has made any statement about the accident and it would have been open to the defence to ask for discovery of any documents on which the plaintiff intended to rely. In our view the appellant must be treated as having waived any objection to the statement.”

There is next a statement of the law on the same issue in *Kassen (Nig.) Ltd v Savannah Bank* (1995) 9 NWLR (Part 420) 439 at 453 *per* Mohammed JSC where he observed as follows:—

“I think the argument of the learned Counsel for the appellants in respect of the exhibits 24–28 is very weak for the simple reason that those exhibits are extracts from a banker’s book. They are admissible if certain conditions have been fulfilled. That condition shall be the oral evidence showing that the exhibits are extracts from a banker’s book, kept by the banker and that the figures copied out had been compared with the original and found correct. Since the appellant’s Counsel had not raised any objection when the exhibits were tendered this Court will not entertain any complaint on their admissibility. In *Raimi v Akintoye* (1986) 3 NWLR (Part 26) at page 97 this Court held that where certain documents are admissible in evidence upon fulfillment of certain conditions or under certain circumstances, an appellant who fails to object to their admissibility in the trial court cannot do so in the Appeal Court.”

I cannot but respectfully endorse the above statements of the law as utterly sound and well founded. In my view, the learned trial Chief Judge having admitted exhibit 5 in evidence by consent and without any objection to its admissibility and the said exhibit 5 not being a document that was inadmissible in law in any event and in all circumstances, erred in law by expunging the same from the proceedings.
think also that the court below was on sound ground when it overruled the said decision of the trial court. See Oguma v International Bank for West Africa Ltd (1988) 1 NWLR (Part 73) 658 at 670. Issue 2 must therefore be resolved in favour of the respondent.

Issues 3 and 4 deal essentially with whether the court below was in error by holding that, apart from exhibit 5, the plaintiff was entitled to judgment in the sum of N238,203.27 representing the principal loan together with interest at the rate of 11.5% as claimed, having regard to the provisions of the Deed of Guarantee, exhibit 4. It is the contention of Chief Ezeobi that if the statement of account, exhibit 5, is declared inadmissible under section 96(2)(e) of the Evidence Act, there is no other legal evidence to sustain the alleged indebtedness on the part of the principal debtor. In that event, he argued, no consequential liability on the part of the appellant may therefore arise. It was his further submission that any liability on the part of the appellant, which was denied, is limited to the principal sum of N140,000 advanced to the first defendant by the plaintiff and no more as per the guarantee agreement.

Mr Onyeabo Obi for his own part strenuously argued that, apart from exhibit 5, there is abundant unchallenged evidence on record establishing the indebtedness of both defendants to the plaintiff in the sum claimed. He referred to paragraph 10 of the plaintiff’s amended statement of claim together with the oral testimony of the plaintiff’s only witness and stressed that the sum of N238,203.27 claimed comprised the principal, interest and other bank charges outstanding against the first defendant as at 28 February, 1982. He finally argued that the appellant neither pleaded nor argued before the court of trial that its liability was limited to N140,000. He submitted that since the appellant did not challenge or controvert the respondent’s evidence that the sum of N238,203.27k was due to it from both defendants, the said appellant could not now raise the point on appeal before the court below or in this Court.
The law is well settled that once pleadings have been settled and issues are joined, the duty of the court is to proceed to trial on those issues as settled in the pleadings of the parties. Where, however, one party fails or refuses to submit the issues he has raised in his pleadings for trial and does not give or call evidence in support thereof, the trial court, unless there are other legal reasons to the contrary, may resolve such issues against such defaulting party. See *Imana v Robinson* (1979) 3–4 SC 1, (1979) 12 NSCC 1 at 5. In the same vein, where evidence given by a party to any proceeding was not challenged by the opposite party who had the opportunity to do so, it is always open to the court seized of the matter to act on such unchallenged evidence before it. See *Isaac Omoregbe v Daniel Lawani* (1980) 3–4 SC 108 at 117; *Odulaja v Haddad* (1973) 11 SC 357; *Nigerian Maritime Services Ltd v Alhaji Bello Afolabi* (1978) 2 SC 79 at 81. So, in *Akanbi v Alao* (1989) 3 NWLR (Part 108) 118 at 153, Karibi-Whyte JSC explained the position as follows:–

“The peculiar circumstance of this case is clearly disclosed from the fact that Counsel for the defendants who had the authority of the defendants at all times materials to this case made a no case submission on the close of the case of the plaintiff; relied on the case of the plaintiffs for that of the defendants and offered no evidence. It is well settled that in such circumstances where the defendant has elected not to call evidence, he must be taken as admitting the facts of the case as stated by the plaintiffs and must stand on his submission and is bound.” (Italics supplied)

In the case on hand, the plaintiff’s only witness testified in the clearest possible terms on the exact liability of the defendants to the plaintiff as at the relevant date but was not cross-examined at all by either of the defendants on any issues raised both in the plaintiff’s pleadings and in the oral testimony of the witness. No doubt, the appellant filed its pleadings in the case but it is trite law that pleadings cannot constitute and are not tantamount to evidence and a defendant who does not give evidence in support of his pleadings or in challenge of the evidence of the plaintiff, as the
The appellant did in the present case, is deemed to have accepted the facts in dispute as adduced in evidence by the plaintiff, notwithstanding the general traverse in his pleadings. See *F.C.D.A. v Naibi* (1990) 3 NWLR (Part 138) 270 at 281; *U.B.N. Ltd v Ogboh* (1995) 2 NWLR (Part 380) 647; *Insurance Brokers of Nigeria v A.T.M. Co. Ltd* (1996) 8 NWLR (Part 466) 316 at 327, etc. I think the court below was perfectly right when it held that the uncontroverted and unchallenged evidence adduced by the plaintiff’s only witness, which the defendants declined to test by cross-examination, provided enough proof of the plaintiff’s case in the absence of contrary evidence to put on the defendants’ side of the imaginary scale of justice. See too *Egbunike v A.C.B. Ltd* (1995) 2 NWLR (Part 375) 34 at 55. It is also clear to me in all the circumstances of this case that, apart from exhibit 5, there is clear-cut unchallenged evidence before the trial court in support of the judgment of the Court of Appeal in favour of the plaintiff in the sum of ₦238,203.27 representing the balance of the overdraft facility granted to the first defendant and guaranteed by the second defendant with interest at the rate of 11½% per annum and other bank charges as at 28 February, 1982.

There is finally the appellant’s contention that its liability under the guarantee was limited to the principal sum of ₦140,000 advanced to the first defendant and did not include any interest or bank charges claimed by the plaintiff. In this regard it ought to be pointed out that this contention never arose from the case presented by the appellant before the trial court. The issue was neither pleaded in its amended statement of defence nor was there any attempt on the part of the appellant to further amend its statement of defence to plead this material fact and consequently to lead evidence thereupon. All the appellant pleaded in effect was that the Deed of Guarantee (exhibit 4) was void and of no effect for want of consideration in that the first defendant failed to pay some premium allegedly due under the guarantee which was
a condition precedent to its validity. The appellant did not, however, adduce any evidence either in proof of the said alleged defence which it duly pleaded or in the establishment of its present posture that its liability is limited to the principal sum of₦140,000 advanced to the first defendant.

In this connection it is necessary to stress not only that evidence at a trial must be directed and confined to the proof or disproof of the issues as settled by the pleadings but that it is not open to a defendant, such as the present appellant, to rely on defences which it should have but had not pleaded at the trial because the plaintiff, such as the present respondent, would have, owing to his failure to plead such new defences in his pleadings, lost the opportunity of calling evidence to controvert them. See *J.O. Idahosa and another v D.N. Oransaye* (1959) 4 FSC 186, (1959) SCNLR 407. I do not therefore conceive that the appellant, not having pleaded its new defence to the effect that its liability is limited to the principal sum advanced to the first defendant and did not include any interest or bank charges thereto, is entitled to raise the issue in the court at this appellate stage of the hearing.

At all events, a close study of the Deed of Guarantee, exhibit 4, shows that the appellant’s liability thereunder includes interest, commission and banking charges. These are clearly indicated in clauses 1, 2, 3 and 10 thereof. Clause 1 extends the appellant’s liability to include “all usual banking charges” and clause 2, apart from the principal amount advanced, also holds the appellant responsible for “such further sum for interest thereon and other banking charges in respect thereof”. Clause 3 similarly brings in the question of the appellant’s liability for interest whilst clause 10, in particular, defines the appellant’s liability under the guarantee to include “interest, commission and banking charges”.

Additionally there is the letter of the offer of the overdraft facility, exhibit 2, which was accepted by the defendants. This contains the terms of the lending with the interest rate expressly fixed at 11½% while the appellant’s security was stated as:–
“Full guarantee of Unity, Life and Fire Insurance Company Ltd for principal plus interest.”

As I explained earlier in this judgment, part of the evidence of the plaintiff’s only witness stated as follows:–

“The balance outstanding as at February, 1982 is ₦238,203.27k. The rate of interest was 11½%.”

The witness was not cross-examined by the appellant as to the amount outstanding unpaid or as to the extent of the appellant’s liability under the Deed of Guarantee. I think having regard to all I have said above that Issues 3 and 4 must also be resolved in favour of the respondent.

Learned Counsel for the respondent, Onyeabo Obi Esq., did intimate the court that he would be withdrawing his cross appeal in the event of the main appeal not succeeding. I need only state that all the issues having been resolved against the appellant, the main appeal accordingly fails and it is hereby dismissed. The cross appeal, on the application of learned Counsel for the respondent/cross-appellant, is hereby struck out. There will be the costs of these appeals to the respondent against the appellant which I assess and fix at ₦10,000.

BELGORE JSC: I also dismiss the main appeal for the reasons fully set out in the judgment of my learned brother, Iguh JSC. The main appeal having failed, the cross appeal is withdrawn and it is struck out. I make the same orders as to costs as contained in the judgment of Iguh JSC.

KATSINA-ALU JSC: I have had the advantage of reading in draft the judgment of my learned brother, Iguh JSC. I entirely agree with it and for the reasons he has given. I too would dismiss the appeal and strike out the cross appeal with ₦10,000 costs to the respondent.

EJIWUNMI JSC: I have had the privilege of reading in draft the judgment just delivered by my learned brother, Iguh JSC. Being satisfied that in the judgment all the issues raised in the appeal were properly considered and eventually
resolved against the appellant, I adopt the said judgment as my own. I therefore would also dismiss the main appeal and strike out the cross appeal as prayed for by learned Counsel for the respondent. In the result, the appeal is dismissed in its entirety by me and the respondent is awarded costs in the sum of ₦10,000 only.

AYOOLA JSC: I have had the privilege of reading in advance the judgment delivered by my learned brother, Iguh JSC. I am in entire agreement with the conclusion he arrived at on each of the issues raised in the appeal and with his decision that this appeal should be dismissed. I agree with his reasons for coming to that conclusion. I do not think that I should, merely for the sake of making a contribution, repeat in different words the points he has so clearly made. In the result I do not wish to add anything. I too would dismiss the appeal and strike out the cross appeal with ₦10,000 costs to the respondent.

*Appeal dismissed and cross appeal struck out.*
Nigeria Deposit Insurance Corporation v Alhaji Taibat Adeniji

FEDERAL HIGH COURT, LAGOS DIVISION

KASIM J

Date of Judgment: 14 MARCH, 2001

Suit No.: FHC/L/FBC/93/2000

Failed bank – Limitation of action – Whether applies to matter in respect of failed banks

Limitation of action – Whether applies to matter in respect of failed banks

Facts

In this action filed by Nigerian Deposit Insurance Corporation in respect of a failed bank the defendant/respondent contended that the action was statute barred going by the provisions of the Laws of Lagos State, while the plaintiff/applicant contended that the Limitation Law of Lagos State did not apply to action filed at the Failed Banks Tribunal.

Section 17 of Decree No. 18 of 1994 (as amended) reads thus:–

“The provisions of the limitation law of a State or Limitation Act of the Federal Capital Territory, Abuja shall not apply to matters brought before the Tribunal under this part of this Decree.”

Held –

By the provisions of section 17 of Decree No. 18 of 1994 (as amended) no Limitation Law of States or Limitation Act of Federal Capital Territory Abuja, apply to failed bank matters.

Objection dismissed.

Nigerian statute referred to in the judgment

Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree No. 18 of 1994, section 17
Judgment

KA SIM J: This ruling relates to the notice of preliminary objection dated 26 July, and filed on 28 July, 2000, which, is to the effect that the suit against the defendant is incompetent in law.

In moving the objection, Counsel for the respondent/applicant submitted that the objection is supported by an eight paragraph affidavit on which he relied especially paragraphs 3, 4, 5 and 6. He also relied on the processes filed in the suit, that is, the statement of claim as amended and dated 11 April, 1999, paragraphs 9 and 10 thereof. Counsel further submitted that from the facts before the court it appears that the transaction in this case took place on 7 June, 1977 and the defendant was expected to pay back the loan on 30 September, 1978. To Counsel, the action arose on 1 October, 1978 and the plaintiff only commenced action on 23 December, 1996, that is, a period of 18 years after the cause of action arose. That, by virtue of the provisions of chapter 118 of the Laws of Lagos State and now chapter 70 of 1973, that is, section 8(1)(a), the action is statute barred.

In further submission, Counsel stated that the relationship in this case is one of banker and its customer or a debtor-creditor relationship. He referred to paragraphs 3, 4, 9 and 14 of the amended application for recovery of debts. He also submitted that the relationship of creditor and debtor is found on simple contract with the right of recovery by action limited to six years from the date the cause of action arose. Thereafter, the action to recover the debt is statute barred. He referred to the Law of Banking by Lord Chorley (6ed) page 28. Counsel further submitted that the limitation of action is a matter which goes to the jurisdiction of the court as such, it can be raised at any time of the proceedings; reliance is placed on the cases of Egbe v Adefarasin (1987) 1 NWLR (Part 47) 13 and Odubeko v Fowler (1993) 7 NWLR (Part 308) 637 at 644. Counsel submitted that the law governing the action is the applicable law at the time of the transaction. He referred to section 8(1)(a)–(c) of Cap 70 Laws of the
Lagos State, which is now Cap 118 Law of Lagos State, which provisions require action of this nature to commence six years after the cause of action arose, he referred to Okpodo v Bendel Newspapers Corporation (1990) 5 NWLR (Part 153) 652 at 663, paragraphs D H, that is, the court is entitled to look at the statement of the claim or the application for recovery of debts only and no more.

In the event that the court is minded to look at the counter-affidavit, the averments therein have no substance for the following reasons:

(1) Acknowledgment of the debt (paragraphs 8–15 and 19) of the counter-affidavit. He referred to the case of First Bank of Nigeria v Karusa Akporido (1996) 8 NWLR (Part 469) 755 at 757, ratio 4. It is the contention of Counsel that this action cannot even be saved by the letter of acknowledgment of the respondent/applicant.

(2) The suit was commenced in 1988 (paragraphs 11–22 of the Court of Appeal).

The Failed Banks Decree has no retrospective effect, Counsel added and cited the cases of Rosset v ACB (1993) 8 NWLR (Part 312) 382 at 394, ratio 5 and Kotoye v Saraki (1994) 7 NWLR (Part 357) 415 ratios 10, 11 and 12. Counsel therefore urged the court to hold that the present action is “maintain action”, he referred to the case of Kotoye v Saraki (Part 357) (supra) ratio 16. That the action is statute barred and as such should be dismissed, reliance is placed on the case of Mercantile Bank of Nigeria v Feteco (1998) 3 NWLR (Part 540) 143 at 147–148.

Counsel for the applicant/respondent informed the court that they filed a counter-affidavit to the supporting affidavit to the objection. That it is their contention that the objection is a ploy adopted by the respondent/applicant to avoid liability, he relied on the case of ACB Ltd v Losada Nig. Ltd (1995) 7 NWLR (Part 405) 26. Counsel submitted that the matter pending in the State High Court was discontinued and
a new suit was filed in the Tribunal, and that the suit in the Tribunal was later transferred to this Court. That the limitation law provided for six years for simple contract and that where the loan is secured by a Deed of Deedure the limitation period is 12 years, reference is made to section 29 of the Limitation Law of Lagos State chapter 118 of 1994. The present defendant pledges two landed properties as securities for the said loan and as such there is a Deed of Mortgage. Counsel, therefore, submitted that where the loan is secured by a debenture, it is covered by section 29 of the Limitation Law.

Counsel further contended that, by section 17 of Decree No. 18 of 1994 (as amended) by Decree No. 62 of 1999, the Limitation Law of Lagos State is inapplicable to this matter. The issue of limitation of time is irrelevant to failed banks matters, Counsel added. It is the further submission of Counsel that the objection, as presented by Counsel, is one in the nature of a demurrer, he referred to the reply to the application for recovery of debts filed on 20th May, 1998, wherein nothing was mentioned about limitation of time. Counsel also submitted that by Order 25 Rules 1–3 of the Rules of this Court, 2000, demurrer has been abolished in this Court that all authorities cited by Counsel for the objection do not avail the objector. He therefore urged the court to dismiss the objection on the ground that limitation of time does not apply to failed banks matters.

Counsel went further to submit that there is an acknowledgment letter dated 19 November, 1980.

Counsel finally urged the court to dismiss the objection and give the matter accelerated hearing in accordance with the provisions of section 6 of Decree No. 62 of 1999.

Counsel for the respondent/applicant in reply, on points of law, submitted that the issue of limitation of time to an action is one which touches on the jurisdiction of the court and as such can be raised at any stage of the proceedings. He also submitted that a statutory legislation should not be
given retrospective effect, except where it is clearly stated. He cited the case of Mercantile Bank Nigeria Limited v Peteco (1998) 3 NWLR (Part 540) 143 at 147. Counsel in conclusion urged the court to dismiss the suit. That marks the end of the submissions of Counsel for the parties.

As a preliminary issue in this objection, it is observed that this objection was dated on 26 July, 2000 and filed in this Court on 28 July, 2000. It is also observed that the objection is in the nature of a demurrer. In law, demurrer is a proceeding whereby a defendant conceives that, even if all the facts of the case as stated by the plaintiff, are taken as true and admitted, the plaintiff is, yet not in law, entitled to judgment on some legal grounds. In other words, it is a procedure whereby an abrupt end is brought to an action in court. There is no doubt that demurrer had been available in this Court until 16 July, 1999, when it was abolished by Order 24(1) of the Rules of this Court, 1999. And, by Order 1 Rule 2 of the Federal High Court (Civil Procedure) Rules, 2000, which came into effect on 1 May, 2000, the 1999 Rules of this Court, are revoked. And under Order 25(1) of the said 2000 Rules of this Court, demurrer is abolished. And for a better understanding of the provisions of the said Order 25(1) of the 2000 Rules, I caused same to be reproduced:

“Order 25(1) – No Demurrer shall be allowed.”

The procedure to be adopted in place of demurrer is contained in Orders 25(1) - (3) of the said 2000 Rules, they are copied below:

(1) A party shall be entitled to raise by his pleading any point of law, and any point so raised shall be disposed of by the Judge who tries the cause at or after the trial.

(2) A point of law so raised may, by consent of the parties, or by order of the court or a Judge in Chambers on the application of either party, be set down for hearing and disposed of at any time before the trial.

(3) If, in the opinion of the court or a Judge in Chambers the decision of the point of law substantially disposes of the whole action, or of any distinct cause of action, ground of
defence, set off, counterclaim or reply therein, the court or
Judge in Chambers may thereupon dismiss the action or
make such other order therein as may be just.”

In effect, as at 1 May, 2000, demurrer was no longer avail-
able in this Court. And as stated above, the present objection
of the respondent/applicant was filed in this Court on 28
July, 2000, more than three months after the commencement
date of the 2000 Rules of this Court, which abolished de-
murrer. To my mind, Rules of Court are meant to be obeyed
and failure to obey them renders, in some cases as the pre-
sent, the affected application incompetent before the court
and such application is liable to be struck out.

It is also observed that the notice of preliminary objection
is an application made during the interlocutory stage of an
action and, as such, the court must endeavour not to give a
decision, at that interlocutory stage, which would decide the
issues meant for trial.

The affidavit evidence in this application, conflict in mate-
rial aspects, and the court must therefore refrain from resolv-
ing the conflicting affidavit evidence without taking oral
evidence. For instance, Counsel for the respondent/applicant
submitted that the loan which was guaranteed by the respon-
dent and was granted on simple contract and, as such, the
limitation period for such loan is six years; whereas, Coun-
sel for the applicant/respondent contended that the loan was
secured by the respondent/applicant by the execution of a
debenture and, as such, the period of limitation of time is 12
years. There is no oral evidence before the court to resolve
such conflicting evidence. There is also no independent affi-
davit evidence in the file from where the court can resolve
the conflicting affidavit evidence.

Counsel for the respondent/applicant submitted, rightly in
my view, that the issue of limitation of time to an action in
court is an issue which touches on the jurisdiction of the
court and, as such, may be raised at any stage of the pro-
ceedings. That is the position in law, because if the action is
statute barred such action is incompetent before the court.
a and liable to be dismissed, since the court cannot entertain
an incompetent suit. Counsel also submitted that statutory
legislation should not be given retrospective effect except
there is an indication to that effect. He has in mind, I pre-
sume, the provisions of section 17 of Decree No. 18 of 1994
(as amended) by Decree No. 62 of 1999, in relation to the
applicability of limitation laws to the failed banks matters.
In this regard, I reproduced hereunder, the provisions of sec-
tion 17 of Decree No. 18 of 1994, which is not deleted or
amended by Decree No. 62 of 1999.

Section 17 of Decree No. 18 of 1994:–

“The provisions of the Limitation Law of a State or Limitation Act
of the Federal Capital Territory, Abuja shall not apply to matters
brought before the Tribunal under this part of this Decree.”

The question to ask now, is which of the two laws would
apply to this matter, is it the provisions of the Limitation
Law Chapter 118 of the Lagos State Laws or the provisions
of section 17 of Decree No. 18 of 1994? There is no doubt
that, “banking etc is one of the items on the exclusive list
over which only the Federal Government has powers to leg-
islate”. Equally, the State has powers to regulate commercial
activities within its area of jurisdiction, such as contracts
made within the State. However, in the case of Labiyi v An-
retiola (1992) 8 NWLR (Part 258) 139, the Supreme Court
set out the hierarchy of legislation or laws as follows:–

(1) decrees;
(2) the unsuspended provisions of the Constitution;
(3) the laws made by the National Assembly;
(4) edicts of the governors of a State.

The superiority of decrees over the unsuspended provisions
of the Constitution can only be tolerated under Military
Rules and no more. The position has now changed since the
introduction of Civil Rule in the country a few months ago.
The Constitution of the country is now the Supreme law, fol-
lowed by existing Acts of National Assembly (including de-
crees which provisions are in line with the provisions of the
Constitutions and democratic principles, and then the laws made by the States. All these Acts and Laws must conform with the provisions of the Constitution. And since banking is an item under the exclusive legislative list of the Constitution, the Federal Government has the right to regulate the activities of that section of the economy and to that extent, the provisions of Decree No. 18 of 1994, to be precise section 17, shall have precedence over the relevant provisions of the Limitation Laws of the States in respect of failed banks matters. And without going into the merits or otherwise of the main suit in this case, I hold that no Limitation Laws of States or Limitation Act of Federal Capital Territory Abuja, apply to failed banks matters.

In view of the foregoing, I am of the view that the notice of objection of the respondent/applicant dated 26 July, 2000 and filed in this Court on 28 July, 2000, is in the nature of a demurrer and, as such, offends the provisions of Order 25 Rule 1 of the 2000 Rules of this Court. The respondent/applicant should have availed herself of the provisions of Order 25 Rule 2(1) which obliges a defendant to raise the point of law he has in the pleadings, that is, in his statement of defence. It is also the view of this Court that the provisions of the Limitation Laws Chapter 70 of the Lagos State or any State Limitation Laws, or that of the High Court of Abuja, has no application to failed banks matters. The applicable law to failed banks matters is Decree No. 18 of 1994 as amended by Decree No. 62 of 1999. In consequence, the objection lacks merit and it is therefore dismissed.
Nigeria Deposit Insurance Corporation v Vincent Nwachukwu Oranu

COURT OF APPEAL, JOS DIVISION
MANGAJI, MUKHTAR, NZEAKO JJCA
Date of Judgment: 29 April, 2001
Suit No.: CA/J/149/96

Banking – Banker/customer relationship – Where overdraft granted – Cause of action in respect of arises when a demand is made

Banking – Debt – When repayable – When a demand is made

Facts
This is an appeal against the judgment of Naron J of the Plateau State High Court in Suit No. PLD/J282/90 dated 4 October, 1996 wherein Progress Bank of Nigeria Plc (now duly substituted by the appellant) was found to have proved that it granted the respondent an overdraft facility but concluded that “the amount was not due and payable at the time the suit was commenced”. Consequently, the learned trial Judge struck out the suit on the ground that it was commenced when the cause of action had not accrued. The appellant was not at all satisfied with the said conclusion. It accordingly filed a notice and grounds of appeal containing three grounds dated 12 November, 1996.

Held –

1. Generally, a debt is repayable either on demand, on notice given or upon any other condition agreed upon by the parties.

2. It is also an implied term in the relationship between a banker and his customer that there should be no right of action for the repayment of an overdraft until there has been a demand or notice given.

3. The cause of action does not arise until there has been a demand made or notice given. When therefore there is
no specific date agreed upon for the repayment of an overdraft, as in the present case, a demand should be made or notice given. In other words, a cause of action on an unpaid overdraft is not deemed to accrue where no specific date for payment is agreed upon until there has been a demand made or notice given.

Appeal allowed.

Cases referred to in the judgment

Nigerian

A.C.B. Ltd v Gwagwada (1994) 5 NWLR (Part 342) 25
Ajide v Kelani (1985) 3 NWLR (Part 12) 248
Akinkuowo v Fafimoju (1965) NMLR 349
Alh. Otaru and Sons Ltd v Idris (1999) 6 NWLR (Part 606) 330
Angyu v Malami (1992) 9 NWLR (Part 264) 242
B.O.N. v Akorede (1995) 1 NWLR (Part 374) 736
Bello v N.B.N. (1992) 6 NWLR (Part 246) 206
BRTC v Egbuonu (1991) 2 NWLR (Part 171) 81
Egbunike v A.C.B. (1995) 2 NWLR (Part 375) 34
Emegokwue v Okadigbo (1973) 4 SC 113
George v Dominion Flour Mills Ltd (1963) 1 All NLR 71
Ibanga v Usanga (1982) 5 SC 103
Ishola v S.G.B. (Nig.) Ltd (1997) 2 NWLR (Part 488) 405
James v Midmotors Nig. Co. Ltd (1978) 11–12 SC 31
Lemonu v Alli-Balogun (1975) 3 SC 87
Njoku v Eme (1973) 5 SC 293
Nsirim v Nsirim (1990) 3 NWLR (Part 138) 285
Odumosu v A.C.B. (1976) 11 SC 55
Oguntimein v Gubere (1964) 1 All NLR 176
This is an appeal against the judgment of Naron J of the Plateau State High Court in Suit No. PLD/J282/90 dated 4 October, 1996 wherein Progress Bank of Nigeria Plc, (now duly substituted by the appellant) was found to have proved that it granted the respondent an overdraft facility but concluded that “the amount was not due and payable at the time the suit was commenced”. Consequently, the learned trial Judge struck out the suit on the ground that it was commenced when the cause of action had not accrued. The appellant was not at all satisfied with the said conclusion. It accordingly filed a notice and grounds of appeal containing three grounds dated 12 November, 1996.

In compliance with the rules of this Court, parties by their Counsel filed and exchanged briefs of argument which they adopted during the oral hearing on 15 March, 2001. Both
learned Counsel formulated two issues each as arising for
determination from the grounds of appeal. Admittedly both
of the issues identified are variants of their corresponding
number. I shall therefore reproduce and determine the appeal
based on the issues identified by the appellant. The issues
are:–

(1) Whether or not the debt was due for repayment at the
commencement of the suit.

(2) Whether or not the appellant was entitled to the judg-
ment of the court in terms of their (sic) claim.

Be that as it may, the respondent in his brief of argument
raised a preliminary objection to the competence of the ap-
peal. His preliminary objection, as can be found at page 3 of
the brief, is in the following terms:–

“By section 25 of the Court of Appeal Act any party to an action
that desires to appeal against an interlocutory decision shall do so
within 14 days. It is submitted that any decision that does not settle
the rights of the parties is an interlocutory decision and any appeal
thereon must be filed within 14 days with or without leave as the
case may be. See the following cases:–

(1) Nwosu v Offor (1997) 2 NWLR (Part 487) 274; (1997) 1
SCNJ 193 at 200 where Ogwunegbu, JSC said; paragraph
19 – Furthermore, the ruling in respect of which the
grounds of appeal relate was not a final decision since it did
not finally dispose of the rights of the parties in the suit.”

Continuing, he said “the decision is interlocutory”.

However, on 15 March, 2001 when this appeal came up for
oral hearing neither the appellant nor his Counsel appeared
although they were duly served with hearing notice. The ap-
peal was thus decidedly taken under Order 6 Rule 9(e) of the
Court of Appeal Rules, 1981 as amended since briefs have
been filed. I am not unaware of the provision of Order 3
Rule 15(i) of the rules of this Court which enjoins a respon-
dent, who intends to rely upon preliminary objections to the
hearing of an appeal, to file notice thereof three clear days
before the date of hearing in order to afford the appellant an
opportunity to respond if he so desires. But the practice
whereby notice of intention to rely upon a preliminary
objection is given only in the respondent’s brief of argument is equally accepted in the practice and procedure of this Court and that of the Supreme Court. See *Ajide v Kelani* (1985) 3 NWLR (Part 12) 248; *Nsirim v Nsirim* (1990) 3 NWLR (Part 138) 285 at 297. Equally true is that when a preliminary objection is raised either by motion or notice the party raising it is not relieved of the duty to argue it during the oral hearing. Clearly it is not just enough to give notice of intention to rely upon a preliminary objection.

The respondent, who desires to have the objection considered, must move the court at the oral hearing for the relief prayed for otherwise he is deemed to have abandoned the objection. See *Nsirim v Nsirim* (*supra*). In other words, the respondent shall not rest on his oars with the full assurance that he has incorporated in his brief the objection. He has the extra duty of moving the objection during oral hearing otherwise the objection shall be taken as abandoned.

Now on 15 March, 2001 when this appeal came up for oral hearing neither the respondent nor his Counsel was present even though they were duly served. The intention the respondent expressed to raise preliminary objection, as contained in his brief of argument, therefore rested on a very weak wicket. Not having been argued during the oral hearing therefore, and in line with decided authorities, I take it that it is abandoned. It is hereby accordingly struck out.

Let me now consider the facts of the case. The plaintiff (Progress Bank of Nigeria Plc) is a third generation bank which carries on the business of banking in some parts of Nigeria including the branch at No. 32 Ahmadu Bello Way, Jos, Plateau State. The defendant maintained a current account no. 014 in the plaintiff bank at its Jos branch. Typical of the distress syndrome in the Nigerian banking industry, the plaintiff found it impossible to exist due to external and internal factors which rendered it bankrupt. Of the factors which rendered the plaintiff distressed is the circumstance which culminated in the plaintiff branch at Jos granting an overdraft to the defendant without due authorisation, by the
Manager of the branch who breached the accepted procedure and approved the sum well above his powers.

It was in October, 1989 that the Jos branch of the plaintiff bank granted the defendant an overdraft facility of ₦600,000 when the maximum overdraft facility a branch can grant is ₦5,000. The defendant then drew his cheque no. JAB/IO699115 payable to the plaintiff bank and with which he drew the whole overdraft in three drafts of ₦200,000 each. The drafts were prepared in the name of LA Anyeji although, in collusion with the Branch Manager, the defendant did not write on the reverse of his cheque the instruction to so prepare the drafts. Neither did the defendant fill the usual draft form. Further, he stealthily omitted to insert the date on his said cheque but with the connivance of the Branch Manager he utilised the whole of the overdraft.

The fraud came to light when the bank inspectors arrived from the plaintiff’s headquarters and upon examining the bank’s documents uncovered it. As is conventional, the Branch Manager was dismissed and criminal proceedings initiated against him and his collaborators.

On 31 May, 1990 therefore, the plaintiff bank issued to the defendant a demand notice from its head office requiring him to regularise his account. Defendant only reacted to the letter on 27 August, 1992 when, in the letter, he requested the plaintiff bank to approve for him an interest waiver. The plaintiff bank, desirous of reclaiming the principal sum, accepted the request and accordingly waived the accumulated interest ₦89,703.53 and credited same into the defendant’s account. But realising that the defendant was dragging his feet, the plaintiff bank took a writ of summons against the defendant. The writ, which was taken on 21 August, 1990 was so taken on the undefended list in accordance with Order 23 Rule 1 of the Plateau State High Court (Civil Procedure) Rules, 1987. It was made in the following terms. Viz:–

“The plaintiff’s claim against the defendant is for the sum of ₦612,798.15 (Six Hundred and Twelve Thousand, Seven Hundred and Ninety-Eight Naira, Fifteen Kobo) being the amount due and
payable by the defendant to the plaintiff as at 2/8/90 for money had and received by the defendant in the form of overdraft at the defendant’s request in the normal course of the plaintiff’s business as a banker, together with interest and the usual bank charges thereon with sum the defendant has refused and neglected to pay in spite of repeated demands.

AND THE PLAINTIFF also claim interest on the said sum ₦612,798.15 at the rate of 25% from 2/8/90 until judgment and thereafter until final liquidation of the whole debt, together with costs.”

The defendant, in reaction to the writ, filed a memorandum of appearance along with which he also filed a notice of intention to defend. In the affidavit in support of the notice of intention to defend the defendant, after having agreed that he received the overdraft facility in issue, proceeded to show how he received the maltreatment of his life as a result of the involvement of the police in the matter and the incarcerations he was subjected to at the instance of the plaintiff.

The learned trial Judge in his wisdom transferred the suit to the general cause list and accordingly ordered for pleadings. In due compliance, the parties filed and exchanged pleadings. The plaintiff on 18 December, 1990 amended its statement of claim with the leave of the court. The defendant also filed another statement of defence dated 4 May, 1992 and reacted to the plaintiff’s amendment to its statement of claim. The pertinent paragraphs in the amended statement of claim are paragraphs 4–13 thereof. Apart from paragraphs 2, 3 and 4 of the amended statement of claim, defendant denied all the averments. In paragraphs 6, 7 and 8 of the amended statement of claim, the plaintiff bank averred as follows:—

“Later in October the same year, at the defendant’s request the plaintiff’s branch at Jos granted the defendant another overdraft of ₦600,000 together with interest and the usual bank charges thereon.

The defendant by his cheque, Progress Bank of Nigeria Limited cheque no. JAB/1069915, overdrew his account by ₦600,000. Plaintiff will at the trial of this suit found upon this cheque.

The defendant instructed that the said sum of ₦600,000 be paid to one L.A Anyaeji by instrument of draft. The plaintiff on the
3/10/89 issued 3 drafts of ₦200,000 each all made payable to the said L.A. Anyaeji and drawn on the plaintiff’s branch at New Market Road, Onitsha. The said drafts shall be founded upon at the trial.”

In reaction and while totally denying the plaintiff’s averments, the defendant averred as follows in his paragraphs 6–10 of the statement of defence:

“Paragraphs six hereby denied. Defendant states that the plaintiff had on various dates between December, 1989 and February, 1990 reported defendant to the police both in Jos and Markurdi that the defendant colluded with the plaintiff’s then Jos branch Manager to defraud the bank. Plaintiff is therefore stopped from now turning around to claim that the defendant applied to it for any overdraft.

In answer to Paragraph 7 defendant states that the said cheque no. JAB/1069915 was never the basis for withdrawing any money from his account with the plaintiff nor was it applied in his account.

Paragraph eight is hereby denied. Defendant states that the said cheque no. JAB/1069915 was never issued to any Mr Anyaeji nor did it contain any instruction that any draft should be issued to him. Defendant states further that he never issued any cheque for ₦600,000 drawn on his account with plaintiff in October, 1989 and as such monies could never have been debited against his name.

Defendant states in answer to Paragraph 9 that it is unimaginable that a cheque which is the basis of a draft could be found in the carpet of the Manager and also be debited against the defendant without his consent, knowledge or instruction.

Paragraph 10 is denied. Defendant states that if any overdraft facility was extended to him the parties would have agreed on terms before such money is disbursed and not for the plaintiff’s so-called head office to unilaterally decide that the money should be paid back with interest.”

From the pleadings, the most crucial issue obviously joined, is the question of receiving overdraft at all. The reliefs the plaintiff’s bank sought for are the following:

“(a) Six Hundred and Twelve Thousand, Eight Hundred and Three Naira, Five Kobo (₦612,803.05) overdraft facility granted to the defendant.
Having joined issues, the plaintiff then called one witness in proof of its case. The defendant called no witness as he elected to rest his case on the plaintiff’s. In its judgment the court below found as follows:–

“The evidence on the grant of overdraft facility to the defendant to the tune of N600,000 as stated by the PW1 stands unchallenged and uncontradicted. This is so because on a critical analysis of exhibits 3, 5, 6 and 7 particularly paragraph 2 thereof, one is not left in doubt that the said facility was granted to the defendant. It is the law that evidence which is unchallenged and uncontradicted ought to be accepted, if found credible when there is nothing on the other side of the balance to be considered.

*Adejumo v Anyantegbe* (1989) 3 NWLR (Part 110) 417 at 651 Para. E. The evidence from the plaintiff on the grant of the facility with particular reference to exhibits 3, 5, 6 and 7 is credible and the court can safely act on it.”

In conclusion, the trial court arrived at the following:–

“The sum total of this is that the matter got to the court prematurely. The amount of the facility granted though in excess of the bank’s limit was not due for payment and the defendant couldn’t have been made to pay.

The effect of this is that for the various reasons given above, the suit is struck out as the amount was not due and payable as at the time the action was commenced. The cause of action had not accrued.”

The plaintiff bank felt aggrieved with the conclusion arrived at by the trial court. It accordingly appealed. I shall henceforth refer to the plaintiff bank as the “appellant” while the defendant shall be referred to as the “respondent”. But before I am done with the facts, I should say how the appellant (Nigeria Deposit Insurance Corporation) became involved as the appellant. On 12 March, 1998, Progress Bank of Nigeria Plc was ordered by the Federal High Court, Enugu to be wound up having found that it was distressed. Accordingly and by the Federal Government Notice No. 10 of 1998, the Nigeria Deposit Insurance Corporation (NDIC) was
appointed its provisional liquidator. Learned Senior Counsel for the appellant, rightly too, therefore applied by a motion on notice seeking for an order to substitute the appellant with NDIC. On 22 February, 2000 this Court granted the applications a result of which the parties, as now reflected in the suit, became the appropriate parties with NDIC as the appellant.

While arguing the first issue as contained in the brief of argument, learned Senior Counsel submitted that repayment of the loan became due on 21 August, 1990 when the appellant commenced the suit leading to this appeal. Learned Senior Counsel referred to the respondent’s notice of intention to defend and the affidavit thereto and submitted the indebtedness to the appellant. He said after the suit was transferred to the general cause lists and pleadings accordingly ordered, the respondent somersaulted and denied ever having received the overdraft or any indebtedness to the appellant. Learned Counsel submitted that an overdraft becomes payable only upon a formal demand notice served on the debtor/customer giving therein a reasonable notice to him to make good the indebtedness. He relied for so submitting on *Angyu v Malami* (1992) 9 NWLR (Part 264) 242 at 252. He stressed that the demand notice in exhibit 5 and the reply in exhibit 6 constitute clear demand and acknowledgment of the indebtedness since the issue of the overdraft was not denied or contested. Learned Senior Counsel further relied on Order 6 Rules 2/4 of the Supreme Court Practice (White Book) 1988 Edition in arguing that a demand notice is a prerequisite before a debt becomes due for repayment. He further cited and relied on *B.O.N. v Akorede* (1995) 1 NWLR (Part 374) 736 at 747.

Further in submissions, learned Senior Counsel posits that since the only issue joined related to whether the respondent was indebted to the appellant the only burden placed on the appellant to discharge was to establish the respondent was indeed indebted to the tune of the sum claimed.
Continuing, learned Senior Counsel submitted that the question whether a debt is not due for payment is but a special defence which must be specifically pleaded and evidence of it properly led. He relied on Order 25 Rule 6(2) of the Plateau State High Court (Civil Procedure) Rules, 1987 and the case of _Odumosu v A.C.B._ (1976) 11 SC 55. He pointed out that the issue of prematurity of the payment of the loan was neither pleaded by the respondent nor did he lead evidence in proof of it and that the court below was in error to have raised it _suo motu_ and resolved it against the appellant. Learned Counsel referred to _Bullen Leaks and Jacobs Precedents of Pleadings_ (12ed) page 334 and submitted that failure to comply with a condition precedent must be taken as an objection by the defence in the pleading stating clearly what that condition was and that it was not performed or fulfilled. He stressed most importantly that the respondent, having denied the receipt of any overdraft, cannot turn around and complain about the time of repayment as the two stands are mutually contradictory.

Still in submissions, learned senior Counsel contended that evidence elicited under cross-examination go to no issue unless the fact is specifically pleaded in the defence; otherwise the evidence so led is discountenanced unless of course the pleading is amended to take care of the evidence so elicited. He referred to _Oyejola v Agboola_ (1995) NWLR (Part 411) 88 and _Woluchem v Gudi_ (1981) 5 SC 291 at 220–321.

While referring to the address of learned Counsel to the respondent before the court below, which brought to the fore the question of prematurity of time of repayment, learned senior Counsel submitted that it (the address) cannot cure the inadequacy of the respondent’s pleading in that respect. He referred to _Yoye v Olubode_ (1974) 10 SC 209 at 215; _Osuigwe v Nwihim_ (1995) 3 NWLR (Part 386) 752 at 763 and _Bello v N.B.N._ (1992) 6 NWLR (Part 246) 206 at 215. He urged that the issue be resolved in the favour of the appellant.
In the respondent’s brief of argument, learned Counsel submitted that the learned trial Judge was correct in striking out the suit for being premature. While relying on some decided cases, learned Counsel submitted that the law “places a burden on any plaintiff in any proceeding to prove his case before the burden shifts to the defendant”. He said the appellant had failed to prove that the debt was due for repayment. Learned Counsel is of the view that nobody is ever taken to court for being indebted to someone but resort to the court of law is had only when the time for repayment has accrued and the debtor has failed and/or refused to pay. He stressed the necessity to ensure the accrual of cause of action and relied on BRTC v Egbuonu (1991) 2 NWLR (Part 171) 81 at 90 and Okechukwu v Alagba (1991) 8 NWLR (Part 207) 54 at 61 when a cause of action is said to have accrued. He submitted that the debt before the court below was clearly not due for repayment. He quoted and relied on the evidence elicited from the lone witness, who under cross-examination said “the overdraft was supposed to last for 12 months from the day the account was overdrawn which is on (sic) December, 1989”. Learned Counsel stressed that the writ of summons was issued on 21/8/90 five months before the date of repayment would have matured. He submitted that the action was premature and therefore incompetent. He said, on the above basis, the proceedings ought to have been terminated since the court below lacked the jurisdiction to entertain it. He cited and relied on Nemi v State (1994) 10 SCNJ 1 at 45–46 on what the court should do upon discovering that it lacks jurisdiction to entertain an action.

Still continuing in argument, learned Counsel submitted that the issue whether the respondent has pleaded that the debt was not due for repayment did not arise, since the case for the respondent was not yet called for determination. He pointed out that since by the appellant’s evidence the debt was due for repayment only on 20/12/90, what was called to question was whether by the appellant’s evidence the matter...
ought to have been filed when the cause of action had not then accrued. He stressed that going by exhibit 7 the respondent had put the question of repayment in issue.

On the issue of leading evidence, especially under cross-examination on matters in respect of which there is no supporting pleading, learned Counsel submitted that it was the duty of the appellant to have led evidence on all material particulars and that it was the appellant’s evidence which had the effect of destroying its case, since it was PW1 who said the action is indeed premature. He argued that the issue be resolved against the appellant.

It is apt to start considering the issue by appreciating the issue that is joined with respect to the overdraft. Paragraphs 6, 7 and 8 of the amended statement of claim contain averments indicating that the appellant had granted the respondent an overdraft to the tune of ₦600,000. Even at the risk of being repetitive, I shall reproduce the averments. They are:

“Later in October same year, at the defendant’s request the plaintiff’s branch at Jos granted the defendant another overdraft of ₦600,000 together with interest and the usual bank charges thereon.

The defendant by his cheque, Progress Bank of Nigeria Limited cheque no. JAB/1069915, overdrew his account by ₦600,000. Plaintiff will at the trial of this suit found upon this cheque.

The defendant instructed that the sum of ₦600,000 be paid to one L.A. Anyaeji by instrument of draft. The plaintiff on the 3/10/89 issued 3 drafts of ₦200,000 each all made payable to the said L.A. Anyaeji and drawn on the plaintiff’s branch at New Market Road, Onitsha. The said drafts shall be founded upon at the trial.”

In total denial of the above averments, the respondent in his paragraphs 6, 7, 8, 9 and 10 of his statement of defence countered as follows:

“Paragraph six is hereby denied. Defendant states that the plaintiff had on various dates between December, 1989 and February, 1990 reported defendant to the police both in Jos and Makurdi that the defendant colluded with the plaintiff’s then Jos branch Manager to
defraud the bank. Plaintiff is therefore stopped from now turning around to claim that the defendant applied to it for any overdraft. In answer to paragraph 7 defendant states that the said cheque no. JAB/1069915 was never the basis for withdrawing any money from his account with the plaintiff nor was it applied in his account.

Paragraph eight is hereby denied. Defendant states that the said cheque no. JAB/1069915 was never issued to any Mr Anyaeji nor did it contain any instruction that any draft should be issued to him. Defendant states further that he never issued any cheque for ₦600,000 drawn on his account with plaintiff in October, 1989 and as such monies could never have been debited against his name.

Defendant states in answer to paragraph 9 that it is unimaginable that a cheque which is the basis of a draft could be found in the carpet of the Manager and also be debited against the defendant without his consent, knowledge or instruction.

Paragraph 10 is denied. Defendant, states that if any overdraft facility was extended to him the parties would have agreed on terms before such money is disbursed and not for the plaintiff’s so-called head office to unilaterally decide that the money should be paid back with interest.”

From the above, the issue has been joined as to whether the appellant did advance to the respondent the overdraft as averred. Understandably the question whether the overdraft was due for payment did not arise at all. The clear issue is whether in point of fact the respondent received the overdraft alleged. If he did that settles the most crucial issues in the matter. Happily the learned trial Judge made definite finding on it. After reviewing the evidence on record vis-a-vis the pleadings, the learned trial Judge at page 44 of the record found that the respondent did in fact receive the overdraft. Although I quoted the portion of the learned trial Judge’s finding earlier on in this judgment, I think I should reproduce it once again for emphasis. He said:—

“The evidence of the grant of overdraft facility to the defendant to the tune of ₦600,000 as stated by the PW1 stands unchallenged and uncontradicted. This is so because on a critical analysis of exhibits 3, 5, 6 and 7 particularly paragraph 2 thereof, one is not left in doubt that the said facility was granted to the defendant.”
It is the law that evidence which is unchallenged and uncontradicted ought to be accepted, if found credible when there is nothing on the other side of the balance to be considered.

Adejumo v Anyantegbe (1989) 3 NWLR (Part 110) 417 at 651 para E. The evidence from the plaintiff on the grant of the facility with particular reference on exhibits 3, 5, 6 and 7 is credible and the court can safely act on it.”

I totally agree with the above finding. Although the respondent denied ever having received the overdraft in issue, his stance was expressed rather with tongue-in-cheek. This can easily be discerned from his brief of argument which is by and large a psalmody designed not to deny the receipt of the overdraft but to posit that it was not due for repayment at the time the action was commenced.

Having thus arrived at a finding, rightly too in my view, that the respondent did receive the overdraft, the next crucial issue was for the learned trial Judge to address the question whether the debt was due for repayment, while considering when a debt would be due for repayment, Ighu JSC delivering the judgment in Ishola v S.G.B. (Nig.) Ltd (1997) 2 NWLR (Part 488) 405 at 422 put the issue so clearly thus:–

“Generally, a debt is repayable either on demand, on notice given or upon any other condition agreed upon by the parties. See Lloyds Bank Ltd v Margolis (1954) All ER 734 at 748 etc. It is also an implied term in the relationship between a banker and his customer that there should be no right of action for the repayment of an overdraft until there has been a demand or notice given. See Angyu v Malami (1992) 9 NWLR (Part 264) 242 at 252. The cause of action does not arise until there has been a demand made or notice given. When therefore there is no specific date agreed upon for the repayment of an overdraft, as in the present case, a demand should be made or notice given. In other words, a cause of action on an unpaid overdraft is not deemed to accrue where no specific date for payment is agreed upon until there has been a demand made or notice given.”

See also Angyu v Malami (1992) 9 NWLR (Part 264) 242 at 252 and BON Ltd v Akorede (1995) 1 NWLR (Part 374) 736 at 747. I find the discussion by JO Orojo in his book
Nigerian Commercial Law and Practice Volume 1 rather very helpful. At paragraph 6.135 of page 364 he said:—

“Where an overdraft is granted by the bank the cause of action does not arise until there has been a demand made or notice given. It is an implied term in the relationship between a banker and his customer that there should be no right of action for the repayment of an overdraft until there has been a demand made or notice given, but the issue of a writ is a sufficient demand.”

Was there any demand made by the appellant in this matter? The learned trial Judge appeared to have adverted to this point when he referred to and accepted as unchallenged and uncontradicted the contents of exhibits 5 and 6. Exhibit 5, it should be noted, is a letter from the appellant demanding the respondent to settle his indebtedness. In his reply contained in exhibit 6, the respondent concluded that the overdraft he received was unauthorised and that he was requesting the appellant to withdraw the suit it filed against him so that he would concentrate on repaying the overdraft. All these show in unmistakable terms that there was a demand properly made by the appellant for the repayment of the overdraft. Whether or not there was a specific date when the overdraft would mature for repayment is an entirely different matter which I will consider in due course. But suffice it to say that there is no specific averment in the statement of defence which made the question of the date of repayment an issue. It should, in the circumstances of the case before the court below, be taken that the date of repayment should commence was not made an issue from the pleadings. As far as a demand for repayment is concerned, exhibit 5 expressed the notice which was served on the respondent to make good his debt and in reaction about two years later, he acknowledged the indebtedness and expressed his willingness to settle it. I therefore agree with the learned trial Judge that exhibit 5 was unchallenged and uncontradicted and the effect of it is that the appellant had given the respondent a demand notice to which he responded, as contained in exhibit 6, his willingness to settle the debt.
The next question in my judgment is whether the issue had been joined regarding the time the overdraft should be repaid. I have gone through the pleadings over and over again but I could not find any averment tending to show that the date of repayment is made an issue. This is quite understandable. The respondent’s case is that he did not receive the overdraft in question at all. To somersault and call in aid the vital question of maturity of the date of repayment at the stage of addresses of Counsel would be a contradiction in the respondent’s case. If he contended that he never received the overdraft but the learned trial Judge found otherwise, then the submission of learned Counsel at the stage of addresses positing that the loan was not due for repayment is but a clear contradiction since he never conceded that he owed the appellant. In any case Order 25 Rule 6(2) of the Plateau State High Court (Civil Procedure) Rules, 1987 is clear. The rule is hereunder reproduced. *Viz:*—

> “Any condition precedent, the performance or occurrence of which is intended to be contested, shall be distinctly specified in his pleading by the plaintiff or the defendant, as the case may be; and, subject thereto, an averment of the performance or occurrence of all conditions thereto, precedent necessary for the case of the plaintiff or the defendant shall be implied in his pleading.”

The above rule appears to be similar to the rule under the English Rules. Bullen and Leake and Jacob’s *Precedents of Pleadings* (12ed) page 334 expressed the view that failure to comply with a condition precedent must be taken as an objection by the defence in the pleading stating therein clearly what those conditions are and showing that they were not fulfilled. The respondent herein did not raise the question about the maturity of the overdraft for repayment. The matter came up when, under cross-examination, PW1 in an answer to a question said:—

> “The overdraft was supposed to last for 12 months from the day the account was overdrawn which was on December, 1989.”

I do not believe that the above evidence can be extended so wide as to contend that it is meant to express the fact that repayment of the loan would only commence 12 months after
the account is overdrawn. Far from it, the above piece of evidence only proved the life span but there is nothing therein to show that the loan shall not mature for repayment until 12 months after the account was overdrawn.

In any event even if that was the intendment of the piece of evidence, coming as it was during cross-examination in a situation where there is no averment in the pleading to support it, the pleading would have to be amended. This is so because where evidence is adduced or attempted to be adduced on facts not pleaded, such evidence should not be allowed to be given and where it had been given, it should be discountenanced or expunged. See Onamade v ACB Plc (1997) 1 NWLR (Part 480) 123; Njoku and others v EME others (1973) 5 SC 293; Okafor and others v Okitiakpe (1973) 2 SC 49; Emegokwue v Okadigbo (1973) 4 SC 113; Shell Pet. Dev Co. v Ambah (1999) 3 NWLR (Part 593) 1; Alh. Otaru and Sons Ltd v Idris (1999) 6 NWLR (Part 606) 330. Clearly the evidence adduced is not supported by any averment in the respondent’s pleading. It must in the circumstances be discountenanced.

It does appear that the learned trial Judge, with all due respect to him, relied on a piece of evidence that finds no support in the pleadings to arrive at his final decision to strike out the suit on the ground that the overdraft was not due for repayment. But from the respondent’s pleading, it was not his case that the overdraft was not mature for repayment. To the contrary, his case was that he never at anytime received the overdraft in issue. If, as the learned trial Judge found that the respondent indeed received the overdraft, the suit would appear to have been settled. But his conclusion that the overdraft was not mature for repayment was built on no pleading. The courts have been admonished to be on guard so that they would not deviate from the case made by each party in the pleadings, otherwise it will unwittingly be making for the parties an entirely new case. See Ibanga and others v Chief Usanga (1982) 5 SC 103 at 124 and 130; Okpala and another v Dereke-Solar (1986) 4 SC 141 at
I have taken cognisance of the submissions of learned Counsel for the respondent. His stand would have been opposite if he had taken steps to amend the respondent’s pleading to take care of the evidence which emerged and which finds no averment to support it. It was just like building something on nothing. But as far as the law is concerned, the finding of the learned trial Judge is perverse and this Court must intervene and have it reversed, most especially having regard to his clear finding that the respondent was indeed granted an overdraft by the appellant who took steps to give notice of demand for its repayment. My answer to the first issue for determination is in the affirmative. Consequently, ground 2 of the grounds of appeal to which the issue is related succeeds.

The second issue for determination posits the question whether the appellant was entitled to the judgment of the court in terms of its claim. While arguing the issue, learned Senior Advocate (S.A.N.) submitted that the appellant had proved its case and was, in the circumstance, entitled to judgment. He said the only issue joined was whether the respondent was indebted to the appellant. That if the answer is in affirmative, then how much is he owing and whether he has paid. Learned S.A.N. said the trial Judge rightly found
that the appellant had granted to the respondent an overdraft facility but reached a wrong conclusion when he introduced the maturity for repayment and relied upon it to strike out the suit. Learned S.A.N. recalled the submissions of learned Counsel for the respondent to the effect that the debt was not due for repayment at the time the action was instituted. He said the submissions are to no avail because there is nothing in the respondent’s pleading which joined the issue on the due date for repayment.

Further, learned S.A.N. submitted that the appellant tendered exhibit 7 to contradict the averment in paragraphs 6 and 13(1) of the respondent’s statement of defence, the effect of which is that the respondent did not at any time receive any overdraft from the appellant. He relied on section 210(c) of the Evidence Act, 1990. He finally urged this Court to intervene and hold that the appellant had proved his case and was thus entitled to judgment.

On his part, learned Counsel for the respondent adopted all the arguments he proffered in respect of the first issue. He stressed that the court does not make case for the parties. He relied on *Egbunike v A.C.B* (1995) 2 NWLR (Part 375) 34, (1995) 2 SCNJ 58 at 77–78. He submitted that the evidence led by the appellant had the effect of destroying his case and indeed did just that. He said in that respect the respondent was not under any duty to lead evidence. He urged that the appeal be dismissed as totally lacking in merit.

I think the answer to issue 2 is largely dependent on the answer to the first issue. Having answered Issue 1 in the affirmative, the answer to the second issue is a foregone conclusion. The pleadings of the parties have determined those issues that are in controversy between them. I may perhaps have to stress that the sole purpose of pleading is to ensure that the parties to a case know the case they will meet at the trial, to obviate any surprise. See *Total (Nig.) Ltd v Nwako* (1978) 5 SC 1; *George v Dominion Flour Mills Ltd* (1963) 1 SCNL R 117, (1963) 1 All NLR 71; *Okagbue v Romaine*

For that reason, it is not open to a party to depart from his pleading and put up a different case. Equally so, a trial court will not depart from the case pleaded by the parties and to found judgment on matter which are neither pleaded nor constitute issues as settled in the pleadings. See *Lemomu v Alli BALOGUN* (1975) 3 SC 87; *Oviawe v I.R.P (Nig.) Ltd* (1997) 3 NWLR (Part 492) 126 at 141–142.

The learned trial Judge based his judgment for the respondent on the premise that the overdraft facility granted to the respondent was not due for repayment. The only clear issue joined between the parties is whether the appellant granted the overdraft as claimed. The respondent categorically denied ever receiving the said overdraft. However, the learned trial Judge found as a fact that the respondent did receive the overdraft. The question of due date for repayment did not present itself. I do not in fact feel that it would, since the overdraft facility was denied by the respondent. Any evidence elicited tending to show that the overdraft was not due for payment has to be pitchforked on some pleading. Issue has to be joined on it. But, as things are in this case, that evidence stands without support. It therefore becomes irrelevant since, in our adjudicatory system, issues must first be joined in the pleading before evidence can be led in their proof. I am of the firm view that the learned trial Judge was in error to have relied solely on the evidence “that the amount was not due and payable as at the time the action was commenced” to strike out the action when the amount was not due and payable was not pleaded. It was just raked from the blue and that is not the practice. If the respondent’s case was that the overdraft was not due for payment he would have pleaded it. But having denied ever receiving the overdraft, it would be contradictory for him to plead the
issue of due date for repayment. The two are mutually exclusive and pleading the former only means that the question of due date of payment did not arise.

Having said that, it is clear that the learned trial Judge had arrived at a perverse conclusion based as it was on evidence not supported by any averment. Having found that the respondent had received the overdraft (a fact which the respondent denied), the learned trial Judge ought to have given judgment to the appellant since it was the issue of grant or non-grant of the overdraft that was joined in the pleading. In the circumstance of this appeal, this Court has to interfere with the conclusion reached by the learned trial Judge. Issue 2 is answered in the affirmative. Grounds 1 and 3 from which it is identified therefore succeed.

The appeal is meritorious. It succeeds in its entirety. Accordingly, I hereby allow it and set aside the conclusion reached by the learned trial Judge namely that:

“The sum total of this is that the matter got to the court prematurely. The amount of the facility granted though in excess of the bank’s limit was not due for payment and the plaintiff couldn’t have been made to pay.

The effect of this is that for the various reasons given above, the suit is struck out as the amount was not due and payable as at the time the action was commenced. The cause of action had not accrued.”

In its place judgment is entered for the appellant, in terms of its claim, and as follows:

“(1) The respondent shall pay the appellant the sum of ₦612,803.05 being overdraft facility granted to him;

(2) Interest of 28% on the principal sum of ₦612,603.05 shall be charged from 3/10/85 till the date of judgment being 4/10/96 and 10% interest upon the judgment sum commencing from the date thereof in terms of Order 40 Rule 7 of the Plateau State High Court (Civil Procedure) Rules, 1987.”

There shall be costs for the appellant which I assess and fix at ₦5,000.
a Mukhtar JCA: I agree.

Nzeako JCA: I agree entirely with my learned brother, Mangaji JCA, that there is merit in this appeal and it should be allowed. I allow the appeal and make the same consequential orders as my learned and noble brother in his leading judgment.

c Appeal allowed.
First Bank of Nigeria Plc v Nireko Enterprises Limited

COURT OF APPEAL, ENUGU DIVISION

AKPABIO, OLAGUNJU, MUHAMMAD JJCA

Date of Judgment: 17 MAY, 2001

Facts

The Anambra State Local Government Systems/Local Government Joint Service Committee drew a cheque of ₦1.6 Million on the defendant/appellant bank in favour of the plaintiff/respondent. The said cheque was dishonoured in spite of the fact that the drawer’s account had sufficient funds to cover the cheque issued to the plaintiff/respondent. The plaintiff/respondent sued the defendant/appellant at the High Court of Anambra State of Nigeria holden at Awka in Suit No. A/62/96 claiming the sum of ₦3.8 million for loss of profit suffered in consequence of the wrongful dishonour of cheque No. HV006662438 of 14/9/95 issued to it. It also claimed 10% interest on the sum.

However, after issues had been joined and the plaintiff’s first witness had testified and was being cross-examined, the defendant/appellant filed a preliminary objection on the basis that the plaintiff/respondent lacked the necessary “locus standi” to institute the action. The trial Judge in a considered ruling, after arguments, dismissed the objection raised by the appellant with ₦1,500 cost against the appellant. The
appellant consequently appealed to the Court of Appeal. The main contention of the appellant in the appeal was that the cheque of ₦1.6 million which was dishonoured, whether rightly or wrongly, was drawn by the “Anambra State Local Government System/Local Government Joint Service Committee”, and not by the respondent.

The appellant contended that if anyone was to sue the bank, it should have been the drawer of the cheque (ie Anambra State Local Government System/Local Government Joint Service Committee), and not the respondent who was a payee and therefore had no privity of contract with the appellant.

**Held** –

1. In banking transaction, it is not only the drawer of a wrongful dishonoured cheque that can sue for breach of contract, the drawee or any other customer for whose benefit the cheque was drawn can sue for recovery of the money or consequential losses, for negligence or for any other tort. In other words, one can sue a bank for any cause of action; whether founded on contract, negligence or any other tort, regardless of whether there was privity of contract between the parties, or not. Similarly, a plaintiff may have “cause of action” and “locus standi” to sue a bank without necessarily having privity of contract depending on what is being sued for.

2. *Locus standi* as a congest is designed to keep out of litigation one who has no interest in a dispute before the court. Its object is to ward off the busybody from the business of the court. But by no stretch of the imagination the principle, which is designed to keep out those who have no business with the action before the court, can be extended to include one with genuine complaint the likes of which the law holds out assurance that it will wade into to effect justice. In the instant case, failure of the appellant to honour the cheque made payable to the respondent gives the right to an inquiry about why the
respondent’s entitlement to the proceeds of the cheque was withheld by the appellant.

3. Privity of contract is not a *sine qua non* to the exercise by a party of its right against another for the wrong allegedly committed by the latter regardless of whether the action is in contract or tort. What is important in the instant case is the violation of the right of the respondent as the beneficiary of the proceeds of the cheque for the sum of ₦1.6 million drawn by the customer of the appellant which the appellant refused to pay when the cheque was presented to it by the respondent.

4. Whether or not a party has the locus to institute and maintain an action against another would depend on what interest or injury the litigating party had manifested in the writ of summons and the claim. Whereas in the instant case, the respondent’s claim had clearly made bare an injury suffered and the injury was directly traceable to the appellant, the respondent must be adjudged to have locus to seek a remedy against the appellant. There existed a very clear nexus between the respondent and the set of facts that constituted the cause of action.

In the instant case, the plaintiff/respondent had a *locus standi* to sue the bank for consequential loss or damages without necessarily having “privity of contract” as he was a beneficiary in the transaction sued upon. That the learned trial Judge was therefore right in holding that the respondent had a *locus standi*.

*Appeal dismissed.*

**Cases referred to in the judgment**

*Nigerian*

*Adesanya v President of Nigeria* (1981) 2 NCLR 358; (1981) 12 NSCC 146

*Adesokan v Adegorolu* (1991) 3 NWLR (Part 179) 293
First Bank of Nigeria Plc v. Nireko Enterprises Ltd

   *Agwaramgo v U.B.N. Plc* (2001) 4 NWLR (Part 702) 1

b. *Anuforo v Obilor* (1997) 11 NWLR (Part 530) 661
   *Bolaji v Bamgbose* (1986) 4 NWLR (Part 37) 632
   *Ebongo v Uwemedimo* (1995) 8 NWLR (Part 411) 22

   *Eleso v Government of Ogun State* (1990) 2 NWLR (Part 133) 420

   *Fregene v Aweshika and others* (1957) WRNLR 156

e. *Momoh v Olotu* (1970) 1 All NLR 117
   *New Nigeria Bank Ltd v Odiase* (1993) 8 NWLR (Part 310) 235
   *Oloriade v Oyebi* (1984) 1 SCNLR 390

f. *Oredoyin v Arowolo* (1989) 4 NWLR (Part 114) 172; (1989) 20 NSCC (Part 111) 64, 72
   *Owodunmi v Registered Trustees of Celestial Church of Christ* (2000) 10 NWLR (Part 675) 315

g. *Thomas v Olufosoye* (1985) 3 NWLR (Part 13) 523
   *United Nigeria Insurance Co. v Muslim Bank (W.A.) Ltd* (1972) NCLR 8

h. **Nigerian rules of court referred to in the judgment**
   High Court of Anambra State (Civil Procedure) Rules, 1988,
   Order 3 Rule 7, Order 10 Rules 1(1), 2(1) and (2), Order 16
   Rules 1 and 18

i. **Counsel**
   For the appellant: PA Afubo, Esq.

j. For the respondent: MI Mozia (Mrs.)
Judgment

AKPABIO JCA: (Delivering the lead judgment) This is an appeal against a ruling of Olike J of the High Court of Anambra State of Nigeria, holden at Awka, in Suit No. A/62/96, wherein he dismissed the preliminary objection of the defendant/applicant that the plaintiff/respondent lacked the capacity and locus to institute this action, with costs of ₦1,500 in favour of the plaintiff.

In the trial court, the claim of the plaintiff was worded as follows:

“Whereupon the plaintiff has suffered substantial loss and damage and claim against the defendant as follows:

(a) ₦3.8 million (Three Million and Eight Hundred Thousand Naira) being loss of profit suffered by the plaintiff in consequence of the wrongful dishonour by the defendant of cheque no. HV00662438 of 14/9/95 issued to the plaintiff by the Anambra State Local Government System/Local Government Joint Service Committee.

(b) Interest at 10% on the judgment award until payment.

Dated at Awka this 20 March, 1996.”

However, after the issues had been joined in the matter and the plaintiff’s first witness had testified and was being cross-examined, the defendant on 22 June, 1997, brought an application on notice pursuant to Order 16 Rules 1 and 18 of the High Court Rules, 1988; Order 10 Rules 1(1) and 2(1) and (2) of the said Rules, Order 3 Rule 7 of the same High Court Rules, and the inherent jurisdiction of the High Court, claiming for the following orders of the High Court.

1. Setting down the issue of lack of capacity of the plaintiff/respondent as contained or raised in paragraph 17 of the statement of defence . . . for hearing and disposal.

2. Dismissing the . . . suit/matter/action without further trial, the plaintiff/respondent lacking the capacity and locus to bring the said action.”

The objection was vigorously contested on both sides, at the end of which the learned trial Judge came out with a six-paged considered ruling in which he dismissed the preliminary objection as being devoid of any merit with costs of
The defendant, being dissatisfied with that ruling, has now appealed to this Court formulating the following three issues for determination.

“The following issues arise for determination in this appeal:–

(i) whether the learned trial Judge was right when he held that there was privity of contract between the appellant and the respondent and therefore that the respondent had the locus standi to institute the action;

(ii) whether the respondent’s claim for damages for wrongful dishonour of cheque is founded on negligence;

(iii) was the appellant a collecting banker or a paying banker to the respondent in the transaction which gave rise to the claim in this suit.”

The defendant will hereinafter in this appeal be referred to simply as the appellant.

In his response the plaintiff, who will hereinafter in this judgment be referred to as the respondent, formulated only one issue as follows:–

‘Issue for determination:–

“The issue for determination in this appeal is whether the learned trial Judge was right when he held that there was privity of contract between the appellant and the respondent and therefore that the respondent had the locus standi to institute the action.”

The respondent then followed up his issue with the following observation:–

“Grounds 2 and 3 having been struck out by this Honourable Court, the corresponding issues identified by the appellant are no longer valid for consideration.”

I have looked into our master file in this appeal and find as a fact that grounds 2 and 3 of the appellant’s appeal were in fact struck out on 12 July, 2000 as being incompetent. Since in our law, all issues formulated for determination in an appeal must arise from and be founded on one or more of the grounds of appeal filed in the case; it follows that grounds 2 and 3 of the appeal having been struck out, Issues 2 and 3 founded on them must also be struck out. Accordingly, Issues 2 and 3 formulated by the appellant above are hereby
struck out. That leaves us with Issue 1 which is identical to
the lone issue formulated for the respondent. I shall accord-
ingly proceed to resolve it as follows:–

“Whether the learned trial Judge was right when he held that there
was privity of contract between the appellant and the respondent
and therefore that the respondent had the *locus standi* to institute
the action.”

In arguing this issue, it was first submitted that the trial court
had agreed with the submission of learned Counsel for the
respondent that he (the respondent) had *locus standi* to insti-
tute the action on the ground that both the respondent and
the drawer of the cheque maintained accounts with the app-
ellant in the same branch at Awka. It was pointed out how-
ever that that was an erroneous conclusion. It was then sub-
mitted that in determining whether a plaintiff has *locus
standi* to maintain an action, the court must confine itself to
the plaintiff’s claim and statement of claim and no more. Be-
ing an issue of law, the court must disregard averments in
any affidavit filed before it. The following three cases were
then cited in support:–


It was further argued that even if the statement of claim con-
tained the averment that the respondent maintained an ac-
count with the appellant, the respondent’s complaint in the
suit, ie dishonour of the cheque, did not relate to the said ac-
count in so far as the cheque in question was not drawn on
that account. It was of course common ground between the
parties, and as averred in paragraphs 6 and 10 of the state-
ment of claim, that the cheque was issued by and drawn on
the account of Anambra State Local Government Sys-
tem/Local Government Joint Service Committee. Conse-
quently, it was the appellant’s contention that the existence


of any other account maintained by the respondent with the appellant was completely irrelevant to the issue in controversy in this case. It followed therefore that the respondent not being a party to the contract between the appellant and the drawer of the cheque, which contract formed the basis upon which the cheque was drawn, the respondent clearly cannot sue on the contract and therefore lacked the *locus standi* to maintain the present action. The case of *African Continental Bank Plc v David O Nwodika* (1996) 4 NWLR (Part 443) 470 at 483 was cited in support. The court was therefore urged to resolve this issue in favour of the appellant.

In response to the above, it was submitted on behalf of the respondent that the question whether or not a plaintiff has a *locus standi* in a suit is determinable from the totality of all the averments in his statement of claim. Thus, in dealing with the *locus standi* of a plaintiff, it is his statement alone that has to be carefully scrutinised with a view to ascertaining whether or not it has disclosed his interest and how such interest has arisen in the subject matter of the action. The cases of *Bolaji v Bamgbose* (1986) 4 NWLR (Part 37) 632 and *Owodunni v Registered Trustees of Celestial Church of Christ and 3 others* (2000) NWLR 10 (Part 675) 315 at 354 were cited in support. The case of *Ejiwummi v Costain (W.A.) Plc* (1998) 12 NWLR (Part 576) 149 at 164 decided by the Court of Appeal was also cited and relied upon. It was emphasised that there must be a nexus between the plaintiff and the disclosed cause of action concerning his rights or obligations which have been breached or threatened to be violated. It was then submitted that such interest has been sufficiently disclosed in the instant case.

The learned Counsel for the respondent then veered into the realms of banking law and practice and explained who a “collecting banker” was, then submitted that:

“Where the drawer has adequate funds in its account to meet the value of the cheque, it would be negligence on the part of the bank if it failed to “clear” the cheque and pay the proceeds into the customer’s account.”
It was then argued that where the bank was negligent while acting as a collecting bank it was the customer, who is the owner of the account and the negligently handled cheque, that can sue as in this case. It was therefore submitted that there was a contract between the appellant bank and the respondent, being its customer. The case of *United Nigeria Insurance Co. v Muslim Bank (W.A.) Ltd* (1972) NCLR 8 SC was cited in support.

In conclusion, it was submitted that the respondent had *locus standi* to institute the action in the High Court because there was a contractual relationship between the appellant and the respondent. There was therefore a privity of contract between them. The court was therefore urged to dismiss this appeal as it lacked merit.

I have carefully considered all the arguments canvassed above by the learned Counsel on both sides, and must say that the wrong impression appears to have been created by the learned Counsel for the appellant that in banking transactions only the drawer of a wrongly dishonoured cheque can sue for breach of contract, whereas the drawee or any other customer for whose benefit the cheque was drawn can sue for recovery of the money or consequential losses, for negligence or for any other tort. For illustration the case of *New Nigerian Bank Ltd v Odiase* (1993) 8 NWLR (Part 310) 235 is a typical example.

In that case the respondent had applied through the appellant bank to the Central Bank of Nigeria for foreign exchange approval to buy $4,000.00 to enable him continue his studies in mining engineering in Turkey Middle East. As the respondent had no account in the bank, he was requested to submit his application through any of the existing customers of the bank, and he did so through one Dr. Aimuwa. However, when the Central Bank of Nigeria’s approval was received, the appellant bank sold it to a complete stranger, instead of using it to remit money to the respondent in Turkey. When the truth ultimately came out the appellant was sued for N750,000 being special and general damages. When the
trial came up at the Edo State High Court the appellant came out with a preliminary objection similar to that of the appellant in the instant case, namely that:

(i) The plaintiff has no *locus standi* in this suit in that there was no privity of contract between the plaintiff and defendant.

(ii) There is no cause of action in this suit since the action is not maintainable in law.”

The learned trial Judge, Obi J, in the court below overruled the objection and held that the respondent had a *locus standi* to sue, as he was clearly a disclosed principal, while his mother and Dr. Aimuwa, through whose account the application was made, were his agents. On appeal to the Court of Appeal (Benin Division) the ruling of the court below was affirmed. It was further added that even if there had been no privity of contract between the appellant and the respondent, the pleadings disclosed that there was a serious case of breach of trust committed by the appellant. There was nothing in our law preventing a beneficiary from suing a trustee. The case of *Fregene and others v Socrates M.A. Aweshika and others* (1957) WRNLR 156 was cited in support.

The above case clearly shows that one can sue a bank for any cause of action, whether founded on contract, negligence or any other tort, regardless of whether there was privity of contract between the parties or not. Also, that a plaintiff may have “cause of action” and “*locus standi*” to sue a bank without necessarily having privity of contract depending on what was being sued for.

I should also observe that the insistence on “*locus standi*” as a precondition for suing the appellant in this case seems to have been borrowed from the realms of chieftaincy disputes as most of the cases cited by the appellant were chieftaincy cases.

As a matter of fact the case of *Adesokan v Adegorolu* (1991) 3 NWLR (Part 179) 293 at 305–306, cited by the appellant, and heavily relied upon by him, was a chieftaincy case decided by the Court of Appeal, Ibadan, when I was there.
In that case we made the following pronouncements which are still valid law in the realms of chieftaincy disputes till today.

1. On determining *locus standi* of plaintiff – In an application to determine whether a plaintiff has *locus standi* or not, the Judge is bound to confine himself within the four walls of the writ of summons and the statement of claim before him and no more, as the issue of *locus standi* is a matter of law. Even if the statement of defence has been filed at the time the objection was made, the Judge would still be bound to confine himself to the statement of claim of plaintiff to decide whether he has a *locus standi*. (Pages 305–306 Paras. H–A).

2. On onus on plaintiff to establish his *locus standi* – For the plaintiff to have a *locus standi* in bringing an action he must show that he has sufficient interest in the matter. ([Momoh v Olotu](1970) 1 All NLR 117 at 123; [Thomas v Olufosoye](1985) 3 NWLR (Part 13) 523 referred to) (Page 307 Paras. A–B)

3. On *locus standi* in chieftaincy matters – In chieftaincy matters it is not enough for the plaintiff to state that he is a member of the family. He has to state further that he has an interest in the chieftaincy title and furthermore, state in his statement of claim how his interest in the chieftaincy title arises and membership of a chieftaincy family is not enough as not all members of a chieftaincy family are eligible for chieftaincy. (Page 307 Paras. A–C).

All the above *ratios* were founded on the two earlier cases of [Momoh v Olotu](1970) 1 All NLR 117 at 123 and [Thomas v Olufosoye](1985) 3 NWLR (Part 13) 525, which were chieftaincy disputes.

Even in *Olotu*’s case, which appears to be the grundnorm or the *locus classicus* on the law of “*locus standi*”, the applicable principle was succinctly put as follows under *ratio* 4 at page 118:

“4. It is not enough for the plaintiff to state that he is a member of the family; he has to state further that he has an interest in the chieftaincy title, and furthermore, state in his statement of claim how his interest in the chieftaincy title arose. It was difficult to say on the pleadings filed that the plaintiff had any locus in the matter.”
Applying the above principles to the statement of claim filed by the respondent in this case, one will see that the facts supporting his claim and how the claim came about were sufficiently disclosed in paragraphs 6–16(a) of his statement of claim, which I need not reproduce in this judgment. The main complaint of the appellant in the appeal is that the cheque for ₦1.6 million which was dishonoured, whether rightly or wrongly, was drawn by the “Anambra State Local Government System/Local Government Joint Service Committee”, and not by the respondent. Therefore, if anyone was to sue the bank it should have been the drawer of the cheque (ie the Anambra State Local Government System/Local Government Joint Services Committee) and not the respondent, who was a payee and therefore had no privity of contract with the appellant.

But I have shown clearly above, through the case of NNB Ltd v Odiase (supra), that one does not need to have privity of contract with a bank before he has “locus standi” to sue for consequential losses either for negligence or breach of trust. See also the most recent case of Agwaramgbo v U.B.N. Plc (2001) 4 NWLR (Part 702) CA 1 where, on a similar complaint as the case in hand, the Court of Appeal (Calabar Division) per Opene JCA had the following to say in his contribution at pages 28–29 of the reports:–

“It is settled law that in determining whether or not a plaintiff has a locus standi to institute an action that it is the statement of claim that should be thoroughly examined as to ascertain whether or not it has disclosed the plaintiff’s interest and how much interest that he has in the subject matter. See Owodunni v Registered Trustees of Celestial Church of Christ and Others (2000) 10 NWLR (Part 675) 315; Bolaji v Bamgbosé (1986) 4 NWLR (Part 37) 632; Momoh v Oloto (1970) 1 All NLR 117; Adesanya v President of Federal Republic of Nigeria (1981) 2 NCLR 358, (1981) 5 SC 112; Eleso v Government of Ogun State (1990) 2 NWLR (Part 133) 420; and Oloriode v Oyebi (1984) 1 SCNLR 390.

On a careful and critical examination of the statement of claim, it shows that the appellant averred that a cheque for the sum of ₦2,022,022.60 was collected by the appellant from the Ministry of Defence as compensation money due to the people of Ekagha
Ekong Village for acquisition of their land, that he gave the Ministry of Defence an indemnity for the full payment of the said compensation money and that he lodged the said compensation money in the partnership account in the respondent’s bank.

From the foregoing, it cannot be said that the appellant had not disclosed sufficient interest in this matter and that he has a *locus standi* to bring this action and this of course is not dependent on the success or merits of the case.”

In view of all that has been said above, I am of the firm view that one can have the *locus standi* to sue a bank for consequential loss or damages without necessarily having privity of contract, if he is a beneficiary in the transaction sued upon as in the instant case. The learned trial Judge was therefore right in holding that the respondent had a *locus standi* in this case.

This appeal therefore fails and is hereby dismissed with costs of ₦5,000 (Five Thousand Naira) in favour of the respondent.

**OLAGUNJU JCA:** I have had the privilege of reading in draft the judgment just delivered by my learned brother, Akpabio JCA, and I agree with his conclusion and reasoning that this appeal lacks merit and should be dismissed.

Truncated by the incompetent second and third grounds of appeal that rendered invalid the second and third issues for determination formulated by the appellant from those two grounds, the lone issue on which the challenge of the decision of the court below is founded is whether the respondent as the plaintiff at the trial court has the *locus standi* to institute the action against the appellant between whom, the appellant argued, there was no privity of contract.

The leading judgment has demonstrated quite clearly and convincingly, from the precedent of the decision of this Court in *New Nigeria Bank Ltd v Odiase* (1993) 8 NWLR (Part 310) 235, that privity of contract is not a *sine qua non* to the exercise by the respondent of its right against the appellant for the wrong allegedly committed by the appellant regardless of whether the action is in contract or tort. What
Olagunju JCA

First Bank of Nigeria Plc v. Nireko Enterprises Ltd

...is important is the violation of the right of the respondent as the beneficiary of the proceeds of the cheque for the sum of ₦1.6 million drawn by the customer of the appellant, which the appellant refused to pay when the cheque was presented to it by the respondent. Given the meaning of “locus standi” as the right to bring an action or to be heard in a given forum, the denial of payment to the respondent of the proceeds of the cheque by the appellant gives the respondent the right to call the appellant’s refusal into question regardless of what excuse for non-payment of the cheque might be open to the appellant with which the trial court is not concerned until the merit of the action is gone into by the court.

The technical expression *locus standi* has been interpreted in a number of cases which include *Adesanya v President of Nigeria* (1981) 2 NCLR 358, (1981) 12 NSCC 146; *Thomas v Olufosoye* (1986) 1 NWLR (Part 18) 669, (1986) 17 NSCC (Part 11) 324, 331, 333; *Fawehinmi v Akilu* (1987) 4 NWLR (Part 67) 797, (1987) 11–12 SCNJ 151 and *Oredoyin v Arowolo* (1989) 4 NWLR (Part 114) 172, (1989) 20 NSCC (Part 111) 64, 72. *Locus standi* as a concept is designed to keep out of litigation one who has no interest in a dispute before the court. In other words, its object is to ward off the busybody from the business of the court. But by no stretch of the imagination the principle, which is designed to keep out those who have no business with the action before the court, can be extended to include one with genuine complaint the like of which the law holds out assurance that it will wade into to effect justice. Failure of the appellant to honour the cheque made payable to the respondent gives right to an inquiry about why the respondent’s entitlement to the proceeds of the cheque is withheld by the appellant. The respondent has the right to know. To raise a preliminary objection to an action alleging a violation of the right is a calculated attempt to scuttle the inquiry. Therefore, the learned trial Judge was right to have overruled the objection.

Everything considered, I agree that the learned trial Judge came to the right decision by not interrupting the trial of the
action. For the foregoing reasons and for the fuller reasons given in the lead judgment I also dismiss this appeal. I abide by the consequential orders made in the lead judgment.

**MUHAMMAD JCA:** I have had a preview of the lead judgment just delivered by my learned brother, Akpabio JCA, with whose reasoning and conclusions I unhesitatingly agree.

The respondent in this appeal had, as plaintiff, sued the appellant, then being the defendant, at the lower court. A cheque in favour of the respondent had been drawn on the appellant. Appellant had dishonoured the cheque in spite of the fact that the drawer’s account had sufficient funds to cover the cheque issued to the respondent. The respondent’s claim against the appellant was for ₦3.8 million for loss of profit suffered in consequence of the wrongful dishonour of cheque no. HV00662438 of 14 September, 1995 issued to the respondent. A 10% interest on the sum as claimed was also asked for by the respondent.

The appellant, as defendant, subsequently filed a preliminary objection on the basis that the respondent lacked the necessary locus to institute the action. The trial Judge in a considered ruling, after arguments, dismissed the objection raised by the appellant with a ₦1,500 cost against the appellant. The appeal before us is in respect of this ruling of the lower court.

There is only one issue for the determination of this appeal. This is so because the two grounds of appeal from which the other issues formulated by the appellant were drawn had ceased to exist since same had been, pursuant to an objection raised and sustained by this Court, struck out. The only issue is whether the trial Judge was right to have found that the respondent had the locus to sue the appellant.

I am of the firm view that whether or not a party has the locus to institute and maintain an action against another, would depend on what interest or injury the litigating party had manifested in the writ of summons and the claim.
Whereas in the instant case, the respondent’s claim had clearly made bare an injury suffered and the injury is directly traceable to the appellant, the former must be adjudged to have locus to seek a remedy against the appellant. There is a very clear nexus here between the respondent and the set of facts that constituted the cause of action. See Ejiwunmi v Costain (W.A.) Plc (1998) 12 NWLR (Part 576) 149 at 164 and New Nigeria Bank Ltd v Odiase (1993) 8 NWLR (Part 310) 235 aptly referred to and applied in the lead judgment.

It is thus not necessary that the respondent must be the appellant’s customer before the locus to institute an action for a clear injury can ensure.

For this and the more elaborate reasons given in the lead judgment, I affirm the judgment of the lower court having found the appeal before us without merit.

I adopt all the consequential orders contained in the lead judgment including the order regarding costs.

Appeal dismissed.
Societe Generale Bank of Nig. Limited v Eleganza Industries Limited

COURT OF APPEAL, LAGOS DIVISION

GALADIMA, ADEREMI, OGUNTADE JJCA

Date of Judgment: 24 MAY, 2001

Banking – Banker and customer relationship – Banking transaction on behalf of customer – Responsibility of bank thereto – Failure to carry out – Negligence inferred

Banking – Documentary credit – Exemption clauses relating thereto – Purpose of – Breach of contract by bank – Whether can rely on exemption clause


Facts

The plaintiff/appellant’s claim was for the sum of ₦421,750.59 as at 30 October, 1990 and interest at the rate of 30% per annum from 1 November, 1990 until the entire debt was liquidated.

The appellant’s complaint was that on 21 March, 1987 the respondent applied through the appellant for and established an irrevocable letter of credit for remittance of foreign exchange to its suppliers abroad. The respondent completed the necessary forms and paid a provisional cash cover in the sum of ₦480,000 for the said sum remitted. Appellant claimed to have submitted all the necessary exchange control documents to the Central Bank of Nigeria for the necessary processing but it carefully omitted to mention when it did so. The appellant simply went on to aver that it was not until 21 November, 1998 that the Central Bank of Nigeria released the foreign exchange for the transaction by which time the exchange rate between the CFA and the Naira had...
gone up substantially, such that there was a huge shortfall which the defendant was then called upon to make up.

On the other hand, the respondent specifically pleaded the date on which the application was made as 20 February, 1987 and the date on which the appellant submitted the documents to the Central Bank as 19 October, 1987, a fact which the appellant deliberately omitted to plead in its case as presented to the court. Besides, the respondent showed that even though the goods in respect of which the letters of credit was established had arrived timeously in June, 1987, the foreign exchange proceeds was not paid until 12 November, 1998 and the respondent specifically pleaded that this was due to the negligence of the appellant.

The respondent also joined issues with the appellant on the latter’s claim that the conditions on the reverse side of the irrevocable letter of credit signed by the respondent created liability against the respondent for the payment of the shortfall in Naira occasioned by the late payment of the foreign exchange proceeds.

Specifically the respondent pleaded in this regard that the negligent delay of the appellant could not be wished away by the said conclusion contained in the irrevocable letter of credit.

After due trial, the learned trial Judge dismissed the appellant’s claim. It appealed to the Court of Appeal.

**Held** –

1. Where a bank holds out itself to be professionally competent and skilled to carry out the necessary obligation involved in a banking transaction such as remittance of foreign exchange and where it shirks that responsibility, it is negligent, *prima facie*, in that it owed the customer a duty of care which it had shirked.

2. Where the law does not stipulate a particular time frame within which a contract is to be performed, it is usually implied that such contract be performed within a reasonable time according to the circumstances bearing in mind
the means and ability of the party to perform the contract.

In the instant case, the period in which the appellant delayed in submitting the exchange control documents to the Central Bank was inordinate and the learned trial Judge was correct to have inferred negligence, as he did in the circumstances, and therefore the appellant should bear the attendant loss.

3. In a contract of international commercial transaction by documentary credit, the relationship between the issuing bank and the confirming bank is that the latter is the agent of the former.

In the instant case, the appellant as issuing bank is the principal of the bank in Abidjan. Therefore, it is vicariously liable for the negligence of the bank in Abidjan in the delay in paying the supplier for over 15 months which resulted in huge exchange loss.

4. In the law relating to banker’s documentary credits, such as in this case, exemption clauses are usually included in the contracts to exempt the banker from liability for matters which are not within his control. However, this is not the case here where evidence has shown that the appellant had every means and opportunity to control the transaction herein either by itself or through its agent in Abidjan but it failed to utilise the opportunity.

Appeal dismissed.

Cases referred to in the judgment

Nigerian

Agbonmagbe Bank Ltd v C.F.A.O. (1966) 1 SCNLR 367
A-G Bendel State v UBA Ltd (1986) 4 NWLR (Part 37) 547
Oyewale v Oyesoro (1998) 2 NWLR (Part 539) 663
GALADIMA JCA: (Delivering the lead judgment) This is an appeal against the judgment of Adeyinka J sitting at the Lagos High Court, Ikeja Division in Suit No. LD/2554/90 delivered on 12 November, 1997.

The appellant (as plaintiff) in the court below claimed from the respondent (as defendant) the sum of ₦421,750.59 as at 30 October, 1990 and interest at the rate of 30% per annum from 1 November, 1990 until the entire debt is liquidated. The sum claimed arose from a shortfall in the foreign exchange remittance in respect of an irrevocable letter of credit established by the defendant in favour of its foreign principals on its current account no. 032311681 with the plaintiff’s Lagos Branch.

Pleadings were ordered, filed and exchanged. The plaintiff called one witness and tendered 13 exhibits while the defendant also called one witness and tendered 15 exhibits.

After the addresses of Counsel for the parties, the learned trial Judge in a reserved judgment dismissed the claim of the plaintiff.

Dissatisfied with the judgment the plaintiff has now appealed to this Court on ten grounds of appeal. The parties filed their respective briefs from the grounds of appeal. The
appellant in his brief formulated the following five issues for determination:

1. Whether on the state of the pleadings and evidence, appellant can be said to have negligently delayed in the performance of its obligations under the contract to open letters of credit in favour of the respondent’s overseas suppliers.

2. Whether on the state of pleadings and evidence the confirming bank was rightly found to be negligent and if so who should bear whatever loss was thereby occasioned.

3. Whether delay in releasing foreign exchange by Central Bank of Nigeria and the consequent delay in paying overseas suppliers by the confirming bank were shown to be negligent and/or caused by the appellant and therefore the appellant should bear the attendant loss.

4. Whether the appellant was not entitled to rely on paragraphs 2, 5 and 6 of exhibit P1.

5. Whether the appellant is not entitled to judgment based on respondent’s admission of the claims of the appellant before the suit and upon the evidence before the court.

On its part, the respondent raised five issues for determination as follows:

(a) What was the period in which the appellant delayed in submitting the exchange control documents to the Central Bank and was it inordinate in the circumstance?

(b) If it is found that the appellant’s delay was inordinate, can negligence be referred to in the circumstance?

(c) What is the relationship in law between the appellant and the confirming bank in Abidjan and can the appellant be held vicariously liable for the delay (if any) of the said bank in the circumstances?

(d) Can the appellant rely on the exception clauses in exhibit P1 to explain away the consequences if its initial delay in submitting exchange control documents and the resultant delay by the Central Bank of Nigeria which resulted in the short-fall.

(e) Was there any admission at all of paragraphs 9 to 12 of the appellant’s claim by the respondent in paragraph 6 of the statement of defence?

It would appear to me that, from the facts of this case set out below hereafter and the evidence adduced before the trial
court as borne by the records, the issues which I consider to have more direct bearing to this appeal are those five issues raised and formulated by the appellant for my consideration and determination in this appeal.

Before I consider these issues which I considered to be germane and relevant to this appeal, I would expose the set of facts upon which the matter was fought in the trial court. The facts of this case are disclosed in the pleadings. The plaintiff’s complaint is that on 21 March, 1987, the respondent applied through the appellant for and established irrevocable letter of credit for remittance of foreign exchange to its suppliers abroad. The respondent completed the necessary forms and paid a provisional cash cover in the sum of ₦480,000 for the said sum remitted. Appellant claimed to have submitted all the necessary exchange control documents to the Central Bank of Nigeria for the necessary processing but it carefully omitted to mention when it did so. The appellant simply went on to aver that it was not until 21 November, 1998 that the Central Bank of Nigeria released the foreign exchange for the transaction by which time the exchange rate between the CFA and the Naira had gone up substantially such that there was a huge shortfall which the defendant is now called upon to make up.

On the other hand, the respondent specifically pleaded the date on which the application was made as 20 February, 1987 and the date on which the appellant submitted the documents to the Central Bank as 19 October, 1987, a fact which the appellant deliberately omitted to plead in its case as presented to the court. Besides, the respondent showed that even though the goods in respect of which the letters of credit was established had arrived timeously in June, 1987, the foreign exchange proceeds was not paid until 12 November, 1988 and the respondent specifically pleaded that this was due to the negligence of the appellant.

The respondent also joined issues with the appellant on the latter’s claim that the conditions on the reverse side of the irrevocable letter of credit signed by the respondent creates
liability against the respondent for the payment of the short-fall in Naira occasioned by the late payment of the foreign exchange proceeds.

Specifically the respondent pleaded in this regard that the negligent delay of the appellant cannot be wished away by the said exclusion contained in the irrevocable letter of credit.

Before proceeding to consider the arguments proffered on these issues, I must comment briefly on the respondents observation made on what they consider as “faulty grounds of appeal”. It would appear these observations were made before the appellant sought for and was granted leave to amend its notice of appeal. The amended notice of appeal was dated 21 November, 2001 and filed on 23 November, 2001. The observation made in the respondent’s brief was filed on 1 June, 2000. This was well over five months before the appellant sought for and obtained leave to amend its notice of appeal. In the circumstances I do not think those observations made by the respondent’s learned Counsel could hold sway and convince me to strike out grounds 1, 6, 7 and 9 of the appellant’s notice of appeal. I will however consider the merits of the issues raised by the appellant in its brief of argument.

I will first of all consider the first and second issues together. It is to be noted that the findings of the lower court were that the appellant negligently delayed in submitting the exchange control documents and also negligently delayed in paying the overseas suppliers. Before reaching these conclusions the learned trial Judge had set out one issue for his consideration at page 122 of the records thus:–

“The 1st issue for determination is whether the appellant negligently delayed in submitting the respondent’s exchange control documents to the Central Bank of Nigeria and in the payment of the proceeds of the irrevocable letters of credit.”

The learned Counsel for the appellant in the brief submitted that the appellant pleaded delay but did not allege that it was negligent nor did it give evidence that the delay was
a negligent. I do not think this assertion is correct. Contrary to this impression, I find that the issue of delay and/or negligent delay was pleaded by the respondent in paragraph 9 of the statement of defence and the appellant duly replied to it in paragraph 1(c) of its reply. The issue of delay and/or negligent delay was glaringly pleaded in the face of the records.

b In paragraph 1(c) of the amended reply to the statement of defence, the appellant, relying on a number of documents, stated as follows:

“(1)(c) That the plaintiff did not delay and was not negligent but in fact treated the defendant as a valued customer and processed the defendant’s foreign exchange with dispatch...”

c However, the learned trial Judge in the judgment at page 131 of the records held that the delay was negligent. It would appear so to me too. The appellant said in paragraph 1(b) of its amended reply that it submitted the exchange control documents to the Central Bank of Nigeria on 31 August, 1987, that is barely seven days after the respondent gave them to the appellant. This is not true. In paragraph 4 of its statement of defence and through its only witness on 18 June, 1996 it was clearly shown that the documents were submitted to the Central Bank only on 19 October, 1987, which is 55 days later. The respondent witness tendered “Exhibit D8”. This is a copy of the appellant’s covering letter to the Central Bank. It will be noted that this piece of evidence is not rebutted by the appellant. Under cross-examination, no attempt was made to debunk this piece of evidence. It was clearly avoided. It is now obvious that the appellant delayed for 55 days and certainly not seven days as it claimed and the delay was unreasonable in the circumstances.

d The appellant denied the delay in the submission of the exchange control documents. That the negligent delay in the submission of the exchange control documents and the Central Bank of Nigeria has not been proved, and consequently
contribution on delay by the Central Bank of Nigeria in releasing foreign exchange has also not been proved.

In the appellant’s brief one important observation was made about the appellant’s first ground of appeal from which the first issue for determination was distilled. The observation about this ground is that it is couched in such a way that it does not complain against a finding of the lower court, so to say, but on a mere opinion or even view of the court as to what the issue set out for determination should be. Appeals are brought against findings or decisions of the court, not otherwise. This explains the superfluous nature of the ground of appeal and the arguments based thereon as contained in the brief of argument of the appellant. This explains also why the case of *Oyewale v Oyesoro* (1988) 2 NWLR (Part 539) 663 and 679 cited by the appellant will not apply. This very quotation the appellant relied on stated that:

“Where a finding of fact by a trial court does not correctly reflect the claims of the parties before it . . .” (italics mine)

With due respect to the learned Counsel for the appellant, the issue for determination as couched by the learned trial Judge is not a “finding” in the circumstances but “an issue for determination”. It is when it has been determined that findings will be made there upon. I agree with the learned Counsel for the respondent that the appellant got off on “a wrong footing” as far as ground 1 is concerned. So whether on the law or on the facts, that issue however postulated must be resolved against the appellant. Under this issue, the appellant made a curious point on page 6 paragraph 412 of its brief of argument to the effect that it must be shown that the period between the submission of documents by the respondent to the period the appellant submitted to the CBN “actually witnessed some fluctuation of the exchange rate before a conclusion of breach or damage at the time can be reached”.

It would appear that the appellant is mixed up and confused about the relevant matter at stake. It was the appellant who pleaded and claimed in the first place that there was
Some fluctuation between the period it submitted the documents to the Central Bank and the period foreign exchange was remitted and this was the basis of its claim for the shortage that resulted. See paragraph 5 of the amended statement of claim, page 33 of the record of appeal, where this was pleaded. Moreover, it has further been shown by evidence that the appellant’s initial delay of 55 days consequentially resulted in a series of delays that were witnessed in this case until 21 November, 1988 when the transaction was finally concluded. See exhibit 6 written and addressed to the CBN which was exhibited by the appellant, wherein the appellant admitted that it submitted the documents later than earlier asserted and catalogued the resultant delay of the entire transaction. The letter is quoted copiously by the learned trial Judge in his judgment on page 123 of the record of appeal as follows:—

“Please find attached various letters from our valued customer (Eleganza Industries Ltd) still claiming that the rate applied is excessive and that this is due largely to the time lag, between exchange control submission to your office and when foreign exchange cover was released for this transaction.

We are of the opinion that they have a case as all exchange control documents were actually submitted to your office on the 19 October, 1987 (copy of the acknowledgment from your office attached) and cover only given on 12 December, 1988, resulting in a time lag of 14 months and we have discovered that between this period the exchange rate went up substantially and this resulted in our customer sustaining in as the Naira value of the CFA debited into the customer’s account was absent twice what it would have cost were the cover released on time.”

The appellant being a bank holds out itself to be professionally competent and skilled to carry out the necessary obligation involved in this transaction and where it shirks that responsibility, it is negligent, *prima facie*, in that it owed the respondent a duty of care which it had shirked. See *Agbonmagbe Bank Ltd v C.F.A.O.* (1966) 1 SCNLR 367.

From the foregoing it is therefore obvious that the appellant delayed for 55 days and not for seven days as it is claimed by the appellant. The delay was unreasonable
considering all the circumstances. Where the law does not stipulate a particular time frame within which a contract is to be performed, it is usually implied that such contract be performed within a reasonable time according to the circumstances bearing in mind the means and ability of the party to perform the contract.

In the instant case, the period in which the appellant delayed in submitting the exchange control documents to the Central Bank was inordinate and the learned trial Judge was correct to have inferred negligence, as he did in the circumstances, and therefore the appellant should bear the attendant loss.

The question asked in the third issue formulated by the appellant is “what is the relationship in law between the appellant and the confirming bank in Abidjan and can the appellant be held vicariously liable for the delay (if any) of the said bank in the circumstances”. The learned Counsel for the appellant submitted in the appellant’s brief that the relationship between the appellant and the confirming bank in Abidjan is one of principal and agent.

I do not think there is a dispute between the parties that the contract in issue herein is one of an international commercial transaction by documentary credit.

The relationship established by this transaction is between the issuing bank, the appellant in this case, and the confirming bank, that is the bank in Abidjan.

In the case of Akinsanya v U.B.A. Ltd (1986) 4 NWLR (Part 35) 273 the Supreme Court has made it clear that the confirming bank is the agent of the issuing bank, here the appellant in the circumstance. The culpability of the appellant’s agent, the confirming bank in Abidjan, is easily revealed through exhibit D14, a letter written by the Central Bank of Nigeria to the respondent on 17 October, 1990. This letter reads:–

“We refer to your letter no. EILSOA/OC/872/90 of 7 August, 1990 in which you complained against the rate of which your account was debited for the above mentioned transaction.
We have investigated the transaction and the delay that resulted in such a huge exchange loss. Our investigation has revealed the following facts:

(1) That your supplier was not paid until 21 November, 1988.

(2) The rate at which CBN was debited was the rate as at that date i.e. No. 0181 to the CFA. France. According to the rules and regulations of the West African Clearing House the first action ought to have been taken by your suppliers bank in Cote D'Ivoire. The bank should have effected the debit soon after the documents were forwarded to you. Only your suppliers and their negotiating bank can explain why they did not negotiate the document till 18 months after opening the letter of credit . . .”

The CBN has made it very clear in this letter that under the rules and regulations of the West African Clearing House (WACN) the confirming bank ought to have debited the CBN’s account with the proceeds of the letter of credit as at June, 1987. It turned out that the confirming bank delayed in paying the supplier for over 15 months. The appellant did not rebut this fact. They confirmed the negligent delay of the confirming bank, a case of passing the buck.

However the law is that the appellant, a principal, has to be vicariously liable for the act of its agent. The liability of the appellant becomes obvious in the sense that despite its copious evidence that it reminded the Central Bank to effect the transaction, it did not produce an iota of evidence documentary or otherwise to prove that it urged on its agent to be up and doing. It is in view of this question called in the third issue which must be answered affirmatively. In effect the appellant ought to be liable for the delay of the confirming bank.

The fourth issue is whether the appellant can rely on the exception clauses in exhibit P1 to explain away the consequences of its initial delay in submitting the exchange control documents and the resultant delay by the Central Bank of Nigeria which resulted in the shortfall. This issue is conterminous partly with issue 2 formulated in the appellant’s brief, and mainly with Issue 4 in the same brief, the appellant relies on exhibits P1 and P9 to exempt itself from
liability for the shortfall that resulted as a result of its undue delay in performing its contractual obligation. It is contended by the appellant, quoting from exhibit P1, that the banks assume no liability or responsibility should the instruction they transmit not be carried out even if they have themselves taken the initiative in the choice of such other bank. Even in this sentence it is implicit on the part of the appellant to transmit the necessary instructions on time. It is the respondent’s case that the appellant failed to transmit the necessary and vital instruction timeously, such that losses were incurred in the course of the transaction. It is not fair that the appellant would now want to take advantage of this clause.

Besides, on page 12 of its brief of argument the appellant quoted copiously from paragraphs 2 and 6 of the reverse side of exhibit P1 to this effect:—

“the drawing/collection will not be considered paid until Central Bank of Nigeria provides you with requisite foreign currency . . .”

This point is missed, I agree with the learned Counsel for the respondent that the inexcusable delay of its agent in Abidjan in paying the supplier affected the CBN in playing its role effectively and timeously. The CBN made it clear in exhibit 14 (supra), in fact the CBN made it clear in exhibits P8 and D14, that it was the appellant’s agent in Abidjan that introduced what it called “crazy” rate which led to the shortfall problem in the first place. The two exhibits show that the account of CBN was debited with the shortfall which it also passes to the appellant. I see no reason why the appellant would be allowed to reap benefit from its own wrong by hiding under the exemption clause.

Where there is a fundamental breach of a contract by a party who seeks protection under an exemption clause, the relevant legal principles dealing with the matter ought to be considered and applied. In the law relating to the banker’s documentary credits, such as in this case, exemption clauses are usually included in the contracts to exempt the banker from liability for matters which are not within his control.
However, this is not the case here where, evidence has shown that, the appellant had every means and opportunity to control the transaction herein either by itself or through its agent in Abidjan but it failed to utilise the opportunity.

In the *A-G Bendel State and others v U.B.A. Ltd* (1986) 4 NWLR (Part 37) 547 it was observed by the Supreme Court as follows:—

“The exemption clause contained in the appellant’s application for the establishment of the letter of credit cannot avail the respondent in that the loss in this case was not beyond the control of the respondent for it could and was at liberty to refuse to reimburse the confirming bank that was not a matter beyond its control”.

See *Chitty on Contracts, Specific Contracts* Volume II (25ed) page 313 paragraph 2687. See also *Ozalid Group Export Ltd v African Continental Bank Ltd* (1979) 2 Lloyd’s Rep. 231.

The fifth and last issue for determination is that of the alleged admission raised by the appellant. The appellant has contended that, by paragraphs 9–12 in its amended statement of claim on pages 34–35 of the record of appeal, it alleged that the respondent had agreed in a letter to pay the shortfall once the Central Bank of Nigeria confirmed the rate of exchange used in debiting the account in question. The appellant also contended that, by paragraph 6 of the statement of defence on page 17 of the record of appeal, the respondent admitted these averments.

I have taken a close look at paragraphs 9–12 of the amended statement of claim. I agree with the learned Counsel for the respondent that it only shows that the respondent was protesting the rates used and would only pay it if it was satisfied with the Central Bank’s explanation. The way I understand it is that the respondent promised to pay the shortfall if the CBN would satisfactorily confirm the rate of exchange.

The letter of admission relied upon by the appellant was not tendered by the appellant. It is not that there is admission by the respondent whatsoever, that the respondent would
pay the shortfall at cost, whatever happens. As I have earlier observed, the records show clearly that the respondent throughout protested and the Central Bank’s explanation does not justify the rates. See exhibits D11, D12 and D13 described as “crazy” and attributed the rates to the delay caused by the appellant’s agents.

Exhibits D11, D12 and D13 are letters showing clearly that the respondent protested on the abnormal rates, exhibit D14 in effect shows also that the rates were unjustified. Even exhibit P6, as it has earlier been observed, makes a case for the respondent describing the applicable rate as excessive and that this is due largely to the time lag between the submission of the exchange control documents to the CBN and when foreign exchange cover was released for the transaction. It is for this I hold that the respondent did not admit that he would pay the shortfall once the CBN confirmed the rate of exchange used in debiting the account in question.

In the circumstances, I hold that this appeal lacks merit. It is accordingly dismissed with ₦5,000 costs in favour of the respondent.

**OGUNTADE JCA:** The conclusion arrived at by my learned brother in the lead judgment is that this appeal lacks merit. I agree with the reasoning. I would also dismiss the appeal with ₦5,000 costs in favour of the respondent.

**ADEREMI JCA:** I agree with my learned brother, Galadima JCA, whose reasons for judgment I have had the privilege of previewing that the appeal is unmeritorious. I would also dismiss and I abide by the order as to costs made in the said lead judgment.

*Appeal dismissed.*
In The Matter of the Companies and Allied Matters Act, 1990 and in the Matter of a Winding up Petition Brought by Nigeria Deposit Insurance Corporation v in the Matter of Premier Commercial Bank Plc

FEDERAL HIGH COURT, LAGOS DIVISION
UKEJE J
Date of Judgment: 28 MAY, 2001

Banking – Insolvent bank – Winding up – Section 38 Banks and Other Financial Institutions Act – Sections 191, 408 and 422(9) Companies and Allied Matters Act Cap 59 Laws of the Federation of Nigeria, 1990

Company Law – Winding up – Insolvent bank – Section 38 Banks and Other Financial Institutions Act – Sections 191, 408 and 422(9) Companies and Allied Matters Act Cap 59 Laws of the Federation of Nigeria, 1990

Facts

The petition to which this judgment relates was brought by the petitioner pursuant to section 38 of the Banks and Other Financial Institutions Act No. 25 of 1999, as amended; sections 191, 408 and 422(9) of the Companies and Allied Matters Act Cap 59 Laws of the Federation of Nigeria, 1990, and under the inherent jurisdiction of this Court.

The petition dated and filed on 4 January, 2001, sought inter alia the following four reliefs:–

(i) That the company may be wound up by the court under the provisions of the Companies and Allied Matters Act.

(ii) That an order be made for the advertisement of the petition before granting the petition.

(iii) That an order be made appointing the Deposit Insurance Corporation as the provisional liquidator.
(iv) Any such further or other orders as the Honourable Court may deem fit to make in the circumstances of this petition.

Arguing the petition on 2nd May, 2001, learned Counsel Ibrahim reiterated all antecedents of the petition herein as stated supra, and stated that the grounds upon which the petition was predicated are as follows:–

(a) That the banking licence of the Premier Commercial Bank has been revoked.

(b) That the Premier Commercial Bank cannot pay its debts.

(c) That it is just and equitable to wind up the Premier Commercial Bank Plc.

Arguing further, learned Counsel submitted that up until this date, ten weeks after the advertisement of the petition, not one person had appeared to the petition, let alone opposed the petition.

Held –

1. **Per Curiam**

   “By section 38 of the Banks and Other Financial Institutions Act, 1991, where the banking licence of a bank has, as in the case of the respondent bank herein, been revoked, the Nigeria Deposit Insurance Corporation shall apply to the Federal High Court for the winding up of the affected bank. And by section 408(f) of the Companies and Allied Matters Act as affected by section 38(4) of the Banks and Other Financial Institutions (Amendment) Act, where a bank’s banking licence has been revoked, that constitutes a circumstance on which the affected bank may be wound up.

   Further, by section 23(C)(3) of the Nigeria Deposit Insurance Corporation Act, as amended by the Nigeria Deposit Insurance Corporation (Amendment) Act, 1997 (1997 No. 5), the Nigeria Deposit Insurance Corporation is deemed, where the Central Bank has revoked a bank’s banking licence to be duly appointed as the liquidator for the purpose of the liquidation of the insured institution.

   But specifically, in the case of the Premier Commercial Bank Plc, the Governor of the Central Bank pursuant to
section 12 of the Banks and Other Financial Institutions Decree as published in Government Notice No. 1904 of 22 December, 2000, has authorised the Nigeria Deposit Insurance Corporation to wind up the respondent bank.

Accordingly, in all the circumstances, the petitioner has shown beyond doubt that the respondent bank is within the meaning of section 408(d) unable to pay its debts and in terms of section 408(f) its banking licence having been revoked under section 12 of the Banks and Other Financial Institutions Decree, can no longer carry on any banking business.

It is therefore just and equitable, by force of law, to wind up the Premier Commercial Bank Plc in terms of section 408(e) of the Companies and Allied Matters Act (Cap 59 Laws of the Federation of Nigeria, 1990).”

2. Per Curiam

“Now, by virtue of Government Notice No. 1094 of 22 December, 2000, the Governor of the Central Bank, upon revoking the banking licence of the respondent bank, had directed the Nigeria Deposit Insurance Corporation (N.D.I.C.) to apply to the Federal High Court to wind up the affairs of the bank. The power to apply to the Federal High Court for the winding up of a bank is statutorily conferred on the Nigeria Deposit Insurance Corporation by section 38(1) of the Banks and Other Financial Institutions Act, 1991.

Further, by virtue of section 23(c)(2)(a), the Nigeria Deposit Insurance Corporation (Amendment) Act, 1997 (1997 No. 5), the Nigeria Deposit Insurance Corporation shall apply to the Federal High Court for the winding up of a bank whose banking licence has been revoked.

And by section 23(c)(2)(b), shall be deemed to be the liquidator for the purpose of the liquidation of the affected bank.

Accordingly, by operation of the laws aforesaid and by the direction of the Governor of the Central Bank in exercise of these powers conferred by section 12 of the Banks and Other Financial Institutions Decree, I hereby order that the Nigeria Deposit Insurance Corporation is statutorily entitled and is hereby appointed as the liquidator of the now wound up Premier Commercial Bank Plc.”

Granting order sought.
Nigerian statutes referred to in the judgment

Banks and Other Financial Institutions Decree No. 25 of 1991, section 38

Companies and Allied Matters Act Cap 59 Laws of the Federation of Nigeria, 1990, sections 191, 408(d), (e) and (f), 422(9)

Counsel

For the petitioner: MU Ibrahim, Esq.

Judgment

UKEJE J: The petition to which this judgment relates is brought by the petitioner pursuant to section 38 of the Banks and Other Financial Institutions Act (No. 25 of 1991) as amended; sections 191, 408 and 422(9) of the Companies and Allied Matters Act Cap 59 Laws of the Federation of Nigeria, 1990, and under the inherent jurisdiction of this Court.

The petition dated and filed on 4 January, 2001, seeks inter alia the following four reliefs:

(i) That the company may be wound up by the court under the provisions of the Companies and Allied Matters Act.

(ii) That an order be made for the advertisement of the petition before granting the petition.

(iii) That an order be made appointing the Nigeria Deposit Insurance Corporation as the provisional liquidator.

(iv) Any such further or other orders as the Honourable Court may deem fit to make in the circumstances of this petition.

The petition was supported by a three paragraph affidavit sworn to by one Rotimi Oluyemi Ojo, the closing Manager of the Premier Commercial Bank Plc, the respondent bank herein. Annexed to the affidavit are three documentary...
Ukeje J

In Re: Premier Commercial Bank Plc 251

a exhibits numbered as: exhibit A (the memorandum and article of association) of the Borno State Co-operative Bank Limited (as Premier Merchant Bank was then called); exhibit B is the certificate of incorporation of the bank dated 23 February, 1987; and exhibit C is the Government Notice No. 1904 of 22 December, 2000, revoking the banking licence of Premier Commercial Bank Plc (among other banks).

c There is also a five paragraph affidavit verifying the petition similarly sworn to by the same, the closing Manager of Premier Commercial Bank Plc, Rotimi Oluyemi Ojo.

d By Rule 19(1) of the Companies (Winding Up Rules) (Cap 59 Laws of the Federation of Nigeria, 1990), it is provided as follows:–

“Advertisement of petition 19(1) No petition shall be advertised until the Judge hearing the petition or a Judge before whom the petition is first mentioned in open court so orders.”

e The petitioner sought and obtained the leave of this Court on 16 January, 2001, to advertise the petition herein. The petition was advertised, as ordered by the court in three newspapers and the Federal Official Gazette, viz:–

f (a) In the Guardian Newspaper of 15 February, 2001 (exhibit AA1);

(b) in the New Nigerian, Friday 16th, 2001 (exhibit AA2);

(c) in the This Day Newspaper of 13 February, 2001 (exhibit AA3); and


g There is a nine paragraph affidavit of compliance dated and filed on 8 March, 2001, by Musa Usman Ibrahim, the petitioner’s Counsel; filed in compliance with Rule 19 of the Companies (Winding Up) Rules (Cap 59 Laws of the Federation of Nigeria, 1990).
Arguing the petition on 8 March, 2001, Ibrahim, learned Counsel on behalf of the petitioner, sought to rely on paragraphs 5–8 of the affidavit of compliance in support of the fact that the petition has been advertised *inter alia*, the manner as stated *supra*, being newspapers with wide circulation across the country, particularly in the *New Nigerian* Newspaper in the 16 February, 2001 edition, a paper with wide circulation in the Northern part of Nigeria (exhibit AA2).

Learned Counsel therefore submitted that the petitioner has complied with the court order dated 19 January, 2001; whereupon the petition was set down for hearing on 2 May, 2001.

Arguing the petition on 2 May, 2001, learned Counsel Ibrahim, reiterated all the antecedents of the petition herein, as stated *supra*, and stated that the grounds upon which the petition is predicated are as follows:–

(a) That the banking picence of the Premier Commercial Bank has been revoked.

(b) That Premier Commercial Bank cannot pay its debts.

(c) That it is just and equitable to wind up the Premier Commercial Bank Plc.

Arguing further, learned Counsel submitted that up until this date, ten weeks after the advertisement of the petition, not one person has appeared to the petition, let alone opposed the petition.

Learned Counsel therefore submitted that no person is opposing the petition. Learned Counsel sought to rely on a decision of Sanyaolu J in *RE: ICON Merchant Bankers Ltd FHC/L/CP/134/98* of 22 May, 1999 (unreported), where the court held that where a petition is not opposed, then it is just and equitable for the court to make a winding up order.

Learned Counsel further submitted that by the revocation of the respondent’s banking licence, as published in the Federal *Gazette* of 22 December, 2000, the substratum of the bank is gone, a fact that makes it just and equitable to wind up the company, that by exhibit C the bank no longer has the

ability to meet its obligations to its depositors and customers, indeed, that the bank is insolvent.

That by section 408(d) of the Companies and Allied Matters Act (Cap 59 Laws of the Federation of Nigeria, 1990), inability to pay one’s debt is a ground for winding up the company and the respondent falls squarely within sections 408(d) and 408(e).

Accordingly, that it is just and equitable to wind up the respondent company. Learned Counsel urged the court to wind up the Premier Commercial Bank Plc.

And learned Counsel strongly urged the court to make the order sought, winding up the respondent bank.

Now, the following issues arise for determination in this suit:–

(1) Whether the petitioner has made out a case strong enough to justify the making by this Court of the order sought, winding up the respondent bank herein, the Premier Commercial Bank Plc; and

(2) whether it is appropriate to appoint the Nigeria Deposit Insurance Corporation as the liquidator of the respondent bank; and

(3) to make appropriate consequential orders.

1. Whether it is just and proper to wind up the Premier Commercial Bank Plc.

It is the contention of the petitioner regarding the respondent bank (amongst other banks listed) that:–

“The grave financial conditions of the respondent bank had culminated in the total erosion of its capital base and the dissipation of the depositors’ funds resulting in the inability of the bank to meet its obligations to their depositors and creditors . . .”

Whereupon the Governor of the Central Bank, in exercise of the powers conferred upon him by section 12 of the Banks and Other Financial Institutions Act, 1991 (1991 No. 25) revoked the banking licence of the respondent bank, with effect from 22 December, 2000.

Now, by section 38 of the Banks and Other Financial Institutions Act, 1991, where the banking licence of a bank has, as in the case of the respondent bank herein, been revoked, the Nigeria Deposit Insurance Corporation shall apply to the Federal High Court for the winding up of the affected bank. And by section 408(f) of the Companies and Allied Matters Act as affected by section 38(4) of the Banks and Other Financial Institutions (Amendment) Act, where a bank’s banking licence has been revoked, that constitutes a circumstance in which the affected bank may be wound up.

Further, by section 23(C)(3) of the Nigeria Deposit Insurance Corporation Act, as amended by the Nigeria Deposit Insurance Corporation (Amendment) Act, 1997 (1997 No. 5), the Nigeria Deposit Insurance Corporation is deemed, where the Central Bank has revoked a bank’s banking licence, to be duly appointed as the liquidator for the purpose of the liquidation of the insured institution.

But specifically, in the case of the Premier Commercial Bank Plc, the Governor of the Central Bank pursuant to section 12 of the Banks and Other Financial Institutions Decree as published in Government Notice No. 1904 of 22 December, 2000, has authorised the Nigeria Deposit Insurance Corporation to wind up the respondent bank.

Accordingly, in all the circumstances, the petitioner has shown beyond doubt that the respondent bank is, within the meaning of section 408(d), unable to pay its debts and, in terms of section 408(f), its banking licence having been revoked under section 12 of the Banks and Other Financial Institutions Decree, can no longer carry on any banking business.
It is therefore just and equitable, by force of law, to wind up the Premier Commercial Bank Plc in terms of section 408(e) of the Companies and Allied Matters Act (Cap 59 Laws of the Federation of Nigeria, 1990).

And I hereby order that the Premier Commercial Bank Plc be and is hereby wound up by operation of law.

2. To appoint the Nigeria Deposit Insurance Corporation as the liquidator of the now wound up respondent bank.

The petitioner also prays that the Nigeria Deposit Insurance Corporation be appointed as the liquidator of the Premier Commercial Bank Plc.

Now, by virtue of Government Notice No. 1094 of 22 December, 2000, the Governor of the Central Bank, upon revoking the banking licence of the respondent bank, had directed the Nigeria Deposit Insurance Corporation (N.D.I.C.) to apply to the Federal High Court to wind up the affairs of the bank. The power to apply to the Federal High Court for the winding up of a bank is statutorily conferred on the Nigeria Deposit Insurance Corporation by section 38(1) of the Banks and Other Financial Institutions Act, 1991.

Further, by virtue of section 23(c)(2)(a) of the Nigeria Deposit Insurance Corporation (Amendment) Act 1997 (1997 No. 5), the Nigeria Deposit Insurance Corporation shall apply to the Federal High Court for the winding up of the bank whose banking licence has been revoked. And by section 23(c)(2)(b) shall be deemed to be the liquidator for the purpose of the liquidation of the affected bank.

Accordingly, by operation of the laws aforesaid and by the direction of the Governor of the Central Bank in exercise of these powers conferred on him by section 12 of the Banks and Other Financial Institutions Decree, I hereby order that the Nigeria Deposit Insurance Corporation is statutorily entitled and is hereby appointed as the liquidator of the now wound up Premier Commercial Bank Plc.

And I so order.
Co-operative and Commerce Bank Nig. Limited v A.O. Mbakwe

COURT OF APPEAL, PORT HARCOURT DIVISION
IKONGBEH, ABDULLAHI, ACHOLONU JJCA

Date of Judgment: 30 MAY, 2001
Suit No.: CA/PH/266/91

Banking – Foreign exchange transaction – Transmission of money – Bank contracted to transmit or remit money by purchaser to issuing bank without more – Where bank defaults in transmitting same – Who can sue defaulting bank

Facts

The respondent commenced an action in the High Court of Imo State Aba claiming US$240,805.15 payable to Bergen Bank, Norway with interest of 15% per annum and ₦10 million damages for breach of contract; in the alternative, he claimed ₦15 million damages for negligence in that the appellant neglected to perform its duty as banker to the respondent.

The case for the respondent was that he banked with the appellant bank in Nigeria and also had an account in Norway with Bergen Bank. He ordered for Norwegian stockfish and for a total value of US$268,285.91, which he deposited the Naira equivalent with the appellant for onward transmission to Bergen Bank, Norway in the Dollar equivalent. The appellant failed to transfer the whole money leaving a shortfall of US$41,285.91.

The respondent alleged in the trial court that the shortfall in the remittance was due to the negligence or incompetence of the appellant. In the trial court, the court delivered judgment in favour of the respondent, the appellant appealed to the Court of Appeal contending that the respondent lacked competence to sue for the money payable to Bergen Bank, Norway.
Held –

Since all that the appellant was required to do and did in the entire transaction was to collect the money from the respondent and remit same to the Norwegian bank, this could not qualify it to be described as an issuing bank.

It issued nothing. It merely acted as a conduit pipe between the respondent (the purchaser) and the Norwegian bank does not lack *locus standi* to institute this action, and he is entitled to the shortfall with interest.

*Appeal dismissed.*

d  **Cases referred to in the judgment**

**Nigerian**

*Adefulu v Oyesile* (1989) 5 NWLR (Part 122) 377

*Adejumo v David Hughes and Co. Limited* (1989) 5 NWLR (Part 120) 146

*Ariori v Elemo* (1983) 1 SCNLR 1

*Ishola v Ajiboye* (1994) 6 NWLR (Part 352) 506

*Mohammed v Ali* (1989) 2 NWLR (Part 103) 349

c  **Counsel**

For the appellant: FC Dike, Esq. (with him M Nwaizulam (Mrs))

For the respondent: Chief E Ume, S.A.N.

h  **Judgment**

**IKONGBEH JCA:** *(Delivering the lead judgment)* This is an appeal by the defendant bank against the decision of the old Imo State High Court, sitting at Aba. The plaintiff commenced proceedings against the defendant bank by a writ of summons wherein he claimed, as *per* paragraph 20 of his amended statement of claim:

- "(i) USD240,805.15 payable to Bergen Bank, Norway with interest at 15% *per annum*;"
(ii) ₦10,000,000 (Ten Million Naira) damages for breach of contract.

Alternatively, the plaintiff claims from the defendant the sum of ₦15,000,000 (Fifteen Million Naira) for negligence in that the defendant neglected to perform its duty as banker to the plaintiff.”

The following facts are not disputed. The plaintiff pleaded them in paragraphs 2–7 and 9 of his amended statement of claim and the defendant bank expressly admitted them in paragraphs 2, 3, 5 and 8 of its further amended statement of defence. The plaintiff banked with the defendant bank and another bank in Norway called Bergen Bank. Sometime in 1981 he ordered 500 bales of a certain type and grade of stockfish and 500 bales of another type and grade from a company in Norway. The total value of both types together with bank charges came to US$268,285.91 which, by the prevailing exchange rate, translated to ₦171,297.35. The credit facility in respect of the transaction was provided by the Norwegian bank, which opened a letter of credit in favour of the plaintiff’s supplier while all local banking transactions in Nigeria were through the defendant bank. The stockfish suppliers shipped the goods to the plaintiff. In accordance with the arrangement among the plaintiff and the two banks, the Norwegian bank forwarded the shipping documents in respect of the stockfish to the defendant bank. It was also arranged among the three parties that the plaintiff should pay the value of the stockfish in Nigerian currency to the defendant bank, which in turn was to convert it to US dollars and remit same to the Norwegian bank. The plaintiff promptly paid the full value to the defendant bank in Nigerian currency but the latter remitted only US$227,000.00 leaving a balance which, as it admits, it still has in its hands till today.

The plaintiff’s case before the lower court was that the shortfall in the remittance was due to the negligence of the defendant, evidenced by the manner in which it had handled the application to the Central Bank of Nigeria for the foreign exchange. He claimed that the short remittance was a breach by the defendant bank of its
contractual obligation to him, which breach occasioned him damage. Hence his claim as noted above.

The defendant bank denied that it was negligent or incompetent. It put all the blame for the short remittance on the Central Bank which, according to it, refused to exchange all the Naira it tendered for exchange.

The plaintiff called one witness in support of his case in addition to his own testimony. Two witnesses testified on behalf of the defendant bank.

On 27 March, 1991 the learned trial Judge, S.W Chianakwalam J, delivered his judgment in favour of the plaintiff. He found as a fact that it was the fault of the defendant that the full amount paid to it by the plaintiff was not remitted to Norway. He ultimately entered judgment for the plaintiff in the following words:

“Within the above consideration and premises, the judgment of this Court against the defendant in favour of the plaintiff is as follows:

(i) In the sum of USD240,805.15 or its equivalent in local currency as at 23 March, 1989. That is special damage.

(ii) Interest on the said sum of USD240,805.15 or its equivalent in local currency at the rate of 15% per annum from 23 March, 1989 up to and including 27 March, 1991.

(iii) ₦1,000,000 (One Million Naira) as general damages.

(iv) Interest on the said sum of ₦1,000,000 (One Million Naira) from 28 March, 1991 until payment of the said One Million Naira is made in full.

(v) ₦800 (Eight Hundred Naira) as costs.

Judgment for plaintiff.”

The defendant bank appeared to have no quarrel with the decision as it related to the finding of liability for breach of contract in making the short remittance. At any rate, it did not raise any complaints against it in its grounds of appeal nor has it formulated any issues for determination in respect of it. Its complaints in the appeal centre mainly on the assumption by the learned trial Judge that the plaintiff had locustandif to maintain the action. It is also quarrelling about
the nature and amount of damages awarded against it in favour of the plaintiff. It, therefore, appealed to this Court on two original grounds and, with leave of this Court, a number of additional grounds. Out of the grounds, Mr CO Akpamgbo S.A.N., who settled the appellant’s brief of argument, identified and formulated the following issues for determination by us:

“(1) Whether the respondent was right in suing for money payable to Bergen Bank, Norway, without any authority or mandate whatsoever from the said Bergen Bank, Norway.

(2) Whether the learned trial Judge was right in giving judgment for the respondent for the said amount said to be payable to Bergen Bank, Norway.

(3) Whether respondent had any cause of action against the appellant.

(4) Whether the learned trial Judge was right in saying that the calculation of the defendant/appellant that the shortfall was $41,285.91 or N31,174.09 was not supported either by its pleadings or borne out by the evidence before the court, and whether the learned trial Judge was right in saying that the defendant/appellant ‘admitted it was still in possession of the Naira equivalent of the shortfall – USD59,285.91’.

(5) Whether the learned trial Judge was right in giving judgment to the plaintiff/respondent for the sum of USD240,805.15 with interest at 15% per annum.

(6) Whether the learned trial Judge was right in assessing general damages payable to the plaintiff/respondent at N1,000,000 (One Million Naira).

(7) Whether the judgment for the payment of interest on the said sum of N1,000,000 (One Million Naira) from 28 March, 1991 until payment of the said N1,000,000 (One Million Naira) is made in full has any meaning without specifying the rate of interest.

(8) Whether the court was in law right to have awarded the sum of USD240,805.15 and N1,000,000 (One Million Naira) with interest thereon as special and general damages respectively.”

Chief E Ume S.A.N., filed a brief of argument on behalf of the respondent. He identified the following five issues for
determination:–

“(1) Whether from the facts and circumstances of the case the defendant/appellant was under obligation to the respondent to transmit the money which the respondent paid to the appellant, as agreed between them, for onward transmission to the respondent’s suppliers of stockfish through the Bergen Bank in Norway?

(2) Whether there was contract between the appellant and the respondent for the transmission of the money to Norway?

(3) Whether the respondent could sue the appellant when the appellant failed to transmit the whole amount to Norway?

(4) Whether the learned trial Judge was right in holding that the appellant was liable to the respondent for failing to transmit the money as agreed by the appellant and the respondent to Norway?

(5) Whether the awards to the respondent by the trial court were reasonable and justifiable and proper exercise of judicial discretion under the circumstances?”

I must say straight away that the first, second and fourth issues as framed by Chief Ume S.A.N., do not arise in this appeal. Before the trial court there was no issue between the parties as to whether or not there was a contract between them for the transmission of the money to Norway or as to whether or not the appellant was under any obligation to the respondent to so transmit it. Those facts were never disputed. In paragraphs 6 and 7 of his amended statement of claim the respondent pleaded that:–

“6. The plaintiff agreed with the defendant that the plaintiff would pay the value of the said stockfish in full to the defendant and that the defendant would remit the value of the said stockfish in U.S. dollars to Bergen Bank, Norway within a reasonable time whereupon the plaintiff paid to the defendant the full value of the said stockfish in Naira.

7. By letters by the defendant to the said Bergen Bank No. MBC 92/81 dated 16/10/81 and 23/11/81 the defendant informed the said Bergen Bank that it had received the collections and that the plaintiff had paid the full value of the stockfish in Nigerian currency and undertook to remit to the said bank the proceeds thereof as soon as exchange approval was obtained.” (Italics mine)
In paragraph 2 of the further amended statement of defence the defendant/appellant expressly admitted the averments in paragraph 7 of the amended statement of claim. Nothing at all was said in the further amended statement of defence about the averments in paragraph 6 of the amended statement of claim. They were, therefore, deemed to have been admitted. Chief Ume himself observed in the respondent’s brief, and drew attention to portions of the record that showed, that the “existence of contract was not doubted nor questioned nor made an issue by the appellant in the court below” and that it “has been made abundantly clear by both parties both in evidence in court and the pleadings”. None of the grounds of appeal complained that the learned trial Judge was wrong in taking the facts admitted or deemed admitted for granted. Again, as I pointed out a short while ago, the defendant has not appealed against the finding by the learned Judge that the defendant was to be blamed for the short remittance. No issue can, therefore, arise regarding that finding. In the circumstances I shall ignore the three issues highlighted.

Issues 1, 2 and 3 in the appellant’s brief can be taken together with Issue 3 in the respondent’s brief. They all raise the question as to the competence or locus standi of the respondent to maintain the action against the appellant in the form he had constituted it. Before going into a discussion of the points raised in these issues, however, I must dispose of the preliminary objection raised by Chief Ume S.A.N. in the respondent’s brief to these issues.

Chief Ume urged us to strike out grounds 1, 2, 3 and 6 of the grounds of appeal together with the issues for determination distilled therefrom. The learned Senior Advocate of Nigeria based his objection on the ground that the points raised by the grounds and issues under attack were not raised in the court below and were not the subject of determination by that court. Learned senior Counsel drew attention to the principle of law, embodied in *Obiode v Orewere (1982)* 1–2.
SC 170 at 182–183 and Mohammed v Ali (1989) 2 NWLR (Part 103) 349 at 352, that a matter or point not taken up in the lower court cannot be raised on appeal.

This objection prompted Mr N Otukwu to file an appellant’s reply brief. In it, learned Counsel countered by pointing out that the grounds of appeal under attack challenged the locus standi of the respondent, as plaintiff, to maintain the action against the appellant. Such challenge, learned Counsel further pointed out, was an indirect challenge to the competence of the court to entertain the plaintiff’s action. For this proposition, learned Counsel relied on Oloriode v Oyebi (1984) 1 SCNLR 390, (1984) 5 SC 1. Relying on Ishola v Ajiboye (1994) 6 NWLR (Part 352) 506, he argued that the issue of locus standi can, therefore, be raised at any stage before the trial court or any of the courts in the chain of the appeal process.

Having regard to the state of the law, as made clear by this Court and the Supreme Court, I see no merit in the preliminary objection taken to these grounds of appeal. Where the law makes provision in favour of a person, such person can waive his rights under the law. Even where the provisions involve the fundamental rights of the person concerned he can, in appropriate circumstances, waive the rights. See Umenwa v Umenwa (1987) 4 NWLR (Part 65) 407 at 417–418 per Nnaemeka-Agu JCA, as he then was, following the Supreme Court in Ariori v Elemo (1983) 1 SCNLR 1, (1983) 1 SC 1 at 27 per Eso JSC. See also Adejumo v David Hughes and Co. Ltd (1989) 5 NWLR (Part 120) 146 at 158–159 per Akpata JCA, as he then was.

If the beneficiary of the statutory provisions waives his rights, or is deemed to have waived them, he cannot be heard later to complain about the violation of those rights. Ordinary, therefore, where a defendant defends an action knowing that the plaintiff has not been authorised to do so by the third party alleged by the defendant to be the rightful plaintiff, he might not, under the general law, be heard to complain later of the plaintiff’s want of locus standi.
Ordinarily, he would be deemed to have waived his right to complain about such want of *locus standi*. Emphasis is on “ordinarily”.

As our law stands, however, the question of *locus standi* is beyond the ordinary run of the mill question. True, it inures to the benefit of the defendant. It does, however, go beyond that. As the fundamental law of the land stands today and as it stood when this matter arose, want of *locus standi*, in addition to giving the defendant the right to complain, also goes to the competence of any court to exercise the judicial powers vested in federal and state courts by section 6(1) and (2) of the 1979 Constitution prevailing at the time the matter, now before us on appeal, arose. (The same provisions are repeated in section 6(1) and (2) of the 1999 Constitution.) What I just said about the effect of want of *locus standi* is the clear import of the provisions of section 6(6)(b) of the Constitution. Those provisions empower a court to exercise the judicial powers vested in courts only if that power is invoked by a person who has the *locus standi* to do so. Put another way, a person who has no *locus standi* cannot invoke the judicial powers of the court. The lower court, being docile and impotent until its judicial powers have been invoked, cannot exercise the jurisdiction conferred on it by section 236 of the 1979 Constitution (section 272 of the 1999 Constitution) without a competent plaintiff.

It is now trite that the issue of the competence of the trial court is so fundamental that it is allowed to be raised at any time even in the Supreme Court for the first time. I cannot put this point across more eloquently than Obaseki JSC did in *Adefulu v Oyesile* (1989) 5 NWLR (Part 122) 377 at 409C–H:

“The importance of this issue in our jurisprudence cannot be underrated and is traceable to the fact that the origin of the requirement in any judicial process is section 6(6)(b) of the Constitution . . . To remind ourselves of the . . . exact text of the subsection I will set it out . . .
a It reads:–

(6) The judicial powers vested in accordance with the foregoing
provisions of this section

(b) shall extend to all matters between persons . . . for the
determination of the civil rights and obligations of the
person

. . . I observe that the issue of locus standi was not raised before
the High Court or before the Court of Appeal. In view of the fact
that it is an indirect questioning of court jurisdiction to adjudicate
on the matters, it can be raised at any time in the course of trial or
on appeal; the Oloriode v Oyebi (1984) 1 SCNLR 390 and exam-
ined by this Court.”

d It is for these reasons that I agree with the appellant’s Coun-
sel that the preliminary objection lacks merit. I accordingly
overrule it. I shall go ahead and consider the issues raised by
the appeal. As I indicated earlier on, I will first take the ap-
pellant’s Issues 1, 2 and 3 together with the respondent’s Is-

Addressing the points raised thereby Mr Akpamgbo
S.A.N. started by pointing out in the appellant’s brief that
the writ of summons and the respondent’s pleadings showed
that the respondent was not claiming the amount involved
for himself but for the Bergen Bank in Norway. The learned
Senior Advocate of Nigeria stressed the fact that the plain-
tiff’s/respondent’s claim referred to the amount claimed as
an amount “payable to Bergen Bank, Norway”. He then
submitted that, in the circumstances, the respondent could
not maintain the action because:–

“The respondent did not tender in evidence any authority or man-
date from Bergen Bank in Norway to institute the action on its beh-
alf. No power of attorney was given to the respondent by Bergen
Bank, nor was any attempt made either in his pleadings or evi-
dence to justify the respondent’s right to sue for money payable to
Bergen Bank in Norway without any power of attorney from the
said Bergen Bank”. (See pages 19–20 of the record).

It was learned Senior Counsel’s final contention on the point
at pages 23–24 that:–

“The action should be properly instituted by Bergen Bank – suing
through its attorney A.O. Mbakwe, if the plaintiff had really got
any authority to bring the action, claiming the money said to be payable to Bergen Bank in Norway.

It is submitted, therefore, that the respondent has no locus standing (sic) in the case and the case ought to be dismissed on this ground. The respondent cannot maintain the action in his own name.”

Chief Ume S.A.N. in answer submitted that the learned senior Counsel for the appellant had laid undue stress on the expression “payable to Bergen Bank, Norway” and had consequently misinterpreted the plaintiff’s/respondent’s claim before the lower court. His arguments on the point were, therefore, misconceived. According to him, the arguments now being put forward on behalf of the appellant are not supported by the facts before the lower court and are contrary to the case put forward by the defendant/appellant there. It was senior Counsel’s contention also that the points being canvassed now were not canvassed in the lower court. They cannot therefore be raised now for the first time in this Court.

With all due respect to Mr Akpamgbo for the appellant, I must agree with Chief Ume that the arguments here are premised on a grave misapprehension of the facts and misconception of the law. Firstly, the appellant’s Counsel based his argument on the fact that the letter of credit involved in this transaction was issued by the defendant/appellant. This assumption is evidence in the learned Senior Advocate’s recount of the facts. At page 2 of the appellant’s brief, he stated that:—

“The plaintiff/respondent made application for the purchase of the said order, for which the defendant/appellant opened letters of credit to the plaintiff/respondent’s correspondence bank, Bergen Bank of Norway which then dispatched the shipping documents to the defendant/appellant for collection of the value from the plaintiff/respondent and for transmission of same to Norway.” (Italics mine)

Throughout his arguments he kept referring to the defendant bank as the issuing bank and the Norwegian bank as the corresponding or confirming bank.
With respect, nothing could be farther from the true position of the facts. The pleadings and the evidence before the lower court told a completely different story from what the learned Senior Advocate has sought to interpret them to mean. In paragraph 4 of the amended statement of claim the plaintiff/respondent averred that:

"4. In respect of the said order of stockfish credit line was in Bergen Bank of Norway and all banking transactions in respect thereto were with the defendant and letter of credit was opened covering the said order.” (Italics mine)

The defendant/appellant expressly stated in paragraph 3 of its further amended statement of defence that this averment was not disputed. It was no wonder, therefore, that the plaintiff/respondent was not challenged or contradicted when he testified that:

"I made an order through the Bergen Bank for 500 bales of round sey stockfish grade A and 500 bales stockfish round cod grade B. The Bank in Norway – Bergen Bank – brought in shipping documents through the defendant. The defendant received the documents, the defendant notified me that the documents had arrived and that I should settle the bills.” (Italics mine)

John Ifeanyichukwu Uzomba, one of the defendant’s/appellant’s supervisors in the foreign exchange department at the material time, testified in his evidence-in-chief at page 58 of the record that:

"The defendant has no connection with the plaintiff’s Bergen Bank of Norway.”

He testified further in cross-examination at pages 58 and 61 that:

"No letters of credit were opened. What was opened were bills for collection. . . I do not know the credit agreement the plaintiff had with Bergen Bank. I do not know the interest rate.” (Italics mine)

From the pleadings and the evidence before the lower court, it could be seen that all that the defendant/appellant was required to do and did in the entire transaction was to collect the money from the plaintiff/respondent and remit same to the Norwegian bank. This could not qualify it to be described as the issuing bank. It issued nothing. It merely acted
as a conduit pipe between the plaintiff (the purchaser) and the Norwegian bank (the issuing bank).

If, as the appellant through its agent made clear in the lower court, it never opened any letters of credit in this matter, then all the elaborate arguments by Mr Akpamgbo based on the effect of such letter of credit has no basis at all. The learned Senior Advocate had submitted at pages 20–94 that:

“...The appellant contends that there are four different contracts in all matters dealing with letters of credit as in this case: namely, the first contract for the sale of the goods between the buyer and the seller; the second contract is between the buyer and the issuing bank; the third contract is between the issuing bank and the corresponding or confirming bank; and the fourth contract is between the corresponding or confirming bank and the seller...”

In the third contract ie between the issuing and corresponding or confirming bank, the issuing bank undertakes to remit the value for the goods supplied to the buyer to the corresponding or confirming bank...

The appellant therefore as the issuing bank was under an absolute obligation to remit to Bergen Bank, the corresponding bank, the money paid by the buyer for payment to the seller of the goods...

It is clear therefore that any action against the issuing bank for failure to pay fully to the confirming bank the value of the goods must be at the suit of the confirming or corresponding bank and not at the suit of the buyer. Of course, the confirming or correspondent bank can give the buyer a power of attorney to sue on its behalf, but the action must be shown to be instituted by the buyer as attorney for the correspondent or confirming bank. The buyer, the respondent in this appeal is a stranger to the contract between the issuing bank and the confirming or correspondent bank, and not being privy to the contract he cannot maintain the action in his own name...

However, it is clear from the pleadings that the respondent was claiming the money which he said was payable to Bergen Bank in Norway. The plaintiff had not explained how he had become a debt collector for Bergen Bank in Norway. But the law is clear on the point that if one is suing as attorney for another person, the one should sue in the name of the principal on whose behalf he is suing...”
These arguments would have been good if the learned Senior Counsel had shown that the appellant never opened any letters of credit. Not only had he not, but also the record showed that it was the Norwegian bank that opened the letter of credit in favour of the plaintiff’s/respondent’s stockfish supplier.

Now, on the pleadings and the evidence before the lower court, did the plaintiff/respondent have any cause of action against the defendant/appellant? This is the most crucial question in this appeal.

As can be seen from the excerpts from the appellant’s brief, it was the contention on its behalf that the action should have been brought by the Norwegian bank or by the respondent as its attorney.

There is clearly no merit in this contention. In the first place, that did not form part of the appellant’s case in the lower court. Its case there was that there was no privity of contract between it and the Norwegian bank to give the latter the right to sue it if it failed to remit the money. This has already been seen from the testimony of John Uzomba who testified for the defendant. According to him, the defendant had no connection with the Norwegian bank. In the course of his address before the lower court, Counsel on behalf of the defendant was categorical in his assertion at page 74 of the record that there was “no privity of contract between Bergen Bank in Norway and the defendant in Nigeria”.

The tune being sung on its behalf now is a complete turn-around. With respect, the law does not permit a party to put up a case at the trial and another, diametrically opposed, case on appeal.

In the second place, the pleadings and the evidence before the court showed that the respondent was the one who had a binding and enforceable contract with the defendant for the transmission of the money to Norway. Here again, the defendant’s/appellant’s witness, John Uzomba, made this point
abundantly clear when he testified in cross-examination at page 59 that:

“The defendant was under obligation to remit to Bergen Bank Norway whatever was approved for the plaintiff by the Central Bank, Lagos.”

His case on his pleadings was that, because of the short remittance, he suffered the humiliation of being blacklisted in Norway and his account there being blocked. He testified unchallenged to the damage he suffered at pages 46 and 47 thus:

“As a result of the non-payment of the amount in full I suffered the following damages:

(i) The Bergen Bank terminated the contract to use them for purchase of goods which contract started in 1972.
(ii) The bank demanded payment of the balance and interest on it in full before they could do business with me again.
(iii) I showed the letter from Bergen Bank to the defendant of my plight. The defendant said it did not concern them and there was nothing they could do about it.
(iv) The foreign bank stopped business with me immediately as they stated. They blocked my account.
(v) The bank in Norway charged 15% interest every year. From 1981 to 1989 the interest has accumulated to 240,000 US dollars. The defendant has not paid the interest to the foreign bank.”

John Uzomba again revealed in cross-examination that:

“Plaintiff approached us that the customer in Norway pestering him with the balance. He asked us to reapply for the balance of USD41,285.91.”

In the circumstances of this case it is my firm view, and I agree with Chief *Ume* for the plaintiff/respondent, that the plaintiff/respondent clearly had a cause of action against the defendant/appellant. He fulfilled his obligation by paying to the defendant/appellant what he was required to pay. Owing to the default on the part of the defendant/appellant, however, he was subjected to the damage he enumerated. In my view, he was perfectly entitled to insist by court action on the defendant remitting the balance to the Norwegian bank so that that bank would leave him alone and let him pursue...
his legitimate business. The Norwegian bank, on the other hand, could not sue because, on the appellant’s own showing before the lower court, there was no privity of contract between it and the appellant regarding the remittance.

For the reasons I have given, I resolve the issues under examination in favour of the respondent and against the appellant.

Issues 4-8 in the appellant’s brief and Issue 5 in the respondent’s brief all deal with the award of damages and the order for interest thereon made by the learned Judge in favour of the plaintiff. The first award complained of is US$240,805.15 or its Naira equivalent. This is covered by Issues 4, 5 and 8. The appellant’s main complaint here is that the award has no basis having regard to the pleadings and evidence before the lower court. The learned Senior Advocate, for the appellant, contended that the learned Judge misapprehended the facts when he held that the defendant/appellant admitted the averment by the plaintiff/respondent that the short remittance amounted to US$59,285.91 instead of US$41,285.91. Learned Senior Advocate further criticised the learned trial Judge for accepting the *ipse dixit* of the plaintiff/respondent that the amount of US$59,285.91 rose to USS240,805.15 through the accumulation of interest. It was learned Senior Counsel’s view that the plaintiff/respondent should and could have produced more concrete evidence of the rate of interest, if any, charged by the Norwegian bank. As he failed to do so, the learned Judge was wrong to have accepted his mere say-so.

Chief Ume, for the respondent, does not appear to dispute that the learned Judge referred to US$59,285.91 instead of US$41,285.91. His contention is, however, that this was a mere misdirection, which did not occasion any miscarriage of justice. According to him:

“All the appellant’s contention throughout this issue is that the short remittance should be USD41,285.91 and USD59,285.91 as the unremitted balance. It is submitted that no capital can be made out of this.” (See page 37 of the respondent’s brief)
In his further view:–

“The question is, was there a short-remittance, which the appellant calls shortfalls? All are agreed that there was a short-remittance. It should have been a misdirection if the learned trial Judge had stated that there was no short-remittance.”

On whether the award of US$240,805.15 could be justified, the learned Senior Advocate contended that since the plain-tiff/respondent stated his claim in paragraph 20 of his state-ment of claim as being US$240,805.15 and the defen-dant/appellant traversed it by merely averring that “para-graph . . . 20 of the amended statement of claim is denied”, there was no proper traverse. Therefore, in his view, “the figure of USD240,805.15 was never questioned how it was arrived at by the respondent”.

With all due respect to Chief Ume, I cannot accept his con-tention that no miscarriage of justice was occasioned by the mistake made by the learned Judge in holding that the amount of short remittance was US$59,285.91 when it was actually only US$41,285.91. I do not agree with learned Senior Counsel that the question was whether there was a short remittance at all. The appropriate question in the cir-cumstances should be, by how much was the amount paid by the plaintiff short remitted by the defendant? By fixing it at US$59,285.91 the learned trial Judge was putting a heavier liability on the defendant than the facts and circumstances of the case warranted. The Judge was clearly not justified in his observation, complained of here, that:–

“The defendant remitted US$227,000.00 dollars leaving a short remittance of US$59,285.91 dollars. This extent of plaintiff’s case was not denied by defendant. The calculation of the defendant that the shortfall was US$41,285.91 or ₦31,174.09 was not supported either by its pleadings or borne out by the evidence before the court.”

He was also clearly wrong in awarding US$240,805.15 against the appellant when the evidence on how that figure was arrived at never left the realm of a mere allegation by the plaintiff/respondent. I do not agree with Chief Ume that the figure was not challenged by the defendant whether the
Norwegian bank charged any interest and at what rate was a matter peculiarly within the knowledge of the plaintiff. Contrary to Chief Ume’s assertion that the defendant merely made a denial without more, the defendant in paragraph 15 of its further amended statement of defence, from which the learned Senior Advocate just lifted the first sentence, went on to challenge every material averment relating to the amount of short remittance and the alleged interest thereon.

As pointed out by Mr Akpamgbo, for the appellant, the charging of interests by banks and their rates are not matters that are concluded verbally. The respondent tendered letters written to him demanding payment. They only talked about US$41,285.91 without any mention of interest. I agree with the appellant that there was no basis at all for the award of the sum of US$240,805.15. The only amount justified by the evidence on this head of claim is US$41,285.91, which all concerned are agreed was the amount by which the defendant underremitted. That is the amount which, having regard to the evidence, I would fix as special damages. The plaintiff had a duty to specifically plead and strictly prove special damages. He failed woefully to prove anything beyond US$41,285.91.

The appellant’s issue 6 relates to the award of N1,000,000 as general damages. It was the appellant’s contention that the learned Judge correctly stated the rule in Hadley v Baxendale (1854) Exch. 341 but failed to apply it correctly to this case. According to the learned Advocate, for him no damage was shown by the evidence to have flowed directly and naturally from the failure by the defendant/appellant to remit the full amount paid to it by the plaintiff/respondent. The latter, in Counsel’s view, has no cause for complaint since he had already collected the full consignment of stockfish and sold same at a profit. According to Senior Counsel:

“The damages that could have been in the contemplation of the parties for any failure by the appellant to transmit the money to Bergen Bank in Norway would have been the actual loss of profit to have been suffered by the respondent had the goods not been collected by him.”
In learned Counsel’s further view, the matters considered by the learned Judge in assessing general damages were of no relevance to the issue.

Now, how did the learned trial Judge deal with this issue of assessing general damages? At page 97, lines 22–31, he said:—

“In addition to the loss of the business sustained in this matter, I find that plaintiff’s international business reputation and image was denied by the breach of contract on the part of the defendant – plaintiff’s exhibit No. 5, a letter Bergen Bank delivered to plaintiff was eloquent on this. Plaintiff is entitled to special and general damages. Consideration is also given to the fact that for a period of ten years, the defendant has without any justification, held the balance of the money it failed to remit to Norway.”

What was the evidence before him? I set the relevant portion out earlier on. The gist of it is that because of the failure by the defendant to remit the full amount to Norway, the bank there terminated his contract with it for purchasing goods. It would do no further business with him until what was owing was paid. His account was blocked. He could no longer go to Norway because the last time he did he was nearly arrested at the instance of the bank there.

Now, in the circumstances, can it be said that the damage suffered by the respondent did not flow directly and naturally from the appellant’s breach of contract? The appellant knew that the credit facility was provided by the Norwegian bank. It knew that if the credit was not repaid the Norwegian bank would pester the respondent for it. The evidence before the court showed that it actually pestered him. These are all matters which the appellant was expected to have in contemplation when it was dealing with the money paid to it for onward transmission to Norway. In the circumstances, I would not regard the respondent’s damage as remote. I would regard it as proximate enough to come within the rule in Hadley v Baxendale (supra).

The next aspect of this issue argued on behalf of the appellant relates to the quantum of the general damages. It was learned Senior Advocate’s contention that the amount...
awarded as general damages was excessive. It should, in his view, have been limited to the loss of profit that the respondent would have suffered had he not collected the goods he had ordered.

I think I am persuaded here. The respondent did not lose his profit on the transaction involved. What he suffered was the embarrassment and the inconvenience he suffered by being harassed by the Norwegian bank and the loss of future business occasioned by the Norwegian bank refusing to do further business with him. I agree with the appellant that, in the circumstances of this case, the award of ₦1,000,000 is on the high side. Considering that the respondent had already sold the stockfish, no doubt at a profit, I think an award of ₦100,000 would have been adequate as general damages.

Issue 7 relates to the award of interest on the general damages under Order 40 Rule 7 of the Imo State High Court (Civil Procedure) Rules, 1988. The only complaint here is that the Judge did not state what the rate of interest was to be. This failure, in Counsel’s view, rendered the order of the learned Judge meaningless.

I must confess that I do not follow the point being made here. The learned Senior Advocate did not assist much. After stating boldly that the order for payment of interest was meaningless, he merely added that it was “not necessary to argue further on the propriety or competence of the said order” and then moved on to issue 8.

If the only complaint is that the Judge did not specifically state the rate of interest (and that is my understanding) then there is no problem. Before the Judge made the order for interest, he set out the terms of Order 40 Rule 7, which clearly provides that the rate of interest should not exceed “ten naira per centum per annum”. In my view, when he proceeded to order interest to be paid on the amount awarded, it must be at the rate fixed by the rule, which he just considered. Since he did not state any specific rate, it must mean he left it at
the maximum fixed by the rule, ie “Ten Naira per centum per annum”.

On the whole, subject to the modifications I propose to make to the orders by the learned trial Judge, this appeal lacks merit and is accordingly dismissed. The orders of the learned Judge shall remain in force subject to the following modifications. The judgment of the lower court shall be for the plaintiff:–

“(i) In the sum of USD41,285.91 or its equivalent in local currency as at 23 March, 1989. That is special damage.

(ii) Interest on the said sum of USD41,285.91 or on its equivalent in local currency at the rate of N10 per centum per annum from 23 March, 1989 up to and including 27 March, 1991.

(iii) N100,000 (One Hundred Thousand Naira) as general damages.

(iv) Interest on the said sum of N100,000 (One Hundred Thousand Naira) from 28 March, 1991 until payment of the said N100,000 Naira is made in full.

(v) N800 (Eight Hundred Naira) as costs.”

Since the appeal has not failed in its entirety, I make no order as to costs of this appeal.

**ABDULLAHI JCA:** I have the benefit of reading in advance the judgment just delivered by my learned brother, Honourable Justice, Ikongbeh JCA. I agree with the reasons given and the conclusion reached.

I also find no merit in the appeal and I accordingly dismiss it. I abide by all the consequential orders made therein.

**ACHOLONU JCA:** I have read in draft the lead judgment of my learned brother, Ikongbeh JCA, and I agree with his reasoning and conclusion. I have nothing to add. I also dismiss the appeal.

*Appeal dismissed.*
Lord Chief Udensi Ifegwu v Federal Republic of Nigeria

Banking – Banks and Other Financial Institutions Decree No. 25 of 1991 – Whether has retrospective effect – How construed

Banking – “Fraud” under section 19(1)(a) of Banks and Other Financial Institutions Decree No. 25 of 1991 – What it entails

Banking – Offences – Conviction for fraudulently granting credit facilities – Unconstitutionality of

Banking – Offences – Fraudulently granting credit facilities – Whether a crime known to Nigerian law

Words and phrases – Fraud – Meaning of

Facts

Before the defunct Failed Banks Tribunal, Zone II, Lagos, Lord Chief Udensi Ifegwu, the applicant was tried and convicted on a two-count charge of conspiracy of fraudulently granting credit facilities contrary to section 516 of the Criminal Code; and for non-disclosure of his personal interest in certain credit facilities contrary to section 18(9) of the Banks and Other Financial Institutions Decree No. 25 of 1991. The applicant’s appeal to the Special Appeal Tribunal was allowed only on sentence, and he paid fines.

With the coming into effect of the 1999 Constitution, the applicant initiated another proceeding before the Federal High Court, Lagos in which he prayed the court to transfer the suit to the Court of Appeal by way of case stated pursuant to section 295(2) of the Constitution of the Federal Republic of Nigeria, 1999 on the grounds that the suit involves interpretation of the Constitution to determine whether the
charges against the applicant and the conviction thereafter violate section 33(8) and (12) of the 1979 Constitution.

The Federal High Court granted the application and consequently referred the case to the Court of Appeal by way of case stated.

The contention of the applicant was that “fraudulently granting credit facilities” was not an offence known to law. Also, that the count relating to non-disclosure of interest contained both acts committed before BOFID came into operation as well as acts consequent to its promulgation, ie pre-1991 and post-1991. Therefore, the blanket conviction for both acts that were not prohibited and those prohibited was unconstitutional.

The respondents submitted that the trial and conviction of the applicant were in conformity with the Constitution in force at the time, and that the issue of jurisdiction was raised before the Special Appeal Tribunal and overruled. In reply to the issue of conviction, he placed reliance on the provisions of section 24(6) of Decree No. 18 of 1994 and section 158 of the Criminal Procedure Act relating to joinder of offences and submitted that the joinder and consequent non-compliance cannot render the decision of the tribunal a nullity.

Held –

1. The crime said to have been committed, going by the framing of the counts, is fraudulently granting credit facilities. A careful study of the Failed Banks Decree No. 18 of 1994 and the Banks and Other Financial Institutions Decree the offence of fraudulently granting credit facilities is not described anywhere. That offence is nonexistent as far as our criminal law is concerned. It is sacrosanct that no person shall be liable to be tried or punished in any court except under the clear and unambiguous provision of a written law.

2. The word “fraud” means deliberate deception intended to gain an advantage. It is very weighty in the realm of
3. A conviction for fraudulently granting credit facilities as passed in the court below is a violation of the provisions of section 33(12) of the Constitution as that offence is not defined under the law on which the count was laid.

4. It is a fundamental principle of law that no statute or law or even rule shall be construed so as to have a retrospective operation, unless its language is such as plainly to require that construction. There is nothing in the wording of the Banks and Other Financial Institutions Decree in its original and amended form to suggest retrospective operation. In the instant case, the deal slips that constituted the first category of, ie exhibit 41, if in fact they were granted before the coming into force of BOFID on 20 June, 1991. Therefore, granting of loans of the first category did not constitute any offence known to law, at least before 20 June, 1991.

Question answered in favour of applicant.

Cases referred to in the judgment

Nigerian

7UP Bottling Co. Ltd v Abiola and Sons (Nig.) Ltd (1995) 3 NWLR (Part 383) 257


Afolabi v Governor of Oyo State (1985) 2 NWLR (Part 9) 734

African Newspapers of Nig. Ltd v F.R.N. (1985) 2 NWLR (Part 6) 137

Agundo v Gberbo (1999) 9 NWLR (Part 617) 71

Aoko v Fagbemi (1961) 1 All NLR 400

Bamaiyi v A-G Federation (2000) 6 NWLR (Part 661) 421

Effiom v The Director of Prisons (1999) 14 NWLR (Part 638) 330
Gamioba v Esezi II (1961) 2 SCNLR 237  
Madukolu v Nkemdi lim (1962) 2 SCNLR 341  
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Ogbomor v State (1985) 1 NWLR (Part 2) 223  
Rossek v ACB Ltd (1993) 8 NWLR (Part 312) 382  
Sonnar Nig. Ltd v Nordwind (1987) 4 NWLR (Part 66) 520  
Spasco Vehicle and Plant Hire Co. Ltd v Alraine (Nig.) Ltd (1995) 8 NWLR (Part 416) 655  
Ubani v Director, S.S.S. (1999) 11 NWLR (Part 625) 129  
Udosen v Necon (1997) 5 NWLR (Part 506) 570

Foreign
Anisiminic Ltd v Foreign Compensation Commission (1969) 1 AER 208
Phillips v Lyre (1870) 6 LR 6 QB 1

Nigerian statutes referred to in the judgment
Banks and Other Financial Institutions Decree No. 25 of 1991, section 19(1)(a)  
Constitution of Federal Republic of Nigeria, 1979, sections 33(8) and (12), 259(2)  
Constitution of Federal Republic of Nigeria, 1999, section 295(2)  
Criminal Code Act (Cap 77) Laws of the Federation of Nigeria 1990, sections 156, 158 and 516
Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree No. 18 of 1994 (as amended), sections 3(1)(b), (c) and (d), 5(2) and 24(6)

Nigerian rules of court referred to in the judgment
Court of Appeal Rules, Order 2 Rules 1, 2 and 3
a Book referred to in the judgment

Collins English Dictionary

b Counsel

For the applicant: Prof SA Adesanya, S.A.N. (with him A Oduntan, Esq., TO Elias, Esq., W Kasali, Esq. and Ayo Ashiru, Esq.)

c For the respondents: Dr SE Mosugu

d Judgment

ADEREMI JCA: (Delivering the lead judgment) Before the Failed Banks Tribunal, Zone II, Lagos (now defunct) the plaintiff was arraigned on a two-count charge which reads as follows:–

e COUNT 1 That you, Lord Chief Udensi Ifegwu (now at large), Jimi Adebisi Lawal (now at large), Tony Nnachetta, Jeff Fayomi while being Directors and/or Managers of Alpha Merchant Bank Plc (now in liquidation) at Lagos between 30 June, 1988 and 1 October, 1993 conspired to commit a felony, to wit fraudulently granting credit facilities to Dubic Industries Limited without lawful authority in contravention of rules and regulations of the said Alpha Merchant Bank Plc and the regulatory authorities (CBN/NDIC) and thereby committed an offence punishable under section 516 of the Criminal Code Act Cap 77 Laws of the Federation of Nigeria, 1990 to be read with section 3(1)(b), (c) and (d) of the Failed Banks (Recovery of Debts) and Financial Malpractices Decree, 1994 as amended.”

f COUNT 10 That you, Lord Chief Udensi Ifegwu (now at large) between 30 June, 1988 and 1 October, 1993 at Lagos while being a Director of Alpha Merchank Bank Plc (now in liquidation) and also a Director of Dubic Industries Limited was connected with the granting of credit facilities totalling US$2,962,062.89 (Two Million, Nine Hundred and Sixty-two Thousand and Sixty-two Dollars, Eighty-nine Cents) now equivalent to ₦242,889,156.98 (Two Hundred and Forty-two Million, Eight Hundred and Eighty-nine
Thousand, One Hundred and Fifty-six Naira, Ninety-eight Kobo) only to Dubic Industries Limited without declaring your personal interest in the said facility to the Board of Directors as required by section 18(3) of the Banks and Other Financial Institutions Decree No. 25 of 1991 and thereby committed an offence punishable under section 18(9) of the same Decree.”

After hearing the parties and evidence and addresses taken the plaintiff was convicted by the Failed Banks Tribunal on the two-count charge. The plaintiff appealed against the decision of the Tribunal to the Special Appeal Tribunal which, after a due consideration of the grounds of appeal and the arguments of Counsel, allowed the appeal only on sentence. According to Prof Adesanya S.A.N., learned Counsel for the plaintiff, his client has since paid the fines. Although, the plaintiff had contended, in his written brief, before this Court that he raised for the first time the issue of the constitutionality of his conviction by the Failed Banks Tribunal before the Special Appeal Tribunal, the defendants, through their written brief, denied that assertion. The uncontroverted fact however is that the plaintiff initiated another proceeding before the Federal High Court sitting in Lagos in which he prayed the court below to transfer the suit to this Court of Appeal by way of case stated pursuant to section 295(2) of the Constitution of the Federal Republic of Nigeria, 1999 which is in pari materia with the provisions of section 259(2) of the 1979 Constitution. Section 295(2) provides:—

“Where any question as to the interpretation or application of this Constitution arises in any proceedings in any court of law in any part of Nigeria (other than in the Supreme Court, Court of Appeal, the Federal High Court or a High Court and the court is of the opinion that the question involves a substantial question of law, the court may, and shall if any of the parties to the proceedings so requests, refer the question to the Court of Appeal, and where the question is referred in pursuance to this subsection, the court shall give its decision upon the question and the court in which the question arose shall dispose of the case in accordance with that decision.”
The grounds upon which the application is predicated are:–

1. The suit involves an interpretation of the Constitution with a view to determining whether the charges against the plaintiff and the conviction thereafter violate section 33(8) of the Constitution of the Federal Republic of Nigeria, 1979 (the then applicable law).

2. The suit further involves the determination whether count 1 of the two-count charge violates section 33(12) of the Constitution of the Federal Republic of Nigeria, 1979 (the then applicable law).

3. There has been a pronouncement on the issue challenging the jurisdiction of the Tribunal in regard to ground 1 and the pronouncement of the Special Appeal Tribunal is unclear and does not appear to have addressed the issue.

The court below (Coram Odunowo J) granted the application on 27 October, 1999 and consequently the case was referred to this Court by way of case stated in terms of section 295(2) of the 1999 Constitution. In this Court both parties filed their respective briefs, the plaintiff filing his brief of argument on 8 August, 2000 and the reply brief on 13 December, 2000, the defendants’ brief of argument was filed on 9 October, 2000.

In the plaintiff’s brief of argument, four issues were identified for determination and they are:–

1. Whether there is a crime known to Nigerian law as fraudulently granting credit facilities.

2. If there is such a crime, whether conviction for fraudulently granting credit facilities violated section 33(12) of the Constitution of the Federal Republic of Nigeria, 1979 (as amended).

3. Whether it was constitutional to convict the plaintiff of conspiracy to commit a felony where the facts alleged as amounting to felony occurred in 1991 while the Failed Banks Decree under which the felony was charged commenced on 9 November, 1994?
(4) Whether it was proper to convict the plaintiff for counts 1 and 10 under the BOFID as a whole without drawing any line or distinction, when the facts as constituting the crime occurred in part before the commencement of the BOFID and partly after the commencement of the BOFID. In other words is a bullet conviction in such a case constitutional?

For their part, the defendants through their brief raised three issues for determination and they are as follows:–

(1) Was the plaintiff/accused/convict misled during his trial?

(2) Did the conviction of the plaintiff contradict the provisions of the 1979 Constitution of the Federal Republic of Nigeria, viz section 33(8) and (12)?

(3) Was the plaintiff’s conviction under the Criminal Code Act and BOFID justified in view of the state of the law?

When this matter came before this Court sitting as a full court, Prof Adesanya S.A.N., learned Counsel for the plaintiff referred to and adopted the plaintiff’s brief of argument filed on 8 August, 2000 and the reply brief filed on 13 December, 2000. In highlighting the salient points in the brief of his client, the learned S.A.N. submitted that the following facts in this case are not in dispute: that the Banks and Other Financial Institutions Decree No. 25 of 1991 (otherwise called BOFID) came into force on 20 June, 1991; that the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree No. 18 of 1994 came into effect on 9 November, 1994; the facts which constituted the subject matter of this case are loans granted which are evidenced by deal slips numbering six, three of which came into being before 20 June, 1991 and the other three came into being after 20 June, 1991. He contended that at the time the loans were granted no offence was created by the deal slips. And “fraudulently granting credit facilities” is not an offence known to law. The plaintiff, he continued, was convicted on...
counts 1 and 10 which aggregated the two sets of loans
granted. Both the Trial Tribunal and the Special Appeal Tri-
bunal (both now defunct) had no jurisdiction to entertain the
case by virtue of section 33(8) of the 1979 Constitution. He
further reasoned that the two alleged offences ought not to
have been lumped together as, according to him, the court
cannot combine what is prohibited with what is not prohib-
ited and give a single conviction. Continuing, he said every
tribunal is an inferior body to a court of record and the
proper venue to challenge the jurisdiction of an inferior tri-
bunal or court or to quash its decisions is the superior court
of record which, in the instant case, is the Federal High
Court; reliance was placed on the decision in A-G Federation v Agwuna (1995) 4 NWLR (Part 388) 234. He further
said that the evidence led relates to the loans granted before
June, 1991. The law applicable then was the Banking Act,
1969 which carries lesser punishment than that imposed by
BOFID but was not applied by the tribunal. Public policy, he
argued, should not deter a court of law from applying the
applicable law; he called in aid the decision in Sonnar Nigeria Ltd v Nordwind (1987) 4 NWLR (Part 66) 520 at 535.
And jurisdiction, he again argued, cannot be assumed under
the facade of public policy. The action commenced on 1
June, 1999 by which time both the tribunal and the Special
Appeal Tribunal had been abolished by Decree No. 62 of
1999, section 3(2) thereof. The proper forum to have ar-
raigned the plaintiff would then be the Federal High Court.
While referring to section 5(2) of the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree
No. 18 of 1994 the tag of finality conferred on the decision
of the Special Appeal Tribunal would not apply since, ac-
cording to him, the Special Appeal Tribunal did not have
jurisdiction. He referred to the decisions in Nwosu v Imo
State Environmental Sanitation Authority and others (1990)
2 NWLR (Part 135) 688 at 732 and Anisminic Ltd v The
Foreign Compensation Commission and another (1969) 1
All ER 208 while urging this Court to hold that the Special
Appeal Tribunal lacked jurisdiction to convict for an act that
did not constitute any offence at the time it was allegedly
committed, that the conviction was without jurisdiction, and
that the proper forum to challenge the jurisdiction of the tri-
bunal is the Federal High Court. He again cited in support
the decisions in Udosen v Necon and others (1997) 5 NWLR
(Part 506) 570 at 585–586; Ubani v Director of S.S.S. and
another (1999) 11 NWLR (Part 625) 129 at 150; and Effiom
and another v The Director of Prisons, Nigeria Prisons Ser-

Dr Mosugu, learned Counsel for the respondents, adopted
his clients’ brief of argument filed on 9 October 2000. The
reply brief filed on behalf of the plaintiff, he contended, vio-
lates the provisions of Order 6 Rule 5 of the Court of Appeal
Rules which allows for the filing of a reply brief by the ap-
pellant for the purpose only to react to all new points arising
from the respondents’ brief. He, however, submitted that the
only new point arising from the respondents’ brief was re-
acted to by the plaintiff on page 12 of the plaintiff’s reply
brief. Pages 1–11 of the reply brief, he submitted, should not
be countenanced as they merely elaborate the plaintiff’s
brief. Reading the provisions of Order 2 Rules 1, 2 and 3 of
the Court of Appeal Rules in conjunction with section
295(2) of the 1999 Constitution, learned Counsel submitted
that the case stated is improper because the defendant was
not heard before the reference was made to the Court of Ap-
peal – a requirement of Form 1. He again submitted that
there is no substantial question of law involved in this matter
as to require reference to the Court of Appeal. The issue of
jurisdiction which, according to him, is substantial or fun-
damental had been raised before the Special Appeal Tribu-
nal and it was overruled, there was no more substantial issue
of law left relying on Bamaiyi v A-G of the Federation
(2000) 6 NWLR (Part 661) 421. Count 1 is a charge rooted
in conspiracy under section 516 of the Criminal Code Act.
On the issue of finality, learned Counsel referred to sections 2(4), 3(1) and 5(3) of BOFID Decree No. 62 of 28 May, 1999 and submitted that any decision handed down before the coming into effect of the decree was preserved. The trial and conviction of the plaintiff, he further contended, were in conformity with the Constitution in force at the time. In reply to the complaint of bullet conviction, learned Counsel prayed the provisions of section 24(6) of Decree No. 18 of 1994 and section 158 of the Criminal Procedure Act which relate to the joinder of offences and stipulate that non-compliance with the provisions of the Decree would not render the decision of the tribunal a nullity. It was again his contention that the cases of Anisminic and Nwosu, cited in support of the case of the plaintiff, are not applicable to the present case. He urged this Court to decline answering the question embedded in the case stated in the alternative, he urged that the question be answered against the plaintiff.

On points of law only, Prof Adesanya submitted that section 259(2) of the Constitution allows the application that led to the present exercise to be brought ex parte. He further argued that the rule that a party cannot benefit from his own wrong cannot prevail over section 33 of the Constitution.

I have looked at the contents of the argument proffered by the respondents in their brief of argument under the notice of preliminary objection, it is my respectful view that they can all be attended to under the treatment of the issues raised by the two parties. And this I propose to do. But before then, I would like to address the issue whether the present action rooted under the case stated is well founded in law. The defendants have in their brief argued that the case stated negates all principles of fair hearing as the defendants were not heard before the reference was made to this Court. The plaintiff has contended that the case stated before this Court is rooted in constitutionality. Both sides relied on the provisions of Order 2 Rules 1, 2 and 3 of the Court of Appeal Rules but while the plaintiff relied on section 259(2) of the 1979 Constitution in aid of his contention, the defendants do
place reliance on the provisions of section 295(2) of the 1999 Constitution. The two provisions of the Constitution are, however, in pari materia. Hereunder are the provisions of the rules of court referred to by the parties as well as those of the Constitution:

Order 2 Rule 1 provide:

“When a lower court refers any question as to the interpretation of the Constitution under section 259 of the Constitution, or reserves any question of law for the consideration of the court in accordance with any written law, the lower court referring or reserving the question of law, as the case may be shall state a case in Civil Form 1 or 2 in the First Schedule to these Rules, which ever may be appropriate and the registrar of the lower court shall forward ten copies direct to the registrar.”

Rule 2(1):

“When the lower court making an application consists of three or more judges; the case shall be stated on behalf of the lower court by a majority of those judges.”

Rule 2(2):

“Where a question is referred or reserved by the lower court the question shall be signed by all or by a majority of the judges of the lower court referring or reserving the question.”

Rule 3(3):

“A case stated under this order shall be divided into paragraphs, which, as near as may be, shall be confined to distinct portions of the subject whether facts, point of law, or document and every paragraph shall be numbered consecutively . . .”.

Section 295(2) of the 1999 Constitution which is applicable to this case provides:

“Where any question as to the interpretation or application of this Constitution arise in any proceedings in any court of law in any part of Nigeria (other than in the Supreme Court, Court of Appeal, the Federal High Court or a High Court, and the court is of the opinion that the question involves a substantial question of law, the court may and shall if any of the parties to the proceedings so requests, refer the question to the Court of Appeal; and where the question is referred in pursuance of this subsection, the court shall give its decision upon the question and the court in which the question arose shall dispose of the case in accordance with that decision.” (Italics mine)
In any democratic setting, which upholds the rule of law, the provisions of the Constitution, which is the grundnorm, always override those of any other law or rules. I go further to say that it is trite law that where the provisions of law or rules of court are inconsistent with those of the Constitution those provisions, to the extent of the inconsistency with the provisions of the Constitution, are null and void. It is not in controversy that the case stated found its way to this Court by virtue of the grant of the application captioned “motion on notice” filed in the court below on 12 July, 1999. The application was granted by Odunowo J on 12 October, 1999. The proceedings before the trial Judge of the court below on 12 October, 1999 show that the defendants were not represented. A careful perusal of the record of proceedings indicate that by affidavit of service the first and second defendants show that through handwriting that they were served with hearing notices. Hearing notices (two in number) bear the insertion that it was motion on notice that was fixed for hearing on 11 October, 1999. The proceedings of 11 October, 1999 indicated that the defendants were not represented in court. At the request of Mr Oduntan, Counsel who appeared for the plaintiff on that day and who informed the court that the application had been served, same was adjourned to 27 October, 1999, on which day the defendants were also recorded as not being represented. The application was granted on that day consequent upon which the suit was transferred to this Court by way of case stated. It is true that there is no satisfactory evidence that copies of the motion were served on the defendants. In effect, that application was in the form of an ex parte one when it was granted. An ex parte application by its very nature is one in which the other party is not put on notice before the application is heard and determined by the court. It is often said that an ex parte application for injunction is, in essence, a violation of the constitutional provisions of fair hearing and the common law principle of audi alteram partem. The application under consideration is not one praying for an order of injunction. It is even milder than that employed in prerogative orders. The
facts underlining the application in issue here are not in controversy. And they could not be and indeed they were never added to or subtracted from by the order of 27 October, 1999. In my respectful view, this type of application is one that is necessary to be taken before the commencement of a substantive matter. It cannot be said to be a negation of the principles of fair hearing. I find support for this pronouncement in the case of *7Up Bottling Co. Ltd v Abiola and Sons Ltd* (1995) 3 NWLR (Part 383) 257 where the Supreme Court at page 280 held:

“There is no doubt that the right to fair hearing under the Constitution is synonymous with the common law rules of natural justice. However, because of the nature of certain preliminary steps that have to be taken before the commencement of substantive matters, the rules of court have made provisions for *ex parte* applications and there is nothing unconstitutional in such rules.”

As I have said above, the sole purpose of bringing that application before the court below is to get that court to transfer, in its entire package, the suit that was before it which, in the view of the applicant, involves a substantial question as to the interpretation of the provisions of the Constitution.

Whether such an application is granted or not the material facts that ground the suit will not be diminished from. Section 295(2) of the 1999 Constitution gives directive to the court as to what order to make when faced with such an application. Under it, where none of the parties applies for such transfer, the court has a discretion to exercise in the matter as to whether to transfer the case or not. But where any of the parties applies for the transfer, it is mandatory that the trial Judge shall refer the question to the Court of Appeal. The question may be asked: what are the principles that should guide the High Court in granting an application to refer a question of law or interpretation of the Constitution to the Court of Appeal? Judicial authorities are *ad idem* that before the High Court can make the reference it must be shown that it (reference):

(1) involves a substantial question of law;
(2) it must relate to or concern the interpretation or application of the Constitution; and

(3) it must have arisen in the proceedings before the court. See Gamioba and others v Esezi II and others (1961) 1 All NLR 584, (1961) 2 SCNLR 237; African Newspapers of Nig. Ltd v Fed. Republic of Nig (1985) 2 NWLR (Part 6) 137; and Rossek v A.C.B. Ltd (1993) 8 NWLR (Part 312) 382.

c
The three conditions must however co-exist. Where they do co-exist, if both parties or one of the parties, as I have said above, applies for a reference, the trial Judge must refer the case. For all I have said supra, I cannot bring myself into accepting the submission of Dr Mosugu that the case stated is improper. Rather, it is my considered view, that it is on a firma terra in this Court. The learned Counsel for the defendants had also contended that the reply brief of the plaintiff violates the rules relating to the filing of the reply brief as contained in Order 6 Rule 5 of the Court of Appeal Rules which is in the following terms:–

"The appellant may also, if necessary within fourteen days of the service on him of the respondent’s brief but not later than three clear days before the date set down for the hearing of the appeal, file and serve or cause to be served on the respondent, a reply brief which shall deal with all new points arising from the respondent’s brief."

d
This is not a matter on appeal to this Court. It is a case stated by which this Court is being invited to answer some questions relating to the interpretation or application of the provisions of the Constitution. To my mind, the reply here is akin to that filed in the course of setting pleadings for trial in the High Court. The rules of court forbid a plaintiff from filing a reply to a statement of defence where no counterclaim is filed by a defendant to a suit or where no new issues are raised, which from the nature of the defence filed would necessitate the plaintiff leading material evidence in rebuttal. See Spasco Vehicle and Plant Hire Co. Ltd v Alraine (Nig.) Ltd (1995) 8 NWLR (Part 416) 655 and Agundo and Ltd v
Gberbo and another (1999) 9 NWLR (Part 617) 71. This is to prevent a party to a suit from having a second bite at the cherry. That principle rooted in fair play, in my view, is applicable here. I have looked at the reply brief filed by the plaintiff, pages 1–11 are an amplification of the plaintiff’s brief, it is only from page 12 onwards that the new issues raised on the defendants’ brief are addressed. I shall therefore not countenance the contents of pages 1–11 of the plaintiff’s reply brief.

I shall take Issues 1 and 2 on the plaintiff’s brief together with issue 2 on the defendants’ brief. The arguments proffered by the plaintiff and the defendants through their respective Counsel and the briefs have been set out above. Under Count 1, the plaintiff was charged with conspiracy to commit a felony to wit: fraudulently granting credit facilities to Dubic Industries Limited without lawful authority and he was said to have committed an offence punishable under section 516 of the Criminal Code Act Cap 77 Laws of the Federation of Nigeria, 1990 and section 3(1)(b), (c) and (d) of the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree No. 18 of 1994. Section 516 of the Criminal Code Act provides:–

“Any person who conspires with another to commit any felony, or to do any act in any part of the world which if done in Nigeria would be a felony, and which is an offence under the laws in force in the place where it is proposed to be done, is guilty of a felony, and is liable if no other punishment is provided, to imprisonment for seven years, or if the greatest punishment to which a person convicted of the felony in question is liable is less than imprisonment for seven years, then to such less punishment.”

Section 3(1)(b), (c) and (d) of the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree No. 18 of 1994 provides:–

“The Tribunal shall have power to:–

(b) try the offences specified in Part III of this Decree;

(c) try the offences specified in the Banks and Other Financial Institutions Decree No. 25 of 1991 and the Nigeria Deposit Insurance Corporation Decree, 1988; and
try other offences relating to the business or operation of a bank under any enactment.”

Under Count 2 he was alleged to be connected with the granting of credit facilities totalling US$2,962,062.89 to Dubic Industries Limited without declaring his personal interest in the said facility to the board of Directors as required by section 18(3) of the Banks and Other Financial Institutions Decree No. 25 of 1991 (otherwise called BOFID) between 30 June, 1988 and 1 October, 1993 while he was a Director of Alpha Merchant Bank Plc and also a Director of Dubic Industries Limited. The salient evidence led in proof of these two counts reveals that the alleged loans, which translated into the provision of funds for the opening of letters of credits occurred as follows: (1) $500,000 on 25 April, 1991; (2) $500,000 on 27 March, 1991; (3) $500,000 on 11 April, 1991; (4) $500,000 on 16 July, 1991; (5) $339,985 on 4 September, 1991; and (6) $109,014.86 on 4 September, 1991. It is instructive to note that the Failed Banks Decree No. 18 of 1994 came into force on 9 November, 1994 while BOFID had its commencement date as 20 June, 1991. As I have earlier indicated, the plaintiff was convicted on both counts. An appeal to the Special Appeal Tribunal reduced the sentences to ₦100,000 or two years imprisonment on Count 1 and ₦100,000 or two years on Count 10 while holding that it had jurisdiction to entertain the appeal. Suffice it to say that the plaintiff had raised the issue of the constitutionality of the conviction before the Special Appeal Tribunal. The plank of the argument of the plaintiff, under the two issues I am considering from his brief, is as to whether the offence for which he was charged existed in the eyes of the law. Learned Counsel for the plaintiff had referred to section 33(8) and (12) of the 1979 Constitution to profer an answer in the negative. Those two constitutional provisions read:–

Section 33(8):–

“No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence; and no penalty shall be imposed for
any criminal offence heavier than the penalty in force at the time the offence was committed.”

Section 33(12):–

“Subject as otherwise provided by this Constitution, a person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefore is prescribed in a written law; and in this subsection, a written law refers to an Act of the National Assembly or a Law of a State, any subsidiary legislation or instrument under the provisions of a law.”

The crime said to have been committed, going by the framing of the two counts, is “fraudulently granting credit facilities”. A felony or a crime must be seen to have been committed within the framework of the provisions of the law under which it is charged. I have had a careful study of the Failed Banks Decree No. 18 of 1994 and the BOFID, nowhere is the offence of “fraudulently granting credit facilities” described. That offence, in my respectful view, is non-existent as far as our criminal law is concerned. It is sacrosanct that no person shall be liable to be tried or punished in any court of this land except under the clear and unambiguous provisions of a written law. I think that is the import of the decision in Aoko v Fagbemi and another (1961) 1 All NLR 400 – though a decision of the High Court of the old Western Region of Nigeria, the law expounded therein remains immutable. In interpreting the combined provisions of section 33(8) and (12) of the 1979 Constitution which I have reproduced above, the Supreme Court in Obioma v The State (1985) 1 NWLR (Part 2) 223 per the judgment of Karibi-Whyte JSC said at page 233:–

“A combined reading of the provisions of section 33(8) and subsection 12 of the Constitution 1979 suggests that whereas no person can be tried and convicted of an offence which did not exist at the time of its commission or which is not contained in an existing law, there is no constitutional or other prohibition against trial and conviction of a person for an offence, which is known to the law and is in existence at the time of its commission but the relevant statute of which has been incorrectly stated. Thus, it is clear that a mere misdescription of the law under which a charge has been brought does not necessarily render the offence charged one not
known to the law at the time of its commission. Hence, as long as the offence charged discloses an offence in a written law and such law is in existence at the time of the commission or omission of the act alleged in the charge was done, the information is valid, and is merely defective if there is any misdescription of the law under which the charge was laid.”

In the Ogbomor’s case cited supra the only missing element in the information are the words “special provision” in the title of the statute that creates the offence other than that the offence charged in that case disclosed an offence in a written and existing law. The offence for which the plaintiff was charged, going by the provisions of the laws under which the charge was laid and which provisions I have reproduced above, is very much unknown to any written and existing law. The Special Appeal Tribunal in treating the submission of the learned Counsel for the appellant before that tribunal, who is now the plaintiff before us, said and I quote:–

“The expression ‘fraudulently’ is an adverb. It is merely descriptive of the mode of false representation or dishonest artifice or trick employed by the four accused persons to enable the 1st appellant gain the unjust advantage which Lawal 2nd and 3rd appellants dishonestly allowed.”

With due respect that is an over-simplication of the matter by the appeal tribunal. That finding of it is not acceptable. The word “fraud” is very weighty in the realm of criminal law. It means “deliberate deception intended to gain an advantage” – definition in Collins English Dictionary. That word is not one which can be regarded as mere “bird of passage”. That the framers of Decree No. 25 of 1991 (BOFID) did not intend to engage in an unguarded use of that word nor did they pretend to encourage the interpreters of the section of BOFID in the use of that word, is borne out of the fact that it was cautiously used in section 19(1)(a) of BOFID which provides:–

“No bank shall:–

(a) employ or continue the employment of any person who is or at any time has been adjudged bankrupt or has suspended payment to or has compounded with his creditors or who is
or has been convicted by a court for an offence involving *fraud* or dishonesty or professional misconduct.”

The use of the word “fraud” in the aforementioned section presupposes that the employee must have been subjected to trial in accordance with due process of the law. And he must have, after adhering to the principles of fair hearing, been found guilty in accordance with the law. It must be said that under our criminal jurisprudence the adversarial system rather than the inquisitorial system is what we practise; an accused is presumed to be innocent, no matter the gravity of the offence, until he is proved, in accordance with the dictates of the law, to be guilty. The way that count was framed undoubtedly suggests that the plaintiff had been found guilty of fraud before he was subjected to trial. Certainly, that must not have been intended as it is an anathema to our criminal practice and procedure.

The respondent had submitted that the plaintiff was given notice of the offence charged and he was not misled. The charge was explicit as to the time, place and the person against whom the offence was committed. The question is not whether the plaintiff was given notice of the offence charged or whether he was misled. The crucial issue is whether there was the offence charged to wit “fraudulently granting credit facilities” as contained in an existing law. I have said *supra* that the offence charged as couched in the charge is unknown to any law. It is for the foregoing that I answer Issue 1 on the plaintiff’s brief in the negative. A conviction for “fraudulently granting credit facilities”, as was passed in the court below, is a violation of the provisions of section 33(12) of the Constitution as that offence is not defined under the law on which the count was laid. Issue 2 on the plaintiff’s brief is therefore answered in the affirmative. For similar reason, issue 2 on the defendants’ brief is answered in the affirmative, Issue 1 on the defendants’ brief does not flow from the facts of this case as admitted by both sides. I shall now take Issues 3 and 4 on the plaintiff’s brief along with Issue 3 on the defendants’ brief. The crucial point
a raised by the three issues (3 and 4 on the plaintiff’s brief and 3 on the defendants’ brief) is whether it was proper to convict a person for an offence committed before the commencement of the legislation under which the offence was charged and whether it is proper to convict a person where the facts constituting the offence occurred partly before the commencement of that law and partly after the commencement. This is what the plaintiff, in his brief, described as “bullet conviction” and he posed the question whether it is constitutional.

This poses a question as to retrospectivity in the interpretation of statutes, acts or laws. Both sides have, in their briefs of arguments, argued these issues copiously. I have carefully read them. It is common ground between the parties that the loans which consisted of the provision of funds for the opening of letters of credits could be divided into two parts, ie with respect to Count 1 that occurred before 20 June, 1991 when BOFID came into force and those that occurred after BOFID came into force. The deal slips that constitute the first category are exhibits 41 (for $500,000 on 25/4/91), 41A (for $500,000 on 27/3/91) and 41B (for $500,000 on 11 April, 1991). Those loans, if in fact they were granted, had been granted before the coming into force of BOFID on 20 June, 1991. Granting of loans of the first category, which I have itemised above, did not constitute any offence known to law, at least before 20 June, 1991. It is a fundamental principle of law that no statute or law or even rule shall be construed so as to have a retroactive operation, unless its language is such as plainly to require that construction. I have looked at the wording of BOFID in its original and amended forms; there is nothing therein to suggest retrospective operation. I go further to say that this basic constitutional principle, which I have set out above, involves a subordinate constitutional rule that a statute is not to be construed so as to have a greater retrospective effect than its language renders necessary. Again, except in special cases,
no new act, law or rule should be construed so as to interfere, as little as possible, with vested rights. And even where the words employed in the couching of the statute, act or law admit of another construction, they should not be so construed as to impose disabilities not in existence at the point of coming into force of such statute, act, law or rule. The principle is *nova constitutio futuris formam imponere debet, non praeteritis* – a new law ought to impose form on what is to follow, but not on the past. It must also be borne in mind that in any democratic setting or in any society which upholds the rule of law as a way of life (and I cannot remember any of the military regimes in this country which, on coming to power, failed to publicly declare that it was going to operate under the rule of law), the law must always look forward and not backward. The maxim is *Lex Prospicit Non Respicit*. See also the Supreme Court (the full court) decision in *Afolabi and others v Gov of Oyo State and others* (1985) 2 NWLR (Part 9) 734 where Eso JSC said at pages 768–769 and I quote:–

“In my view the law has always been that unless a contrary intention is expressed, there is a presumption that an enactment has no retrospective operation. The principle is.

‘*LEX PROSICIT NON RESPICIT*’.

that is the law looks forward and not back . . .

In *Phillips v Lyre* (1870) 6 LR 6 QB 1 at page 23 Wills put it in lucid form when he said, and I am in complete agreement – of retrospective legislation, that it is:–

‘Contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law’.”

The lumping of the two sets of fact – one existing before the coming into force of the law and the other existing after the commencement of the law – and handing down a blanket conviction and sentence – what the plaintiff styled as bullet conviction is bad in law. The other set of facts which finds
expression in deal slips tendered as exhibits 41c, 41d and
41e relating to loans of $500,000, $339,985 and $109,014.86
respectively occurred after the coming into force of BOFID.
The plaintiff could have properly stood trial with the estab-
lishment of those facts and, consequently, properly con-
victed but for, what I have earlier said in this judgment, that
Count 1 is founded on a non-existent law. There is no of-
fence known as “fraudulently granting credit facilities”
which is known to any law. The success or failure of Count
10 depends on the success or failure of Count 1. And since
the facts of non-disclosure of the plaintiff’s personal interest
in the said facilities to the board of Directors stem from the
facts on which Count 1 rests – granting of loans partly be-
fore and partly after 20 June, 1991, Count 10 cannot stand;
the plaintiff cannot be convicted under it. Issues 3 and 4 on
the plaintiff’s brief are consequently answered in the nega-
tive. In the same vein, I answer Issue 3 on the defendants’
brief of argument in the negative.

In the final result and for all I have said above, it is my
judgment that the plaintiff’s suit is meritorious. If the matter
were on an appeal before us I would have, for the reasons
that there is no crime styled as “fraudulently granting credit
facilities” and the conviction for that crime being in viola-
tion of the provisions of section 33(12) of the 1979 Constitu-
tion and the law on which the charge was laid was given ret-
rospective application, allowed the appeal, set aside the con-
victions and sentences. But, since the matter came to us by
reference (case stated), I return the following answers:—

(1) There is no crime known to Nigerian Law as
“fraudulently granting credit facilities”.

(2) Conviction on a crime which is unknown to law is
unconstitutional and must not be allowed to stand.

(3) It is unconstitutional, indeed it is a violation of all
known principles of law, to convict the plaintiff of
conspiracy to commit a felony in the circumstances
of this case where the facts alleged as amounting to
felony occurred in 1991 while the Failed Banks Decree under which the felony was charged commenced on 9 November, 1994.

(4) It is improper in law to convict the plaintiff for Counts 1 and 10 under the BOFID as a whole without drawing any distinction, when the facts on which the crime was predicated occurred in part before the commencement of the BOFID and partly after the commencement of the BOFID.

Oguntaide JCA: I have had the advantage of reading in draft a copy of the lead judgment by my learned brother, Aderemi JCA. He has ably and comprehensively dealt with the issues raised in the appeal. I entirely agree with his approach to the issues and the conclusion arrived at. He has also set out the relevant facts. I intend to make a few comments of my own. I do not, however, intend to repeat the facts.

An aspect of the matter is whether or not the plaintiff could bring his suit before the lower court having regard to the fact that the Special Appeal Tribunal, which was the final Court of Appeal over the decisions of the Failed Bank Tribunal, had given its judgment in the matter. The argument of the defendants before us is that the suit before the lower court was an indirect way to re-open a matter which the Special Appeal Tribunal had finally settled by its judgment.

I am with respect unable to agree with the submission of Dr. Mosugu for the defendants. It has always been recognised that where a court of law has no jurisdiction to adjudge on a matter, the proceedings of the court and the ultimate adjudication, no matter its correctness or seeming merit, will still amount to a nullity. See Madukolu v Nkemdilim (1962) 1 All NLR (Part 4) 587.

If the Failed Bank Tribunal which tried and convicted the plaintiff had no jurisdiction to do so, the mere fact that the Special Appeal Tribunal later gave judgment on appeal over the matter will not restore to the Failed Bank Tribunal a
In Anisminic Ltd v Foreign Compensation Commission and another (1969) 1 All ER 208 at 213 the House of Lords (in England) per Lord Reid observed:

“Statutory provisions which seek to limit the ordinary jurisdiction of the court have a long history. No case has been cited in which any other form of words limiting the jurisdiction of the court has been held to protect a nullity. If the draftsman or parliament had intended to introduce a new kind of ouster clause so as to prevent any enquiry even whether the document relied on was a forgery, I would have expected to find something much more specific than the bald statement that a determination shall not be called in question in any court of law. Undoubtedly such a provision protects every determination which is not a nullity. But I do not think that it is necessary or even reasonable to construe the word ‘determination’ as including everything which purports to be a determination but which is in fact no determination at all. And there are no degrees of nullity. There are a number of reasons why the law will hold a purported decision to be a nullity. I do not see how it could be said that such a provision protects some kinds of nullity but not others; if that were intended it would be easy to say so.”

In the instant case, the appellant had been charged before the Failed Banks Tribunal. On the first count, he was charged with conspiracy to commit a felony to wit: fraudulently granting credit facilities to Dubic Industries Limited without lawful authority under section 516 of the Criminal Code Act Cap 77 Laws of the Federation of Nigeria, 1990 and section 3(1)(b), (c) and (d) of the Failed Banks Tribunal (Recovery of Debts) and Financial Malpractices Decree No. 18 of 1994. But as my learned brother has demonstrated in the lead judgment, such offence did not exist in the eyes of the law. Sections 33(8) and 33(12) of the 1979 Constitution of Nigeria (which is applicable) provides:

“33(8) No person shall be held to be guilty of a criminal offence on account of any act or omission that did not at the time it took place, constitute such an offence and no penalty shall be imposed for any criminal offence heavier than the penalty in force at the time the offence was committed.”
(12) Subject as otherwise provided by this Constitution, a person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefore is prescribed in a written law; and in this subsection a written law refers to an Act of the National Assembly or a Law of a State, any subsidiary legislation or instrument under the provisions of a law.”

It is trite law that nobody may be convicted of any offence except that created under a written law, see Aoko v Fagbemi and another (1961) 1 All NLR 400. It follows in my view that since the first count brought against the plaintiff was unknown to law, the Failed Banks Tribunal had no jurisdiction to have tried it. The tenth count against the plaintiff alleged that the plaintiff committed some offences at a time when BOFID had not come into existence. Acts which had been done before BOFID came into existence were lumped with those said to have been done after BOFID came into existence. The Failed Banks Tribunal recorded a conviction on the two counts thus creating a situation which gave BOFID a retroactive effect. It is my firm view that the Failed Banks Tribunal had no such jurisdiction by force of section 33 of the 1979 Constitution.

The fact that the Decree, which established the Special Appeals Tribunal, protects its decision as being final will not shield such decision from scrutiny where the complaint touches the absence of jurisdiction in the tribunal. I therefore agree with the answers given in the lead judgment by Aderemi JCA to the questions referred to this Court. I would also give the same answers.

IGE JCA: I have had the privilege of previewing the judgment just delivered by my learned brother, Aderemi JCA.

I agree with my learned brother’s reasoning and conclusions in answer to the case stated by the lower court.

The plaintiff’s suit is definitely meritorious and I abide by my learned brother’s decision that there is no offence under our criminal law with the description of “fraudulently granting credit facilities”.

Aderemi JCA: I disagree with the answers given in the lead judgment by IGE JCA to the questions referred to this Court. I would give different answers.
Any conviction under such unknown crime is not only unconstitutional but is also null and void and should be set aside.

**Galadima JCA:** I had the advantage of reading before now the lead judgment just delivered by my learned brother, Aderemi JCA.

I agree entirely with his reasoning and conclusion. The questions raised in the lower court for the consideration of the full court have been carefully considered. There is no crime in Nigerian criminal law described as “fraudulently granting credit facilities”.

To convict a person under such non-existing crime will be unconstitutional, null and void as it is contrary to the provision of section 36(8) of 1999 Constitution and such conviction should be quashed accordingly.

**Sanusi JCA:** I read in advance the judgment of my learned brother, Aderemi JCA. I agree with it that the plaintiff’s appeal is meritorious and I accordingly allow it. I abide by the orders made in the lead ruling.

*Question answered in favour of applicant.*
United Bank for Africa Plc and another v Alhaji Babangida Jargaba

COURT OF APPEAL, KADUNA DIVISION
OMAGE, MUHAMMED, SALAMI JJCA
Date of Judgment: 25 JUNE, 2001
Suit No.: CA/K/323/00

Banking – Branch Manager of bank – Status of – Whether action of binding on bank
Banking – Cheque – Who retains the cheque drawn by customer on his bank after clearance

Facts
The respondent claimed to have bought trucks of fertilizer from the first defendant and he could not take delivery of the whole trucks of fertilizer he paid for, instead of 12 trucks he was able to collect nine and the respondent was given ₦5 million leaving a balance of ₦1.960 million. The defendants failed to pay the outstanding balance, hence this action. The High Court delivered judgment in favour of the plaintiff and the appellants, being dissatisfied, appealed to the Court of Appeal.

Held –
1. A cheque drawn by a customer on his bank is kept or retained by his bank after clearance. In the instant case, the cheque issued by the United Bank for Africa Plc, Funtua by banking practice in Nigeria was in the custody of the first appellant which arrested that the payment was made to Barmani Holdings.

2. Actions of an agent carried out within the scope of his ostensible authority bind the principal, whether such acts are for the benefit of the principal or not, provided he is shown to have acted within the scope of the authority. The second appellant in the instant case being the branch Manager for its Kaduna North Branch and therefore its agent has ostensible authority to collect money on behalf of the principal.
of the bank as the first appellant’s directing mind and will and the very ego and centre of the personality of the appellant.

Appeal dismissed.

Cases referred to in the judgment

Nigerian

ACB Limited v Gwagwada (1994) 5 NWLR (Part 342) 25

Ben Thomas Hotel Ltd v Sebi Furniture Limited (1989) 5 NWLR (Part 123) 523


Fashanu v Adekoya (1974) 6 SC 83

Jipreze v Okonkwo (1987) 3 NWLR (Part 62) 737

Kimdey v Military Governor Gongola State (1988) 2 NWLR (Part 77) 445

Knightbridge Limited v Atamako (2000) 2 NWLR (Part 645) 385


Nwosu v Imo State Environmental Sanitation Authority (1990) 2 NWLR (Part 135) 688

Ojiegele v State (1988) 1 NWLR (Part 71) 414

Ojiegele v Okwaranyin (1962) 2 SCNLR 358

Okai II v Ayikai II 12 WACA 31

Onabruchere v Esegine (1986) 1 NWLR (Part 19) 799

Peat Marwick, Ani, Ogunde and Co. v Okike (1995) 1 NWLR (Part 369) 71

Texaco Nigeria Limited v Commercial Amalgamated Printers Limited (1972) 1 NWLR 108
Trenco Nigeria Limited v African Real Estate Investment Co. Limited (1979) 5 LRN 146

Counsel

For the appellants: Ibrahim Buba, Esq.

For the respondents: Ogbodokwe Enock-Lucky, Esq.

Judgment

OMAGE JCA: (Delivering the lead judgment) In the High Court no. 10, in the Kaduna State High Court, Coram Gregory S, Lawan J, a judgment was delivered on 3 July, 2000. The judgment was delivered in a suit filed under the undefended list procedure, the leave to issue which his Lordship had granted earlier. The judgment inter alia is as follows:

“It is true that a defence that I am not liable is a defence, but from the facts of this case and the affidavit evidence and documents, there is no defence on merit. I accordingly enter judgment against the 2nd defendant in favour of the plaintiff.”

The endorsement on the writ of the plaintiff is:

“For a claim against the defendants jointly and/or severally in the sum of ₦1,960,000 being outstanding arising from the failure of the defendants to fully supply to the plaintiff the required numbers of trucks load of fertilisers 2–10% interest on the judgment sum and cost of this action.”

The facts of the case, as contained in the applicant’s affidavit, in support of the motion for hearing of the claim under the provisions of the undefended suit, Order 23 of the High Court (Civil Procedure) Rules, Kaduna State is in part as follows:

“(7) That sometime in 1999, the plaintiff desire to purchase fertiliser in commercial quantities . . . he was introduced to the 2nd defendant in Kaduna.

(9) The second defendant informed the plaintiff that a truck load of fertiliser was sold at ₦600,000 that is to say ₦1,000 per bag, since a truck of fertiliser contain 600 bags.
(11) That with the assurance from the second defendant to the plaintiff that the 1st defendant was having in large quantities to dispose of, the plaintiff purchased bank draft made payable to the 1st defendant.

(12) That in all, the plaintiff made payment in bank draft to the tune of N\textsterling}12,690,000 for the truck loads of fertiliser to the 1st defendant on the instructions and directives of the 2nd defendant.

(15) That when the plaintiff went to the 2nd defendant in order to evacuate his truck load of fertiliser, the 2nd defendant directed the plaintiff to the warehouses and/or to the premises of a company called Barmani Holdings Company Nig. Ltd in Kaduna.

(16) That when the plaintiff got to Barmani Holding Company Ltd in his bid to evacuate his fertiliser he was told there was a price increase of N\textsterling}50,000 per bag.

(18) That at the time the plaintiff had evacuated the 9th truck load of fertilizer his outstanding balance was N\textsterling}6,960,000 hence the plaintiff went back to the 2nd defendant to demand a refund of the said balance.

(19) That on plaintiff’s demand of a refund he was paid the sum of N\textsterling}5 million, thereby having a balance of N\textsterling}1,960,000.”

The affidavit concluded that the first defendant issued several memorandum undertaking to pay the balance which was not paid.

In a motion dated 1 April, 2000, the first and second defendants supported their notice of intention with an affidavit which denies in its paragraph 2(a) the paragraphs 7–24 of the plaintiff’s affidavit, and averred that the first defendant facilitated the grant of import licence to one Drury Industries to import Sola Urea Fertiliser Drury Industries Ltd. The latter failed to repay the debt to the first defendant, who consequently appointed Otunba Olutola Sembose as receiver/Manager over the assets of Drury Industries as agent to dispose of the fertilizer pledged to the first defendant by Drury Industries Ltd. The plaintiff did approach the first defendant to purchase the fertilizer and he was informed by the second defendant that the fertilizer had been sold to Barmani Holdings Ltd for a total sum of N\textsterling}50,760,000 to which body
the plaintiff was directed (4c). It was not the second defendant who sold the fertilizer. Thereafter all the averments in the plaintiff’s affidavit were denied. The affidavit of intention to defend had annexed to it exhibit FRI.

On the return date, 7 May, 2000, after the appearance of both Counsel for the plaintiff and the defendant. After hearing both Counsel, the court adjourned the matter to 3 July, 2000 for judgment.

It is against the judgment, that judgment so delivered and quoted above, that the first defendant has filed this appeal. For the avoidance of doubt, the defendants in the suit in the court below are (lst) United Bank for Africa Plc, second defendant Alh. Ibrahim EL-Rufai. The judgment of the court below in material particular is:

“I accordingly enter judgment against the 2nd defendant in favour of the plaintiff in the sum of N1,960,000 against the 1st and 2nd defendants.”

The first defendant filed five grounds of appeal from which he formulated one issue for determination, which is written in the brief of argument in the alternative. Here it is.

“Was the learned trial Judge right in refusing to transfer the case from the undefended list to ordinary cause list for adjudication in the light of the evidence before the lower court or in the alternative. Did the appellants’ notice of intention to defend disclose a defence on the merit to be entitled to have the suit transferred from the undefended list for adjudication on the merit in the light of evidence before the lower court.”

In the respondent’s brief filed on 28 February, 2001, he adopted the same issue formulated by the appellant. He also adopted the alternative issue of the appellant. The issue to be determined therefore in this appeal is this: in the light of the evidence before the court, was the learned trial court right in failing to place on the general cause list the claims of the plaintiff? For the purpose of clarity, the facts of this case in the court below simply is that the respondent claims to have bought trucks of fertilizer from the first defendant through the second defendant and he could not take delivery of the whole trucks of fertilizer he paid for. Instead of 12 trucks he
was able to collect nine and the respondent was given \( \mathbf{₦}5 \) million leaving a balance of \( \mathbf{₦}1.960 \) million. It is because the defendants failed to pay to the respondent the balance of \( \mathbf{₦}1.960 \) million that the plaintiff filed this claim for the balance under the undefended list procedure. The first and second defendants filed a notice of intention to defend within the prescribed time, and the matter came before the learned trial court on 17/5/2000. The appellant’s Counsel drew the attention of the court to the notice of intention to defend and referred to portions of the affidavit that the plaintiff did not buy from the first and second defendants but from Barmani Holdings Ltd, with the UBA drafts. She said, in paragraph 4 of the affidavit, the second defendant denies liability to the respondent. The appellant’s Counsel in the court below referred to the several annexures to the affidavit, and urged the court to transfer the plaintiff’s claim to the general cause list to enable the defendant to defend the claim against them. The printed record shows further that the appellant’s Counsel, as defence Counsel in the court below, said:–

“I submit that we have a defence *prima facie* and we are not supposed to show that at this stage.”

The learned trial Judge adjourned the case “on 17 May, 2000, for judgment on 3–7 July, 2000”.

On the said 3–7 July, 2000, the trial court delivered judgment as recorded above, which for convenience I reproduce here:–

“It is true that a defence that I am not liable is a defence, but from the facts of this case, and the affidavit evidence and documents, there is no defence on the merit.”

Order 22 of the High Court (Civil Procedure) Rules requires the trial court to transfer the plaintiff’s claim to the general cause list if the affidavit of intention to defend shows a defence on the merit. The rule does not expect a determination of the claim at that stage on the merit. The issue to be determined therefore is this, does the defence of the respondent show any merit?
In the instant appeal, the trial Judge is entitled on the spot to determine whether or not the statement showing a defence shows any plausible defence, not just a general denial which does not join a substantial issue with the applicant’s claim. In *U.N.N. v Orazulike Trading Company* (1989) 5 NWLR (Part 119) at 29 Uwaifo JCA, as he then was, he is now JSC, interpreted the rule of defence on merit as follows:–

“The law is that where the defendant raises any substantial question of fact which ought to be tried, leave should be given.”

What then is the defence shown by the defendant? It is that the money was received by a third party whereas the document annexed shows the receipt issued to the claimant by the appellant taking the facts as they are on the printed record, it cannot be said that the defence of the defence shows any merit.

Exhibits ABJ1, 2 and 3 are clear evidence of an admission by the appellant of liability to the respondent. See *Nwosu v Imo State* (1990) 4 SCNJ 197 at 115, (1990) 2 NWLR (Part 135) 688. The receipts are evidence of receipt of the money for purchase of the fertilizer by the appellant, and a balance thereof is due to the respondent.

I therefore affirm the judgment of the court below and dismiss the appeal. There will be costs of ₦3,000 to the respondent.

**SALAMI JCA:** In the High Court of Justice of Kaduna State, in the Kaduna Judicial Division sitting in the plaintiff’s claim, endorsed on his writ of summons against the defendants, reads as follows:–

1. The plaintiff’s claim against the defendants jointly and/or severally is the sum of ₦1,960,000 (One Million, Nine Hundred and Sixty Thousand Naira only) being an outstanding balance arising from the failure of the defendants to supply to the plaintiff required numbers of trucks load of fertilizers.

2. 10 percent interest on the judgment sum and costs of this action.”
Being an action brought under the undefended list by virtue of Order 22 of the Kaduna State High Court (Civil Procedure) Rules Cap 66 of the Laws of Kaduna State of Nigeria, 1991. The writ of summons was supported by the affidavit. To the affidavit, in support of the action, was attached three documents issued by the second defendant. The defendants filed notice of their intention to defend supported by affidavit, to which exhibit FRI is attached.

On the return date, the learned trial Judge heard argument of both Counsel and reserved the matter for judgment. In his reserved and considered judgment, the learned trial Judge rejected the defence and entered judgment in favour of the plaintiff as follows:

“I accordingly enter judgment against the 2nd defendant in favour of the plaintiff in the sum of ₦1,960,000 against the 1st and 2nd defendants.”

The defendants are dissatisfied with the judgment and being aggrieved have appealed to this Court on four grounds of appeal, but abandoned ground 1 and were left with three grounds from which only one issue was framed in the alternative. The issue is set out immediately hereunder:

“Was the learned trial Judge right in refusing to transfer the case from the undefended list to ordinary cause list for adjudication in the light of evidence before the lower court or in the alternative, did the appellants’ notice of intention to defend disclose a defence on the merit in the light of evidence before the lower court.”

The learned Counsel for the respondent adopted in the respondent’s brief the appellant’s formulation of issue.

Before considering the argument proffered by the parties in their respective briefs of argument, it may be pertinent to state the facts of the case as presented by the two sides to the action.

It is the plaintiff’s (hereinafter referred to as the respondent) case that he was introduced to the defendant (hereinafter referred to as the appellants) when he wanted to buy fertilizer in large quantities. At the premises of the first appellant he met second appellant who informed him that a truck
load of fertilizer was being sold for ₦600,000 or at ₦1,000 per bag since a truck load comprised of 600 bags. When he was assured by the second appellant that first appellant had fertilizer in large quantity to dispose of he purchased a bank draft from the Funtua Branch of first appellant for seven truck loads of fertilizer made payable to Kaduna North branch of the first appellant where the second appellant had an office. Respondent deposed further, in his affidavit in support of the application, that with further assurance from the second defendant that the first appellant had more fertilizer in his stock to dispose of, he purchased another bank draft from Afribank Malumfashi branch made payable to the first appellant for a second set of truck loads of fertilizer. It was the respondent’s case that the total value of the two bank drafts was ₦12,960,000 paid for the truck loads of fertilizers to the first appellant on the instruction and directive of the second appellant. He gave the number of the two drafts as (a) 288452/BO201–026678 and (b) 020049/BO35000725H. Neither of them was attached to the affidavit in support.

When he was ready to take delivery of the fertilizer, it was averred that he approached the second appellant who directed the respondent to warehouses or premises of a company called Barmani Holdings Company Nigeria Limited. It was further averred that on getting to the warehouse in his bid to evacuate the fertilizer he was informed of a price increase of ₦50 per bag which was protested to the second appellant to no avail and the number of truck loads he had bought had to be paid for.

It was further averred that at the time the respondent took delivery of only nine truck loads of fertilizer, it appeared the stock of fertilizer had been exhausted and he had an outstanding balance of ₦6,960,000. Respondent then returned to the second appellant for the refund of his outstanding sum but was paid the sum of ₦5,000,000 only thereby leaving a balance of ₦1,960,000.
It was averred that the respondent visited the second appellant to demand the payment of his money but all he succeeded in securing from him were written undertakings, exhibits ABJ1 and ABJ2. It was finally averred that in August, 1999 the second appellant wrote the first appellant reminding it of the respondent’s outstanding money. The letter is marked exhibit ABJ3 and attached to the affidavit in support of the writ of summons.

The appellants in the affidavit in support of their notice of intention to defend in paragraph 2(a) thereof denied paragraphs 7–24 of the respondent’s affidavit. It was averred that the first appellant helped one Drury Industries Limited to procure an import licence to import solar urea fertilizer which Drury Industries Limited was unable to finance. The first appellant, which financed the importation, appointed one Otunba Senbore as the receiver/Manager to dispose of the fertilizer used to secure the loan granted to Drury Industries Limited. It was admitted that the respondent approached the second appellant to purchase fertilizer, but he was told that the fertilizer had been sold out but Barmani Holdings Company (Nigeria) Limited, which bought the largest consignment, had some in stock and he was accordingly directed.

A letter written by the receiver/Manager and addressed to the first appellant’s managing Director was marked exhibit FR1 and attached to the affidavit in support of the notice of intention to defend.

The only issue respectfully calling for determination in this matter is whether the affidavit accompanying the appellant’s notice of intention to defend disclosed a defence on the merits to justify transferring the suit from undefended to the general cause list under Order 22 Rule 3(1) of the Kaduna State High Court (Civil Procedure) Rules Cap 68 of the Laws of Kaduna State of Nigeria, 1991.

In the appellant’s brief some arguments were canvassed on irrelevant matters which were not in issue in this appeal. The
question of a conflicting affidavit was never taken up before the trial court neither was the question of the status of the deponents to either affidavit raised in the court below. Just as the respondent failed to depose personally to the affidavit in support of his suit so also did the second appellant shy away from an oath in respect of the affidavit accompanying their notice of intention to defend. The material deposed to in either case was supplied by the respective solicitor to some third parties who were neither eye witnesses nor partis to the transaction now under litigation. This was not an issue in the trial court and cannot be raised here for the first time without leave. I do not propose to comment further on what is not an issue before this Court and a case of the kettle calling the pot black. There can only be a competent issue if there is a ground of appeal challenging the ratio decidendi of the judgment.

Learned Counsel for the appellant contended in the appellant’s brief that, while the respondent is saying he did pay the money to the appellant, the latter contends that the respondent did not pay the buying price to them but to a third party, namely Messers Barmani Holdings Limited. In the circumstances the onus was on the respondent to produce evidence of the payment. Learned Counsel then submitted that, in the light of the conflicting averments, the only way to find out the truth is to find out whether the instruments were paid to Barmani Holdings Limited or to the appellant.

I agree with the learned Counsel for the appellant that, in a situation where there is no evidence as to whom the instruments were paid, the only method to ascertain the truth or otherwise of the matter is to sight the instruments and the question of whether the instruments were paid to a third party, Messers Barmani Holdings Limited, or whether they were truly paid to the appellant, would be resolved because where there is oral and documentary evidence the latter should be used as a hangar from which to evaluate the oral testimony. See Kimdey v Military Governor, Gongola State

But, in the circumstances of this case, there is the appellant’s admission through the second appellant, who wrote exhibits ABJ1, ABJ2 and ABJ3, which made it no longer, at least, necessary for the respondent to substantiate the averments contained in his affidavit in support of his writ of summons. The exhibits are recited serially immediately hereunder. Exhibit ABJ1 was written on the second appellant’s officially headed notepad and reads as follows:–

“Alhaji Babangida Jargaba,

Kindly give us one week in relation to the refund fertilizer purchase from UBA Plc through Barmani Holdings regarding the balance of N1,960,000.

signed 9/9/99”. (italics mine)

d Precisely a week later exhibit ABJ2 was written to the respondent:–

“Alhaji Babangida Jargaba,

Kindly give us a grace period of 15 days for your balance of N1,960,000 being payment routed for Barmani Holdings for purchase of Drury Fertilizer.

signed 16/9/99”. (italics mine)

e Exhibit ABJ3 is a memorandum written jointly by the second appellant and one Nasiru M. Abubakar, Head, Funds Transfer. It reads thus:–

“MEMO
FROM: KADUNA NORTH BRANCH
KDN/MST/NMA/721/99
TO. The Group Head National Corporate Bank, Lagos.
CC: AGM, BOC North, Kaduna

DRURY SALES OF FERTILIZER

We write to notify your good-selves that the following individuals/corporate bodies are yet to receive the balance of their fertilizer stock bought from us nor refund of funds collected by BARMANI HOLDINGS LIMITED through Plc Kaduna North Branch.
1. Alh. Salisu and Sons  ₦9,450,000.00
2. Alh. Shulden Natatu/Alh. Nura  1,860,000.00
3. Alh. Babangida Jargaba  1,960,000.00
4. Alh. Sarki Zaria  1,260,000.00

Kindly expedite action in ensuring that these clients are refunded as some of them are planning legal action against the company and our bank.

We await your urgent response.

(SGD.) (SGD.)
IBRAHIM EL-RUFAI  NASIRU M. ABUBAKAR
BRANCH MANAGER  HEAD, FUNDS TRANSFER
d
CC: ALH. SULEIMAN GARBA NURU – CEO Barmani Holding Ltd.
CC: OTUNBA OLUTOLA SENBORE – THE Receiver/Manager Drury Ind. Ltd.”

e
The last exhibit is a case of the accused who admitted everything. There is no better evidence than the one that proceeded from the accused’s mouth. The exhibits nailed the appellants. I agree that the value of the admission depends on the circumstances in which it was made and evidence in such circumstance is always to affect the weight of admission: Okai II v Ayikai II 12 WACA 31, 32; Ojiegele v Okwaranyin (1962) 2 SCNLR 358, (1962) 1 All NLR 605, 610 and section 17 of the Evidence Act. The second appellant, having admitted that the money was collected through the bank there, will no longer be a burden to prove what has been admitted by the appellants. See Onobruchere and another v Esegine (1986) 1 NWLR (Part 19) 799, (1986) 2 SC 385, 397. Section 75 of the Evidence Act Cap 112 of the Laws of the Federation of Nigeria, 1990 provides as follows:–

“75. No fact need be proved in any civil proceedings which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands or which by any rule or pleading
in force at the time they are deemed to have admitted by their pleadings:–

Provided that the court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions.” (Italics mine)

The learned trial Judge did not exercise his discretion by requiring the facts admitted to be proved otherwise than by the admission. The onus of proof therefore shifts squarely on the appellants to show that they had no obligation to pay the money, which is established has been paid to them.

The mere allegation that there has been payment of money, even without the admission, implies *prima facie* an obligation on the appellant to repay. Therefore, the onus was on them to show the money was not repayable: *Seldon v Davidson* (1968) 1 WLR 1083. To avoid judgment being given against the appellants they had the burden of showing that they did not participate in the transaction as well as not receiving the money in question. The burden of tendering the drafts whereby the money was paid was on them. Firstly, they have to produce the drafts whereby the money was paid for the fertilizer or the refund was made, otherwise, judgment would be given against them even if the matter were to be placed on the general cause list and the respondent failed, refused or neglected to produce the cheques as he would still not be saddled with the burden because they are the ones asserting the positive of payment being made to Barmani. The cheque issued by United Bank for Africa Plc, Funtua by banking practice in Nigeria is in the custody of the appellant who had asserted that the payment was made to Barmani Holdings. I take judicial notice that the cheque drawn by a customer on his bank is kept or retained by his or its bank after clearance. The only cheque, which would not probably be in the appellant’s custody, through the normal course of banking is the respondent’s second draft drawn on Afribank Plc Malumfashi branch. Even that too must be produced in evidence by the appellant who had alleged that payment was made to Barmani Holdings Company Nigeria Limited and
not to them to establish the assertion. This is summed up by the Latin saying:

“Ei incumbit probatio, qui dicit, non qui negat; cum per rerum naturam factum negantis probatio nulla sit.”

Meaning the proof lies on him who affirms, not upon him who denies, since by the nature of things he who denies a fact cannot produce any proof.

I agree with learned Counsel for the appellant that the triable issue should not necessarily succeed at the end of the day. All the appellants need do is to show that there is a triable issue or a defence that is not vague or a sham. But I disagree with his contention that the learned trial Judge had no business, at the time of deciding whether to transfer the case from the undefended to the general cause list, to consider whether the appellant proved to whom the money was paid and that it was sufficient, once the issue is raised, in the notice of intention to defend, that the payment was not made to the appellant to affect a transfer. This is not the spirit of the provisions of Order 22 especially Rule 3(1) thereof which is designed to relieve the courts of the rigour of pleadings and the burden of hearing tedious evidence and sham defences mounted by the defendants who have no defence and are just determined to dribble and cheat the plaintiffs out of the reliefs they are normally entitled to. Before a matter is transferred to the general cause list the affidavit accompanying the notice of intention to defend must disclose a defence on the merit and not a mere denial that the money was not paid to the appellant as postulated in the appellant’s brief. There was nothing stopping or preventing the appellant accompanying and attaching to the affidavit disclosing the defence with an application to join Barmani Holdings Company Limited or an affidavit deposed to by that other company accepting liability. These materials would probably raise the “substantial question of fact which ought to be tried” contemplated in the case: *NAB Ltd v Felly Keme Nig. Ltd* (1995) 4 NWLR (Part 387) 100, 112–113 and not just a mere fanciful denial.
There is a long line of authorities to the effect that for the matter to be transferred from the undefended to the general cause list, the affidavit in support of the notice of intention to defend must show or disclose enough facts to satisfy a reasonable tribunal that the defendant has a defence to the action: It must be such that will require the plaintiff to proffer an explanation for certain matters with regard to his claim or seriously question the plaintiff’s claim.

The object of the affidavit in disclosing the ground for asking to be let in to defend the suit are not frivolous, vague or fanciful or designed to delay the trial of the action but must show that there is a dispute between the contending parties to be tried. See *Texaco Nigeria Limited v Commercial Amalgamated Printers Ltd* (1972) 1 NMLR 108; *Nishizawa Ltd v Jethwani* (1984) 12 SC 234; *Jipreze v Okonkwo* (1987) 3 NWLR (Part 62) 737; *Ben Thomas Hotels Ltd v Sebi Furniture Ltd* (1989) 5 NWLR (Part 123) 523, 529; *C.C. Bank Nigeria Plc v Samed Investment Co. Ltd.* (2000) 4 NWLR (Part 651) 19; *ACB Ltd v Gwagwada* (1994) 5 NWLR (Part 342) 25, (1994) 4 SCNJ (Part 11) 268, 277; and *Knightbridge Limited v Atamako* (2000) 2 NWLR (Part 645) 385, 390. It is, however, not for the court at that stage to determine whether the defence is good or will succeed or not.

The present case is equally different from the case of *Peat Marwick, Ani, Ogunde and Co. v Okike* (1995) 1 NWLR (Part 369) 71, 86. The distinguishing factor is the admission by the second appellant herein. He is the first appellant’s branch Manager in charge of its Kaduna North branch at the time material to the cause of action in this suit. He was the first appellant’s directing mind and will of the corporation, the very ego and centre of the personality of the corporation. See *Lennards Carrying Co. Ltd v Asiatic Petroleum Co. Ltd* (1915) AC 705, 712 and *Bolton Engineering Co. Ltd v Graham and Sons* (1957) 1 QB 159 172–173 *per* Lord Denning. Although the second appellant denied giving an undertaking to settle the debt, he failed to deny making or being privy to exhibits ABJ1, ABJ2 and ABJ3. No reasonable party, in the
circumstance of this case, would attempt doing so because all three documents were once faxed on the second appellant’s direct telephone line number 233693 as shown on his official letter headed pad, exhibit ABJ1. To succeed in severing the second appellant from ABJ series, the appellants have a duty of first showing that the sheet on which exhibit ABJ1 was written does not belong to the second appellant.

The cases cited in the appellant’s brief are decided on their own peculiar facts and peculiar circumstances: *Ojegele and others v The State* (1988) 1 NWLR (Part 71) 414, (1988) 2 SCNJ (Part II) 231, 238. They have no application to the background facts of this appeal. Exhibit FRI, for example, does not assist the defendants. It merely stated the receiver/Manager’s dealings. It did not exclude the possibility of Mallam Ibrahim El-Rufai having a sideshow of his own. As the first appellant’s agent of Managerial status with ostensible authority to act, his acts bind the first appellant whether such acts are for the benefit of the principal or not, provided he is shown to have acted within the scope of their authority. See *Lloyd v Grace Smith and Co.* (1912) AC 716; *Trenco Nig. Limited v African Real Estate Investment Co. Ltd and another* (1978) 1 LRN 146 and *Wood v Martins G Bank* (1958) 1 WLR 1018, 1030. The second appellant is the branch Manager of the first appellant for Kaduna North and has ostensible authority to collect money on behalf of his employer.

In the circumstance, the appeal fails and it is dismissed by me. I affirm the decision of the trial court with costs assessed at ₦3,000.

**R.D. MUHAMMAD JCA:** I have read before now the judgment of my learned brother, Omage JCA, just delivered. I agree with his reasoning and conclusion. The appeal lacks and is dismissed by me.

I also affirm the decision of the trial court. The respondent is entitled to costs which I assess at ₦3,000.

*Appeal dismissed.*
Intercity Bank Plc v Feed and Food Farms Nigeria Limited and others

Mortgage – Definition of
Mortgage – Power of sale – Mortgagee not a trustee
Mortgage – Power of sale – Principles governing

Facts

Mr Mahfouz Fawaz, the third respondent herein is the joint chairman of the first and second respondents who are both duly incorporated limited liability companies. Sometime in 1996 the second respondent opened a current account with the appellant at its Kano Branch. The appellant then granted a loan facility of N3,000,000 (Three Million Naira) to the second respondent. The facility was secured by the second respondent’s landed property situate at No. 15, Batawa Close, Kano. The respondent, as chairman of the first respondent, also deposited the first respondent’s certificate of occupancy in respect of its premises in Bauchi to the appellant. Things did not go well between the appellant and the respondent. The appellant decided to exercise its power of sale by virtue of the deed of mortgage created over No. 15, Batawa Close, Kano. It advertised to sell the house in several media houses. As a result the respondents, as plaintiff, instituted an action against the appellant before the Kano High Court in which they sought the following reliefs:

1. A declaration that the purported advertisement for sale of the 3rd plaintiff’s landed property situated at 15, Batawa Close and covered by Kano State Government Certificate of Occupancy No. LKN/RES/97/276 by the defendant without giving prior notice to the plaintiffs particularly the 2nd and 3rd plaintiffs is unconstitutional, unlawful and therefore null and void.
2. An order directing a thorough reconciliation of the 2nd plaintiff’s account with the defendant by a reputable firm of Chartered Accountants to be appointed by the court.

3. An order setting aside all overcharges either by way of interest, commission on turnover (COT), unauthorised dealings in the account and all other unauthorised or unlawful and illegal transaction by whatever name so described by the defendant respecting the 2nd plaintiff’s said current account as being illegal, unlawful, null and void.

4. A declaration that the defendant cannot advertise, cause to be advertised, sell, eject, possess or realise in any manner, the 2nd plaintiff’s landed property situated and known as No. 15, Batawa Close, Kano and covered by Kano State Government Certificate of Occupancy No. LKN/RES/97/276 or exercise any powers at all conferred on it by virtue of the duly perfected deed of legal mortgage respecting the said property between the 2nd plaintiff and the defendant until the due determination of this suit.

5. Orders of injunction restraining the defendant either by itself, agents, servants, assigns, privies, or by whatever name known and called from doing or omitting to do any or all of the following:

   (a) From taking any steps and/or exercising any rights and/or powers whatsoever under the deed of legal mortgage between it and the 2nd plaintiff respecting the property situated and known as No. 15, Batawa Close, Kano and covered by Kano State Government Certificate of Occupancy No. LKN/RES/97/276 and or any other security arrangement between it and the plaintiffs.

   (b) From advertising, selling, auctioning, entering, and taking possession of, ejecting, harassing, intimidating, dispossessing or in any manner whatsoever disturbing the plaintiffs particularly the 2nd plaintiff’s quiet possession and peaceful enjoyment of the landed property situated and known as No. 15, Batawa Close, Kano, and covered by Kano State Government Certificate of Occupancy No. LKN/RES/97/276.

   (c) From taking any steps and/or actions that are capable of embarrassing, harassing, molesting, ridiculing and/or all the plaintiffs in suit or any of their staff, agent, representatives etc on account of the disputed accounts between the 2nd plaintiff and the defendant.
(d) From the publishing to any persons(s) natural or corporate, including public and private media authorities etc, any allegation of indebtedness by the plaintiff to the defendant respecting the disputed accounts between the defendants and the 2nd plaintiff.

6. An order directing the defendant to immediately release and surrender to the plaintiffs, more particularly the 1st plaintiff, certificate of occupancy No. BA/3004 which was deposited with the defendant for safekeeping.

7. General damages for the illegal debitting of the 2nd plaintiff’s account by the defendant and for all mental stress, harassment, intimidation, etc caused the plaintiff’s particularly the 3rd plaintiff by the defendant.

8. Legal costs and the costs of filing and prosecuting this action.”

After listening to the arguments of Counsel on both sides, the learned trial Judge in his ruling relied very heavily on the case of A.C.B. v Awogboro (1991) 2 NWLR (Part 176) 711 and granted the reliefs applied for.

The appellant was not happy with this ruling. It therefore appealed to the Court of Appeal.

Held –

1. A mortgage is a conveyance of property as security for a debt which is lost or becomes dead to the debtor if the money or the interest due thereon is not paid on a certain date. In the instant case, the mortgagor failed to pay the sum borrowed on the due date.

2. A mortgage deed is a written agreement containing written conditions amongst which is the provision of the time when the agreement will be terminated by a refund of the money borrowed from the mortgagee, or the occurrence of the right to sell the mortgaged property upon failure of the mortgagor to repay the sum lent to him by the mortgagee.

3. The power of sale is given to the mortgagee for his own benefit to enable him the better to realise his debt. The court may interfere with the exercise of the power at the
instance of those interested in the proceeds of sale. But the court will not interfere merely to prevent its exercise contrary to the wishes of the mortgagor, or even, except on terms of payment of the mortgagee debt, where it has been said because the mortgagee is seeking some collateral object and not merely the payment of his debt. This is so because the mortgagee is not a trustee of the power for the mortgagor and the court will not inquire into his motives for exercising it.

4. The court will not inquire into the motives of a mortgagee for exercising his power of sale. Since the power of sale is bestowed upon the mortgagee for his own benefit, it follows that if a mortgagee exercises the power of sale _bona fide_, without corruption or collusion with the purchaser or with reckless impropriety as to tantamount to fraud, the court will not interfere.

5. In the exercise of his right of sale, the mortgagee is not a trustee for the mortgagor and the court will not interfere with the exercise of his power of sale. In the instant case, the mortgagor complained that the mortgaged sum is not ascertained and urged the court to restrain the sale of his mortgaged property until the amount owed is ascertained, upon which reason the trial court ordered a restraint of the mortgagee from effecting the sale. The trial court should not have restrained the mortgagee from exercising its power of sale.

6. A mortgagee will not be restrained nor can his power of foreclosure be affected by the exercise of his power of sale merely because the amount due is in dispute or the mortgagor objects to the manner in which the sale is being arranged or because the mortgagor has commenced a redemption action in court. In the instant case, the fact that the second respondent is disputing the exact amount owed is not sufficient reason to restrain the appellant from exercising his power of sale under the deed of legal mortgage.

Appeal allowed.
Cases referred to in the judgment

Nigerian

A.C.B. Ltd v Awogboro (1991) 2 NWLR (Part 176) 711
A-G Kwara State v Olawale (1993) 1 NWLR (Part 272) 645
Gombe v Aliyu (1999) 7 NWLR (Part 612) 612
Ihekwoaba v ACB Ltd (1998) 10 NWLR (Part 571) 590
Nigerian Housing Development Society Ltd v Mumuni (1977) NSCC Vol. II 65
Okonkwo v C.C.B. (1997) 6 NWLR (Part 507) 48
Sabbagh Assad and another v Bank of West Africa (1962) All NLR 1153
UBN v Tropic Food Ltd (1992) 3 NWLR (Part 228) 231

Foreign

Adams v Scott (1895) 7 WR 213
Hickson v Darlow (1883) 23 Ch.D. 690

Books referred to in the judgment

Fisher and Lightwood’s Law of Mortgage (9ed) by E.L.G. Tyler page 367
Halsbury’s Laws of England (4ed) paragraph 725

Counsel

For the appellant: D Samaila
For the respondents: Olajide Ayodele, S.A.N. (with him Nureni Jimoh)

Judgment

MUHAMMAD JCA: (Delivering the lead judgment)
Mr Mahfouz Fawaz, the third respondent herein, is the joint chairman of the first and second respondents who are both duly incorporated limited liability companies. Sometime in
1996 the second respondent opened a current account with the appellant at its Kano Branch. The appellant then granted a loan facility of ₦3,000,000 (Three Million Naira) to the second respondent. The facility was secured by the second respondent’s landed property situate at No. 15, Batawa Close, Kano. The respondent, as chairman of the first respondent, also deposited the first respondent’s certificate of occupancy in respect of its premises in Bauchi to the appellant. Things did not go well between the appellant and the respondent. The appellant decided to exercise its power of sale by virtue of the deed of mortgage created over No. 15, Batawa Close, Kano. It advertised to sell the house in several media houses. As a result the respondents, as plaintiff, instituted an action against the appellant before the Kano High Court in which they sought the following reliefs:–

1. A declaration that the purported advertisement for sale of the 3rd plaintiff’s landed property situated at 15, Batawa Close and covered by Kano State Government Certificate of Occupancy No. LKN/RES/97/276 by the defendant without giving prior notice to the plaintiffs particularly the 2nd and 3rd plaintiffs is unconstitutional, unlawful and therefore null and void.

2. An order directing a thorough reconciliation of the 2nd plaintiff’s account with the defendant by a reputable firm of Chartered Accountants to be appointed by the court.

3. An order setting aside all overcharges either by way of interest, commission on turnover (COT), unauthorised dealings in the account and all other unauthorised or unlawful and illegal transaction by whatever name so described by the defendant respecting the 2nd plaintiff’s said current account as being illegal, unlawful, null and void.

4. A declaration that the defendant cannot advertise, sell, eject, possess or realise in any manner, the 2nd plaintiff’s landed property situated and known as No. 15, Batawa Close, Kano and covered by Kano State Government Certificate of Occupancy No. LKN/RES/97/276 or exercise any powers at all conferred on it by virtue of the duly perfected deed of legal mortgage respecting the
said property between the 2nd plaintiff and the defendant until the due determination of this suit.

5. Orders of injunction restraining the defendant either by itself, agents, servants, assigns, privies, or by whatever name known and called from doing or omitting to do any or all of the following:

(a) From taking any steps and/or exercising any rights and/or powers whatsoever under the deed of legal mortgage between it and the 2nd plaintiff respecting the property situated and known as No. 15, Batawa Close, Kano and covered by Kano State Government Certificate of Occupancy No. LKN/RES/97/276 and or any other security arrangement between it and the plaintiffs.

(b) From advertising, selling, auctioning, entering, and taking possession of, ejecting, harassing, intimidating, dispossessioning or in any manner whatsoever disturbing the plaintiffs particularly the 2nd plaintiff quiet possession and peaceful enjoyment of the landed property situated and known as No. 15 Batawa Close, Kano, and covered by Kano State Government Certificate of Occupancy No. LKN/RES/97/276.

(c) From taking any steps and/or actions that are capable of embarrassing, harassing, molesting, ridiculing and/or all the plaintiffs in suit or any of their staff, agent, representatives etc. On account of the disputed accounts between the 2nd plaintiff and the defendant.

(d) From the publishing to any persons(s) natural or corporate, including public and private media authorities etc, any allegation of indebtedness by the plaintiff to the defendant respecting the disputed accounts between the defendants and the 2nd plaintiff.

6. An order directing the defendant to immediately release and surrender to the plaintiffs, more particularly the 1st plaintiff, certificate of occupancy No. BA/3004 which was deposited with the defendant for safekeeping.

7. General damages for the illegal debiting of the 2nd plaintiff’s account by the defendant and for all mental stress, harassment, intimidation, etc caused the plaintiff’s particularly the 3rd plaintiff by the defendant.

8. Legal costs and the costs of filing and prosecuting this action.”
The respondent then filed a motion *ex parte* and another one on notice in respect of interlocutory application restraining the appellant from doing and/or omitting to do all or any of the following:–

“(a) From taking any steps and/or exercising any rights and/or powers whatsoever under the deed of legal mortgage between the defendant and the 2nd plaintiff over the 2nd plaintiff’s landed residential property situated and known as No. 15 Batawa Close, Kano and covered by Kano State Government Certificate of Occupancy No. LKN/RES/97/276 pending the hearing and determination of the substantive suit.

(b) From advertising for sale or lease, selling, mortgaging, auctioning either by private treaty or public auction, entering into and taking possession of, ejecting, harassing, intimidating, dispossessing and/or taking any steps whatsoever to eject, dispossess, harass, intimidate or in any manner whatsoever doing any act(s) or thing(s) that is/are capable of disturbing the plaintiff’s quiet possession and peaceful occupation of the landed property situated and known as No. 15 Batawa Close, Kano and covered by Kano Government Certificate of Occupancy No. LKN/RES/97/276 pending the hearing and determination of the substantive suit.

(c) From publishing to any person(s) natural or corporate, including private and public media, authorities, any allegations of indebtedness by the plaintiffs or any of the plaintiffs to the defendant; winding up and/or taking any steps to and/or doing any act(s) thing(s) that is/are capable of ridiculing and/or threatening the plaintiffs, their staff, agents, servants, etc pending the hearing and determination of the substantive suit.

2. Any other order(s) as the Honourable Court may deem fit to make in the circumstances of this case.”

The motion was supported by a four paragraphed affidavit. The defendant filed a counter-affidavit. After listening to the arguments of Counsel on both sides, the learned trial Judge in his ruling relied very heavily on the case of *A.C.B. v Awogboro* (1991) 2 NWLR (Part 176) 711. In fact he almost reproduced the case verbatim. He then applied the case
a hook, line and sinker (if I may use the expression) to the present case and came to the following conclusion:–

1. The court must therefore in view of the above facts, law and decided case, hold that the applicant has satisfied the conditions i.e preservation of the res, for the grant of interlocutory injunction and is entitled to be granted the orders as prayed.

The court must also hold that the applicant is not encouraged to rescile from his mortgage agreement but the facts and figures must be examined to ensure that no party is allowed to take advantage of the other.

That even if the order of injunction is not granted the doctrine of lis pendens will operate to stop the defendant from selling the property during the dependency of this suit.

2. That the court order for the accelerated hearing of the substantive suit.

3. That the case is adjourned to . . . for mention.”

The appellant was not happy with this ruling. It therefore appealed to this Court. The notice of appeal contained three grounds of appeal. Without their particulars, the grounds of appeal read:–

1. The learned trial Judge erred in law when he totally relied on the case of A.C.B. v Awogboro (1991) 2 NWLR (Part 176) 711 in deciding the application for injunction to restrain an unpaid mortgage from exercising his rights under the mortgage contrary to and distinguishable from law as stated by the Supreme Court.

2. The learned trial Judge erred in law when he granted an injunction restraining the appellant exercising its rights under the mortgage when the deed of mortgage is not being controverted.

3. The learned trial Judge erred in law and failed to arrive at proper conclusions when he adopted in its entirety the decision in A.C.B. v Awogboro (1992) 2 NWLR (Part 176) 711 as if same is a carbon copy of the case now before him.”

In compliance with the rules of court, the parties filed and exchanged briefs of argument. In the appellant’s brief the
following issues were identified for the determination of the appeal:

“1. Whether an unpaid mortgage can be restrained by a court of law from exercising his/her power of sale pursuant of a deed of legal mortgage.

2. Whether the principles in the case of A.C.B. v Awogboro (1991) 2 NWLR (Part 176) 711 are applicable to the instant matter.”

The respondent also formulated two issues for the determination of the appeal. The two issues are in substance the same with the ones identified by the appellant. The two issues are as follows:

“1. Whether the learned trial Judge was right in applying the principles established in the case of A.C.B. v Awogboro (1991) 3 NWLR (Part 176) 711 and U.B.N. v Tropic Food Ltd (1992) 3 NWLR (Part 228) 231 to this case.

2. Whether the interlocutory injunction cannot be ordered in a case where there is a dispute as to the amount owed by the mortgagor so as to affect the right of the mortgage to foreclose and sell the secured property.”

However, taking into consideration the issues involved in this appeal, the facts and the grounds of appeal filed, it is my considered opinion that only one issue is sufficient for the determination of this appeal. This is the first issue formulated by the appellant which is virtually the same as the second issue formulated by the respondents. The issue whether the trial Judge was right in applying the principles established in Awogboro case (supra) will not be of assistance to us. The resolution of the issue, one way or the other, will not solve our problem. An issue for determination must be, among other things, of such a nature that a decision on it, one way or the other, must affect the result of the appeal. See A-G, Kwara State v Olawale (1993) 1 NWLR (Part 272) 645. I will therefore adopt the second issue formulated by the respondents for the determination of this appeal which is:

“Whether the interlocutory injunction cannot be ordered in a case where there is a dispute as to the amount owed by the mortgagor
It was submitted in the appellant’s brief that in a deed of mortgage, power of sale is like a shield that protects a mortgage against an erring or defaulting mortgagor. Thus, once a mortgagor defaults in paying the principal sum or any interest thereof the power of sale has arisen. It was submitted that once the power of sale becomes exercisable, nothing short of paying the entire amount owed will stop the mortgagor from selling the mortgaged property. It was then submitted that in the instant case the power of sale has arisen because the second respondent was in default in paying the amount owed plus interest and that the appellant has demanded the payment of the money. It was then submitted that nothing short of paying the entire amount can stop the appellant from exercising its power of sale against the mortgaged property in accordance with the mortgage documents. The following case was cited in support: Okonkwo v C.C.B (1997) 6 NWLR (Part 507) 48. It was further submitted that the sale could not be stopped even when the mortgagor objects to the sale arrangement or has commenced a redemption action as stated in the case of Nigerian Housing Development Society v Mumuni (1997) NSCC Volume II page 65, (1977) 2 SC 57. It was then submitted that the case of U.B.N. Ltd v Tropic Foods Ltd (1992) 3 NWLR (Part 228) 231 relied upon by the trial court to counter the position of our law in Okonkwo v C.C.B. (supra) was wrongly applied.

In the respondent’s brief, after referring and quoting from Okonkwo v C.C.B. (supra) and Nigeria Housing Development Society v Yaya Mumuni (supra), it was submitted that two things seemed to have been overlooked as a major distinction between this case on appeal and the cases referred to in Okonkwo (supra). The case in Okonkwo, it is contended, is in respect of setting aside the sale of mortgaged property. It was in reviewing the issue as to whether or not the court would set aside the sale, that the court expressed the view that a dispute as to the amount owed by the mortgagor
would not preclude the sale of the property. In the present case the property is yet to be sold by the mortgagee and the respondents have asked the court for a restraining order to enable the parties to carry out a reconciliation of the accounts. It was also submitted that in *Okonkwo’s* case, the appellant admitted the non-payment of the loan. Having made that admission the court had no option but to hold that the power of sale was properly exercised. In our present case there are averments which place it on a different pedestal from *Okonkwo’s* case. From the averments it is apparent that the question as to whether the respondent is owing the appellant on the state of the accounts is even in dispute.

The respondents then referred to and quoted extensively from the cases of *A.C.B. v Awogboro (supra)* and *U.B.N. v Tropic Foods Ltd (supra)* and submitted that, from the two cases, it is apparent that there is a lot the court can do to ensure the rights of an applicant are protected pending the determination of the substantive suit. It was submitted that the power of sale by the mortgagee should be subject to the ascertainment of the total indebtedness of the mortgagor.

It was reached that the trial Judge took these factors into consideration in the conclusion which he created on the matter. The order of injunction restraining the appellant from exercising its power of sale pending the hearing and determination of the substantive suit was rightly made in the circumstances of this case on appeal. It is further submitted that the facts of the present case are distinct and indeed different from the facts on *Okonkwo’s* case. It was then submitted that this Court should not interfere with the exercise of discretion to grant the injunction sought by the respondents in the court below. The trial court rightly exercised the discretion vested in it and this Court should not interfere with the exercise of the discretion.

From the writ of summons, the joint statement of claim, the motion on notice for interlocutory injunction and its supporting affidavit, there is a duly perfected deed of legal
mortgage between the second respondent and the appellant in respect of a landed property situated and known as No. 15, Batawa Close, Kano. It was when the appellant tried to exercise its power of sale that the respondents sought for and were granted an interlocutory injunction restraining the appellant from selling the property. The matter is therefore governed by the law of mortgage. It is settled with regard to the law of mortgages that the court will not inquire into the motives of a mortgagee for exercising his power of sale. The power of sale is bestowed upon the mortgagee for his own benefit. It therefore follows that if a mortgagee exercises the power of sale bona fide, without corruption or collusion with the purchaser or with reckless impropriety as to be tantamount to fraud, the court will not interfere. The court will also restrain a mortgagee from selling even if there is a dispute as to the actual amount due.

In *Halsbury's Law of England* (4ed), it was stated at paragraph 725 that:

“The mortgage will not be restrained from exercising his power of sale because the amount due is in dispute or because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed in court, that is, the amount which the mortgagee claims to be due to him, unless, on the terms of the mortgagee, the claim is excessive.”

See also *Fisher and Lightwood's Law of Mortgage* (9ed) by E.L.G. Tyler where it is stated at page 367:

“The power of sale is given to the mortgagee for his own benefit, to enable him the better to realise his debt. The court may interfere with the exercise of the power at the instance of those interested in the proceeds of sale. But the court will not interfere merely to prevent its exercise contrary to the wishes of the mortgagor, or even (except on terms of payment of the mortgage debt), it has been said because the mortgagee is seeking some collateral object and not merely the payment of his debt. For the mortgagee is not a trustee of the power of the mortgagor, and the court will not inquire into his motives for exercising.”
The Supreme Court stated the provision of the law in *Nigerian Housing Development Society Ltd v Yaya Mumuni* (1977) NSCC Vol. II page 65 at 73:

"It is a well established principle of law that a mortgagee will not be restrained on the exercise of his power of sale merely because the mortgagor objects to the manner in which the sale is being arranged or because the mortgagor has commenced a redemption action in court (See *Adams v Scott* (1859) 7 WR 213). But the mortgagor will be restrained if the mortgagor pays the amount claimed by the mortgagee into court (See *Hickson v Darlow* (1883) 23 ChD 690).

We are of the opinion that in the case on appeal, nothing short of the payment in full of the principal money with interest due on 26 April, 1968 could have restrained the first defendant from the exercise of right of sale on 29 April, 1968. This ground of the appeal is therefore sustained."

In our present case, even though the second respondent is disputing the exact amount owed, this is not sufficient to restrain the appellant from exercising its power of sale under the deed of legal mortgage. The appellant can only be restrained from exercising its power of sale if the respondents have paid into court the amount claimed by the appellant. The respondents did not pay the amount claimed into court. The learned trial Judge is therefore wrong to restrain the appellant from exercising its power of sale under the deed of legal mortgage.

In the circumstance, the appeal succeeds and is allowed by me. The ruling of the lower court is set aside. The appellant is entitled to costs which I assess at N3,000.

**MOHAMMED JCA:** In this interlocutory appeal against the order of interlocutory injunction granted against the appellant by the lower court, although two issues for the determination of the appeal were distilled from the three grounds of appeal in the respective briefs of argument filed by the learned Counsel on both sides, there is in fact only one real issue for determination in this appeal. This issue is whether or not the learned trial Judge was right in granting the order contained in his ruling of 22 July, 1999 now on appeal. In
this respect, I entirely agree with my learned brother, Mohammed JCA, in his judgment, which he has just delivered, that the order of interlocutory injunction ought not to have been granted. The law on the power of a mortgagee to exercise his power of sale under the deed of mortgage is indeed trite. The mortgagee will not be restrained from exercising his power of sale simply because the amount due is in dispute. See *Sabbagh Assad and another v Bank of West Africa* (1962) All NLR 1153 at 1155.

Accordingly, for the foregoing reasons and fuller reasons contained in the lead judgment, I also allow this appeal and set aside the ruling of the lower court of 22 July, 1999. In place of that ruling of the lower court, there shall be substituted an order dismissing the respondent’s application. I also award N3,000 costs to the appellant.

**Omagh JCA:** Two issues are formed by the appellant from the three grounds of appeal filed with copious particulars. The two issues are:–

“(1) Whether an unpaid mortgagee can be restrained by a court of law from exercising his/her power of sale pursuant to a deed of legal mortgage.

(2) Whether the principles in the case of *A.C.B. v Awogboro* (1991) 2 NWLR (Part 176) 711 are applicable to the instant matter.”

The respondent to the appeal also formulated two issues proposed as follows:–

“1. Whether the learned trial Judge was right in applying the principles established in the case of *A.C.B. v Awogboro* (1991) 3 NWLR (Part 176) 711 and *UBN v Tropic Food Ltd* (1992) 2 NWLR (Part 228) 287 to this case.

2. Whether an interlocutory injunction cannot be ordered in a case where there is a dispute as to the amount owed by the mortgagor so as to apply the right of mortgagee to foreclose and sell the secured property.”

The appeal is against the ruling of BS Adamu J of the Kano High Court delivered on 22 July, 1999 when the trial court, after hearing arguments on an interlocutory application of
the mortgagor, ruled thus:

“...must therefore in view of the above facts, laws and decided case hold that the applicant has satisfied the conditions ie preservation of the res for the grant of interlocutory injunction and is entitled to be granted the orders as prayed.”

Briefly put, the issue before the court below is whether the court can order the sale of a mortgaged property when the mortgagor is contesting the quantum of his liability to the mortgagee? It was the appellant’s averment and assertion that the court cannot and should not in the suit that was filed. He was therefore dissatisfied with the ruling made by the court below, upon which reason he filed this appeal. The issue proposed by the respondent is a variation in theme and substance of the issues formulated by the appellant. It is worth considering the two sets of issues together. Issue 2 of the respondent is of the same substance as the appellant’s Issue 1, while issue 2 of the appellant is a variation of the respondent’s Issue 1. I commence consideration of the appeal with the appellant’s Issue 1 and the issue of the respondent. It is:

“Whether an unpaid mortgagee can be restrained by a court of law from exercising a power of sale in a deed of mortgage. The respondents issue 2 is whether an interlocutory injunction cannot be ordered in a case where there is a dispute as to the amount owed by the mortgagor so as to apply the right of the mortgagee to foreclose?”

The wording of the appellant’s issue is emotionally intimidating to the reader, but the question also provokes a question. Has the right to foreclose arisen? It seems to me that when the question, whether an interlocutory injunction cannot be ordered against a mortgagee who wishes to order a foreclosure is put and compared with the first question, whether the learned trial court was right to apply the principles established in ACB v Awogboro, we would arrive at one issue only for consideration, it is whether a court of law can issue an injunction to restrain the mortgagee from exercising a right of sale under a mortgage deed. To answer the question, these two issues must be determined from a definition
of a mortgaged deed, \((a)\) that is a written agreement which contains a written condition, and \((b)\) among the conditions is the provision of the time when the agreement is terminated by a refund of the money borrowed from the mortgagee, or the occurrence of the right to sell the mortgaged property upon failure of the mortgager to repay the sum lent to the mortgager by the mortgagee. Therefore, a mortgage may be defined as a conveyance of property as security for a debt which is lost or became dead to the debtor if the money or the interest due thereon is not paid on a certain date. The question then is, has the certain date arrived? In the instant appeal, the certain date has arrived when the mortgager has failed to pay the sum borrowed on the due date. In \textit{Fisher and Lightwood’s Law of Mortgage} (9ed), the following is subscribed by the learned author: “The power of sale becomes due to a mortgagee when he exercises his power of sale.”

In the exercise of the right of sale, the mortgagee is not a trustee for the mortgager and the court will not interfere with his exercise of his “power of sale”. In the instant appeal, the mortgager complained that the mortgaged sum was not ascertained and urged the court to restrain the sale of his mortgaged property until the amount owed was ascertained, upon which reason the court below ordered a restraint of the mortgagee from effecting the sale. Was the court below right to so order? The answer to the question has been previously determined by the court in \textit{Okonkwo v Co-operative and Commerce Bank Nig. Plc} (1997) 6 NWLR (Part 507) 590 when it was ruled that a mortgagee’s power of sale or foreclosure cannot be affected merely because the amount under the mortgage against it was in dispute. In order to stop the power of sale of the mortgaged property the amount owed must be paid in full. See also \textit{Ihekwoaba v ACB Ltd} (1998) 10 NWLR (Part 571) 590 CA; \textit{BON and Zakari Gombe v Haruna Aiyu} (1999) 7 NWLR (Part 612) 621. In my respectful opinion, the complaint of the mortgager notwithstanding, about the actual sum owing on the mortgage, the court will
not intervene or restrain the mortgagee from exercising his right of the mortgaged property. To intervene is to seek to vary the terms of the mortgaged agreement and the court will rewrite the mortgage agreement for the parties. The right of sale of the mortgagee is the only certain shield of recovery of the mortgagee’s investment. He should not be disturbed and he should be allowed to sell *ceteris paribus* (all things being equal).

In sum I agree with the reasoning and conclusions of my learned brother that the court should not restrain the power of the mortgagee to sell the mortgaged property.

In effect the appeal succeeds and the decision of the court below is set aside. I abide by the consequential order for costs made in the lead judgment of my learned brother, RD Muhammad JCA.

*Appeal allowed.*
Nuba Commercial Farms Limited and another v NAL Merchant Bank Limited and another

COURT OF APPEAL, KADUNA DIVISION
OMAGE, MOHAMMED, MUHAMMAD JJCA

Date of Judgment: 5 JULY, 2001
Suit No.: CA/K/58/2000

Banking – Banker’s book – Banker’s records stored in computer – Whether admissible as banker’s book – Section 97(1) and (2) Evidence Act Cap 112 Laws of the Federation of Nigeria, 1990

Banking – Interest – Calculation of – Once action filed in court – Calculation of interest to be left to court

Constitutional law – Fair hearing – Purport of – Failure of appellant to cross-examine or address court – Whether such constitutes breach of fair hearing

Evidence – Banker’s books – Banker’s records stored in computer – Whether admissible as banker’s book – Section 97(1) and (2) Evidence Act Cap 112 Laws of the Federation of Nigeria, 1990

Facts

The appellants sued the respondents in the High Court of Kaduna State wherein they sought a declaration that one Mohammed I Aliyu, who signed the consent and approval to a mortgage transaction between the respondents and the appellants in respect of the appellants’ property located on Oark Road, Zaria, was incompetent and that it was illegal for the said Mohammed I Aliyu to give such a consent or approval to the mortgage.

The appellants also prayed the court for an order nullifying the deed of mortgage and a perpetual injunction restraining the respondents from selling either by public auction or private treaty the property in issue in exercise of the power of sale under the deed of mortgage.
The respondents, upon being served with the appellants’ claim, filed a statement of defence and counterclaim indicating that all the disbursements made by the appellants were on the mortgage agreement and that the appellants were indebted to the respondents in the sum of ₦9,011,005.99 with interest thereon.

When the matter was set down for trial, the appellants failed to attend the court on the date fixed for the hearing. The trial court thereafter allegedly proceeded to hear the respondents’ counterclaim after the appellant’s claim was struck out for want of prosecution.

At the conclusion of the hearing on the counterclaim, the trial court entered judgment in favour of the respondents as claimed. The appellants were aggrieved and so appealed to the Court of Appeal complaining in the main that they were not accorded a fair trial or fair hearing.

Held –

1. Generally a claim before the court is ascertained and when the claim is for a definite sum with interest particularly in banking cases, the expectation of the law is that the claims of the plaintiff having been placed before the court as an independent arbiter to determine the usual calculation of interest would be as the court in its judgment will determine. In other words, the claimant will not continue to calculate the interest in its records and thereby be a Judge in its own cause.

2. Once the case is filed in a court of law, the bank’s calculation of interest on the agreed rate should be stayed and the matter left for determination by the court according to the law in the matter before the court.

Per Curiam

“Is the bank having filed a claim in court entitled to continue to calculate the sum due, or claimed from the court according to its own calculated interest in its office, or is the claimant entitled only to the sum claimed on the statement of claim as filed in the court? As I recorded above, unless
a. The statement of claim is amended before judgment, and evidence exists in court on the claim, before it, a court of law will not and should not award more than the sum stated on the statement of claim of the party claiming. A court of law will look at the case before it to see whether the claim before it asks for interests on the principal sum up to the date of judgment. In the instant appeal, the counterclaimant claimed ₦9,011,005.99 being the outstanding balance against the plaintiff, thus:

b. ‘The defendant further claims interest on the interests on the aforesaid facility at the rate of 21% from the end of July until judgment is delivered. And thereafter with interest at 10% until judgment debt is liquidated.’

c. There is clearly a stated sum on which interest is to be calculated, when a new figure of freshly calculated interest is produced by the counterclaimant before judgment, surely it will create difficulty in ascertaining the sum being claimed, it is not open to the court to accept such an arbitrary calculation as its judgment.”

d. 3. Fair hearing means an opportunity to be heard in a court proceeding or in any situation where justice is required to be established.

e. 4. Section 97(1) provides for the admissibility of secondary evidence in certain stated cases including when the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, or any person legally bound to produce it. By virtue of section 97(1)(h), such secondary evidence is admissible “when the document is an entry in a banker’s book”. In the proper interpretation of the statute, the words in the Evidence Act do not contemplate in its ambit the information stored by the respondent to be other than in a book and the appellant cannot be said to have in his possession copies of its contents. More importantly, the contents of such information have never been in the possession of the person against whom it was used. It is therefore right to conclude that the information retrieved from the computer being made by
the respondent for its own use, is wrong to be used in the trial against the appellant.

Appeal allowed in part.

Cases referred to in the judgment

Nigerian

Atanda v Lakanmi (1974) 3 SC 109
E.D. Tsokwa and Sons Ltd v C.F.A.O. (1993) 5 NWLR (Part 291) 120
Ekpenyong v Nyong (1975) 2 SC 71
Otapo v Sunmonu (1987) 2 NWLR (Part 58) 587

Nigerian statute referred to in the judgment

Evidence Act Cap 112 Laws of the Federation of Nigeria, 1990, section 97(1) and (2)

Counsel

For the appellant: JA Achimugu

Judgment

OMAGE JCA: (Delivering the lead judgment) In the court below in the Kaduna Judicial Division sitting in Zaria, the appellant in this appeal issued against the defendant (now respondent) a writ seeking a declaration that one Mohammed I Aliyu, who signed the consent and approval to a mortgage transaction between the plaintiff and the defendant in respect of the plaintiff’s property located in Park Road, Zaria, which property is covered by a certificate of occupancy No. 1568–1570, is incompetent and that it is illegal for the said Mohammed I Aliyu to give such a consent or approval to the mortgage.

The appellant sought three other declarations saying the deed is illegal, null and void; and for a perpetual injunction to restrain the defendant, by themselves, servants, agents from selling either by public auction or private treaty the
property covered by the certificate of occupancy nos. 1568, 1769 and 1770 in exercise of the power of sale under the deed of mortgage between the plaintiff and the defendants.

The defendant, upon receipt of the plaintiff's claim, filed its statement of defence and counterclaim and said therein that all the disbursements made by it to the plaintiff/appellant were on the mortgage agreement, and that the plaintiff is indebted to the defendant in the sum of ₦9,011,005.99 (Nine Million, Eleven Thousand and Five Naira and Ninety-nine Kobo) with interest thereon at 21% from the end of July, 1994 until judgment is delivered, and thereafter with interest at 10% until judgment debt is liquidated.

The suit was fixed for hearing, it is the complaint of the respondent that the plaintiff failed to come to court on the date fixed for the hearing. The plaintiff/appellant complained in his brief of argument that the Court proceeded to the hearing of the respondents’ counterclaim and did not allow the plaintiff to take part in the proceedings. In its brief the respondent averred that the plaintiff’s prayer for an interlocutory injunction was granted by the Court in the suit. Since the order was made to restrain the sale of the property, the plaintiff/appellant “have been dilly dallying” on their case which necessitated striking out their suit on two separate occasions for lack of diligent prosecution, ie on 11 April, 1996 by Honourable Justice S.H. Makeri, and on 14 July, 1998 by Honourable Justice Dogara Mallam, inspite of their Counsel being served with hearing notices. This necessitated the respondent in proving their counterclaim on 10 November, 1998. The plaintiffs were served with a hearing notice against that date, and they absented themselves from court while the case was adjourned to 13 December, 1998 for cross-examination of DW1 and for continuation of the hearing.

The respondent said the averment of the plaintiff/appellant is untrue, which said the counterclaim proceeded to trial by the calling of one witness by the respondent. The respondent
said it is true that the appellant failed to prosecute his claim and his claim was struck out. When the counterclaim proceeded to the hearing it was, in my view, the natural step to follow. After one witness was called, as the DW1, proceeding in the counterclaim was adjourned to enable the plaintiff to appear in court to cross-examine the witness but the plaintiff failed, refused and/or neglected to take any part in the proceedings in the claim. Thereafter the claim in counter to the plaintiff’s claim was adjourned for judgment for a long period, but the plaintiff took no steps in the proceedings. After the judgment was delivered, the plaintiff felt dissatisfied and appealed. He filed three grounds of appeal and formulated three issues, namely:

“(1) Whether there was fair trial or fair hearing in this case?
(2) Whether a trial court has the power to grant to the counterclaimants more than it had claimed?
(3) Whether the court was right in admitting exhibit P75 statement of account in evidence and whether the admission did not occasion a miscarriage of justice.”

In its response, the respondent formulated from the grounds of appeal filed by the appellant the following propositions:

(1) Whether the appellants being the plaintiff in the lower court after having their case struck out for lack of diligent prosecution, served severally with hearing notices, but decided to absent themselves from trial can raise an appeal that there was no fair trial of the case?
(2) Whether a bank is not at liberty to vary interest rates as agreed by both parties to the contract/agreement even if there is a subsisting case in respect of the debt in the court.
(3) Whether the bank’s record of transaction between them and their customers stored in the computer and reproduced violates the provisions of sections 97(1)(h) and 97(2)(e) of the Evidence Act, 1990?

I have carefully read the grounds of appeal of the appellant with particular reference to ground 1, on which it seems to
me that the appellant’s Issue 1 is founded. It seems to me that the respondent’s Issue 1 does not derive entirely from the appellant’s ground of appeal. My understanding of the appellant’s complaint in Issue 1 relates to the hearing or proceedings of the court in the counterclaim and not to the entire proceedings, it cannot be said to refer to the main claim which has been struck out. As observed in the respondent’s Issue 1, the appellant cannot and should not be allowed to complain about the proceedings of the court before the hearing of the counterclaim, because the appellant has not shown before the court below any reason why his claim should be relisted and the appellant was not in the appeal complaining about that period when the court has struck out the claim and about which there is no appeal. A better way to look at the issue is this, I will divide the proceedings in the court below into two, by saying there are two periods in the hearing of the matter in the court below. The first period of the hearing of the claim of the plaintiff is one, and the period of the hearing of the counterclaim of the defendant is two. Issue 1 of the plaintiff/appellant’s complaint should be seen to be about period two before the court, while the period on which the respondent’s issue is formulated is mainly on period one, but be said to include the period one as defined above. This is so because the appellant was absent from the court at the hearing in the two periods. In the above circumstance, the treatment of the respondent’s Issue 1 will be limited only to the second period as defined above, that is the period when the counterclaim was heard by the court and after until judgment in the court below. In the above reason, it will be inappropriate to strike out entirely the respondent’s Issue 1. Issue 1 of the appellant asked the question whether there was a fair trial or fair hearing of this case? By the particulars supplied in ground 1 of the appellant’s grounds of appeal, it seems clear to me that the complaints in the appellant’s Issue 1 can easily be resolved by reference to the record. It is a matter of fact. In the particulars to Issue 1 of the appellant’s brief, he found fault thereto by claiming a lack of opportunity for the appellant to be heard after the respondent
closed its case in the court below, and that it is a breach of
Order 38 of the rule of court. It is pertinent to consider what
happened in the court below. What happened in the court
below is recorded on page 53 of the record, it is identified as
the last paragraph on the page, it reads:–

“Court: Case adjourned to 13 December 1998, for cross-
examination of DW1 and continuance of hearing. The plaintiff
shall be served.”

The above does not indicate or support the allegation made
in the appellant’s ground of appeal. What is apparent from
the above quoted from the printed record, regard to the cir-
cumstances of the facts contained in the printed record, is
that the court below, Coram Dogara Mallam, adjourned for
further hearing the testimony of DW1 on the counterclaim.
The period could enable the plaintiff/appellant to go to court
to cross-examine the witness on the counterclaim of the de-
fendant/respondent. But the plaintiff/appellant, who in any
case had been absent from the court earlier and his claim had
been struck off, failed to go back to the court to cross-
examine the defence witness. From this stage onwards it is
convenient to consider the respondent’s Issue 1 with Issue 1
of the appellant. The printed record shows that after the ad-
journment of the defence’s counterclaim on 18 December,
1998, from 10 November, 1998, the plaintiff failed to appear
in court on 15 December, 1998. On 15 December, 1998 the
defendants were present and the court recorded as follows:–

“Since the plaintiff is not in court to cross-examine the witness we
hereby close our case, and ask for a date for address. It is to be
noted that it is the respondent who closed its case, not the court.”

The respondent was of course right to close its case when
the plaintiff failed to appear to cross-examine the defen-
dant’s witness. In spite of the respondent’s prayer the court
adjourned the suit for address to 18 February, 1999. This
again was sufficient time for the plaintiff to appear in the
court. The plaintiff failed to avail himself of the opportunity
to go to court. Can it be truthfully said that there was no fair
hearing?
Fair hearing has been described as an opportunity to be heard in a court proceeding or in any situation where justice is required to be established. See *Otapo v Sunmonu* (1987) 2 NWLR (Part 58) 587; *E.D. Tsokwa and Sons Ltd v C.F.A.O.* (1993) 5 NWLR (Part 91) at 128.

Can it be said that the appellant was not given such an opportunity? My view is that the appellant was given an ample opportunity to go to the court to prove his claim and challenge the counterclaim. Considering that the appellant instituted the action, he should have gone to the court below to prove his claim. Address of the respondent was taken on 18 February, 1999 and the court adjourned the hearing to 18 May, 1999 for judgment. The silence and nonchalant attitude of the appellant to the suit must in the circumstance be said to amount to acquiescence in the final decision. I am of the view that from the commencement of the action, the appellant was given sufficient opportunity to present his claim to the court and to offer his defence to the counterclaim but the appellant failed to use the opportunity. It does not lie with the appellant to claim that there was no fair hearing. There was. I therefore resolve the said Issue 1 in favour of the respondent against the appellant.

Issue 2 of the appellant is “whether the trial court has the power to grant to the counterclaimant more than it had claimed”. A counterclaim is a claim by the defendant against the plaintiff in the same proceedings. The onus of proof, which lies on the plaintiff to prove his claim also, is on the defendant to prove the averments in his counterclaim against the plaintiff, not against another person, or he will fail in his claim. Generally a claim before the court is ascertained and when the claim is for a definite sum with interests, particularly in banking cases, the expectation of the law is that the claims of the plaintiff having been placed before the court as an independent arbiter to determine the usual calculation of interest will be as the court in its judgment will determine. In other words, the claimant will not continue to calculate the interest in his records and thereby be a Judge in its own
cause. It seems to me that once the case is filed in a court of law, the bank’s calculation of interest on the agreed rate should be stayed and the matter left for determination of the court according to the law in the matter before the court. In issue 2 of the respondent, it asked “whether a bank is not at liberty to vary interest rate as agreed by both parties to the contract agreement even if there is a subsisting case in respect of the debts in court”.

It is convenient to consider the respondent’s issue 2 with the appellant’s issue 2, which are quoted above, it is whether the trial court has power to grant to the counter claim more than it had claimed. Considering that the main grouse of the appellant in issue 2 is the award of more sum than is claimed in the counterclaim, and when the explanation of the counterclaimant is that he continued to calculate the interests on its record despite the pendency of the claim on a court of law. Issue 2 of the respondent is direct to the issue and better couched than the appellant’s issue 2. Now the issue is this: Is the bank, having filed a claim in the court, entitled to continue to calculate the sum due or claimed from the court according to its own calculated interest in its office, or is the claimant entitled only to the sum claimed on the statement of claim as filed in the court? As I recorded above unless the statement of claim is amended before judgment and evidence exists in the court on the claim before it, a court of law will not and should not award more than the sum stated on the statement of claim of the party claiming. A court of law will look at the case before it to see whether the claim before it asks for interest on the principal sum up to the date of judgment. In the instant appeal, the counterclaimant claimed ₦9,011,005.99 being the outstanding balance against the plaintiff thus:–

“The defendant further claims interest on the aforesaid facility at the rate of 21% from the end of July until judgment is delivered. And thereafter interest at 10% until judgment debt is liquidated.”

There is clearly a stated sum on which interest is to be calculated, when a new figure of freshly calculated interest is
produced by the counterclaimant before judgment, surely it will create difficulty in ascertaining the sum being claimed, it is not open to the court to accept such an arbitrary calculation as its judgment.

A High Court duly constituted is a court of record, not only because its proceedings are recorded but the sum claimed therein is certain. Once the claim is filed in the court, the claim remains certain until it is increased or decreased by order of the court because the party claiming has not only filed an application for such an increment, he should also have proved it or established the basis for it. In answer to the question, therefore, is a court at liberty to vary the sum claimed to include a freshly calculated interest after the writ or statement of claim is filed? The answer will be whether the claimant amended his prayers before the court and has proved it, otherwise the court cannot. In the instant appeal, the respondent’s counterclaimant has prayed the court for the payment from the plaintiff for the principal sum, he has also prayed for interest at a stated rate before judgment, and a further interest at another rate after judgment.

There must be an end to litigation. Once therefore the claim is brought before the jurisdiction of the court, it is my opinion, that the decision should be left to the court alone to determine the interest according to the conclusion on the evidence received. You cannot ask the court to decide the issue of your complaint and still continue to calculate interest, as you had agreed with your adversary, and expect the court to announce that as judgment. Calculation of interest on your record must cease because the matter has been placed before the court and, if the claim is proved, interest in the court is calculated as prayed.

A court of law does not have the power to grant more than is claimed in the statement of claim without issues. It is settled law that a court should not grant to a party what he has not asked for. See Ekpenyong v Nyong (1975) 2 SC 71–80/81. In any case, the parties should be heard on any grant
of relief not claimed. See *Atanda v Lakanmi* (1974) 3 SC 109. In conclusion, the Issue 2 in both the appellant’s and the respondent’s brief is resolvable by asking the question, was the court below right to have awarded to the counter-claimant more than what it claimed? The answer is No. The court below was in error to have so ordered. I resolve Issue 2 therefore in favour of the appellant.

In Issue 3, the appellant asked “whether the court was right in admitting exhibit P75 (statement of account) in evidence, and whether the admission did not occasion a miscarriage of justice”? The respondent asked “whether the bank’s record of transaction between them and the customers stored in the computer of the respondent and reproduced violates the provisions of section 97(1) and section 97(2)(e) of the Evidence Act, 1990”?

Section 97(1) provides for the admissibility of secondary evidence in certain stated cases including when the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, or any person legally bound to produce it. In section 97(1)(h), it provides “when the document is an entry in a banker’s book”. The first issue that falls to be determined in the issues in this appeal on the admissibility of the banker’s particulars stored in a computer, is that in the proper interpretation of the statute the words in the Evidence Act do not contemplate in its ambit the information stored by the respondent to be other than in a book and the appellant cannot be said to have in his possession copies of its contents. More importantly, the contents of such information have never been in the possession of the person against whom it was used. It is therefore right to conclude that the information retrieved from the computer being made by the respondent for its own use, is wrong to be used in the trial against the appellant.

In sum the appeal succeeds in part. On the counterclaim in the sum of₦9,011,005.99 only one issue is resolved against the appellant. The appellant was in fact given a fair hearing
in the court below. The appeal succeeds in part. The judgment of the court below is set aside. I make no order for costs.

R.D. MUHAMMAD JCA: I have had a preview of the judgment just delivered by my learned brother, Omage JCA. He has thoroughly dealt with all the issues canvassed in this appeal. I agree with his reasoning and the conclusions he reached. I, too, allow the appeal in part and set aside the judgment of the court below. I make no order as to costs.

MOHammed JCA: The judgment of my learned brother, Omage JCA, which he has just delivered was read by me before today. I agree that this appeal succeeds in part. The judgment of the lower court delivered on 27 January, 2000 in the sum of ₦22,942,038.73 in favour of the respondent is hereby set aside. In place of that judgment, there shall be entered judgment in the sum of ₦9,011,005.99 being the actual sum claimed by the respondent in its counterclaim against the appellant.

There is no order on costs.

Appeal allowed in part.
Chindo World Wide Limited v Total Nigeria Plc

COURT OF APPEAL, BENIN DIVISION
BA’ABA, AKAAHS, TOBI JJCA
Date of Judgment: 5 JULY, 2001
Suit No.: CA/B/144/98

Banking – Payment into account – Proof of – When conclusive – Mere lodgement of cheque in account – Whether conclusive

Contract – Written terms of – Admissibility of extrinsic evidence to contradict, vary or add – Principles applicable

Damages – Special and general damages – How pleaded – How proved – Principles governing


Facts

Before the High Court of Edo State sitting at Benin, the appellant claimed against the respondent the sum of ₦3,420,000 with interest. In the alternative, it claimed an order that the respondent supply to the appellant three trucks of petroleum products which it failed to supply and/or pay their current market value.

The case of the appellant on the pleadings was founded on the fact that about 10 November, 1993 the appellant, a company engaged in selling petroleum products amongst others in Benin City, paid a total sum of ₦1,680,000 to the respondent for the supply of petroleum products by the respondent. The said sum of ₦1,680,000 was paid into the respondent’s account with Afribank Plc, Ring Road, Benin City which issued a teller to the appellant. Upon presentation of the teller showing the payment into the respondent’s account, the respondent issued an acknowledgment *vide* exhibit A,
a the respondent supplied the appellant with one truck of engine oil leaving a balance of three trucks of engine oil. While the respondent admitted issuing exhibit A, it claimed that the teller on which exhibit A was issued was fake and that fact was confirmed by the bank. For that reason, the respondent refused to complete the supply of the balance of the three trucks of engine oil which gave rise to the action which culminated in the appeal.

b

c The respondent is a public liability company incorporated under the Companies and Allied Matters Act Cap 59 Laws of the Federation of Nigeria, 1990. The respondent sells and distributes petroleum products throughout Nigeria with a branch office in Benin City. The case of the respondent, on the other hand, was that the appellant was its customer, which was expected to pay into the respondent’s account with Afribank Plc, Ring Road, Benin City, for whatever products it wanted from the respondent. The customer was expected to fill four copies of Afribank teller. The original was to be retained by the respondent, the duplicate was kept by the customer, that is the appellant, while the bank retained the two copies. That in order to make payment into the bank, Afribank, by cash or cheques, a quadruplicate bank teller was given to the person making the payment. If the cash or cheque was received, two tellers of the stamped quadruplicate are retained by the bank and the duplicate and triplicate copies are given to the payer. The original teller is batched or captured for record purposes in the computer.

d Sometime in 1993–1994 the respondent through their auditors discovered some irregularities relating to tellers in their account section. As a result, the respondent alerted its bank, Afribank, Benin City, to obtain copies of some bank tellers but the bank informed it that no payments were made into its account. The respondent later discovered a lot of bank tellers, purported to have been paid by the appellant, which were actually not paid. According to the respondent, as a result of the investigation, it was discovered that the appellant
had already collected a truck of engine oil using the fake teller. Consequently, the respondent stopped the appellant from further lifting its products. Following the huge losses it suffered, as revealed by the investigation, the respondent denied the appellant’s claim in the action the appellant instituted against the respondent and counterclaimed for the sum of ₦2,511,667.20 being the value of the products of the respondent collected by the appellant using the fake teller purportedly showing payments made to Afribank, Benin City and interest at the rate of 21%. It was the counterclaim that gave rise to the cross appeal.

Upon conclusion of the trial, the court found that the appellant did not make any payment in the sum of ₦1,680,000 and dismissed the appellant’s claim. It granted the respondent the sum of ₦420,000 with interest on the counterclaim as admitted by the appellant. It however found that the respondent’s claim for ₦2,511,667.20 was not proved.

Both the appellant and the respondent were dissatisfied with the judgment so they appealed and cross appealed to the Court of Appeal, respectively.

Held –

1. A cheque, in strict sense, is an order or request for payment. Until the cheque is honoured or cleared and the amount stated on it paid, it is not money. Therefore, the mere lodgement or purported lodgement of cash or cheque in a party’s account, as in the instant case, cannot be conclusive proof of payment until the party’s account is actually credited with the amount.

2. In civil cases the burden of proving a particular fact is on the party who asserts it, but the onus does not remain static. It shifts from side to side, where necessary, and the onus of adducing further evidence is on the person who will fail if such evidence is not adduced. In the instant case, as the appellant was the party who asserted in its pleading that it had made payment into the account of the respondent with Afribank Plc, Ring Road, Benin City.
City, which the respondent denied by proper traverse in its amended statement of defence, the onus was on the appellant to prove its assertion. The appellant having failed to prove the assertion, the proper order which the learned trial Judge should make was one of dismissal.

3. The law is that special damages must be alleged with particularity so that the defendant should know, not only what is the amount of loss or damage which the plaintiff alleges he suffered, but also how such amount is made up or calculated. The obligation to particularise arises not because the nature of the loss is necessarily unusual but because a plaintiff, who has the advantage of being able to base his claim on a precise calculation, must give the defendant access to the facts which make such calculation possible.

4. As a general rule, when a transaction has been reduced to or recorded in writing by the agreement of the parties, extrinsic evidence is inadmissible to contradict, vary, add to or subtract from the terms of the document.

5. By virtue of section 93 of the Evidence Act, proof of the contents of the documents may be proved either by primary or secondary evidence. In the instant case, the failure of the respondent to tender his statement of account in respect of its counterclaim against the appellant was therefore fatal to the respondent’s counterclaim having regard to the provisions of section 93 of the Evidence Act.

Appeal and cross appeal dismissed.

Cases referred to in the judgment

Nigerian

A-G Oyo State v Fairlakes Hotels Ltd (No. 2) (1989) 5 NWLR (Part 121) 255
ACB Ltd v A-G Northern Nigeria (1967) NMLR 231
Adeniji v Adeniji (1972) 1 All NLR (Part 1) 298
Adimora v Ajufo (1988) 3 NWLR (Part 80) 1
Agunwa v Onwukwe (1962) 2 SCNLR 275
Commissioner for Works, Benue State v Devcon Development Consultants Ltd (1988) 2 NWLR (Part 83) 407
Highgrade Maritime Services Ltd v First Bank of Nigeria Ltd (1991) 1 NWLR (Part 167) 290
Ijebu Ode L.G. v Adegbeji Balogun and Co. (1991) 1 NWLR (Part 166) 136
Ike v Ugboaja (1993) 6 NWLR (Part 301) 539
Jalico Ltd v Ovoniboyes Technical Services Ltd (1995) 4 NWLR (Part 391) 534
Jegede v Citicon (Nig.) Ltd (2001) 4 NWLR (Part 702) 112
Motonwase v Sorungbe (1988) 5 NWLR (Part 92) 90
N.B.T.C. Ltd v Narumal Ltd (1986) 5 NWLR (Part 33) 117
N.M.S. Ltd v Afolabi (1978) 2 SC 79
Ngilari v Mothercat Ltd (1999) 13 NWLR (Part 636) 626
Nigerian Housing Development Society v Mumuni (1977) 2 SC 57
Nnajiofor v Ukonu (1985) 2 NWLR (Part 9) 686
Okubule v Oyagbola (1990) 4 NWLR (Part 147) 723
Oshinjirin v Elias (1970) 1 All NLR 153
Savannah Bank (Nig.) Ltd v Salami (1996) 8 NWLR (Part 465) 131

Foreign
Perestrello Ltd v United Paints Co. Ltd (1969) 1 W.L.R. 570

Nigerian statute referred to in the judgment
Evidence Act Cap 112 Laws of the Federation of Nigeria, 1990, section 93
Chindo World Wide Ltd v. Total Nigeria Plc

a Counsel

For the appellant: PIN Ikwueto, Esq.

For the respondent: GA Eghobamien, Esq.

b Judgment

BA’ABA JCA: (Delivering the lead judgment) This is an appeal against the judgment of the Edo State High Court, sitting at Benin City, in Suit No. B/217/94, delivered on 20 February, 1997, and a cross appeal. The plaintiff (now the appellant) claimed as per its paragraph 15 of the amended statement of claim against the defendant (the respondent herein) as follows:–

“15. WHEREFORE the plaintiff claims against the defendant the sum of N3,420,000 (Three Million, Four Hundred and Twenty Thousand Naira) plus 30% interest from 10 November, 1993 till date of payment or alternatively the defendant to supply the three trucks of engine oil (petroleum products) forthwith and/or pay their current market value.”

Pleadings having been filed, delivered and exchanged as ordered and subsequently amended. The case went to trial on the amended statement of claim dated 18 April, 1995 and the amended statement of defence dated 17 October, 1995. At the hearing, the appellant called one witness while the respondent called two witnesses and Counsel for the parties addressed the court.

The learned trial Judge in his considered judgment dismissed the appellant’s case in its entirety and gave judgment to the respondent in the sum of N420,000 with interest at 10% from 15 November, 1993 being the value of the single truck load of engine oil, the appellant admitted lifting from the respondent.

Both parties are dissatisfied with the judgment of the trial court and appealed against the judgment to this Court. The appellant filed his notice of appeal dated 24 February, 1997, filed on 25 February, 1997, containing five grounds of appeal. The original notice of appeal filed by the appellant was with the leave of this Honourable Court granted on 29

The parties exchanged briefs of argument in respect of the main appeal as well as the cross appeal in accordance with the rules of this Court. The three issues formulated in the main appeal, which the learned Counsel for the respondent adopted for determination in this appeal, are as follows:–

(a) Whether exhibit A constituted a *prima facie* proof that the appellant paid the sum of ₦1,680,000 to the respondent for the supply of petroleum products.

(b) Whether the learned trial court correctly placed the onus of proving the payment of ₦1,680,000 on the appellant.

(c) Whether the fraud alleged by the respondent against the appellant was established as required by law.

Before proceeding to consider these issues, I deem it pertinent to state briefly the facts of this case. The case of the appellant on the pleadings was founded on the fact that about 10 November, 1993, the appellant, a public liability company duly incorporated, engaged in selling petroleum products amongst others in Benin City, paid a total sum of ₦1,680,000 to the respondent for the supply of petroleum products by the respondent. The said sum of ₦1,680,000 was paid into the respondent’s account with Afribank Plc, Ring Road, Benin City which issued a teller to the appellant. Upon presentation of the teller showing the payment into the respondent’s account, the respondent issued an acknowledgment receipt exhibit A to the appellant. Following the payment acknowledged *vide* exhibit A, the respondent supplied the appellant with one truck of engine oil leaving a balance of three trucks of engine oil. While the respondent admitted issuing exhibit A, it claimed that the teller on which exhibit A was issued was fake and that fact was confirmed by the bank. For that reason, the respondent refused to complete the supply of the balance of the three trucks of
The respondent is a public liability company incorporated under the Companies and Allied Matters Act Cap 59 Laws of the Federation of Nigeria, 1990. The respondent sells and distributes petroleum products throughout Nigeria with a branch office in Benin City. The case of the respondent, on the other hand, was that the appellant was its customer which was expected to pay into the respondent’s account with Afribank Plc, Ring Road, Benin City, for whatever products it wants from the respondent. The customer is expected to fill four copies of Afribank teller. The original is retained by the respondent, the duplicate is kept by the customer, that is the appellant, while the bank retained the two copies. That in order to make payment into the bank, Afribank, by cash or cheques, a quadruplicate bank teller is given to the person making the payment. If the cash or cheque is received, two tellers of the stamped quadruplicate are retained by the bank and the duplicate and triplicate copies are given to the payer. The original teller is batched or captured for record purposes in the computer. Sometime in 1993–1994 the respondent through their auditors discovered some irregularities relating to tellers in their account section. As a result, the respondent alerted its bank, Afribank, Benin City, to obtain copies of some bank tellers but the bank informed it that no payments were made into its account. The respondent later discovered a lot of bank tellers, purported to have been paid by the appellant, which were actually not paid. According to the respondent, as a result of the investigation, it was discovered that the appellant had already collected a truck of engine oil using the fake teller. Consequently, the respondent stopped the appellant from further lifting its products. Following the huge losses it suffered, as revealed by the investigation, the respondent denied the appellant’s claim in the action the appellant instituted against the respondent and counterclaimed for the sum of
N2,511,667.20 being the value of the products of the respondent collected by the appellant using the fake teller purportedly showing payments made to Afribank, Benin City and interest at the rate of 21%. It is the counterclaim that gave rise to the cross appeal.

At the hearing of the appeal on 23 April, 2001, Counsel for the parties adopted and relied on their respective briefs of argument in respect of the main appeal as well as the cross appeal. Learned Counsel for the appellant, PIN Ikwueto Esq., in the appellant’s brief dated 27 July, 1998, filed on 6 August, 1998, extensively referred to the evidence adduced before the trial court, quoting portions of the record of proceedings and submitted on his issue (a) that there can be no doubt that if the teller submitted by the appellant to the respondent had been produced, same would have put paid to the issue as to whether the appellant paid the sum of N1,680,000 to the respondent’s account with Afribank Plc, Benin Branch. That, however, strangely enough the police who should know about the matter were not called by the respondent nor was it shown that it was impossible to call the police to give this vital evidence. He relied on section 149 of the Evidence Act and cited the case of Jalico Ltd and another v Owoniboys Technical Services Ltd (1995) 4 NWLR (Part 391) 534 at 546 in support of his case. Learned Counsel for the appellant said the teller is in the custody of the respondent, but it refused to produce it. He further submitted that PW1 testified positively that he personally paid the sum of N1,680,000 into the respondent’s account with Afribank Plc, Ring Road, Benin Branch and was given a teller in acknowledgment thereof. That the teller was handed over to the respondent which issued exhibit A. Learned Counsel referred to the evidence of DW1 and complained that the respondent completely ignored giving any indication as to the whereabouts of the “daily statement of account” it collects from its bankers. It is suggested that the respondent ought to have tendered the statement of account obtained by
the respondent for the period the appellant paid the sum of ₦1,680,000 into the respondent’s account. It is further submitted that having regard to the significance of exhibit A, the appellant satisfactorily proved that it paid the sum of ₦1,680,000 into the account of the respondent. Reference was made to the evidence of DW1 and DW2, some portions of which were reproduced in the appellant’s brief thereafter, repeating the same points.

On issue (b), after referring and quoting portions of evidence and decided cases, it is submitted that the position of the law is now certain that where a trial Judge proceeds on a wrong assumption as to the onus of proof, this misapprehension and wrong assumption may affect the learned trial Judge’s views on the evidence and his conclusion and in such a case an appellate court will be perfectly right to interfere. Furthermore, it is submitted that on the uncontested case the onus was on the respondent to prove that exhibit A, being a receipt issued by the respondent to prove that acknowledging payment of the sum of ₦1,680,000, does not prima facie establish that the appellant paid the said sum to the respondent. That the onus is on the respondent to prove that the appellant did not in fact pay the said sum to the respondent but the respondent has woefully failed to discharge the onus.

It is submitted on issue (c) that the allegation of fraud in this case, having not been pleaded as required by law with utmost particularity nor distinctly proved, the Court of Appeal is entitled to reverse the finding of the trial court that the respondent’s pleading “clearly contains the particulars of fraud”, as found by the learned trial Judge. He further submitted that the learned trial Judge erred in accepting inadmissible evidence. Finally, the learned Counsel for the appellant urged us to allow the appeal and reverse the judgment of the learned trial Judge by granting the appellant’s claims.

In reply, learned Counsel for the respondent, Solo I Eghobamien Esq., in the respondent’s brief of argument dated 20 June, 2000, filed on 21 June, 2000, submitted that the
plaintiff has a duty to prove that he paid the sum of ₦1,680,000 by teller and was issued a receipt (Exhibit A) which teller the defendant said was fake especially in the face of the evidence of DW2 who testified to the effect that the plaintiff did not pay the alleged sum in their bank in favour of the defendant. He referred to pages 35 and 48 of the record where issues were joined by the parties and the evidence of DW2 on the procedure of payment of cash or cheque in their bank, Afribank Plc, Ring Road, Benin Branch, where the plaintiff claimed to have paid the said amount. Reference was made to the judgment of the learned trial Judge on the evidence of PW1 and his inability to produce and tender any evidence of payment of the amount claimed to have been paid into the respondent’s account with Afribank, Ring Road, Benin Branch. It is further submitted in that connection that the finding or conclusion of the learned trial Judge put paid to the plaintiff’s case on the issue of whether or not it paid the said sum of ₦1,680,000 into the defendant’s account with Afribank Plc or any payment at all. He urged us to reject the submission of the learned Counsel for the appellant on issue (a).

It is submitted on issue (b) that from the pleading and the evidence led, one thing is clear and that is the parties joined issues on whether or not there was payment of the sum of ₦1,680,000. The appellant claimed that it paid and was issued with only one copy of the teller which it presented to the defendant which in turn issued a receipt (exhibit A) in the record of proceedings. On the other hand, the respondent led evidence to the effect that the appellant did not pay any money into the respondent’s account with Afribank. That the appellant brought fake teller for which it was issued exhibit A. Learned Counsel for the respondent said, on the basis of exhibit A, the account of the appellant was credited with the said amount.

He added however, on the discovery of the fraud the appellant’s account was reversed and debited with the said
a amount. He referred to the judgment of the learned trial Judge at pages 69 and 71 of the record and submitted that the evidence of DW2 is vital in proving whether or not there was any payment into the respondent’s account with Afribank Plc and urged us to accept the finding of the learned trial Judge on the issue of the shifting of the onus of proof which is supported by the pleading and evidence on record.

b Furthermore, learned Counsel for the respondent submitted that the issue before the learned trial Judge was one of credibility of the witnesses and not that of interpretation of a document as the court does not need to interpret exhibit A having held that no money was paid into the respondent’s account by the appellant. Learned Counsel urged us not to interfere with the findings of the learned trial Judge as it is supported by evidence.

c On issue (c), reference was made to paragraph 5 XII, XLII, XIV, XVIII, XIX and XXI of the amended statement of defence and counterclaim. It is argued in this connection, citing a number of cases, that sufficient facts have been pleaded to put the case of fake teller and fraud to the notice of the appellant as required by law. He urged us to dismiss the appeal for lack of merit. In civil cases both the parties as well as the courts are bound and guided by issues as settled in the pleadings. See Okechukwu Adimora v Nnanyelugo Ajufo (1988) 3 NWLR (Part 80) 1. Indeed it is a fundamental principle of the determination of disputes between the parties that judgment must be confined to the issues raised by the parties. It is not competent for the courts *suo motu* to make a case for either or both of the parties and proceed to give judgment on the case so formulated contrary to the case of the parties before them. See Commissioner for Works, Benue State and another v Devcon Development Consultants Ltd and another (1988) 3 NWLR (Part 83) 407; Nigerian Housing Development Society and another v Ywya Mumuni (1977) 2 SC 57; Adeniji and others v Adeniji and others (1972) 1 All NLR (Part 1) 298; and A.C.B. Ltd v AG. Northern Nigeria (1967) NMLR 231. It is because of the
importance of pleadings in civil cases, such as the one at hand, that I find it necessary to commence the consideration of this appeal by first setting out the relevant paragraphs in the pleadings where the parties have joined issues. Paragraphs 4, 5, 6, 7, 9, 10, 11, 12, 13 and 14 of the amended statement of claim are as follows:

“4. The defendant company sells petroleum products to the plaintiff and other customers in Benin City.

5. The plaintiff says that on 10 November, 1993, at Benin City, it ordered petroleum products worth \( N\,1,680,000 \) (One Million, Six Hundred and Eighty Thousand Naira) from the defendant who agreed to deliver them to the plaintiff’s office at Benin City within three weeks. Time was of the essence in their contract of supply.

6. The plaintiff says that he paid the said sum of \( N\,1,680,000 \) and was issued with two Total Nigeria Plc receipts nos. 4046050 and 4044651 for \( N\,790,000 \) and \( N\,890,000 \) respectively making a total payment of \( N\,1,680,000 \). These receipts shall be relied upon at the trial.

7. The plaintiff says that the defendant supplied only products worth \( N\,420,000 \) and has refused to deliver the balance of the products and/or refund the current market value of \( N\,3,420,000 \) to the plaintiff in spite of repeated demands.

8. The plaintiff says that time was of the essence in the contract of supply entered into with the defendant company.

9. The plaintiff says that the defendant unilaterally (sic) breached the contract of supply and has bluntly refused to supply the petroleum products or pay their current market value.

10. The plaintiff says that the current market value for a truck load of engine oil which the defendant company has not supplied to the plaintiff within three weeks is now \( N\,1,140,000 \) (One Million, One Hundred and Forty Thousand Naira).

11. The plaintiff says that the total money it paid to the defendant in November, 1993 was for four trucks of engine oil but the defendant supplied only one truck.

12. The plaintiff says that the defendant has since November, 1993 refused and/or neglected to supply the remaining three trucks of oil.
13. The plaintiff says that the three trucks of oil yet to be supplied by the defendant have a current market value of ₦3,420,000 (Three Million, Four Hundred and Twenty Thousand Naira).

14. The plaintiff says that when all efforts to get the defendant to supply the three trucks of oil or its current value of ₦3,420,000 (Three Million, Four Hundred and Twenty Naira), to it failed, it was left with no other alternative but to institute this action against the defendant.”

The paragraphs in the amended statement of defence and counterclaim that I consider relevant are 4, 5 and 6 and paragraph 5 of the counterclaim, that is 5(i)–(xxi), as well as the claim.

“5. The trade relations between the plaintiff and the defendant is based on the following conditions:–

(i) When the plaintiff wants any product from the defendant it is supposed to pay cash into the bank account of the defendant at the Afribank Plc, Ring Road, Benin and present the teller to the company who issues a cash receipt in respect of such payment.

(ii) The plaintiff is expected to have a copy of the teller, one is left with the defendant while the third is retained by the bank.

(iii) The result is that at any given time at least one of the tellers will be available.

(iv) Because it is the teller the defendant’s cashier received and not cash it is shown in his books as transfer on receipt.

(v) The cashier is then expected to give the copy of the teller to the Branch Admin Manager of the company for further action.

(vi) The cashier does not and should not collect cash from the plaintiff or any other customer in this connection.

(vii) The bank is thereafter expected to give credit of the amount paid into the defendant’s account. This is then reflected in the statement of account of the defendant.

(viii) If the defendant’s bank statement of account fails to reflect the amount in the teller, the teller is investigated and when the bank is unable to confirm receipt, then the teller is regarded as fake.
(ix) At this stage the plaintiff’s statement of account with the defendant which was earlier credited with the amount shown on the fake teller is reversed and its account is redebited.

(x) This explains the reversing of the statement of account earlier given to a customer.

(xi) On receipt of the statement of account of defendant from the bank there is a reconciliation of account.

(xii) It was in this process that the huge fraud perpetrated by the plaintiff and its collaborators was discovered.

(xiii) The defendant made a report to the police and some accounts staff of the defendant were arrested by the police while one of them is declared wanted by the police.

(xiv) The arrested staff of the defendant had destroyed the tellers allegedly presented to the company by the plaintiff.

(xv) The plaintiff was requested by the defendant to make copies of its tellers available for reconciliation but it refused to present any.

(xvi) The defendant then went to cross check with the bank which bank denied that such payment was indicated in the account of the plaintiff with the defendant were ever made to it and the bank said no tellers were issued by the bank to the plaintiff for the relevant period.

(xvii) The police arrested the managing Director of the plaintiff and other people and investigations are continuing.

(xviii) Meanwhile the plaintiff had used the receipts issued to it based on the alleged lodgement in the bank on the fake tellers to lift the defendant’s products from its Koko plant. Particulars of statement of account of the plaintiff at all material times as well as the products will be shown and will all be relied upon at the hearing. The plaintiff is hereby put on notice to produce its own copies of the tellers.

(xix) From September, 1993 the plaintiff allegedly paid a total of ₦1,680,000 on fake tellers and was able to lift products of the defendant worth ₦420,000 when the fraud was detected. As a result further supplies to the plaintiff was stopped by the defendant.
INTERNAL INVESTIGATION BY THE DEFENDANT SHOWS THAT AS AT NOW, THE PLAINTIFF LIFTED PRODUCT FROM THE DEFENDANT’S DEPOT/PLANT TO THE TUNE OF ₦2,511,667.20 FOR WHICH PAYMENTS WERE NOT MADE.

EVIDENCE WILL BE LED AT THE HEARING TO SHOW THE DETAILS OF FAKE PAYMENTS MADE BY THE PLAINTIFF AND PRODUCTS OF THE DEFENDANT THE PLAINTIFF FRAUDULENTLY COLLECTED FOR WHICH NO PAYMENTS WERE MADE. RELEVANT DOCUMENTS WILL BE RELIED UPON AT THE HEARING.”

WHEREOF THE DEFENDANT COUNTERCLAIMS FROM THE PLAINTIFF AS FOLLOWS:


(ii) INTEREST AT THE RATE OF 21% ON THE SAID ₦2,511,667.20 UNTIL JUDGMENT IS GIVEN AND PAYMENT MADE IN THIS COUNTERCLAIM.

(iii) ₦10,000 BEING GENERAL DAMAGES.”


PW1 IS ONE INNOCENT EZE, CHAIRMAN/MANAGING DIRECTOR OF THE APPELLANT COMPANY, WHO GAVE EVIDENCE AT PAGES 35–39 OF THE RECORD. HE SAID:

“I AM THE CHAIRMAN/MANAGING DIRECTOR OF THE PLAINTIFF COMPANY, AND MY OFFICE IS AT NO. 77, NEW LAGOS ROAD, BENIN CITY. MY COMPANY IS AN OIL MARKETING COMPANY. I KNOW THE DEFENDANT COMPANY. THE DEFENDANT IS MY CUSTOMER AND I DO BUY PRODUCTS FROM THEM. SOMETIME IN NOVEMBER, 1993, IE ON THE 10TH THEREOF, I PAID THEM IE THE DEFENDANT TO SUPPLY PLAINTIFF WITH FOUR TRUCKS OF ENGINE OIL, MAKING A TOTAL OF ₦1,680,000. THE SUPPLY WAS TO BE DONE OR EFFECTED WITHIN THREE WEEKS OF PAYMENT.

WHEN I PAID, I WAS GIVEN A RECEIPT. THE PAYMENT WAS EFFECTED BY WAY OF A CASH PAYMENT. I PAID INTO DEFENDANT’S ACCOUNT WITH AF-RIBANK PLC, RING ROAD BRANCH, BENIN CITY. ON PAYMENT, I WAS GIVEN A TELLER STAMPED WITH THE WORD RECEIVED. I SENT THE TELLER
to the defendant and obtained defendant’s receipt. I see this document now shown to me, it is the receipt I was given.”

He went on at pages 36–37:–

“Witness continues: After the payment, defendant supplied the plaintiff with one truck leaving a balance of three trucks. The one supplied is valued at ₦420,000. The value of the three outstanding trucks is ₦10,800,000 as at now. As at the time the statement of claim was amended, the value was ₦3,420,000. I demand for the supply of the three outstanding trucks and I was told that products are not available. Up till now, I have not been supplied with the three trucks.

I want the court to order the defendant to supply me with the three trucks or pay me the current market price of the three trucks which is ₦10,800,000.

I want the court to dismiss defendant’s counterclaim. I did not buy on credit from the defendant. I do not owe defendant. I am not supposed to have a copy of the teller when I pay to the bank. The teller I was given by the bank, I gave to defendant’s cashier who then gave me a receipt exhibit A.

It is not true that I supplied fake teller to the defendant company. It is true that I have an account with defendant but I do not have an account with the bank. This sum of ₦1,680,000 which I paid, was credited to my account, with the company. It is not true as alleged that I collaborated with the staff of defendant to defraud defendant. It is true I was arrested by the police in connection with the alleged fraud. I was later cleared by the police. It is not true as alleged by the defendant, that I lifted products worth ₦2,511,667.20 for which I made no payments. At the defendant’s company, no supply of products is made on credit to any customer.”

Cross-examination of PW1 at pages 37–39 of the record reads:–

“It is not up to a month that I started paying into the defendant’s account with AFRIBANK PLC before this incident. I have been in business since 1974.

The payment I made into defendant’s account is the first time I have had to pay money into a bank account for business with someone else. I have not paid money into any other bank. When I pay money into a bank, I fill out the teller by myself. I was required to fill out three copies of tellers in the bank. I was given only one copy by the bank after payment. I know what happened
to the other two copies. The other two copies were taken by the bank.

It will be about three or four times, I have had to pay money into defendant’s account including the payment for ₦1,680,000. I do not retain any tellers. I submit the tellers to defendant. I do not know the name of the defendant’s cashier I gave the teller to, but I know him in person.

This cashier was one of the persons arrested by the police. I do not know as a matter of fact that the police has not concluded its investigations. I do not know whether anyone has been charged to court over this matter. I was not charged. I do not know that the police was unable to get some of the persons involved, in the alleged fraud.”

DW1, one Abdul Nasir Ahmed, testified at pages 41–43. He said:–

“It is not true that defendant is owing plaintiff the sum of ₦3,420,000 or anything at all. It is not true that defendant was paid to supply plaintiff with certain goods and defendant defaulted. It is true defendant counterclaim. Plaintiff was our customer. It buys engine oil from defendant. When plaintiff comes to buy engine oil, we require payment into our account with the bank. We expect plaintiff to pay into our account with AFRIBANK PLC, Ring Road, Benin City.

We obtain statement of account from the bank on a daily basis. When a customer goes to the bank to pay, he collects a teller and pays, and then presents the teller to defendant’s officers and then the payer shall then be issued a receipt by the cashier which will then be presented to the Industrial Sales Manager. A document is then prepared by a clerk ie a removal note, which will then be signed by the branch Manager to enable the customer collect the consignment.

The teller brought by the customer is left with the cashier who then passes same to the accounts department or section. We expect the customer to fill four copies of the AFRIBANK teller. The original is retained by the defendant, the duplicate is kept by the customer while the bank retains the remaining two copies. At the time the customer presents his teller to the defendant’s cashier, the defendant can know that money has been paid into its account from the bank’s stamp on the teller. At that time, the customer’s account with the defendant is credited with the amount on the teller. When we receive daily statement of account from the bank, we reconcile with our own account and any discrepancy in a
customer’s account shall alert us so that we call the customer to bring his evidence of payment, to enable us reconcile his account. If a customer is unable to present evidence of payment, we debit his account and ask him to go and pay.

The teller brought by the customer initially remains with accounts section. We also reconcile with bank, and if the bank shows that the money has not been paid, we debit the customer and ask him to pay. If a customer has been supplied with products based on such a teller, we ask the customer to pay for the products due to our relationship with them. Sometime in 1993–1994, something happened between the plaintiff and the defendant as to plaintiff’s accounts. We discovered when our auditors came in to check that the accounts clerk in charge of banking one Mr Inyanga had posted some tellers, into the banking journal, which sums were not credited into defendant’s account. We called for the tellers, from our account section but we could not trace them. There were no file copies and we alerted the bank to give us copies of their own tellers. The bank said no such payment have been made. From there on, we discovered a lot of other tellers purported to have been paid by plaintiff company but which were actually not paid. As a customer, plaintiff was invited and questioned as to the unpaid monies. He said he paid ie PW1. We asked him to provide the evidence the (second copy of the teller) of payment. He could not produce it. He said he had receipt for his payments and that was the only evidence that he had, to show he had paid. The matter was then taken to the police. The police arrested our cashier, the clerk in charge was not seen to be arrested, another accounts staff was also arrested. PW1 was arrested. I do not know what happened later as police took over the matter. I am aware that plaintiff had collected a truck load of engine oil before we discovered that the teller was not genuine and we stopped plaintiff from further lifting. Our investigations revealed that plaintiff had before this time lifted products from the defendant on the basis of purported payments via tellers. Plaintiff had lifted bitumen from the Kaduna Refinery and engine oil from our Koko plant in this fashion. I have evidence to show that plaintiff lifted these items. I see these documents, they are despatch notes or receipts of acknowledgment. They are all copies. The originals are with the customer ie plaintiff.”

The evidence of DW2, one Anthony Igoba, whose evidence is at pages 47–48 of the record. The witness said:

“I am an officer with Afribank Nigeria Plc, Benin City. I know defendant company it is one of our customers. From our records I
do not know plaintiff company. From our records I do not know Innocent Eze. I am here on subpoena. I am aware that sometime, police visited the bank where I work in connection with the parties, and interrogated my Manager and some members of staff in cash department. The nature of the interrogation was whether there were cash lodgements by plaintiff or Innocent Eze into the bank. The response was that there were no such lodgements. In order to make a payment into our bank, by cash or cheque he is given a quadruplicate bank teller. If the cash or cheque are received, two tellers of the stamped and signed quadruplicate are retained by the bank, and the duplicate and triplicate copies are given to the payer. The original teller is batched or captured for record purposes in the computer. Our computer has no records of any payments made by the plaintiff company to defendant. From available records, I would be surprised to hear that plaintiff made payments through our bank to defendant as there is no record of such transactions in our books.”

The burden of proving a particular fact is on the party who asserts it. See *Okubule v Oyagbola* (1990) 4 NWLR (Part 147) 723 and *Ike v Ugboaja* (1993) 6 NWLR (Part 301) 539. That is the position in civil cases but the onus does not remain static. It shifts from side to side, where necessary, and the onus of adducing further evidence is on the person who will fail if such evidence was not adduced. See *Nigerian Maritime Services Ltd v Afolabi* (1978) 2 SC 79 at 84 and *Highgrade Maritime Services Ltd v First Bank of Nigeria Ltd* (1991) 1 NWLR (Part 167) 290. As the appellant was the party who asserted in its pleading that it had made payment into the account of the respondent in the Afribank Plc, Ring Road, Benin City, which the respondent denied by proper traverse in its amended statement of defence, the onus was on the appellant, on the principle stated above, to prove its assertion. The appellant having failed to prove the assertion, the proper order which the learned trial Judge should make is one of dismissal. It is clear from the evidence of PW1, DW1 and DW2 that the appellant (as plaintiff) failed to adduce evidence capable of belief of its claim of payment. It should be noted that despite its claim of payment to Afribank, the appellant failed to invite Afribank to
produce the evidence of the claimed payments in the respondent’s account with the bank.

I am therefore in complete agreement with the order of dismissal made by the learned trial Judge. See *H.M.S. Ltd v First Bank of Nigeria Ltd* (1991) 1 NWLR (Part 167) 290 at 305 and 310.

A cheque, in strict sense, is an order or request for payment. Until the cheque is honoured or cleared and the amount stated on it paid, it is not money. It follows therefore that the mere lodgement or purported lodgement of cash or cheque in a party’s account, as in this case, cannot be conclusive proof of payment until the party’s account is actually credited with the amount.

In matters of credibility based on the demeanour of witnesses, a Court of Appeal cannot and ought not interfere as it did not have the advantage of seeing such witnesses testify. If what is involved are findings based on inferences, which the learned trial Judge has drawn from the evidence, the Court of Appeal is in as good a position as the trial court and can make its own findings if, in its own view, the findings made by the learned trial Judge are wrong. See *N.B.T.C. Ltd v Narumal Ltd* (1986) 4 NWLR (Part 33) 117 at 126; *Ugwu and others v Oghuzuru and others* (1974) 10 SC 191 at 192; *Motunwase v Sorungbe* (1988) 5 NWLR (Part 92) 90; and *Nnajiofor and others v Ukonu* (1985) 2 NWLR (Part 9) 686. Apart from the fact that the findings of the trial court were based on credibility in this case, I also hold the view that the learned trial Judge was right in his finding hence I cannot interfere with the judgment.

I therefore resolved issues (a) and (b) formulated by the appellant against the appellant in favour of the respondent. Having disposed of the appeal on issues (a) and (b), I do not consider it necessary to deal with issue (c), which in my view will have no effect on the judgment of the learned trial Judge. I therefore hold that the appeal lacks merit and is
accordingly dismissed. In the cross appeal filed by the defendant, now cross-appellant, four issues were formulated in the cross-appellant’s brief. They are:–

1. Whether exhibits E–L1 are not sufficient evidence in the circumstances of this case to prove the quantity and value of the goods taken by the cross-respondent?

2. Whether it is necessary in the circumstance of this case to produce the defendant’s statement of account (if any) with Afribank Plc in proof of non-payment by the plaintiff for the goods collected from the defendant.

3. Whether a claim for the value of goods had and taken away is a claim for liquidated damages or special damages that must be specifically particularised in the pleadings of the claimant?

4. Whether the conclusion reached by the learned trial Judge in respect of the counterclaim is supported by the evidence on record.”

The plaintiff, who is now the cross-respondent on the other hand, formulated only one issue at page 6 of the cross-respondent’s brief which reads:–

“(i) Whether on the evidence before the court, the respondent/cross-appellant established its counterclaim for the sum of ₦2,511,667.20?”

As the facts of the case, in respect of the main appeal and the cross appeal, are the same arising from the same transactions, it is no longer necessary to repeat the facts as rightly stated by the learned Counsel for the cross-appellant in the cross-appellant’s brief. The evidence of both parties that I considered relevant has in fact been reproduced herein.

Learned Counsel for the cross-appellant, Solo I. Eghobamién Esq., in the cross-appellant’s brief, referred to the judgment of the learned trial Judge at page 75 of the record and submitted that the defendant led evidence to establish that the plaintiff/appellant lifted its products and in proof tendered exhibits E–E4 and E–L which speak for themselves, and are the documents which show that the plaintiff actually took products from the defendant. It is further
submitted that, having regard to the finding of the learned trial Judge at page 71 of the record, the plaintiff did not pay the sum of ₦1,680,000 into the defendant’s account with Afribank Plc, Ring Road, Benin Branch. It is no longer necessary to require the defendant/cross-appellant to produce any statement of account in the face of exhibit M. Learned Counsel argued that although the counterclaim is a separate and distinct suit from the main suit, but where the same issues of fact arise in the substantive suit and the counterclaim, the finding of the trial Judge in respect of such issue of the claim invariably determines the same issue that arises in the counterclaim. He then submitted that the court cannot find differently in respect of the same issue, citing the case of Jegede v Citicon (Nig.) Ltd (2001) 4 NWLR (Part 702) 112 at 119 in support of his submission.

Reference was made to the contents of the record particularly the judgment by the learned Counsel for the cross-appellant who urged us to re-evaluate the evidence in order to come to the right conclusion regarding the proof of the counterclaim by the cross-appellant. Learned Counsel for the cross-appellant at page 12 of his brief defined damages as follow: “Damages may be defined as the disadvantage which is suffered by a person as a result of the act or default of another. It may also be defined as a loss or deterioration, caused by the negligence, design or accident of one person to another in respect of the latter’s person or property”. He contended that, by whatever name it is called, the cross-appellant pleaded and led evidence to prove the loss the cross-appellant suffered for its products that the appellant/cross-respondent carried away without paying for.

Furthermore, learned Counsel submitted that the proof of special damages is not radically different from the general method of proof in civil cases as it is equally proved on a balance of probability. Learned Counsel contended that the conclusion of the learned trial Judge in respect of the counterclaim is not supported by the evidence on the record.
learned Counsel for the cross-appellant made a lot of reference to the evidence, and the finding of the learned trial Judge and cited several authorities in support of his cross appeal. He concluded by urging us to allow the cross appeal.

In reply, PIN Ikwueto Esq., learned Counsel for the cross-respondent, in the cross-respondent’s brief, referred to the evidence of DW1 at pages 42, 43 and 75 of the record, containing some of the findings of the learned trial Judge, and stated that undoubtedly the cross-appellant’s counterclaim on the pleadings should rightly be classified as items of special damages, being a claim for specific goods delivered and not paid for. Continuing, the learned Counsel submitted that the position of the law has now crystallised to a point of certainty that special damages must be strictly proved, citing the Supreme Court case of Oshinjirin and others v Elias and others (1970) 1 All NLR 153 at 156 in support of his submission.

He said it is admitted by DW1 that exhibit M was prepared for the purpose of this case and further submitted that, as a general principle, documents made by a person interested when proceedings are pending or anticipated are not admissible, citing Susano Pharmaceutical Co. Ltd v Sol Pharmaceutical Co. Ltd and Another (2000) 4 NWLR (Part 651) 60 at 68 and section 91(3) of the Evidence Act.

Learned Counsel for the cross-respondent again referred to the conclusion of the learned trial Judge at page 75 of the record regarding the failure of the cross-appellant to tender its statement of account in proof of its counterclaim. He submitted that the learned trial Judge correctly resolved the issue raised by the cross-appellant in the counterclaim. In conclusion, learned Counsel for the cross-respondent urged us to dismiss the cross appeal.

In my view, the only issue formulated by the cross-respondent has sufficiently covered all four issues formulated by the cross-appellant. For that reason, I adopt the cross-respondent’s sole issue in determining the cross
appeal. In its determination of the counterclaim, which gave rise to the cross appeal, the learned trial Judge at pages 75–77 said:–

“The defendant did not produce before the court its bank statement covering the period it alleges that plaintiff made no payments. As learned Counsel for defendant had argued against the plaintiff, the onus is now on the defendant to prove its claims that plaintiff made no payments for goods totalling ₦2,511,667.20. In my view, the defendant’s statement of account with Afribank Plc should have been tendered in proof of this fact. It is thus not acceptable for DW2’s evidence to be used in proof of this fact. Oral testimony is inadmissible in proof of the contents of a document, and the court will not speculate on the contents of a document not before it. See Shell Pet. Dev Co. Ltd v Tiebo VII see citation below per Katsina-Alu JCA at page 63A and U.B.N. v Ozigi (1994) 3 NWLR (Part 333) 385.

Aside from all that, the defendant in its counterclaim merely said, it claimed the sum of ₦2,511,667.20 from the plaintiff. This claim which is clearly composed of payment for goods supplied ought to have been particularised in the pleading, being special damages. The evidence is not that plaintiff lifted one item valued at ₦2,511,667.20 see exhibit E–L1. These exhibits show that the items are many and were taken over a period of time.

It is now trite law that special damages have to be specially pleaded and particularised in the pleading. The defendant did not in its counterclaim give particulars of the several items that make up the claim for ₦2,511,667.20. See paragraph 1 of the claim, as quoted above. See Shell Pet. Dev Co. Ltd v Tiebo VII and Sons (1996) 4 NWLR (Part 445) 657 at 680 and 682H.

In the absence of the bank statement of the defendant for the relevant period and in the absence of the special damages being specially pleaded, it is impossible for the court to hold that the claim for ₦2,511,667.20 has been proved, except for one single item. That item was admitted by the plaintiff. That it is in respect of the single truck load of engine oil, it said it took delivery of. The value of this truck load of oil is agreed by the plaintiff to be ₦420,000. Having admitted that it actually took one truck load of engine oil and since I have found that plaintiff made no payment for same, it is my view that the fact that it was not specially pleaded shall not detract from plaintiff’s admission. What has been admitted need
no further proof. See section 75 of the Evidence Act. Defendant is thus entitled to payment for this single truck load of engine oil.

On the whole, therefore, I am satisfied and I hold as follows:–

(a) That the plaintiff made no payment in the sum of ₦1,680,000 to the defendant’s Afribank Plc, Ring Road, Benin Branch account, for the purpose of buying defendant’s petroleum products.

(b) The plaintiff acting on the basis of the purported payment actually took delivery of one truck load of engine oil from defendant, valued at ₦420,000.

(c) Plaintiff did not pay for this single truck load and has not paid for same.

From the totality of the evidence before me, I am satisfied that plaintiff has failed to prove its case and it is hereby dismissed.

As for defendant’s counterclaim, it succeeds partially. Defendant claimed interest of 21% on the sum of ₦2,511,667.20 till payment. I have held that defendant having not properly pleaded the special damages is only entitled to the value of products which plaintiff agreed it took ie ₦420,000 and not to the sum of ₦2,511,667.20.

Being a business transaction, defendant is entitled to interest on the value of the products taken since November, 1993. Defendant in the counterclaim did not specify the date it wants the interest to run from. From the evidence of PW1, he made the purported payment on 10 November, 1993 and took delivery thereafter exhibit E1, ie the despatch note of 15 November, 1993, shows that the consignment was made pursuant to Exhibit A, ie the receipt No. 4046050 of 10 November, 1993.

Thus from this exhibit, it is clear that plaintiff took delivery of the only truck load it could get from the scheme on 15 November, 1993. It should therefore pay interest on the sum of ₦420,000 from 15 November, 1993 at the rate of 10% per annum.

As for the claim for general damages, I am satisfied that there is no evidence to warrant the grant of the sum claimed or at all. Nothing has been said of any losses flowing from the plaintiff’s act apart from the fact that it pretended or purported to have paid the sum of ₦1,680,000 when in fact it had not made such a payment and in the interim actually took delivery of one truck load of defendant’s product.

Plaintiff shall now pay for same along with some interest. The claim for general damages in my view cannot be sustained.”

A counterclaim is substantially a sort of cross action not merely a defence to the plaintiff’s claim. The burden of
proving a particular fact is on the party who asserts it. See *Okubule v Oyagbola* (1990) 4 NWLR (Part 147) 723 and *Ike v Ugbonja* (1993) 6 NWLR (Part 301) 539. That is the position in civil cases but the onus does not remain static. It shifts from side to side, where necessary, and the onus of adducing further evidence is on the person who will fail if such evidence was not adduced. See *Highgrade Maritime Service Ltd v First Bank of Nigeria Ltd* (1991) 1 NWLR (Part 167) 290. As the cross-appellant with the defendant was the party who asserted in its pleading that it has an outstanding sum of ₦2,511,667.20 plus interest against the plaintiff/cross-respondent, the onus is on the cross-appellant to prove its assertion in its counterclaim. The same principle of law was applied to the case of the plaintiff/cross-respondent. It is said that what is good for the goose is also good for the gander. It cannot be disputed that the cross-appellant did not particularise its counterclaim, which is a claim of special damages.

No evidence was also led in respect of the items claimed, which are many and supplied on different dates, which ought to have been specifically pleaded and strictly proved. In the Supreme Court case of *Ngilari v Mothercat Ltd* (1999) 13 NWLR (Part 636) 626 at 647 648, the court had this to say:–

“Thus, in the *Perestrello* case (*supra*) Lord Donovan at page 456 summarised the position in the following words:–

‘The obligation to particularise in the latter case arises not because the nature of the loss is necessarily unusual but because a plaintiff who has the advantage of being able to base his claim on a precise calculation must give the defendant access to the facts which make such calculation possible.’

Further still the learned authors of Bullen and Leake and Jacobs *Precedents on Pleadings* (11ed) at page 200 (or (12ed) page 379) expressed the matter succinctly in similar terms as follows:–

‘Special damages must be alleged with particularity so that the defendant should know, not only what is the amount of loss or damage which the plaintiff alleges he suffered, but also how such amount is made up or calculated’.”
The Supreme Court of Nigeria in the case of Ijebu Ode LG v Adeleji Balogun and Co. (1991) 1 NWLR (Part 165) 136 at 158, a case of contract, the issue of the definition of the “general” and “special” damages was considered and the court inter alia said:–

“The assumption is that that which is not general damages must be special damages. The expressions are usually contrasted kept separate for better elucidation of the nature of the damages flowing from breach of contract.

The expression is used to denote both liability and proof. For instance in Prehn v Royal Bank of Liverpool (1870) L.R. 5 Ex. 92; Martin B at pages 99–100 stated the position thus:–

‘General damages . . . are such as the jury may give when the Judge cannot point out any measure by which they are to be assessed, except the opinion (and judgment of the reasonable man . . . special damages are given in respect of any consequences reasonably and probably arising from the breach complained of’.”

It is clear from the pleading of the cross-appellant, with respect to the learned Counsel for the cross-appellant, that the learned Counsel did not pay any regard to the rule concerning the pleading and proof of special damages which requests that special damages must be pleaded in detail and strictly proved. See Oshinjirin v Elias (1970) 1 All NLR 153 at 156–157; Perestrello Ltd v United Paints Co Ltd (1969) 1 W.L.R. 570; Agunwa v Onwukwe (1962) 1 All NLR 537, (1962) 2 SCNLR 275; A-G of Oyo State and another v Fairlakes Hotels Ltd and Another (No. 2) (1989) 5 NWLR (Part 121) 255 at 277 and 279.

It cannot be disputed that, when a transaction has been reduced to or recorded in writing by the agreement of the parties, extrinsic evidence is, as a general rule, inadmissible to contradict, vary, add to or subtract from the terms of the document. See Savannah Bank (Nig.) Ltd v Salami (1996) 8 NWLR (Part 465) 131 and 147.

The failure of the cross-appellant to tender his statement of account in respect of its counterclaim against the cross-respondent is therefore fatal to the cross-appellant’s
counterclaim having regard to the provisions of section 93 of the Evidence Act Cap 112 Laws of the Federation of Nigeria, 1990, which provides that proof of the contents of the documents may be proved either by primary or secondary evidence. As rightly held in my view, what is admitted requires no proof hence the award of the cost of one truck of engine oil admitted by the cross-respondent.

I am therefore in complete agreement with the learned trial Judge that the counterclaim has not been proved, as required by law, except for the one truck of engine oil and must therefore be dismissed.

I resolved the only issue against the cross-appellant in favour of the cross-respondent in that the counterclaim has not been proved.

On the whole, I hold that both the appeal and the cross appeal lack merit and are hereby dismissed. The judgment of the learned trial Judge, Idahosa J, delivered on 20 February, 1997 is hereby affirmed.

I make no order on costs.

TOBI JCA: In civil cases, the burden is on the party who will fail if no evidence is given in the case. While that party in most cases is the plaintiff, it is not invariably so. In the instant case, the burden to prove the statement of claim is on the plaintiff, while the burden to prove the state of defence and the counterclaim is on the defendant.

I entirely agree with my learned brother that both parties did not discharge the burdens placed on them by law. I therefore also dismiss the main appeal as well as the cross appeal. I make no order as to costs.

AKAAHS JCA: The main appeal as well as the cross appeal are centred on the burden of proof and evaluation of evidence which the learned trial Judge adequately considered. In the case of the plaintiff/appellant, apart from tendering the receipt issued to it by the defendant/cross-appellant based on the teller it produced as evidence of payment of ₦1,680,000 into the latter’s account in Afribank Plc, the
plaintiff ought to have subpoenaed the bank to produce the statement of account of the defendant for the period the plaintiff allegedly made the payment which the defendant denied. The crediting of ₦1,680,000 into the defendant’s account would have proved conclusively that the plaintiff actually paid the money. The onus therefore was on the plaintiff to satisfy the court that the money was paid. The onus was not discharged and so the learned trial Judge rightly dismissed the plaintiff’s claim.

Similarly the defendant/counterclaimant has to plead the products the plaintiff collected and the dates they were collected without the plaintiff actually paying for them. In addition, since collusion was alleged between the plaintiff and some staff of the defendant in the matter the receipts were issued and the lifting of the products, the defendant had the additional burden of satisfying the provisions of section 138 of the Evidence Act since the commission of a crime was in issue. And so, apart from particularising the dates and amounts of the products which were lifted by the plaintiff, the defendant had to, in addition to producing the statement of account showing that its account was not credited with the amount the plaintiff said it paid, go further to lead evidence in proof of the collusion between the plaintiff and its staff.

My learned brother, Ba’aba JCA, has painstakingly reviewed the evidence adduced at the trial court and correctly adumbrated the legal principles on the burden of proof and, in my view, found that the learned trial Judge was right in his decision. As none of the parties discharged the onus of proof, save for the admitted ₦420,000 being the value of the truck of the engine oil which the plaintiff took delivery of for which there was no evidence of payment, both the main appeal and cross appeal fail and they are dismissed. The judgment of the lower court is hereby affirmed.

I also make no order on costs.

Appeal and cross appeal dismissed.
Sinyeofori Akpassam Umoetuk v Union Bank of Nigeria Plc

COURT OF APPEAL, CALABAR DIVISION

EKPE, EDOZIE, OPENE JJCA

Date of Judgment: 10 JULY, 2001

Suit No.: CA/PH/284/98

Banking – Cheque – Wrongful dishonour of – Breach of contract – Damages therefor – Measure of

Facts

The appellant, a pharmacist, was awarded a contract to manufacture certain drugs. After paying a sum of ₦350,000 to the supplier of the required raw materials, he applied and purchased from the respondent bank a bank draft for the sum of ₦230,000 to balance the payment for the raw materials.

The draft was dishonoured by the bank and the appellant caused a letter to be written protesting this error, the bank did not reply to the letter. The appellant thereafter instituted the action in the High Court claiming the ₦230,000 being the value of the bank draft he purchased from the respondent, the sum of ₦350,000 being the non-refundable deposit he paid for the supply of raw materials and the sum of ₦4 million being the loss occasioned by his inability to utilise his money with the respondent and ₦5,420,000 being general damages. The lower court though found that the cheque was wrongfully dishonoured and that the appellant was entitled to substantial damages awarded only ₦50,000 as damages. The appellant appealed.

Held –

Where a bank wrongfully dishonours the cheque of its trading customer or a customer in business, the law presumes injury to him without proof of actual damages and he is entitled to substantial damages although he neither pleaded nor proved actual damages and it does not matter that the amount involved in the cheque is not large. The award of ₦50,000 by the trial court was therefore inadequate.

Appeal allowed.
a Cases referred to in the judgment

Nigerian

b Allied Bank of Nigeria Limited v Akubueze (1997) 6 NWLR (Part 509) 374
Balogun v NBN Limited (1978) 3 SC 155
College of Education, Warri v Odede (1999) 1 NWLR (Part 586) 253
Douglas v Peterside (1994) 3 NWLR (Part 330) 37
Elf Nigeria Limited v Sillo (1994) 6 NWLR (Part 350) 258
c Ijebu Ode Local Government v Adedeji Balogun and Co. Ltd (1991) 1 NWLR (Part 166) 136
Kusfa v United Bawo Construction Co. Ltd (1994) 4 NWLR (Part 336) 1
d Lipede v Sonekan (1995) 1 NWLR (Part 374) 668
Maiden Electronics Works Limited v A-G Federation (1971) 4 SC 53
f Nigeria Produce Marketing Board v Adewummi (1972) 1 All NLR (Part 2) 433
Obere v Board of Management, Eko Baptist Hospital (1978) 6–7 SC 15
g Odogwu v A.G of the Federation (1996) 6 NWLR (Part 456) 508
Ojini v Ogo-Oluwa Motors Nigeria Ltd (1998) 1 NWLR (Part 534) 353
h Okongwu v NNPC (1989) 4 NWLR (Part 115) 296
Onaga v Micho and Co. (1961) 2 SCNLR 101
i Salami v Savannah Bank of (Nig.) Ltd (1990) 1 NWLR (Part 130) 106
Swiss-Nigeria Wood Industries Ltd v Bogo (1972) 1 All NLR (Part 2) 433

Foreign

Addis v Gramophone Co. Limited (1920) AC 488
Hadley v Baxendale (1854) 9 Exch. 341
Owen v Sykes (1936) 7 KB 192
Wilson v United Counties Bank Limited (1920) AC 102

Counsel

For the appellant: Assam E. Assam, Esq.
For the respondent: Imo Inyang, Esq.

Judgment

EKPE JCA: (Delivering the lead judgment) By a writ of summons, the appellant (as plaintiff) brought this Suit No. HEK/4/94 against the respondent (as defendant) at Eket High Court of Akwa Ibom State. In paragraph 14 of the statement of claim, the appellant averred and claimed the following relief:

"By virtue of the matters aforesaid the plaintiff has suffered intense loss and been greatly injured in his business and credit and brings this action claiming as special and general damages the sum of ₦10,000,000 (Ten Million Naira) as follows:

(a) The sum of ₦230,000 value of draft purchased by the plaintiff on 17 September, 1992 (No. 159669).

(b) The sum of ₦350,000 being non-refundable deposit paid to Tommipharm Nigeria Ltd forfeited due to the return of the defendant’s draft.

(c) The sum of ₦4,000,000 being loss occasioned by the plaintiff’s inability to utilize his fund deposited with Tommipharm Nigeria Ltd and the defendant.

(d) General damages for breach of contract – ₦5,420,000

Total – ₦10,000,000."

The respondent entered conditional appearance to the suit. Pleadings were filed and exchanged by the parties. After the close of pleadings and having regard to the statement of
defence, the appellant brought a motion on notice praying the court below for an order entering judgment for the appellant in the sum of ₦230,000, claimed in paragraph 14(a) of the statement of claim and admitted by the respondent in the statement of defence, as having been received by it from the appellant for the issuance of a bank draft which the respondent later dishonoured. The appellant filed an affidavit in support of the motion but the respondent did not file a counter-affidavit in opposition thereto. In a ruling by the learned trial Judge delivered on 8 June, 1995, judgment was entered for the appellant in the said sum of ₦230,000 claimed by the appellant. Thereafter, the case in respect of the reliefs claimed in paragraph 14(b), 14(c) and 14(d) of the statement of claim proceeded to trial. At the trial, the appellant who testified as PW1 was cross-examined by the defence and he then closed his case without calling any witness. The defence opened and one witness was called who testified as DW1 and after the cross-examination of DW1 the defence’s case was closed. Learned Counsel for both parties addressed the court. In a considered judgment delivered on 28 January, 1997, the learned trial Judge, Idiong J, entered judgment in favour of the appellant and awarded him the sum of ₦350,000 as special damages, which the appellant claimed in paragraph 14(b) of the statement of claim, and also ₦50,000 as general damages in respect of the claim in paragraph 14(d) of the statement of claim, with ₦2,000 costs to the appellant. The learned trial Judge dismissed the claim for ₦4,000,000 in respect of paragraph 14(c) of the statement of claim as being an item of special damages, which the appellant was expected to prove strictly, but the appellant was unable to do so.

Being dissatisfied with the award of ₦50,000 as general damages, the appellant has now appealed to this Court against the said award upon a notice of appeal containing three grounds of appeal, namely:

“Grounds of Appeal
Ground 1 –
The learned trial Judge erred in law in awarding the plaintiff a meagre N50,000 in the circumstances of this case despite his finding that the plaintiff is entitled to be awarded substantial damage for the wrongful return of his draft.

Particulars of Errors
1. The court found that it took the defendant 7 (seven) months from the date of notification of the return of the draft for them to inform the plaintiff that his complaint was only receiving attention.
2. The court found as a fact that the defendant by its own admission under cross-examination had no plausible reason for returning the plaintiff’s draft and so acted most negligently to the plaintiff’s detriment, embarrassment and loss.

Ground 2 –
The learned trial Judge erred in law when he held that on the plaintiff’s claim of N4,000,000 as special damages, he needed to prove every kobo of the amount claimed before he could be entitled to an amount under that head of claim.

Particulars of Error
1. What was required of the plaintiff was that he needed to establish his entitlement under that head of claim, and to that type of damage by credible evidence, of such a character as would suggest that he indeed is entitled to an award under that head.
2. The plaintiff gave such evidence that lent itself a quantification in the loss he suffered when the defendant returned his draft and Famacor terminated his contract.
   (a) The trial court found that the ‘plaintiff got contract to manufacture and supply drugs and there was credible evidence to that effect’ by Famacor Ltd in the sum of N1,900,000 and there was uncontroverted evidence that he needed the sum of only N580,000 (made of N350,000 which he paid as deposit to Tommipharm Limited, as deposit, and N230,000 which he paid by draft purchased from the defendants) for all the raw materials to compound the drugs he was contracted to manufacture for Famacor Limited and could have made a profit of at least N1,300,000 on this lone transaction which was to be a revolving contract.
   (b) The court found that the plaintiff was given N400,000 as an advance on being awarded the contract by...
Famacor Limited and he was to refund the said payment when the contract was terminated.

3. The court had a duty to evaluate the evidence given in support of the loss sustained before rejecting it, particularly as the defendant neither contradicted any aspect of the claim in their pleading nor by evidence.

Ground 3 –
The award of general damages was against the weight of evidence.”

In accordance with the rules of this Court, the parties through their Counsel filed their briefs of argument. For the appellant, two issues were identified in the appellant’s brief for the determination of the appeal. They read:–

“1. Whether in the circumstances of this case, the sum of ₦150,000 could amount to damages at large or substantial damages to which the learned trial Judge held the plaintiff/appellant was entitled.

2. Whether the claim of ₦4,000,000 as loss resulting from the appellant’s inability to utilize his deposits was properly described as special damages for which the court required strict proof.”

The respondent in his brief of argument did not frame any issue but adopted the two issues identified by the appellant for the determination of the appeal.

Before considering the issues for the determination of the appeal, I will briefly set out the facts of the case at the court below, as garnered from the pleadings and evidence. The appellant is a pharmacist by profession and the respondent is his banker operating at other places in Nigeria, including Eket the branch office of the respondent bank. The appellant was awarded a contract by Famacor Laboratories Ltd (hereinafter referred to as Famacor) to manufacture and supply some specified quantities of drugs for the company at the sum of ₦1,905,000. It was a revolving contract. In pursuance of this, the appellant ordered raw materials from Tommipharm Nigeria Ltd (hereinafter referred to as Tommipharm) and obtained quotations for the raw materials required for the manufacture and supply of the drugs.
Thereafter, he paid a non-refundable deposit of ₦350,000 to Tommipharm and obtained a receipt, which was tendered in evidence as exhibit 3. After that, Tommipharm wrote and informed the appellant to pay the balance of ₦230,000 before the raw materials he ordered could be delivered to him. On the receipt of that letter, the appellant went to the Eket branch of the respondent’s bank and bought a bank draft in the sum of ₦230,000 in favour of Tommipharm through All States Trust Bank, Victoria Island, Lagos, as instructed by Tommipharm. The appellant then delivered the bank draft to Tommipharm at Port Harcourt and obtained a receipt. The appellant said that he bought the bank draft from the respondent on 17 September, 1992, but on 28 September, 1992 Tommipharm wrote to him that it could not deliver the raw materials to him as ordered because the bank draft made to it through All States Trust Bank, Victoria Island, Lagos, was returned unpaid. Worried by this development, the appellant through his Counsel wrote a letter to the respondent bank at its Eket Branch office and complained that the said bank draft was returned unpaid. According to the appellant, it took the respondent seven months to reply to the appellant’s letter of complaint. It was the case of the appellant that, in view of the ugly development, he was unable to perform his contract with Famacor for the supply of the drugs and the contract was consequently terminated by Famacor and he was asked to pay back to Famacor the sum of ₦400,000 which Famacor paid to him as an initial deposit. Tommipharm, on its own part, not only refused to supply the appellant with the raw materials he ordered for the preparation of the said drugs, as a result of the said dishonoured bank draft that was made in its favour through All States Trust Bank, Victoria Island, Lagos, but also confiscated the sum of ₦350,000 which the appellant paid to it as a non-refundable deposit.

The respondent, in the main, did not dispute the salient facts of the appellant’s case, namely, that the appellant is a
pharmacist by profession, that the appellant bought the said bank draft from its (respondent’s) branch office at Eket in favour of Tommiparm through All States Trust Bank Ltd, Victoria Island, Lagos, that its (respondent’s) branch office at Victoria Island, Lagos, refused to pay the said draft on the ground of irregularity of the signature of the second signatory (a supervisor) in the respondent bank. The respondent’s only witness, who testified in court as DW1, admitted under cross-examination that the reason thus given for returning the bank draft unpaid was not sufficient. DW1 further admitted that there was a delay by the respondent in replying to the appellant’s solicitor’s letter of complaint about returning the bank draft unpaid. The witness, however, denied the liability of the respondent to the appellant’s claims for ₦350,000, ₦4,000,000 and ₦5,420,000 respectively in the statement of claim.

As I have stated earlier, the appellant formulated two issues which have been reproduced for the determination of the appeal and the respondent also adopted the two issues.

The appellant has argued the two issues together in his brief of argument. The appellant founded his argument on the premises that the appeal principally is on quantum of general damages and as to whether, in the circumstances of the case, the sum of ₦50,000 awarded as general damages could be said to be substantial damages or adequate compensation to the appellant for the tremendous loss he had suffered due to the respondent’s breach of contract with the appellant. It was submitted that, having regard to the uncontroverted facts of the case together with the loss suffered by the appellant as found by the learned trial Judge and guided by the applicable law as was ably analysed by the learned trial Judge, the award of ₦50,000 to the appellant cannot be regarded as amounting to substantial damages which the learned trial Judge held that the appellant was so entitled. On the claim for ₦4,000,000 by the appellant, which the learned trial Judge classified as being a claim in special damages and dismissed the same for want of strict proof, it was
submitted by the appellant that the classification by the trial Judge was erroneous as this head of claim is of a general nature and was claimed as a direct consequence of the breach which the law could infer as resulting directly from the breach of the contract by the respondent. It was contended that the learned trial Judge failed to evaluate the said claim in the light it was made and also failed to evaluate the evidence of loss sustained by the appellant before rejecting the claim. It was further contended that the trial Judge was wrong in rejecting the claim as the nature of the appellant’s loss was such that he ought to have been awarded substantial damages on this head of claim. It was argued that in considering the claim of the appellant, what the learned trial Judge needed was to avoid double compensation. The appellant cited *Kusfa v United Bawo Construction Co. Ltd* (1994) 4 NWLR (Part 336) 1, and submitted that the principle is that in an action for breach of contract, where the plaintiff has difficulty in quantifying the actual loss occasioned therein, he may claim in general damages and the fact that the appellation “general” was not attached to the loss does not qualify the claim as “special” damages. On the attitude of the respondent towards the plight of the appellant, it was submitted that the learned trial Judge ought to have taken this into consideration in awarding actual monetary compensation for the loss occasioned to the appellant after the trial Judge had found the same as despicable and inconsiderate. The appellant further submitted that the acts of the respondent as firmly established in evidence ought to have induced the learned trial Judge to award very substantial exemplary damages against the respondent, particularly as there was no plea in mitigation of those acts. It was finally argued that although the learned trial Judge showed a clear understanding of the case and resolved the issues in dispute in the case, and thereby reached a verdict, yet his consequential order on the award of substantial damages (which in fact amounted to an award of nominal damages) did not reflect the result of
dispassionate consideration of the issue canvassed at the trial. The following cases were referred to: *Swiss Nigerian Wood Ind. Ltd v Bogo* (1972) U.I.L.R. 337; *Shell BP Co. Ltd v Jammal Eng. Ltd* (1974) 4 SC 33; *Ijebu-Ode Local Govt. v Adedeji Balogun and Sons Ltd* (1991) 1 NWLR (Part 166) 136. After referring to *Balogun v National Bank of Nigeria Ltd* (1978) All NLR 63, the appellant urged this Court to set aside the award of N50,000 general damages by the lower court as meagre and in its place to award substantial and exemplary damages to the appellant.

In the respondent’s brief of argument, Issue 2 was first argued before Issue 1.

On issue 2 in the brief of argument, it was argued for the respondent that from the state of pleadings of the appellant, the sum of N4,000,000 claimed in paragraph 14(c) of the statement of claim was an item of special damages and this was clearly supported by the appellant’s Counsel in his address on the issue of damages at page 35 lines 15–18 of the record of appeal. It was pointed out that the respondent also recognised and treated the reliefs claimed in paragraph 14(b) and (c) of the statement of claim as claims for special damages and referred to page 32 of the record of appeal. It was submitted that the learned trial Judge took the correct view in ascribing the appellant’s claim for N4,000,000 in paragraph 14(c) of the statement of claim as an item of special damages of which the appellant was required to prove strictly his entitlement to the sum of money claimed and, not having done so, the claim was rightly rejected by the learned trial Judge and referred to page 48 lines 33–42 of the record of appeal. It was also submitted that a party cannot be allowed to make a case different from his pleadings and that a party cannot make a claim for special damages and when he fails he turns around to demand that general damages should have been awarded, because the two categories of damages are governed by different principles. References were made to *Ijebu Ode Local Government v Adedeji Balogun and Co. Ltd* (1991) 1 SCNJ 1 at 18, (1991) 1 NWLR (Part 166) 136;
Kusfa v United Bawo Construction Co. Ltd (1994) 4 NWLR (Part 336) 1; Union Bank of Nig. Ltd v Odusote Bookstores Ltd (1995) 9 NWLR (Part 421) 558, (1995) 12 SCNJ 175. The respondent therefore urged this Court to hold that the appellant’s arguments on this issue are misconceived and ought to be discountenanced. On Issue 1, it was submitted for the respondent that the award of general damages is a matter for the discretion of the trial Judge and so, in the instant case, the sum of ₦50,000 awarded to the appellant was appropriate and justifiable as substantial damages for the wrongful dishonour of the appellant’s draft by the respondent. The case of Balogun v National Bank of Nig. Ltd (1978) 3 SC 155 was cited. It was also submitted that the principles of law on which an appellate court can reverse or interfere with an award of general damages are well established and reference was made to the case of Ijebu-Ode Local Govt. v Balogun (supra). It was contended for the respondent that in assessing what is fair and reasonable in the award of general damages, the law demands that previous awards made by the court in comparable cases in the same jurisdiction or even in a neighbouring locality where similar social, economic and industrial conditions exist should be borne in mind. In this respect, the cases of Allied Bank of (Nig.) Ltd v Akabueze (1997) 6 NWLR (Part 509) 374, (1997) 6 SCNJ 116, where the Supreme Court reduced the award, and Balogun v National Bank of Nig. Ltd (supra), where the Supreme Court increased the award, were referred to.

On the question of award of exemplary damages raised by the appellant in his brief, it was contended for the respondent that the question was never raised or canvassed in the court below and that it is trite law that no party can raise in the Appeal Court a matter which was not raised in the court below for the first time, without the leave of the Court of Appeal, citing the case of Oba Oyebade Lipede and 7 others v Chief Adio Sonekan and others (1995) 1 NWLR (Part 374) 668, (1995) 1 SCNJ 184. It was also submitted that before
exemplary damages can be properly awarded, it must have been specifically claimed and even when it has been so claimed, the court is against such award in contract situations arising from the wrongful dishonour of cheques. The cases of Odogwu v A-G, Federation (1996) 7 SCNJ 132, (1996) 6 NWLR (Part 456) 508; Allied Bank of Nig. Ltd v G Akabueze (supra) at page 144 per Iguh JSC were alluded to. It was therefore opined that in this case exemplary damages could not have been competently awarded by the lower court as it was not specifically claimed nor permissible in this type of case.

It is my intention to consider the two issues in the appellant’s brief separately, even though the appellant argued them together in his brief of argument. It seems to me that each of the two issues formulated by the appellant is independent of the other and requires separate treatment. Issue 1 raises the question of the quantum of damages as to whether the sum of N50,000 awarded the appellant as general damages by the court below was commensurate with the substantial damages to which the court below held that the appellant was entitled. The law with respect to the measure of damages for a breach of contract has not changed ever since the famous dictum of Alderson B in the case of Hadley v Baxendale (1854) 9 Exch. 341 where at page 354 he observed as follows:–

“Now we think that the proper rule in such a case as the present is this: 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 such as may fairly and reasonably be considered either as arising naturally in accordance 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.”

See Shell BP v Jammal Eng. Ltd (1974) 4 SC 33; Ijebu-Ode Local Government v Adefemi Balogun and Co. Ltd (1991) 1 NWLR (Part 166) 136. The principle upon which a Court of Appeal can interfere with the award of damages by a trial
court has been stated and restated by both the Supreme Court and the Court of Appeal in several decided cases, that there is hardly any need for citation of authorities. However, in the case of *Obere v Board of Management, Eku Baptist Hospital* (1978) 6–7 SC 15, the Supreme Court stated the principle thus:–

“The principle upon which an appellate court will act in reviewing an award of damages are now well settled and can be summarised as follows: An appellate court is not justified in substituting a figure of its own for that awarded by the lower court simply because it would have awarded a different figure if it had tried the case at first instance. Before the appellate court can properly intervene, it must be satisfied either that the Judge in assessing the damages applied a wrong principle of law such as taking into account such irrelevant factor or leaving out of account some relevant factor or that the amount awarded is either so ridiculously low or so ridiculously high that it must have been a wholly erroneous estimate of the damages.”

See *Onaga v Micho and Co.* (1961) 2 SCNLR 101; *Douglas v Peterside* (1994) 3 NWLR (Part 330) 37; *Union Bank of Nig. Ltd v Odusote Bookstores* (1995) 12 SCNJ 1, (1995) 9 NWLR (Part 421) 558; *Ojini v Ogo Oluwa Motors Nig. Ltd* (1998) 1 SCNJ 20, (1998) 1 NWLR (Part 534) 353; *College of Education, Warri v Odede* (1999) 1 NWLR (Part 586) 253. It is incumbent on the party wishing to disturb the damages awarded by the trial court to satisfy the appellate court that the Judge did not follow the principle stated above in the award of damages. See *Owen v Sykes* (1936) 7 KB 192. In the statement of claim in the instant case, the appellant claimed from the respondent the sum of ₦5,420,000 as general damages for breach of contract against the respondent for wrongfully dishonouring the appellant’s bank draft. It is quite clear from decided cases that, in a case of this nature, where a banker wrongfully dishonours the cheque of its trading customer or a customer in business, the law presumes injury to him without proof of actual damage and he is entitled to substantial damages although he neither pleaded nor proved actual damage. See *Balogun v National Bank of Nigeria Ltd* (1978) 3 SC 155; *Allied Bank of (Nig.) Ltd v...*
Akabueze (1997) 6 NWLR (Part 509) 374. In his judgment in the instant case, the learned trial Judge was left in no doubt that the respondent wrongfully dishonoured the appellant’s bank draft and the appellant was entitled to substantial damages for the wrongful dishonour of the bank draft. He awarded the appellant the sum of ₦50,000 as general damages. The vital question is whether the award of ₦50,000 by the court below is justifiable as substantial damages. In Black’s Law Dictionary (7ed) page 397, the expression “substantial damages” is defined as a considerable sum awarded to compensate for a significant loss or injury. Before this Court can interfere with the award of damages by the lower court, it should be convinced that the award was based on an entirely erroneous estimate of the damages to which the appellant should be entitled. In Allied Bank (Nig.) Ltd v Akabueze (supra) at page 405, the Supreme Court in dealing with the principles governing the interference by an appeal court with the amount of damages awarded by a trial court expressed the view that if the appellate court thinks that the damages awarded are radically wrong, it ought to interfere even though that error cannot be pinpointed. Having regard to the facts and circumstances of this case including the fact that the value of the Naira, our national currency, has declined so much in recent years, I hold the view that the award of ₦50,000 as general damages by the court below is rather ridiculously low and entirely an erroneous estimate of the damages to which the appellant should have been entitled. I therefore regard this as a proper case in which this Court should interfere with the award by the court below. Accordingly, I hold that an award of the sum of ₦130,000 as general damages ought to be made in favour of the appellant.

The contention of the appellant that he is entitled to exemplary general damages is a misconception. In Allied Bank (Nig) Ltd v Akabueze (supra), it was held by the Supreme Court that exemplary damages cannot be awarded in a purely contractual action. See Addis v Gramophone Co. Ltd
As to Issue 2 in the appellant’s brief of argument, the question is whether the sum of N₄,000,000 claimed in paragraph 14(c) of the statement of claim was an item of special damages. In paragraph 14(c) of the statement of claim, the appellant claimed as follows:—

“The sum of N₄,000,000 being loss occasioned by the plaintiff’s inability to utilise his fund deposited with Tommipharm Nig. Ltd and the defendant.”

To support the claim for N₄,000,000 the appellant in his testimony at the trial stated at page 26 of the record of appeal as follows:—

“I also urge to ask the defendant to pay me the sum of N₄,000,000 being the expected profit I would have made if the contract had not been terminated since it was a revolving contract.”

The appellant did not give details as to how he computed the loss of N₄,000,000 expected profit. In his judgment the learned trial Judge at page 48 of the record of appeal reviewed the claim for N₄,000,000 and regarded it as a claim for special damages for which the appellant was expected to prove strictly his entitlement to it. He held the view that it was not enough as the appellant had done to name a figure as an expected profit without credible evidence as to how he arrived at that figure. The trial Judge therefore rejected the claim as not proved. I entirely agree with the views of the learned trial Judge. In Kalu v Mbuko (1988) 3 NWLR (Part 80) 86 it was held that specific loss of earning or loss of use is a matter which falls in the realm of special damages which must be averred and proved. I therefore hold the firm view that the sum of N₄,000,000 claimed in paragraph 14(c) of the statement of claim was an item of special damages which required strict proof, but the appellant did not prove the same and so the learned trial Judge rightly rejected it.

In the final result therefore, the appeal succeeds in part in respect of the award of general damages and to that extent it is hereby allowed. The award of the sum of N150,000 is increased to the sum of N130,000 as general damages. However, in respect of the claim for N₄,000,000 by the appellant,
the judgment of the court below rejecting the same is affirmed and the appeal on it is hereby dismissed. Each party shall bear his or her own costs of this appeal.

EDOZIE JCA: I had a preview of the judgment just read by my learned brother, Ekpe JCA. I entirely agree with his conclusion allowing the appeal.

The facts of the case have been admirably set out in the judgment and a replication serves no useful purpose. The appeal turns on the quantum of damages awardable for a breach of contract arising from the wrongful dishonour of the appellant’s bank draft leading to his inability to procure the necessary raw materials to execute his contract with a third party for the manufacture and supply of drugs. The issues raised for determination are:–

1. Whether in the circumstances of this case the sum N50,000 could amount to damage at large or substantial damage to which the learned trial Judge held the plaintiff/appellant was entitled.
2. Whether the claim of N4,000,000 loss arising from the appellant’s inability to utilise his deposit was properly described as special damages for which the court requires strict proof.”

Undoubtedly, the appellant’s claim is predicated on breach of contract due to the wrongful dishonour of the bank draft he had purchased from the respondent bank for the payment of raw materials required to perform his contract with a third party. It is settled that in cases of breach of contract, the assessment of damages is calculated on the loss sustained by the injured party, which loss was either in contemplation of the contract or is an unavoidable consequence of the breach. See Shell B.P. v Jammal Engineering Ltd (1974) 4 SC 33, 1 All NLR (Part 1) 542; Ijebu-Ode Local Government v Adedeji Balogun and Co. Ltd (1991) 1 NWLR (Part 166) 136 at 158. The principle of assessment for breach of contract is *restitutio in integrum* that is that in so far as the damages are not too remote, the plaintiff be restored, as far as money can
do it, into the position in which he would have been if the breach had not occurred. The principle is not *restitutio in opulentinum* – giving him a windfall: *Okongwu v N.N.P.C.* (1989) 4 NWLR (Part 115) 296 at 316. It is improper and indeed misleading to categorise damages by the use of the words “general” and “special” for apart from damages naturally resulting from the breach, no other form of general damages can be contemplated: *Nigerian Produce Marketing Board v Adewunmi* (1972) 1 All NLR (Part 2) 433 at 438; *Swiss-Nigeria Wood Industries Ltd v Bogo SC/14/70* delivered on 3 March, 1970; *Maiden Electronics Works Ltd v A-G, Federation* (1974) 1 SC 53.

In the instant case, it seems to me that the question whether the claim of N4,000,000 as loss suffered by the appellant is special or general damages is irrelevant. What matters is whether the appellant had established, both from his pleadings and evidence, that he incurred that loss and that it is a direct consequence of the wrongful dishonour of the bank draft in question. No such evidence was forthcoming. Even if there were such evidence, which is not conceded, it is still a moot question whether the award could legally be made. Discussing the measure of damages for the wrongful dishonour of a customer’s cheque, the learned author of *Law of Banking* (6ed) Lord Chorley had this to say at page 110:–

“The ordinary rule for measuring or quantifying damages is that established by the leading case of *Hadley v Baxendale* (1854) 9 Ex 341 viz, that the party in breach must pay the amount of damages which flows directly and naturally from his failure to keep his contract, provided that such would reasonably have been within the contemplation of the parties at the time when they made their contract. There is however, great difficulty in applying this rule to the contract to honour cheques because it will rarely happen that the banker has any knowledge as to the circumstances under which the customer came to be making payment. Suppose, for example, the customer loses the benefit of an exceptionally profitable contract through the wrongful dishonour of his cheque; is the bank liable to pay him the whole of the loss? There is no decision upon this point but it is thought that, since possibilities of this kind are obvious, the banker must take the risk of them and is liable.”
At any rate the appellant did not establish he sustained the loss of N4,000,000; consequently, the dismissal of this head of claim by the court below cannot be faulted.

Generally, a breach of contract without proof of damage can only attract nominal damages. However, the principle has since crystallised that where a banker wrongfully dishonours the cheque of its trading customer in business, the law presumes injury to him without proof of actual damages and he is entitled to substantial damage although he neither pleaded nor proved actual damage. See Wilson v United Countries Bank Ltd (1990) AC 102 at 193; Balogun v National Bank of Nig. Ltd (1978) 3 SC 155 at 170; Allied Bank (Nig) Ltd v Akubueze (1997) 6 NWLR (Part 509) 374. In the case of Salami v Savannah Bank of (Nig.) Ltd (1990) 2 NWLR (Part 130) 105 at 127, it was observed that:

“Damages in cases of breach of contract of a banker to its customer are at large, that is, in such cases the court may award such amount as it seems reasonable in the circumstances of the breach of the contract even though there is no proof of actual loss. Where it is a wrongful dishonour of a cheque the amount involved in the cheque may not even be large but the dishonour of the cheque may be regarded as injurious and for a man who is a trader, it may be detrimental to his trade or business and as such the award is always made substantial irrespective of whether the cheque is small or large.”

In the case in hand, the appellant was awarded the sum of N50,000 as damages for the wrongful dishonour of the bank draft under consideration and this he regarded as inadequate.

It must be borne in mind that an appellate court does not ordinarily alter or interfere with an award of damages made by the lower court except where the award is shown to be either too high or manifestly too low or where it was based on a wrong principle. The appellate court should be convinced that the award of damages made by the lower court was based on an entirely erroneous estimate before it will interfere. See Ijebu-Ode Local Government v Adedeji Balogun and Co. Ltd (1991) 1 NWLR (Part 166) 136; Onaga v Micho

It is sad that a bank draft issued by the respondent branch at Eket could be dishonoured by its branch in Lagos on the flimsy ground that the signature of the supervisor of the drawer was irregular when, with the modern advanced technology in communication, the genuineness of the draft could be ascertained in a matter of a few minutes. It is even sadder that it took the respondent bank at Eket seven months to respond to the letter by the appellant’s solicitor complaining about the dishonour of the bank draft. Had the bank acted diligently, this dispute would have been averted. I am of the view that the sum of ₦50,000 awarded as damages is too low and that it be increased to ₦130,000.

For these reasons in addition to those elaborately stated in the lead judgment, I also partially allow the appeal with all the consequential orders made in the lead judgment.

OPENE JCA: I have had a preview of the judgment delivered by my learned brother, Ekpe JCA.

I agree with him that the appeal partially succeeds, id est, in respect of the award of general damages and that the award of the sum of ₦50,000 should be increased to the sum of ₦130,000 as general damages. I also agree with him that the claim of the sum of ₦4,000,000 was not strictly proved and that it should be dismissed and it is accordingly dismissed.

I abide by the consequential order made in the leading judgment including the order as to costs.

Appeal allowed in part.
Samson Babatunde Olarewaju v Afribank Nigeria Plc

SUPREME COURT OF NIGERIA
KATSINA-ALU, AYOOLA, IGUH, KARIBI-WHYTE, OGWUEGBU JJSC
Date of Judgment: 13 JULY, 2001
Suit No.: SC109/96

Banking – Operational banking malpractices – Operational banking irregularities, operational banking deficiencies or dishonest banking practices – Whether offences known to criminal law – Whether employee should be prosecuted for these offences before employer can dismiss employee

Facts
The plaintiff, Samson Babatunde Olarewaju, brought this action in the High Court of Justice, Maiduguri, presided over by Kolo CJ. In the action he claimed the following reliefs:–

(a) Determination that the defendant’s letter dated 11 March, 1993 addressed to the plaintiff titled ‘dismissal’ is incompetent, illegal, void and of no effect whatsoever.

(b) That the defendant be ordered to reinstate the plaintiff to his former post.

(c) That the defendant be ordered to pay all arrears of salaries and entitlement due to the purported dismissal.

(d) That he be promoted to bring him at par with his mates.

(e) An injunction restraining the defendant from dismissing the plaintiff without just cause.

(f) The cost of the suit.

(g) In the alternative to paragraph (b) payment of the sum of Six Hundred Thousand Naira (₦600,000) only as general damages to the plaintiff by the defendant for wrongful dismissal of the plaintiff from the service of the defendant on or about 11 March, 1993.”

I would like to observe that after the plaintiff had closed his case and the defendant opened its own, the plaintiff amended his statement of claim on 15 December, 1993 by adding paragraph (g) as appeared above. I would observe also that the plaintiff did not give or lead further evidence as regards subparagraph (g) after the amendment was granted.
At the end of the trial, the learned Chief Judge in a reserved judgment found in favour of the plaintiff. The learned CJ concluded thus:

“It is my view, therefore, that the plaintiff’s employers made a serious mistake and took a calculated risk when they ventured to dismiss the plaintiff without first having the plaintiff arraigned for the serious offences of fraud and have his guilt established in a law court. Such dismissal in my view cannot stand the test of the time as it is a nullity. I also declare the dismissal of the plaintiff a nullity and consequently a judgment for the plaintiff with costs. I assessed the costs at ₦1,000 (One Thousand Naira) in favour of the plaintiff against the defendant bank.”

The learned CJ proceeded to make the following orders:

1. I order that the plaintiff be re-instated by the defendant bank forthwith.
2. I order that his salary be restored and the arrears of his salaries from the date of the dismissal to the date of this judgment be paid forthwith.
3. This judgment notwithstanding the defendant bank is free to revive the issue of criminal prosecution and urge the police to prosecute all those suspected of the alleged fraud in respect of the said sum of ₦3 million.”

The defendant was dissatisfied with the said decision of the High Court. It appealed to the Court of Appeal. The Court of Appeal allowed the appeal and set aside the judgment and orders of the trial court. It declared:

“The appeal is meritorious and is hereby allowed. The summary dismissal of the respondent is valid and subsisting as it is justified. The respondent’s claim stands dismissed.”

Aggrieved by the decision of the Court of Appeal, the plaintiff has appealed to the Supreme Court.

Held –

1. On the evidence before the trial court, the appellant was clearly guilty of banking malpractices, irregularities and dishonest practices but these do not constitute any offence known to law.
It is now settled law that where a person is accused of a criminal offence, he must first be tried in a court of law where the complaints against him will be examined in public and where he will get a fair hearing as set out in the Constitution. Where the dismissal of a servant is based on a criminal charge or allegation, such allegation must first be proved before the dismissal can stand. See *Garba v University of Maiduguri* (1986) 1 NWLR (Part 18) 550; *Olaniyan v University of Lagos* (1985) 2 NWLR (Part 9) 599.

In the instant case, exhibit D, the letter of dismissal, did not contain any reasons for the dismissal of the appellant. Put simply, the letter did not make any allegations of a criminal nature against the appellant. The cases of *Garba v University of Maiduguri* (supra) and *Anakism v U.B.N. Ltd* (1994) 1 NWLR (Part 322) 557 relied upon by the appellant and the trial court are not relevant to the circumstances of the present case. They are distinguishable from it. In *Garba’s* case a particular criminal offence known to law was committed while none was committed in the instant case. In *Anakism’s* case, there were no such written and express terms of employment, as in the present case, that gives the respondent a discretion to either dismiss before or after criminal prosecution.

On the evidence before the trial court, the appellant was clearly guilty of banking malpractices, irregularities and dishonest practices. But these do not constitute any offence known to law. And although the respondent pleaded “fraud” in its statement of defence, no evidence was led on “fraud”. The position of the law is clear. Facts pleaded in respect of which no evidence was led go to no issue.

Appeal dismissed.
Cases referred to in the judgment

Nigerian

*Anakism v U.B.N. Ltd* (1994) 1 NWLR (Part 322) 557

*Garba v University of Maiduguri* (1986) 1 NWLR (Part 18) 550

*Honika Sawmill Nig. Ltd v Hoff* (1994) 2 NWLR (Part 326) 252

*Olaniyan v University of Lagos* (1985) 2 NWLR (Part 9) 599

*Shitta-Bey v Federal Public Service Commission* (1981) 1 SC 40

*Yusuf v UBN Ltd* (1996) 6 NWLR (Part 457) 632

Foreign

*Ridge v Baldwin* (1964) AC 40

Book referred to in the judgment


Counsel

For the appellant: Yusuf O Alli, S.A.N. (with him SA Oke, Esq.)

For the respondent: JK Gadzama, S.A.N. (with him AO Chukwurah, Esq. and Nana Wathanafa (Miss))

Judgment

KATSINA-ALU JSC: *(Delivering the lead judgment)* The plaintiff, Samson Babatunde Olayewaju, brought this action in the High Court of Justice, Maiduguri, presided over by Kolo C.J. In the action he claimed the following reliefs:—

“(a) Determination that the defendant’s letter dated 11 March, 1993 addressed to the plaintiff titled ‘dismissal’ is incompetent, illegal, void and of no effect whatsoever.
(b) That the defendant be ordered to reinstate the plaintiff to his former post.

(c) That the defendant be ordered to pay all arrears of salaries and entitlement due to the purported dismissal.

(d) That he be promoted to bring him at par with his mates.

(e) An injunction restraining the defendant from dismissing the plaintiff without just cause.

(f) The cost of the suit.

(g) In the alternative to paragraph (b) payment of the sum of Six Hundred Thousand Naira (₦600,000) only as general damages to the plaintiff by the defendant for wrongful dismissal of the plaintiff from the service of the defendant on or about 11 March, 1993.”

I would like to observe that after the plaintiff had closed his case and the defendant opened its own, the plaintiff amended his statement of claim on 15 December, 1993 by adding paragraph (g) as appeared above. I would observe also that the plaintiff did not give or lead further evidence as regards subparagraph (g) after the amendment was granted.

At the end of the trial, the learned Chief Judge in a reserved judgment found in favour of the plaintiff. The learned Chief Judge concluded thus:–

“It is my view, therefore, that the plaintiff’s employers made a serious mistake and took a calculated risk when they ventured to dismiss the plaintiff without first having the plaintiff arraigned for the serious offences of fraud and have his guilt established in a law court. Such dismissal in my view cannot stand the test of the time as it is a nullity. I also declare the dismissal of the plaintiff a nullity and consequently a judgment for the plaintiff with costs. I assessed the costs at ₦1,000 (One Thousand Naira) in favour of the plaintiff against the defendant bank.”

The learned CJ proceeded to make the following orders:–

1. I order that the plaintiff be re-instated by the defendant bank forthwith.

2. I order that his salary be restored and the arrears of his salaries from the date of the dismissal to the date of this judgment be paid forthwith.
3. This judgment notwithstanding the defendant bank is free to
revive the issue of criminal prosecution and urge the police
to prosecute all those suspected of the alleged fraud in re-
spect of the said sum of ₦3 million.”

The defendant was dissatisfied with the said decision of the
High Court. It appealed to the Court of Appeal. The Court of
Appeal allowed the appeal and set aside the judgment and
orders of the trial court. It declared:—

“The appeal is meritorious and is hereby allowed. The summary
dismissal of the respondent is valid and subsisting as it is justified.
The respondent’s claim stands dismissed.”

Aggrieved by the decision of the Court of Appeal, the plain-
tiff has appealed to the Supreme Court. The plaintiff shall
hereinafter be referred to as the “appellant” and the defen-
dant shall be referred to as the “respondent”.

The appellant formulated six issues for determination in
this appeal. These read:—

“1. Whether the failure of the Court of Appeal to consider at all
the submissions of the appellant’s Counsel in the brief filed
on behalf of the appellant before the court below did not
lead to a breach of his right to a fair hearing and led to a
miscarriage of justice.
2. Whether the dismissal of the appellant was done in accor-
dance with the agreement between the parties and the rules
of natural justice to have entitled the court below to dis-
agree with the trial court that the dismissal of the appellant
was not done in accordance with the law.
3. Whether the Court of Appeal was obliged to consider and
decide on points that were not decided by the trial court that
is whether the Court of Appeal could decide on purely aca-
demic and hypothetical issues that did not arise from the
judgment of the trial court.
4. Whether the allegations of fraudulent practices, banking
irregularities and other serious allegations made against the
appellant by the respondent are such matter that can be dealt
with domestically when the allegations either singly or
taken together import commission of criminal offences
cognisable under Nigerian penal laws and whether the re-
spondent abandoned the allegations of fraudulent practices
levied against the appellant.
5. Whether the Court of Appeal was right to have disallowed the order of reinstatement of the appellant once the trial court came to the conclusion that the dismissal was null and void and when there would be nothing to sustain the continued dismissal of the appellant.

6. Whether the court below could base its decision on the collective agreement made between a trade union and the respondent when the appellant was not a party thereto nor was it shown that the agreement was made for his benefit.”

For its part, the respondent raised three issues for determination. These read as follows:–

A. Whether the several acts of the appellant constituting operational banking malpractices, operational banking irregularities and dishonest practices are synonymous with “fraud” in its strict criminal sense.

B. In the alternative that the appellant committed “fraud” in its strict sense, whether the respondent was not at liberty to dismiss him in view of the contents of exhibits “C”, “W” and “Y”.

C. Whether the collective agreement exhibit “W” was binding on the parties.

I prefer the issues formulated by the respondent. They are not verbose and they go straight to the issue in controversy. I shall therefore consider this appeal on the basis of the respondent’s issues, which will be treated together.

The relevant facts are these. The appellant was an employee of the respondent. He was employed on 12 January, 1982. He rose to the rank of a deputy Manager.

In November, 1992 he was suspended from duty on some allegations of fraud, embezzlement of money and sundry allegations. Before suspension however the appellant was queried in writing. He answered the query. He subsequently appeared before the senior staff disciplinary committee of the respondent. The committee submitted its report to the management of the respondent. By a letter dated 11 March, 1993 the appellant was dismissed. The appellant went to court and instituted this action against the respondent at the Maiduguri High Court, claiming the relief set out earlier on.
**Issues A, B and C**

Issue A poses the question whether the several acts of the appellant constituting operational banking malpractices, operational banking irregularities and dishonest practices are synonymous with “fraud” in its strict criminal sense. It was argued for the appellant that the various allegations made against him in the pleadings of the respondent and evidence led by its witnesses, constitute offences under sections 308, 310, 311, 314, 315, 323, 324, 325 and 362 of the Penal Code. It was said that the appellant could be prosecuted under any of these sections of the Penal Code law applicable to Borno State.

DW1, DW2, DW3, DW4 and DW5, it was pointed out, were unanimous in their testimonies that the acts for which the appellant was dismissed led to a loss of over N3 million to the respondent. The respondent in its pleadings described the acts as “fraudulent”. To underscore the nature of the allegations, it complained to the police which in turn arrested the appellant and others. The police intimated that at the end of the investigation they would prosecute them.

It was the submission of the appellant that in this kind of setting, the respondent should have stayed all actions until after the completion of the criminal prosecution of the appellant. What the respondent did amounted to putting the cart before the horse.

It was also submitted that the dismissal of the appellant while criminal investigations were going on, on the allegations, was clearly *ultra vires* the respondent and therefore unconstitutional. For this submission, Counsel for the appellant relied on the cases of *Garba v F.C.S.C.* (1988) 1 NWLR (Part 71) 449. It was argued that the commission of crime was not only in issue in this case. It was also the cornerstone of the defence of the respondent. It was the reason that led to the dismissal of the appellant.

For the respondent, it was conceded that the respondent as defendant in the High Court, pleaded among others “fraud”...
in its statement of defence. That notwithstanding, no evidence was led on fraud. It is trite law that facts pleaded in respect of which no evidence was led go to no issue. The case of *Honika Sawmill Nig. Ltd v Hoff* (1994) 2 NWLR (Part 326) 252.

The respondent, however, had in addition pleaded operational banking malpractices and dishonest practices committed by the appellant. The respondent argued that it led evidence which conclusively proved the commission of operational malpractices and dishonest practices by the appellant. See the evidence of DW1, DW2, DW3, DW4 and DW5.

It was said that, on the evidence before the court, it will be seen that the actions of the appellant while in the employment of the respondent could be referred to as operational banking malpractices, operational banking irregularities, operational banking deficiencies or dishonest banking practices. The fact that one calls them fraudulent acts does not envisage “fraud” as conceived in criminal law. It was argued that the respondent did not allege the commission of a particular criminal offence known to law by the appellant.

It is now settled law that where a person is accused of a criminal offence, he must first be tried in a court of law where the complaints against him will be examined in public and where he will get a fair hearing as set out in the Constitution. Where the dismissal of a servant is based on a criminal charge or allegation, such allegation must first be proved before the dismissal can stand. See *Garba v University of Maiduguri* (1986) 1 NWLR (Part 18) 550; *Olaniyan v University of Lagos* (1985) 2 NWLR (Part 9) 599.

In the instant case, exhibit D, the letter of dismissal, did not contain any reasons for the dismissal of the appellant. Put simply, the letter did not make any allegations of a criminal nature against the appellant. The cases of *Garba v University of Maiduguri* (supra) and *Anakism v U.B.N. Ltd* (1994) 1 NWLR (Part 322) 557 relied upon by the appellant and the trial court are not relevant to the circumstances of
the present case. They are distinguishable from it. In Garba’s case a particular criminal offence known to law was committed while none was committed in the instant case. In Anakism’s case there were no such written and express terms of employment, as in the present case, that gives the respondent a discretion to either dismiss before or after criminal prosecution.

On the evidence before the trial court, the appellant was clearly guilty of banking malpractices, irregularities and dishonest practices. But these do not constitute any offence known to law. And although the respondent pleaded “fraud” in its statement of defence, no evidence was led on “fraud”. The position of the law is clear. Facts pleaded in respect of which no evidence was led go to no issue.

On the other hand, “irregularity” and “malpractice” do not constitute offences known to our criminal law. These have been defined at pages 762 and 667 of the Chambers’ 20th Century Dictionary (1983 edition) respectively as follows:

“irregularity” a rough place or bump on an even surface; an instance of action, behaviour, etc not conforming to rules or regulation.

and

“malpractice” an evil or improper practice; professional misconduct; treatment falling short of reasonable skill or care; illegal attempt of a person in position of trust to benefit himself at others’ loss.

In any event the appellant was not accused of irregularity or malpractice in his letter of dismissal. The letter did not state any reasons for his removal. In a master and servant class of employment, the master is under no obligation to give reasons for terminating the appointment of his servant.

Generally employments fall into three categories, viz:

(a) master and servant;
(b) a servant holds an office at pleasure;
(c) employment that is governed by statute.
See Ridge v Baldwin (1964) AC 40 per Lord Reid; Olaniyan v University of Lagos (1985) 2 NWLR (Part 9) 599. Both parties agree that the present case does not fall within the third class. It is not a case where the tenure of office of the servant is governed by statute. It is also common ground that the present case is one of master and servant.

The law regarding master and servant is not in doubt. Under this class of employment there cannot be specific performance of a contract of service. The master has the power to terminate the contract with his servant at any time and for any reason or for none. However, if the master does terminate the contract in a manner not warranted or provided by the contract, he must pay damages for breach of contract. So as Lord Reid said in Ridge v Baldwin (supra):

“So the question in a pure case of master and servant does not at all depend on whether the master has heard the servant in his own defence: it depends on whether the facts emerging at the trial prove breach of contract.”

What this means is this: In this class of cases an officer’s appointment can lawfully be terminated without first telling him what is alleged against him and hearing his defence or explanation. Similarly an officer in this class can lawfully be dismissed without observing the principles of natural justice.

I shall now attempt to relate the facts of the present case to the contract governing the parties. The appellant (as plaintiff) pleaded in paragraphs 3, 4, 5, 6 and 7 of the amended statement of claim as follows:

“3. The plaintiff’s employment with the defendant is governed by the regulations and procedural agreement as well as the main collective agreement between the Nigerian Employer’s Association of Banks, Insurance and Financial Institution, terms and conditions of service as incorporated in Part II (section 1) of the said collective agreement.

4. The plaintiff had since his confirmation of appointment been promoted, trained, transferred and/or served in various branches of the defendant, the Maiduguri branch inclusive as his last place of posting.”
5. The defendant by its letter dated 17 November, 1992 suspended the plaintiff from duty and by a further letter dated 11 March, 1993 dismissed the plaintiff from its employment in flagrant departure from the provisions of the said collective agreement. Both letters of suspension and dismissal shall be relied upon at the trial of this suit.

6. The plaintiff states that although he was suspended from duty by the defendant pending final investigation of operational malpractices the outcome of the investigations were not communicated to him up to the time of filing this suit.

7. The plaintiff will contend at the trial of this suit that his dismissal is void, incompetent and unconstitutional."

In reply to the plaintiff’s averments, the defendant pleaded in paragraphs 2, 2B, 2C, 2F, 2G, 2H, 3, 5 and 7 of the further amended statement of defence as follows:

“2. The defendant admits the averment in paragraph 5 of the plaintiff’s statement of claim only to the extent that the employment relationship was governed by the terms and conditions contained in the ‘MAIN COLLECTIVE AGREEMENT’ between the Nigerian Employers Association of Banks, Insurance and Allied Institutions and Association of Senior Staff of Banks, Insurance and Financial Houses. This main collective agreement is hereby pleaded. The plaintiff is put to the strictest proof of other allegations contained in paragraph 5 of the statement of claim.

2A. That the defendant was formerly known and called International Bank for West Africa Limited (IBWA).

2B. The defendant avers that by an internal General Memorandum No. 157 dated 18 October, 1991 addressed to all senior staff and copied to all board members, management staff, area Managers and branch Manager of the defendant the Senior Assistant General Manager of the defendant (Mr Charles Ugboko) communicated the new agreement reached on summary dismissal. The memo is hereby pleaded and shall be relied upon at the trial of this case.

2D. The defendant further avers that consequent upon the issuance of the query and the reply referred to in paragraph 2C above, the plaintiff was suspended from duty. The defendant’s letters both dated 16th and 7 January, 1992 suspending the plaintiff from duty are hereby pleaded and shall be relied upon at the trial of this case. The plaintiff is hereby
given notice to produce the original copy of the query letter at the trial of the case.

2E. The defendant further avers that the cash debit advices Nos. 2964 and 2685 dated 21 May, 1991, No. 4845 dated 29 July, 1991, No. 0271 dated 2 March, 1991, and No. 1276 dated 20 November, 1990 signed by the plaintiff which were over and above this cash authorised limit are hereby pleaded and shall be relied upon at the trial of this case.

2F. The defendant avers that the report of the senior staff disciplinary committee dated 16 and 17 November, 1992 which investigated the Auno fraud is hereby pleaded and shall be relied upon at the trial of this case.

2G. The defendant avers that further to paragraph 2D above, the plaintiff was downgraded in rank after his suspension. The defendant’s letter downgrading the plaintiff dated 10 January, 1993 is hereby pleaded and shall be relied upon at the trial of this case. The plaintiff is hereby given notice to produce the original copy of the letter at the trial of this case.

2H. The defendant avers that on or about 15 May, 1992 the Maiduguri branch of the defendant communicated to all its staff by way of an internal mail the authorised cash limits for the branch as regards all staff of the branch and the Auno sub-branch. The said internal mail numbered 001 and dated 15 May, 1992 was signed by the then Branch Manager YI Jahun and the plaintiff himself. The said mail will be relied upon at the hearing of this case. The plaintiff is hereby given notice to produce his original copy at the trial of this case.

3. The defendant denies the averment contained in paragraph 6 of the plaintiff’s statement of claim and states that the plaintiff was duly communicated with the decisions and outcome of the investigations and deliberations of the defendant’s disciplinary committee which directly indicted the plaintiff of perpetration of the fraud. All correspondences, letters and documents that exchanged between the parties are hereby pleaded, particularly:

The defendant hereby gives the plaintiff notice to produce all original copies of the aforesaid letters written to him.

4. The defendant denies the averments contained in paragraphs 7, 8 and 9 of the statement of claim and puts the plaintiff to the strictest proof of the allegation contained therein.

5. The defendant states that the plaintiff was duly interviewed by the investigative panel set up to investigate the said fraudulent transactions and he was accorded an opportunity of defending himself and the outcome of the investigation was duly and effectively communicated to the plaintiff.

6. The defendant further states that it was consequent upon the findings of the senior staff disciplinary committee that the plaintiff’s employment was terminated.

7. The defendant states that all opportunities were given to the plaintiff to defend himself and he unsatisfactorily failed to offer reasonable explanations as regards the commission of the irregularities and fraud.”

At the trial the defendant called evidence to justify the dismissal of the plaintiff. DW4, Simeon Chinedinma Okeraofor, testified at page 21 of the record thus:—

“The plaintiff was a staff of the bank. He was a senior staff up to 1993 when he was dismissed from the services. He was the Deputy Branch Manager.

There was operational malpractices at our Auno sub-branch which is supervised by Maiduguri main branch. The bank lost a lot of money as a result of the malpractices. Many informal advices were signed without being backed by the necessary instrument ie cheque. Transactions were carried out when the customers in question have no money in their accounts. By internal advices I mean debits and credits. It is a transaction between the sub-branch and the main branch. The plaintiff signed some debit advices which were above his limits. His limit is ₦15,000. The branch Manager and his deputy supervise the Auno sub-branch. There were five advices that were signed in excess. Out of the five one was signed by the plaintiff alone while the remaining four were signed by the plaintiff and the supervisor at Auno. I know the plaintiff’s signature and anywhere I see his signature I can identify. I worked at Maiduguri for 10 years. I worked up to December, 1990. The plaintiff was at the Maiduguri branch when I was working at Maiduguri. There are four advices out of the five I have been
a. mentioning. One was missing. It is an advice for ₦145,000. It was dated 2 March, 1992. It is the advice signed by the plaintiff alone. We searched for the original of the advice dated 2 March, 1992 but could not locate it. If I see a copy of the advice in question I can identify. This is the copy of the advice which is missing.”

b. DW4 continued as follows:–

“The limitation of ₦15,000 is in connection with issuance of cheque. On advice he has no limit. The cheques he authorised are in the bank. In the cheques he authorised he exceeded his limit. An advice can be accepted or rejected. Any document signed by the plaintiff is binding on the bank. Four white copies of exhibit Y1–Y6 were sent to Lagos for computer system. The Maiduguri branch sent the whole ones for computer system.

c. The dismissal letter was signed by Mr DB Sosu, Senior Principal Manager Personnel and by Charles Ugboro, Deputy General Manager. Human Resources Manager, Charles Ugboro was a member of the committee which investigated the involvement of the plaintiff in the financial malpractices. All the members of the committee are staff of the defendant. Each was invited to defend himself in the absence of the other. The plaintiff was not taken to court. In 1993 he was not taken to court. He was dismissed for signing customer’s cheques when there is no sufficient fund. The accounts are bad. I worked with the plaintiff before and I am familiar with his handwriting. A staff of the branch filled in the forms and he signed the forms. Some were terminated some were dismissed and some were confirmed. The Auno branch had a Manager. He is a junior staff and whatever action he is going to take must be approved by either the Manager or his deputy. The deputy Manager is answerable to the Manager. If the sub-branch wants to withdraw money from the main branch it would have to be through advice. This cannot be possible without the signature of the authorised officer. The authorised officers are the Manager and his deputy. The Manager of the sub-branch who raises the advice would sign one portion while the Manager of the main branch or in his absence his deputy would sign the other portion. When the main branch raises advice on Auno branch the head of the particular department that raised the advice would sign and the Manager or his deputy would sign the other portion. Exhibit Y1, Y2, Y3 and Y5 emanated from Maiduguri main branch to Auno sub-branch. Exhibit Y4 originated from Auno to Maiduguri main branch. The advices honoured. Money was released. The one which bears only one signature is exhibit Y4 which emanated from Auno to Maiduguri. The document was signed by the plaintiff and the amount involved is
N226,200. It was supposed to have been signed by the Auno branch Manager. He can sign up to that amount in the absence of the Manager. The rest exhibits namely: Y1, Y2 and Y3 were signed by Haruna Yakubu and countersigned by the plaintiff. Exhibit Y2 was signed by one other officer and countersigned by the plaintiff. Haruna Yakubu is an authorised signatory. The person who signed exhibit Y2 is a signatory.

The advices as they are were in order. Exhibit Y4 is not in order. Drafts were issued to the customers. The customers who withdraw cash from the main branch were not having money in their accounts at Auno. A cheque drawn by Auno customer of sub-branch would first of all be approved by the sub-branch Manager but before money is released it has to be signed by a Manager as his deputy. The Manager has no limit on accounts that have money. On customer’s account, money would only be withdrawn through issuance of cheques and approval of the same. Mallam Yahaya Jahun was the Manager. There are many advices involved. The total amount involved in that branch was about N3.2 million.”

DW3, Baba Mohammed Rufai, was the branch Manager of the respondent bank. After giving evidence-in-chief this witness was recalled. He testified as follows:–

“I testified for the defence on 1 March, 1994. I am a branch Manager and being a branch Manager I am the representative of the management. The Manager has no limit. He can sign any amount where there is money in the account. Where there is no money in the account the Manager can only lend out up to N25,000. Where there is money in the account the deputy Manager is limited to N45,000. Where there is no money it is only the Manager who can decide this. Deputy Manager has no power on this matter. The limitation changes from time to time. In May, 1992 the Manager has no limit while his deputy is limited to N15,000. Where there is no money the deputy Manager has no power. I do not know the limitation in 1990 but it could not be higher than that of 1992.

Auno branch is a sub-branch. It is not possible to register an inter-branch advice without the same being supported by a cheque or teller. In the instant case the cheques which accompanied the advices in question were destroyed as they were signed by Abdul-Wahab while the advices were countersigned by the plaintiff. He countersigned and he also disbursed the money.”

It is clear to me from the evidence led by the respondent that the appellant committed banking malpractice, irregularities
and dishonest banking practices. The question to be resolved, however, is whether the contract of service empowered the respondent to dismiss any servant who is guilty of malpractice, irregularities, and dishonest practices.

In this regard it is imperative to examine the provisions of exhibit Y tendered at the trial by the appellant. I must point out here that the respondent equally tendered a copy as exhibit C. The said exhibit Y (or C) is an addendum to the senior staff main collective agreement tendered and marked as exhibit W which is not exhaustive. Both exhibits Y and C read as follows:

"International Bank for West Africa Ltd.
AFRIBANK
IBWA
General Memorandum
18 October, 1991

GENERAL MEMORANDUM NO. 159
PERSONNEL NO. 32
TO: ALL SENIOR STAFF

SUBJECT: SENIOR STAFF COLLECTIVE AGREEMENT

This is to inform all senior staff that on the intervention of the industrial arbitration panel, an agreement has now been reached on the subject ‘summary dismissal’ which previously was not agreed upon as evident on page 9 of the revised senior staff collective agreement. For easy reference, and based on the industrial arbitration panel award, we re-produced below what shall now come under the dispute Part 11 (section 1) Article 4 (iv) of the main collective agreement between NEALI AND ASSBIFI.

This should now be regarded as part of the senior staff main collective agreement.

PART II (SECTION 1)
ARTICLE 4(IV) SUMMARY DISMISSAL

a. An employee may be summarily dismissed for certain acts of gross misconduct. Such acts include proven case of:

i. Theft, fraud, dishonesty, defalcation and irregular practices in respect of cash, vouchers, records, returns on customer’s account and foreign exchange transactions;

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. intentionally divulging confidential information in breach of any ‘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 on the office premises or within its immediate surroundings;
viii. deriving any benefit in the course of his official duties which places him in such a position that his personal interest and his duty to the employer or to any customer or the employer are in conflict;
ix. failure to report promptly any irregularity on the part of any other employee after having knowledge of such irregularity;
x. abusive or insulting language or behaviour to any client which is prejudicially to the business interests of the employer, and
xi. any other offences which may be agreed upon between the association and the Union from time to time.

b. 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’ or a ‘second and last’ warning letter may be issued and the fact that the warning is a final one will be made clear in the letter.

c. Before either summary dismissal or warning letter 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.
It will be observed from the contents of exhibits Y and C that there are 11 categories of grounds pursuant to which any member of staff can be summarily dismissed by the respondent. The one relevant in the present case is category (i). It seems to me clear that the actions or conduct of the appellant could constitute (i) fraud, or (ii) dishonesty or (iii) irregular practices in respect of cash, vouchers, records, returns on customer’s account and foreign exchange transactions.

We must bear in mind that the present case is one of master and servant with written and express terms of employment. Where therefore an employee has been found guilty by a disciplinary committee of any of the gross-misconducts highlighted above, the master has a choice – either to exercise his or its discretion in favour of prosecuting the erring servant or dismissing him summarily as in the instant case. In other words, prosecution before a court of law, in the circumstances, is not a *sine qua non* for summary dismissal.


“It is not necessary, nor is it a requirement under section 33 of the 1979 Constitution that before an employer summarily dismisses his employee from his services under the common law, the employee must be tried before a court of law where the accusation against the employee is for gross misconduct involving dishonesty bordering on criminality, I may go further to say that the provisions of 33 (*supra*) have no application to the facts of this case.”

As I have already indicated, the parties are bound by the agreement (ie the collective agreement) which were both pleaded and tendered in evidence as exhibits W, Y and C.

The issue to be resolved is strictly whether the summary dismissal of the appellant is in keeping with the contract between them. Exhibit D is the letter of dismissal dated 11 March, 1993. It reads:–

“CUIDBS/OFO/IRSW/0529/93"
11 March, 1993
Mr S.B. Olarewaju (3260 D)
Afribank Nigeria Plc
Maiduguri Branch,
Maiduguri.
Dear Sir,

DISMISSAL
Please be informed that with immediate effect, your services with the bank are no longer required. You are hereby DISMISSED.
You are requested to surrender all the bank’s property in your possession including your identity card and unused cheque leaves to the Manager (Maiduguri branch). Also clear the balance in your account ‘35’ before your final departure.
Your indebtedness to Afribank Nigeria Plc as at February, 1993 will be communicated to you.

Yours faithfully,
Afribank Nigeria Plc
(SGD) (SGD)
D.B. SOSU CHARLES UGBOKO
SENIOR PRINCIPAL MANAGER DEPUTY GENERAL MANAGER
(PERSONNEL) (HUMAN RESOURCES MANAGEMENT)
CC: CHIEF INSPECTOR
SAGM (NORTH WEST and ABUJA)
AREA MANAGER (NORTH WEST) KADUNA
MANAGER (MAIDUGURI BRANCH)
HEAD – PERSONNEL SERVICES
– MANPOWER PLANNING and DEVELOPMENT
– COMPUTER UNIT”.

No reason was given for the dismissal of the appellant. As I stated earlier on in the course of this judgment, the master can terminate the contract with his servant at any time and for any reason or for none. The letter of dismissal did not allege the commission of crime known to our law against the appellant and for which he was dismissed. The court cannot go outside the letters of exhibit D.
But if the master terminates the contract with his servant in a manner not warranted by the contract, he must pay damages for breach of contract. The remedy is in damages. The court cannot compel an unwilling employer to re-instate a servant it has dismissed. The exception to the general rule is in cases where the employment is especially protected by statute. In such cases, the employee who is unlawfully dismissed may be re-instated to his position. See *Olaniyan v University of Lagos* (*supra*); *Shitta-Bey v Federal Public Service Commission* (1981) 1 SC 40.

Finally, I must stress that the present case is not one governed by statute. It does not therefore fall within the class of cases such as *Shitta-Bey v Federal Public Service Commission* (1981) 1 SC 40; *Olaniyan v University of Lagos* (*supra*). Further discussion here on contracts governed by statute will serve no useful purpose.

In the result, this appeal fails and is dismissed. I affirm the decision of the Court of Appeal given on 18 April, 1996. The respondent is entitled to costs which I assess at N10,000.

**Karibi-Whyte JSC:** I had the privilege of reading the judgment just delivered by my learned brother, Katsina-Alu JSC. I agree with the reasoning and conclusion that this appeal should be dismissed. I also will and hereby dismiss the appeal.

Appellant shall pay N10,000 as costs to the respondent.

**Ogwuegbu JSC:** I have had the privilege of a preview of the judgment of my learned brother, Katsina-Alu JSC. I agree with his conclusion and reasoning by which he came to the conclusion. I agree that the appeal be dismissed with N10,000 costs to the respondent.

**Iguh JSC:** I have had the privilege of reading in draft the judgment just delivered by my learned brother, Katsina-Alu JSC, and I am in complete agreement with him that this appeal is without substance and ought to be dismissed.
He has considered all the issues canvassed in this appeal in great detail and I have nothing more to add. I abide by the order as to costs therein made.

AYOOLA JSC: For the reasons given in this judgment just delivered by my learned brother, Katsina-Alu JSC, which I have had the privilege of reading, I too would dismiss this appeal with ₦10,000 costs to the respondent.

Appeal dismissed.
Sparkling Breweries Limited and others v Union Bank of Nigeria Limited

SUPREME COURT OF NIGERIA
OGUNDARE, ACHIKE, BELGORE, EJIWUNMI, MOHAMMED JJSC
Date of Judgment: 13 July, 2001
Suit No.: SC.113/1996

Banking – Letters of credit – Conditions precedent to issuance of – Failure to perform – Effect
Contract – Existence of – How determined
Tort – Unlawful interference with business – Tort of – What constitutes

Facts
The resume of the plaintiffs’ claim, as can be distilled from the tedious paragraphs of the amended statement of claim, is that the respondent, after issuing letters of credit in favour of the plaintiffs’/appellants’ customers/creditors abroad, unilaterally and wrongfully cancelled them in breach of the contractual arrangement between the parties. It is in consequence of the said breach that has occasioned injury that the plaintiffs made this claim of several billion Naira for breach of contract. In the alternative, the plaintiffs claimed the sum of N16,315,365,565 special and general damages for unlawful interference with the business of the plaintiffs, including interest on the aforesaid several billions, and in the further alternative, for a total sum of N221,627,500 special and general damages for unlawful interference with the business of third to sixth defendants.

The respondent in its own further amended statement of defence, denied the alleged contract. In fact, the respondent averred that the opening of the letter of credit was predicated on eight stipulated conditions which the plaintiffs failed to comply with.

After due hearing, the learned trial Judge found for the plaintiffs and held that there was a breach of contract and
made specific awards to the six plaintiffs totalling several billion Naira.

Dissatisfied, the respondent appealed to the Court of Appeal against the judgment of the trial Judge as regards liability and quantum of damages. The lower court allowed the appeal, set aside the judgment of the trial court and also dismissed the appellants’ cross appeal on quantum of damages. The lower court expressly held that the respondent was not liable for any breach of contract or for unlawful interference with the appellants’ business.

The appeal to the Supreme Court is at the instance of the plaintiffs/appellants.

**Held** –

1. The tort of unlawful interference with the business of another consists in one person using unlawful means with the aim and effect of causing damage to another. To constitute the tort, the means used must be unlawful, otherwise the tort is not established. In the instant case, the Court of Appeal having held that there was no breach of contract, which was the unlawful means relied on to ground the tort, it must necessarily follow that the alternative claim in the tort of unlawful interference with business must fail. In effect, the appellants had no cause of action in that regard.

2. Whether or not there is a semblance of a legally binding agreement between the parties, that is, a situation where the parties to the contract confer rights and impose liabilities on themselves, will largely depend on whether there exists a mutual assent between them. Where there is doubt on whether the parties have concluded a legally binding agreement, the court has the responsibility to analyse the circumstances surrounding the alleged agreement and determine whether the traditional notion of “offer” and “acceptance” can be distilled from the purported agreement. The mutual assent must be
a outwardly manifested. The test of the existence of such mutuality is objective.

3. When there is mutual assent, the parties are said to be *ad idem*.

4. An “offer” is an expression of readiness to contract on the terms specified by the offeror (ie the person making the offer) which if accepted by the offeree (ie the person to whom the offer is made) will give rise to a binding contract. In other words, it is by acceptance that the offer is converted into a contract.

5. On appellants’ admission that some conditions precedent to the conclusion of a legally binding contract were yet to be complied with, it became certainly unarguable that there was no meeting of the minds between the parties that could lead to the conclusion that the parties were *ad idem* on the obligation for the issuance of a contract.

*Appeal dismissed.*

**Cases referred to in the judgment**

**Nigerian**

*Ali v State* (1988) 1 NWLR (Part 68) 1

*Ijale v Leventis and Co. Ltd* (1959) SCNLR 255

*Nta v Anigbo* (1972) 5 SC 156

*Ogunbiyi v Ishola* (1996) 6 NWLR (Part 452) 12

*Otuedon v Olughor* (1997) 9 NWLR (Part 521) 355

**Foreign**

*JT Stratford and Son Ltd v Lindley* (1965) AC 269

*Norwich Union Fire Insurance Society v Price* (1934) AC 455

**Book referred to in the judgment**

*Clerk and Lindsell on Torts* (16ed) page 850
Counsel

For the appellants: JI Nweze (with him MB Idris-Kutigi, Esq.)

For the respondent: Professor AB Kasumnu, S.A.N. (with him IO Akhidenor, Esq. and EI Eseme, Esq.)

Judgment

OGUNDARE JSC: (Delivering the lead judgment) The appellants were, at all times relevant to this case, customers of the respondent bank. All the appellants belong to a group known as Olori Group of Companies. Following the cancellation by the respondent of purported letters of credit issued by it at the request of the appellants, the latter sued, claiming as per paragraph 27 of their amended statement of claim:

“27. WHEREFORE all the plaintiffs’ claim against the defendant as follows:–

(i) an order of injunction restraining the defendant and all their agents whomsoever from taking any steps to sell any of the plaintiffs’ properties mortgaged to it since the defendant is in fact indebted to the plaintiffs.

(ii) the sum of ₦656,919,000 only being special and general damages against the defendant for breach of contract arising from the unlawful cancellation of irrevocable letters of credit issued by the defendants, and so issued for valuable consideration given by the plaintiffs to the use of the defendant, and for the specific purposes and benefits of the plaintiffs’ business.

(iii) pursuant to paragraph 26 the sum of ₦554,732,565 for the 1st plaintiff and ₦103,723,000 for the 2nd plaintiff.

(iv) pursuant to paragraph 25, the sum of ₦6,000,000 being the value of 12,000,000 crates for the 1st plaintiff and ₦9,000,000 being the value of 18,000,000 (sic) for the 2nd plaintiff.

OR IN THE ALTERNATIVE TO (ii), (iii) and (iv) ABOVE

(v) the said sum of ₦16,315,365,565 being special and general damages for unlawful interference with the business of the plaintiffs.
(vi) interest on the said sum of ₦16,315,365,565 only from 1 April, 1989, until payment.
(vii) further and/or other reliefs.

IN THE FURTHER ALTERNATIVE TO (v), (vi) and (vii) ABOVE:

(viii) the sum of ₦42,325,000 being special and general damages for unlawful interference with the business of the 3rd plaintiff.
(ix) the sum of ₦42,325,000 being special and general damages for unlawful interference with the business of the 4th plaintiff.
(x) the sum of ₦42,325,000 being special and general damages for unlawful interference with the business of the 5th plaintiff.
(xi) the sum of ₦42,325,000 being special and general damages for unlawful interference with the business of the 6th plaintiff.”

In their amended statement of claim, they had pleaded, *inter alia*:

“5. In addition to the foregoing, the 1st and 2nd plaintiffs aver that they also bring this action in their capacity as those persons for whose benefit and advantage the contractual arrangements with the defendant more specifically pleaded in paragraphs 7, 8, 12, 13 and 14 of this statement of claim were entered into, and to whom the rights acquired under the said contracts have accordingly been transferred.

6. All the plaintiffs further state that all the transactions that have given rise to the reliefs sought by them in paragraph 27 of this statement of claim, to which by this action they claim to be entitled, arise from diverse contracts between their respective selves (as ‘the buyer’ or ‘the importer’ of goods and materials) of the one part, and the defendant (as ‘the issuing bank’ of documentary credits) of the other part, by virtue of which the defendant, in consideration of the payment to them by the plaintiff of the local value of the various documentary credits, and the further payment by the plaintiffs to the defendant of commissions, and other bank charges as remuneration for its services, agreed to issue and establish *irrevocable letters of credit* in favour of certain third party – sellers/suppliers of goods and materials and to finance their importation into Nigeria by, and upon the application of, the plaintiffs for the purposes of their aforesaid
business. The plaintiffs state that the relevant and precise particulars of each of the said ‘documentary credit’ contracts between their respective selves and the defendant are as appear by the date contained in ‘Particulars of Letters of Credits Contracts’ shown in paragraph 14 of this statement of claim.

7. About the month of March, 1986, by an agreement made between the plaintiffs and the defendant at the defendant’s head office/principal place of business at No. 40 Marina, Lagos, the parties entered into a ‘further contract’ under the terms of which the defendant as the ‘issuing bank’ of documentary credits agreed to open letters of credit for the importation of brewery raw materials for the specific purpose (known to the defendant) of enabling the 1st and 2nd plaintiffs to produce beer and soft drinks in sufficient quantities.

8. In order to achieve the objective of the said ‘further contract’ referred to in paragraph 7 above, and upon the specific and express written directions of the defendant, (as contained in those exchanges of correspondence particularised below), the parties further agreed that all Federal Government of Nigeria ‘import licences’ held in the name of, and available for use by any and all of the plaintiffs and other members of the OLORI GROUP OF COMPANIES should be utilised for the importation of brewery raw materials for the benefit of the 1st and 2nd plaintiffs. In the alternative it was understood that the 3rd to 6th plaintiffs shall import the brewery raw materials for sale to the 1st and 2nd plaintiffs at a profit of 15% of the production value. (Particulars are omitted).

9. At the material time, each of the 3rd–6th plaintiffs inclusive possessed all due and necessary governmental authority for the importation into Nigeria of various goods, being holders of those Federal Republic of Nigeria import licences of which precise description details are given in the particulars of import licences shown immediately below.

All the original import licences are with the defendant and it is hereby given notice to produce them. (Particulars are omitted)

12. In consideration for, and as condition precedent to issuing and establishment of the said ‘documentary credits’, the defendant demanded and did receive from the respective
plaintiffs the Nigerian currency value of the various credits to be established, and did further cause the respective plaintiffs to make ‘advance import duty payments’ in respect of all the goods sought to be imported under the various contract for sale of goods referred to in paragraph 10 of this amended statement of claim, the said payments being in the respective equivalent amount shown in the ‘particulars of payments to the issuing bank’ (ie the defendant) shown immediately below.

All the original receipts of payments are with the defendant and it is hereby given notice to produce them in court.

(Particulars are omitted)

13. By various ‘applications to purchase foreign currency’ (as in ‘Form M’) pleaded in the ‘Particulars of Applications to Purchase Foreign Currency’ shown immediately below, the respective plaintiff (as ‘the applicant’) applied to the defendant (as ‘the issuing bank’) for foreign exchange allocation for payment for the importation of those goods to which the ‘contract of sale of goods’ pleaded in paragraph 10 refer, and their said applications were all granted and approved by the defendant on or about 11 August, 1986.

All the original applications are with the defendant and it is hereby given notice to produce them in court.

(Particulars are omitted)

14. In pursuance of all those matters pleaded in paragraphs 6–13 above, and upon the fulfilment by the respective plaintiffs of all the contractual obligations reserved as to their own part particularly referred to in paragraphs 6 and 12 above, the defendant (as ‘the issuing bank’), did issue and establish ‘irrevocable letters of credit’ for the account of the respective plaintiffs (as ‘accreditors’) in the respective amounts, and in favour of those sellers/suppliers of goods and materials (as ‘beneficiaries’) as shown in the particulars of letters of credit contracts immediately below.

All the original letters of credit are in the custody of the defendant and it is given notice to produce the original at the trial.

(Particulars are omitted)

15. Subsequent to the issue and establishment of the said ‘letters of credit’, but before they could be utilised by the respective plaintiffs and the respective beneficiaries in whose favour they were issued, the defendant unilaterally
repudiated the terms of the contract pleaded in paragraphs 6, 7, 8, 12 and 13 of this amended statement of claim by cancelling/procuring the cancellation of each and everyone of the letters of credit particularised above, in spite of the fact that ‘irrevocable letters of credit’ are in law incapable of cancellation or modification by the issuing bank (including the defendant) and in spite of the plaintiffs’ written protests and warnings as to the loss and damage that would be occasioned to them in consequence of the defendant’s said act in breach of contract, and the defendant’s written assurances and undertakings to rectify the position.

(Particulars are omitted) . . . .

23. In addition/in the alternative to the reliefs claimed by these plaintiffs in paragraph 27 below, the plaintiffs repeat the material averments of facts set out in paragraphs 7–22 above, and will contend at the trial of this action that the defendant has (their said act of cancellation of the letters of credit) interfered with (or prevented or hindered) the plaintiffs in the execution of all the contracts hereinbefore pleaded, and further, that the said interference was deliberate and furthermore, that the said interference was direct, and that the said unlawful interference with the plaintiffs in the due performance of all the said contracts has occasioned loss and damage to them, in consequence of which they claim to be entitled to the reliefs sought in paragraph 27 of this amended statement of claim.”

It would appear from the amended statement of claim that the main complaint of the appellants was that the respondent, after issuing letters of credit in favour of the former’s trade creditors, wrongfully cancelled same, thereby causing injury to the appellants which occasioned to them damage. They claimed as stated earlier above.

The respondent denied the appellants’ claims and joined issues with them on their pleadings. In its further amended statement of defence, it averred, inter alia:–

“5. The defendant avers that at the request of the 1st and 2nd plaintiffs, it made available to the two plaintiffs, (1st and 2nd) credit facilities which were fully utilised. The defendant shall rely on all material documents evidencing this averment at the trial of this action.
6. Further to paragraphs 4 and 5 above, the defendant further states that it granted loans and other facilities in the sum of ₦6.5 million (as regards the 1st plaintiff) and ₦1.2 million (as regards the 2nd plaintiff) respectively. The defendant shall found on all material documents evidencing this averment at the trial of this action.

9. As a result of the loans, advances and other credit facilities made available to the 1st and 2nd plaintiffs (which they fully drew and utilised) the said 1st and 2nd plaintiffs are substantially indebted to the defendant well in excess of ₦27 million (the current figures of which shall be made available at the trial of this action). The said indebtedness is subject of litigation as counterclaim in Suit No. W/259/89 – Prince Morrisson Olori and 2 Others v Union Bank of Nigeria Plc and Another. The co-plaintiffs in Suit No. W/259/89 are the 1st and 2nd plaintiffs herein.

11. The defendant denies paragraph 5 of the amended statement of claim and avers that it was neither aware of nor was it a party to any agreement or arrangement as stated in paragraphs 6, 7, 8, 12, 13 and 14 of the amended statement of claim.

12. With further reference to paragraphs 5 and 9 of the amended statement of claim, the defendant denies having reached any agreement, contract or further contract with the plaintiffs either individually or collectively whereby it was agreed that import licences issued in the name of one would be utilised by or for the benefit of any other company other than the company in whose name the import licence was issued.

The defendant will at the trial rely on the express provision in the import licences which prohibit the making of such an arrangement.

13. The defendant denies paragraph 7 of the amended statement of claim and avers that there was no contract between it and the 1st and 2nd plaintiffs as alleged.

14. The defendant denies paragraphs 9, 10 and 11 of the amended statement of claim and puts the plaintiffs to the strictest proof of the existence of the alleged import licences and contracts of sale and the conditions relating to such contracts of sale.
15. With reference to paragraphs 12 to 24 of the amended statement of claim, the defendant avers that there were negotiations between it and some of the plaintiff companies for the opening of letters of credit.

16. That consequent upon these negotiation and exchange of letters between it and some of the plaintiff companies, it (the defendant) by its letter of 25 July, 1986 addressed to the 1st plaintiff, agreed to register 1st plaintiff’s Form M with a view to the opening of a letter of credit if the following conditions are met:

1. Irrevocable undertaking to resume full operation of accounts in our books when production resumes with all sales proceeds paid direct to our branch.
2. Updating of repayment of liability in the name of Olori Motors and Co. Ltd at our Mission Road branch.
3. Clearing of overdraft created as a result of loan repayment on Sparkling Breweries Ltd and Olocold Drinks Nig. Ltd accounts.
4. That inspection of properties mortgaged and those held on simple deposit is undertaken.
5. Payment of 30% import levy/tariff without increasing the current account overdraft.
6. 150% cash margin upfront to be held on a separate cash margin account.
7. Payment of import duty without increasing the current account overdraft.
8. A corresponding reduction to the loan (ie ₦300,000 if the documentary credit is going to be for ₦300,000 exactly) separately and in addition to the normal monthly ₦130,000 repayment. The defendant avers that none of the conditions listed above was complied with.

17. The defendant denies the payment allegedly made by the plaintiffs on paragraph 12 of the amended statement of claim and also denies paragraph 13 in respect of the making of application to purchase foreign currency.

18. In the alternative to paragraph 17 hereof, the defendant avers if such payments were in fact made (which is denied), the payments made were in settlement of the indebtedness of the plaintiffs to the bank and/or were made subject to the fulfilment of the other conditions stipulated in defendant’s letter of 25/7/86.
19. The defendant denies the issuance of irrevocable letters of credit to the plaintiffs as alleged in paragraph 14 of the amended statement of claim and in the alternative, the defendant avers that if any letter of credit was issued (which is denied), it was issued subject to the conditions stipulated in paragraph 16 herein being met which conditions were never met.”

In summary, the appellants’ case is that sometime in March, 1986, the third to sixth appellants applied to the respondent for irrevocable letters of credit for the importation of hops and other raw materials for the use of the first and second appellants. As a result of this, the respondent set out certain conditions (see exhibit 2) for the appellants to meet before the letters of credit were established. The appellants substantially complied with exhibit 2 except conditions 2, 3 and 8 which they, by exhibit 3, asked the respondent to waive. The appellants stated that they entered into a further contract whereby the import licences of the third to sixth appellants were to be utilised for the benefit of the first and second appellants for the production of beer and soft drinks. According to the appellants, the profit accruing from this arrangement would be shared 15% to the holders of the import licences and the rest to defray the outstanding loan of the first and second appellants. The appellants contended that the respondent eventually waived the remaining conditions, registered their Form M and processed the letters of credit which it later cancelled without any reference to them. The appellants tendered exhibits 10, 10(a) and 10(b) as copies of the established letters of credit which the Chairman/Managing Director of the appellants took with him when he travelled overseas and he used in inducing their trade creditors as to payment to them and thus enabled him to secure from the creditors some quantities of hops. It is the appellants’ further case that when they learnt of the cancellation of the letters of credit, they made several appeals to the respondent to reconsider the position and warned it of the attendant damages the cancellation would cost them. When the respondent would not yield, they instituted the action leading to this appeal.
The respondent, on the other hand, contended that the appellants failed to comply with all the conditions set out in exhibit 2. The respondent further contended that if the facts were as claimed by the appellants, the right to sue did not lie in them but in their trade creditors. It finally contended that exhibits 10, 10(a) and 10(b), that is the alleged letters of credit, were mere forms as they did not contain such details as the name of the corresponding bank that would transform the forms into valid letters of credit. It is the respondent’s case that the contract was not concluded.

The action proceeded to trial at the conclusion of which the learned trial Judge, in a reserved judgment, found for the appellants and adjudged:–

"On the whole plaintiffs’ claim as contained in their final endorsed statement of claim succeed and are hereby allowed with cost of ₦2,000 to the plaintiffs.”

The learned Judge made the following findings of facts:–

1. That the respondent waived conditions 2, 3 and 8 contained in exhibit 2.
2. That the letters of credit were established by the respondent.
3. That the appellants could maintain the action.
4. That there was no transfer of import licences from the third to sixth appellants to the first and second appellants.
5. That the respondent was a party to the tripartite agreement between it, on the one hand, third to sixth appellants on the second part, and first and second appellants on the third part, whereby the third to sixth appellants as holders of import licences would use the same to import raw materials to be sold to the first and second appellants to produce beer and soft drinks; the first and second appellants were to pay to each of the third to sixth appellants 15% of the total production value as profit to the latter and the
balance was to be used to defray any indebtedness to
the respondent.

6. That the respondent was in breach of contract.

On damages, the learned Judge made the following specific
awards:

(i) N17,104,700 loss of profit to first appellant.

(ii) N20,200,000 loss of profit to second appellant.

(iii) N32,355,000 to each of third to sixth appellants.

(iv) The sum claimed for reactivating of the beer and
soft drinks factories was allowed.

(v) N2.5 billion to first and second appellants each to
repurchase their crates.

The respondent appealed to the Court of Appeal against the
judgment of the trial court both as to liability and damages.

That the court allowed the appeal, set aside the judgment of
the trial court and dismissed the appellants’ claims. The ap-
pellants’ cross appeal on quantum of damages was dis-
missed. The Court of Appeal found that the findings made
by the trial court were perverse and unhesitatingly set them
aside. The court found the respondent not liable for breach
of contract or for unlawful interference with the appellants’
business.

On damages, the Court of Appeal found that the evidence
was not sufficient or credible to support the awards made by
the trial court and set aside these awards.

The appellants being aggrieved by the decision of the
Court of Appeal have, with leave of that court, appealed to
this Court upon nine grounds of appeal. In their written brief
of argument filed pursuant to the rules of this Court, they,
however, formulated only two issues as calling for determi-
nation in this appeal, that is to say:–

“(a) Whether the Court of Appeal was right in reversing the
finding of the lower court that the defendant/respondent
unlawfully interfered with the business of the 3rd to 6th
plaintiffs/appellants; and
Whether the award of damages made in favour of the 3rd to 6th plaintiffs/appellants is sustainable in law.”

All grounds of appeal not covered by these two issues are deemed abandoned and are hereby struck out. For the avoidance of doubt, these grounds are (i), (ii), (iii), (vii) and (ix).

The respondent, in its own written brief, adopted the two issues raised by the appellants. I shall now proceed to consider these two issues. Before doing so, however, I need to observe that these two issues relate only to the case of the third–sixth appellants. It follows, therefore, that the first and second appellants are no longer pursuing the appeal. The appeal, as it relates to them, is hereby dismissed.

At the oral hearing of the appeal before us, learned Counsel to the parties adopted and relied on their respective briefs and offered no further submissions. This appeal, therefore, rests on the submissions in the written briefs.

Issue (a):

It is submitted in the appellants’ brief that the court below was in error in holding that a finding that there was no breach of contract equally absolved the respondent bank of liability for unlawful interference with the appellants’ business for the reason that the tort of unlawful interference with business can be established independently of contract or breach thereof. It is argued that in the case on hand the respondent instead of sticking to its guns not to open the letters of credit asked the appellants to resubmit their original documents. The respondent retained the import licences until they expired and could no longer be used. It is submitted that even as the court below held that the respondent was not in breach of contract when it failed to open the letters of credit, its conduct in frustrating the appellants from utilising the import licences through the opening of the letters of credit by other banks is tortious and amounted to unlawful interference with the appellants’ business. It is argued that the respondent’s purpose in detaining the import licences could only be to injure the business of the appellants. The case of *J.T. Stratford and Son Ltd v Lindley and Another*
Further submitted that as there was no ground of appeal specifically challenging the finding of the trial court on the issue, the court below was wrong to have reversed the finding. It is urged that the finding ought to stand.

Orteon v Olughor (1997) 9 NWLR (Part 521) 355; Ogunbiyi v Ishola (1996) 6 NWLR (Part 452) 12; and Ijale v Leventis and Co Ltd (1959) SCNLR 255 are relied on. This Court is urged to hold that the claim for unlawful interference with business was made out.

For the respondent, it is submitted that by the pleading, evidence and address of learned Counsel for the appellants at the trial, the alternative claim for unlawful interference with the business of the appellants was based on there being a breach of contract on the part of the respondent and, as the court below had held that there was no breach of contract, the alternative claim collapsed and was rightly dismissed by the court below.

I have carefully considered the arguments advanced by both sides. It would appear that the appellants have changed their case in this Court. Their case for damages for the tort of unlawful interference with their business is pleaded in paragraph 23 of their amended statement of claim, which for ease of reference I quote here again. Paragraph 23 reads:–

“23. In addition/in the alternative to the reliefs claimed by these plaintiffs in paragraph 27 below, the plaintiffs repeat the material averments of facts set out in paragraphs 7–22 above, and will contend at the trial of this action that the defendant has (their said act of cancellation of the letters of credit) interfered with (or prevented or hindered) the plaintiffs in the execution of all the contracts herein before pleaded, and further, that the said interference was deliberate and furthermore, that the said interference was direct, and that the said unlawful interference with the plaintiffs in the due performance of all the said contracts has occasioned loss and damage to them, in consequence of which they claim to be entitled to the reliefs sought in paragraph 27 of this amended statement of claim.”(Italics mine)
It is clear that this alternative claim of the appellants was predicated on the alleged breach of contract by the respondent for unlawfully cancelling the letters of credit established for the appellants. It was not their case that the retention of their import licences by the respondent was responsible for the collapse of their business. PW2, Prince Dr Morrison Olori, the chairman/managing Director of the six appellants and their star witness, testified thus:

“The plaintiffs sued the defendant with whom they opened letters of credit and it cancelled the same which is law (sic) it (not?) was allowed to do. The cancellation of the letters of credit made the whole business of the plaintiffs to collapse. The import licence expired before I was informed that the letters of credit had been cancelled and so, I could not utilise them. Before then, I had travelled to Europe and carried some of the import licence to show to the manufacturer who exported some to me which I used for a short period of time.” (Italics is mine for emphasis)

I may pause here to observe that the witness could not have been speaking the truth when he deposed that the “import licence expired before I was informed that the letters of credit had been cancelled”. This is so because in his letters of 17 September, 1986 and 17 October, 1986 (Exhibits 12 and 15 respectively) he was pleading with the respondent to reconsider its decision “to cancel” the said purported letters of credit. In Exhibit 27 dated 26 September, 1986 and written in reply to the letter of 17 September, 1986 (Exhibit 12) the respondent wrote to the witness that “the matter has been reconsidered but the bank’s view has not changed”.

Later in his evidence, the witness said:

“The plaintiffs have sued the defendant to court because it cancelled the letters of credit.”

Testifying further on the damages suffered by the third to sixth appellants, Chief Ololi said:

“The 3rd – 6th plaintiffs suffered damages because the workers of these companies sued for their salaries and allowances as they were forced to close down as a result of the cancellation of the letters of credit and the plaintiffs paid ₦10 million to settle the staff of each of the 3rd – 6th plaintiffs. These plaintiffs also suffered the
It is not his evidence that the business of the third to sixth appellants collapsed as a result of the wrongful retention by the respondent of the appellants’ import licences that subsequently expired.

In his final address at the trial, Mr Nweze learned Counsel for the appellants, as plaintiffs, submitted as hereunder:

“The plaintiffs also claimed for unlawful interference with their business. Counsel for the plaintiffs submitted that this claim was contingent on the defendant’s breach of contract and it was a claim in tort. Counsel then referred to the case J.T Stratford and Son Ltd v Lindley (1965) AC 269 and Clerk and Lindsel on Torts (16ed) page 850. Counsel contended that as a result of the interference the following facts had emerged namely that letters of credit were issued by the defendant but the seller was not notified; that at a point in time, the defendant withheld all the documents of the plaintiffs without which the plaintiff could not open letters of credit with another bank as stated by DW1, the defendant kept the plaintiffs in suspense believing/thinking that they would notify the seller and the plaintiffs continued to warn the defendant of the damage that it would cause and these warnings were unheeded until the import licences expired. Counsel maintained that the above amounted to unlawful interference with plaintiffs’ business as they were calculated to injure them.”

In effect, learned Counsel based the claim for the tort of unlawful interference with business on the alleged breach of contract.

The learned trial Judge, in his judgment, said this of the claim for unlawful interference with business:

“Counsel for the plaintiffs also submitted that plaintiffs’ business was unlawfully interfered with and gave reasons which have been enumerated supra. The court is of the view that the plaintiff has also established this in view of the fact that there was no rebuttable evidence by the defendant.”

Again, it cannot be said that this verdict was based on the unlawful retention of import licences, a fact that was not pleaded.
In the light of all I have said above, the appellants cannot now in this Court base their claim in tort on the retention by the respondent of the import licences and their eventual expiration. That claim was based on the alleged breach of contract occasioned by the respondent cancelling the purported letters of credit. In my respectful view, Ayoola JCA (as he then was), was on a terra firma when in his judgment he observed:–

“Although the Judge purported to find the claim for unlawful interference established, it is clear that the alternative claim was predicated on there being a contract and a breach of that contract.”

I can see no merit in the appellants’ complaint against the learned Justice’s view. The tort of unlawful interference with the business of another consists in one person using unlawful means with the aim and effect of causing damage to another. To constitute the tort, the means used must be unlawful otherwise the tort is not established. As Viscount Redcliffe put it in *J.T. Stratford and Sons Ltd v Lindley (supra)* at pages 328–329 of the report:–

“The case comes before us as one in which the defendants have inflicted injury on the plaintiffs in the conduct of their business and have resorted to unlawful means to bring this about. It cannot be denied that to induce breaches of contract is to employ unlawful means. If the defendants were within the protection of section 3 of the Trade Disputes Act their interference with their members’ contracts of employment would not in itself be wrongful or unlawful, but even so, the procuring of the breaches of the hiring contracts would be against them; and where, as here, there does not appear to be even a trade dispute in contemplation of which the defendants can be said to have acted, they have two sets of tortious or unlawful acts which the plaintiffs can pray in aid against them.”

In the case on hand, the Court of Appeal having held that there was no breach of contract (and this was the unlawful means relied on to ground the tort) it must necessarily follow that the alternative claim in the tort of unlawful interference with business must fail. This, in my respectful view, was the point being made by Ayoola JCA in his judgment.
Ayoola JCA’s further observation to the effect that:

“The defendant has appealed against the ‘whole decision’ which must include the Judge’s view on the alternative claim. It is evident that if there was no breach of contract and if the condition precedent to the performance by the defendant of any obligation has not been fulfilled, there would be no unlawful interference with business as the two claims were based on the same facts. The whole tenor of the appeal had been to challenge the basis of the whole decision. In the result, the consequence of allowing the appeal is to set aside the whole decision and substitute therefor an order dismissing the action in its entirety.”

has also come under attack for the reason that there was not before the Court of Appeal any ground of appeal challenging the finding of the trial court on the respondent’s liability for the tort of unlawful interference with the appellants’ business. It is urged on us to restore the trial court’s finding on liability for the said tort.

The respondent (as the appellant in the court below) in its amended notice of appeal filed 11 grounds of appeal the last of which read:

“Judgment is against the weight of evidence.”

In the appellants’ brief before the court below four issues were formulated as calling for determination, Issues 3 and 4 of which read:

3. Was the trial Judge right in law in holding that the defendant is liable to the six plaintiffs for breach in cancelling the irrevocable letters of credit it issued in favour of the 3rd to 6th plaintiffs?

4. If the answer to issue No. 3 is in the affirmative, was the trial court right in making the various awards of damages it made in favour of the six plaintiffs?”

It would appear to me that in the circumstances of this case Ayoola JCA was in order to observe, as he did, in the passage of his judgment under attack. This Court in Nta v Anigbo (1972) 5 SC 156 decided that the omnibus ground of appeal postulates that “there was no evidence which, if accepted, would support the finding of the learned trial Judge
or the inference which he had made”. See also *Ali v The State* (1988) 1 NWLR (Part 68) 1. That undoubtedly is the case here. There was no scintilla of evidence to support the trial court’s finding of liability on the alternative claim of the appellants. I think this finding can be challenged on the omnibus ground of appeal. Ideally, though, it would have been more prudent if the appellants in the court below had raised a specific ground of appeal challenging the finding of liability on the alternative claim.

The case of *Otuedon v Olughor (supra)* relied on by the appellants is just not apposite to the present case. In that case, the two courts below had found that the defendants were bound by a documentary evidence tendered at the trial. That finding that they were bound by the evidence tendered was not appealed against on appeal to this Court. There I held that the defendants could “not be heard to argue against that finding”. In *Ogunbiyi v Ishola (supra)*, Onu JSC observed at page 23 of the report:–

“Be it noted that where a party has not appealed against a finding of the trial court or the Court of Appeal, he cannot be heard to question that finding on appeal. See *Ijale v Leventis and Co. Ltd* (1959) SCNLR 255, (1959) 4 FSC 108, the essence of an appeal being, to have an opportunity to have one’s suit re-examined before a higher or independent panel with a view to convincing such a panel in its favour.”

I agree with this statement of law. In the circumstances of this case, however, where there was no evidence to support a finding made by the trial court, I think that finding can be challenged under the omnibus ground of appeal that the decision is against the weight of evidence.

In view of all that I have been saying, I answer question (a) in the affirmative. As the alternative claim was predicated on there being a breach of contract and that premises having been found not to be the case by the court below, the verdict of the trial court on that claim was rightly reversed by the court below.
In view of the conclusion reached on issue (a), no useful purpose will be served by discussing this issue. The respondent was found not liable for breach of contract and for unlawful interference with the appellants’ business. It is not necessary any longer to consider the issue of damages. Sufficient to say that the court below was right in its decision setting aside the award of damages made by the trial court. I affirm that decision.

In conclusion, I find no merit in this appeal which I dismiss with ₦10,000 costs to the respondent.

BELGORE JSC: The appellant never fulfilled the conditions the respondent needed to open a letter of credit as requested of him. There is therefore no evidence, throughout the proceedings in the trial court, of any breach of contract much less any damages arising therefrom. The Court of Appeal came to a correct conclusion in this matter. I agree with the lead judgment of my learned brother, Ogundare JSC, in his conclusion that this appeal has no merit. I also dismiss it with ₦10,000 costs to the respondent.

MOHAMMED JSC: I also agree that this appeal has failed as my learned brother, Ogundare JSC, has ably elaborated in his judgment. I have had the privilege of reading the judgment in draft before now. In the lead judgment all the salient issues have been considered and I have nothing more to add. The appeal is dismissed. I award ₦10,000 costs in favour of the respondent.

ACHIKE, JSC: I have had the privilege of reading the judgment just delivered by my learned brother, Ogundare JSC. I entirely agree with the reasoning and the conclusion that this appeal is completely devoid of merit and deserves to be dismissed. The appeal raises some elementary but fundamental principles of the law of contract that demand to be reiterated, if only by way of emphasis.
The six plaintiffs/appellants had in their prolix 27 paragraphs of their amended statement of claim, sought for 11 reliefs. The amended appellants’ pleadings have been substantially reproduced in the leading judgment and no reason demands that they be reproduced again in this judgment. The resume of the plaintiffs’ claim, as can be distilled from the tedious paragraphs of the amended statement of claim, is that the respondent, after issuing letters of credit in favour of the plaintiffs’/appellants’ customers/creditors abroad unilaterally and wrongfully cancelled them in breach of the contractual arrangement between the parties. It is in consequence of the said breach that has occasioned injury that the plaintiffs made this claim of several billion Naira for breach of contract. In the alternative, the plaintiffs claimed the sum of ₦16,315,365,565, special and general damages for unlawful interference with the business of the plaintiffs, including interest on the aforesaid several billions, and in the further alternative, for a total sum of ₦221,627,500 special and general damages for unlawful interference with the business of third to sixth defendants.

The respondent in its own further amended statement of defence denied the alleged contract. In fact, the respondent averred that the opening of the letter of credit was predicated on eight stipulated conditions which the plaintiffs failed to comply with.

After due hearing, the learned trial Judge found for the plaintiffs and held that there was a breach of contract and made specific awards to the six plaintiffs totalling several billion Naira.

Dissatisfied, the respondent appealed to the Court of Appeal against the judgment of the trial Judge as regards liability and quantum of damages. The lower court allowed the appeal, set aside the judgment of the trial court and also dismissed the appellants’ cross appeal on quantum of damages. The lower court expressly held that the respondent was not liable for any breach of contract or for unlawful interference with the appellants’ business.
The appeal to this Court is at the instance of the plaintiffs/appellants.

In their brief, the appellants identified two issues for determination namely:

"(a) Whether the Court of Appeal was right in reversing the finding of the lower court that the defendant/respondent unlawfully interfered with the business of the 3rd to 6th plaintiffs/appellants and

(b) Whether the award of damages made in favour of the 3rd to 6th plaintiffs/appellants is sustainable in law."

The respondent adopted these two issues formulated by the appellants. It is clear that these two issues are expressly directed to the case of the third to sixth appellants because the first and second appellants cease to be interested in the appeal.

The nature of the plaintiffs’/appellants’ claim, as averred in their amended statement of claim, which of course they failed to prove, was that there was a subsisting contract between the parties. Whether or not there is a semblance of a legally binding agreement between the parties, that is, a situation where the parties to the contract confer rights and impose liabilities on themselves, will largely depend on whether there exists a mutual assent between them. Where there is doubt on whether the parties have concluded a legally binding agreement, the court has the responsibility to analyze the circumstances surrounding the alleged agreement and determine whether the traditional notion of “offer” and “acceptance” can be distilled from the purported agreement. The mutual assent must be outwardly manifested. The test of the existence of such mutuality is objective. See Norwich Union Fire Insurance Society v Price (1934) AC 455 at 463. When there is mutual assent, the parties are said to be ad idem. Now the two items “offer” and “acceptance”, earlier referred to, call for some explanation in order to recognise whether or not the parties are ad idem. An “offer” is an expression of readiness to contract on the terms specified by the offeror (ie the person making the offer) which if
accepted by the offeree (ie the person to whom the offer is made) will give rise to a binding contract. In other words, it is by acceptance that the offer is converted into a contract.

The first question that calls for determination is whether there was a binding contract between the parties, and if so, whether there was a breach of same. On their part, the appellants maintain that they applied to the respondent for irrevocable letters of credit to enable the first and second appellants to import hops and other raw materials. Consequent to this, the respondent stipulated certain conditions precedent to be met by the appellants before the letters of credit could be issued. These were set out in exhibit 2. The appellants in evidence attested that they substantially complied with the conditions stipulated in exhibit 2 except conditions 2, 3 and 8 for which they requested the respondent to waive. By another contract, the import licences of the third to sixth appellants were to be put to use for the production of beer and soft drinks and the profits accruing therefrom would be shared partly by the third to sixth appellants and partly used to defray the outstanding loan of the first and second appellants. The appellants concluded their version of the transaction by putting in evidence exhibits 10, 10(a) and 10(b) as copies of the established letters of credit that the Chairman and Managing Director of the appellants showed to their overseas creditor in convincing them as regards security for goods that would be supplied on credit to the appellants. When the appellants learnt of the threat of cancellation of letters of credit by the respondent, they advised the respondent to reconsider the position and warned it of the inevitable damages that would result therefrom. In fact, this action was commenced as the respondent failed to heed the appellants’ warning.

For the respondent, it was contended that there was no concluded contract between the parties because the appellants failed to comply with the conditions stipulated in exhibit 2 and submitted that, even if there was a binding contract as alleged, its breach would avail only the overseas
creditors of the appellants the right to initiate an action for breach of contract, but definitely not the appellants. It concluded by pointing out that exhibits 10, 10(a) and 10(b) were not letters of credit but were forms which, if properly and completely furnished with the necessary details, would enable the appellants to obtain the desired letters of credit.

The learned trial Judge, without embarking on a detailed evaluation of the evidence placed before him regarding whether or not the parties concluded a binding contract, particularly as it related to the unfulfilled conditions 2, 3 and 8 under exhibit 2, whether there was waiver of these three conditions, and whether there had been the issuance of letters of credit in favour of the appellant’s overseas creditors, arrived at a precipitate conclusion that there existed a binding contract between the parties. But, in allowing the appeal, the Court of Appeal denied that such a conclusion was tenable. In allowing the appeal, the Court of Appeal inter alia, specifically found as follows:–

1. That some of the conditions precedent to the issuance of irrevocable letters of credit were not complied with by the appellants.

2. That the respondent did not waive any of the conditions that were not complied with.

3. That the respondent did not issue any letters of credit and none was cancelled.

4. That the respondent was not liable to the appellants either in contract or tort.

The alleged breach of contract arose from the cancellation of the letters of credit at the instance of the respondent. Clearly, if the respondent did not issue any letters of credit there was nothing to cancel. Indeed, it became obvious that where some of the conditions precedent for the issuance of letters of credit were not performed, it was extremely difficult, in legal circles, to appreciate how one can either picture the existence of the alleged contract or objectively analyse the fancied contract between the parties in terms of “offer” and
“acceptance”. Thus, on the appellants’ admission that some conditions precedent to the conclusion of a legally binding contract were yet to be complied with, it became certainly unarguable that there was no meeting of the minds between the parties that could lead to the conclusion that the parties were *ad idem* to the obligation on the issuant of a contract. Had the learned trial Judge adverted his mind to this basic principle of the law of contract, he would have easily appreciated that it was wishful thinking to hold that the parties had concluded a legally binding contract. This clearly explains why the Court of Appeal had no difficulty in holding that the respondent was not liable in contract. It is worthy of note that the appellants never appealed against that finding.

In the face of this far-reaching position, the appellants now turned to their alternative claim, ie that the respondent unlawfully interfered with the appellants’ business. This found favour with the learned trial Judge which it predicated on the lawful retention of the appellants’ import licences. That approach, surely, could not avail either the court or the appellants, first, as that fact was not pleaded by the appellants and, second, this claim in the alternative was based on the alleged breach of contract on the part of the respondent, which as earlier stated, had been denied by the lower court. Respectively, I agree with and adopt the reasoning of Ayoola JCA, as he then was, when in his judgment he observed thus:—

“Although the Judge purported to find the claim for unlawful interference established. It is clear that the alternative claim was predicated on there being a contract and a breach of that contract. The defendant has appealed against the ‘whole decision’ which must include the Judge’s view on the alternative claim. It is evident that if there was no breach of contract and if the condition precedent to the performance by the defendant of any obligation has not been fulfilled, there would be no unlawful interference with business as the two claims were based on the same facts. The whole tenor of the appeal had been to challenge the basis of the whole decision. In the result, the consequence of allowing the appeal is to set aside the whole decision and substitute therefore an order dismissing the action in its entirety.”
What this boils down to is that, since the trial court premised the respondent’s liability on the alternative claim of unlawful interference with the business of the appellants by the respondent’s breach of the alleged contract that was discredited by the lower court, it necessarily follows that the nonexistence of the contract alleged completely negatived the alternative claim of unlawful interference with the business. In effect, the appellants (as plaintiffs) had no cause of action. The Court of Appeal was right to have set aside the judgment of the trial court wherein it upheld the alleged contract.

Since the lower court had found that the respondent was not liable to the appellants either in contract or in tort, a finding I am in full agreement with, no useful purpose will be served to consider the issue of damages, the award in respect thereof the lower court set aside. I would accordingly affirm the decision on damages.

In the result, this appeal fails and I dismiss it with ₦10,000 costs.

EJIWUNMI JSC: I have had the privilege of reading in advance the judgment just delivered by my learned brother, Ogundare JSC. In the said judgment the facts that led to this appeal have been adequately reviewed and I also agree with the reasoning in respect of the issues raised for the determination of the appeal, which resulted in the dismissal of the appeal in its entirety.

For all the reasons so advanced in the lead judgment, I also dismiss the appeal with costs in the sum of ₦10,000 in favour of the respondent.

*Appeal dismissed.*
Simetequip (Nig.) Limited and another v Omega Bank Plc

COURT OF APPEAL, BENIN DIVISION
BA’ABA, AKAAHS, ROWLAND JJCA
Date of Judgment: 16 JULY, 2001

Banking – Interest rates – Guidelines on interest rate – Given by Central Bank from time to time generally and not to a particular bank or in relation to a particular transaction

Facts

The appellant took a loan from the respondent, which he failed to liquidate, whereupon the respondent took him to court and obtained judgment against him under the undefended list procedure.

He appealed to the Court of Appeal averring that inter alia the respondent was arbitrarily changing the interest rate.

Held –

There can be no question of fixing arbitrary rates of interest or rates of interest contrary to C.B.N.’s guidelines. The necessary guidelines on the rate of interest on loans are given by the Central Bank from time to time generally and not to a particular bank or in relation to a particular transaction.

Appeal dismissed.

Cases referred to in the judgment

Nigerian

Demuren v Asuni (1967) 1 All NLR 94
Egbe v Alhaji (1990) 1 NWLR (Part 128) 546
Fadiora v Gbadebo (1978) 3 SC 219
Gekebe v Enekebe (1964) All NLR 105
a  
Mobil Oil v Federal Board of Internal Revenue (1977) 3 SC 97
Nishizawa Ltd v Jethwani (1984) 12 SC 234
b  
U.B.N. Ltd v Ozigi (1994) 3 NWLR (Part 403) 404
UTC (Nig.) Ltd v Pamotei (1989) 2 NWLR (Part 103) 244
Ukwu v Bunge (1997) 8 NWLR (Part 518) 527
c  
University of Lagos v Olaniyan (No. 1) (1985) 1 NWLR (Part 1) 156
Worbi v Asamanyuah 14 WACA 669
d  
Counsel
For the appellant: OO Fakunle, Esq. (with him A Adekoya)
For the respondent: RW Ekundayo, Esq.
e  
Judgment

BA’ABA JCA: (Delivering the lead judgment) This is an appeal against the judgment of the Ondo State High Court, sitting at Akure, in Suit No. AK/12/91 delivered on 12 February, 1992.

The respondent was the plaintiff in the trial court, where he commenced an action against the appellants (as defendants), by a writ of summons dated 23 January, 1991 supported by a 20 paragraph affidavit. The action was brought under Order 23 Rule 1 of the Ondo State High Court (Civil Procedure) Rules, 1987, under the undefended list procedure. The respondent’s claim as contained in the writ of summons at page 2 of the record is as follows:–

“The plaintiff’s claim against the defendant jointly and severally is for the sum of ₦666,702.94 (Six Hundred and Sixty-six Thousand, Seven Hundred and Two Naira, Ninety-four Kobo) being the amount owing as loan and interest on the account of the 1st defendant with the plaintiff at its Akure branch, and interest at the current bank rate on the said sum of ₦666,702.94 from 31 December, 1990 until payment before judgment or payment of the judgment debt in accordance with the usage of bankers and course of dealing.
between the plaintiff on the one part and the defendants on the other part.”

Upon being served with the writ of summons accompanied by the supporting affidavit, a memorandum of appearance dated 11 February, 1991 was filed on behalf of the appellants by their Counsel, MB Alonge Esq. Thereafter, in reaction to the supporting affidavit, a notice of intention to defend dated 25 February, 1991, accompanied by a 19 paragraph counter-affidavit, deposed to by one Theophilus Ojo Adejoro, the second appellant, was filed on behalf of the appellants on 21 March, 1991. The respondent, apparently in response to the counter-affidavit filed by the appellants, filed what they erroneously titled “counter-affidavit”, deposed to by one Yinka Olaniyan, a Manager in the respondent’s bank, containing nine paragraphs. The appellants, in turn, filed a further and better counter-affidavit of nine paragraphs, deposed to by Theophilus Ojo Adejoro, the second appellant.

The learned trial Judge in his judgment delivered on 12 February, 1992 held:

“This case was taken in this Court on 30 January, 1991 for the first time and was adjourned to 21 March, 1991 at the instance of the defendants’ Counsel. It was adjourned again to 24 April, 1991 and 30 May, 1991 respectively. The plaintiff in this case brought this matter pursuant to Order 23 of the Rules of the High Court of Ondo State, 1987 and filed a writ of summons and an affidavit in support on 23 January, 1991. The defendant on 21 March, 1991 filed a notice of intention to defend and in addition filed what was captioned a ‘counter-affidavit’. On 30 May, 1991 I ruled that the defendant had no good grounds of defence to this action and ordered that the suit be entered in the undefended list for hearing as such and the case was adjourned to 4 June, 1991 for hearing. On 4 June, 1991 the case was further adjourned to 5 July, 1991 at the request of the defendants’ Counsel in view of the fact that there was a move at settlement. The case was again adjourned to 6 September, 1991, 25 November, 1991 and today 12 February, 1992. Having considered the writ of summons and the affidavit in support of the action and the contents of the ‘counter-affidavit’ attached to the defendants’ notice of intention to defend the action which I am not convinced provides enough defence to the action,
judgment is hereby entered against the defendants in favour of the plaintiff as per the latter’s writ of summons.”

Being dissatisfied with the judgment, a notice of appeal dated 25 February, 1992 was filed on behalf of the appellants on 26 February, 1992 containing four grounds of appeal. The grounds of appeal are as follows:

“(1) The whole proceedings are a nullity in that a likelihood of bias overshadows the case as the learned trial Judge that presided over the proceedings is a sister-in-law of the chairman of the plaintiff as is patent in exhibit E attached to the writ of summons and he held the post until January, 1992.

(2) The learned trial Judge erred in law in entering the suit for hearing in the undefended list when the conditions precedent in law before doing so were not nullified.

Particulars of Error

(a) There was no application by way of motion for the issue of the writ of summons in the case,

(b) the writ was issued in the normal way and accompanied with an affidavit dated the same day,

(c) it is not the court, but the solicitor to the plaintiff, that marked the writ as one of the undefended list.

(3) The trial court failed to exercise its discretion judiciously and judiciously in refusing leave to the defendant to defend the claim and this led to a miscarriage of justice.

Particulars

1. defendants delivered a notice that they intended to defend the suit,

2. defendants delivered two affidavits to that effect,

3. the affidavits show that the defendants took the loan at an interest rate of 13%; the increase in the rate of interest by plaintiff first to 17% and later to 29% was wrongful; commission on the turnover was unilaterally increased by plaintiff from 2% to 3%; sums of money were wrongly debited to defendants’ account; plaintiff breached its contract with defendants by preventing defendants from operating their account thereby frustrating their efforts and making them to lose some contracts; wrong insurance premiums were debited at compound interest to the account exhibited by plaintiff was untrue and unfair nor was there any reconciliation
of same and defendant gave notice of a counterclaim for which they wanted to sue the plaintiff,

4. the decision of the court is against the weight of affidavit evidence before the court.”

The facts of this case are simple and largely not in dispute between the parties. The respondent is a limited liability commercial bank, while the first appellant is a registered liability company. The second appellant is a business man. The appellants were customers of the respondent bank at its Akure Branch, operating current account No. 010100347 on which the appellants obtained credit facility and entered into a mortgage agreement in respect thereof. As time passed by, the account was not operated, culminating in the failure of the account which accrued interest that amounted to ₦666,702.94 as at 31 December, 1990.

Respondent’s repeated demands for the payment of the said sum was not heeded by the appellants, the consequence of which led to the institution of an action under the undefended list, leading to this appeal.

Briefs of argument were filed and exchanged by the parties in accordance with the rules of practice and procedure of this Court.

At the hearing of the appeal which came up on 23 May, 2001, the application by a motion on notice dated 23 May, 2001, for substituting the name Omega Bank Plc for the name Owena Bank was granted by this Honourable Court in its order dated 23 May, 2001, hence the change of the respondent’s name to Omega Bank Plc. Counsel for the parties adopted and relied on their respective briefs for the purpose of this appeal.

The appellants formulated two issues for the determination of this Court in the appellant’s brief. They are:–

“(i) Whether or not the lower court was right in entering this suit in the undefended list when no application by way of motion praying for such was ever made to it by plaintiff/respondent.
(ii) Whether the affidavits sworn to by appellants herein and filed with the notice of intention to defend plaintiff/respondent’s action at the lower court dated 21 March, 1991 and 3 July, 1991 respectively disclosed sufficient defence on the merits as to warrant the setting aside of the judgment given by the lower court under the undefended list.”

The respondent, on the other hand, also formulated two issues for determination as follows:

(i) Whether or not the lower court was right in entering this suit in the undefended list when no application by way of motion praying for such was ever made to it by the respondent.

(ii) Whether affidavit evidence of the appellant disclosed sufficient evidence on the merits to warrant listing the suit under the normal cause list instead of the undefended cause list under which it was heard and determined.

Learned Counsel for the appellants, OO Fakunle Esq., in the appellants’ brief dated 9 February, 2000, filed on 10 February, 2000 and the appellants’ reply brief dated 9 January, 2001, filed on 10 January, 2001, referred to Order 23 Rules 1 and 2 of the Ondo State High Court (Civil Procedure) Rules, 1987 and submitted that the suit of the plaintiff can only be entered in the undefended list and the writ of summons marked accordingly on the application of the plaintiff. He contended that, in the case at hand, nowhere did the plaintiff make an application to the court as required under Order 23 Rule 1 of the Ondo State High Court (Civil Procedure) Rules, 1987. That, quite surprisingly, what the plaintiff did was to take out a writ of summons in the ordinary way against the defendant which was filed on 23 January, 1991, which the plaintiff on its own typed at the top left-hand side of the writ with the words “undefended list”. Learned Counsel for the appellants argued that for the lower court to rightly place the case under the undefended list and mark the writ of summons accordingly, there ought to have been an application made to it, which is not the situation in this case,
citing a number of cases in support of his submission, including the case of *U.T.C. (Nig.) Ltd v Pamotei* (1989) 2 NWLR (Part 103) 244 at 299. He concluded his submission on his issue (i) by submitting that the learned trial Judge was, therefore, in error when he entered judgment in favour of the respondent and urged us to resolve the issue in favour of the appellant.

On issue (ii), learned Counsel for the appellant submitted that the two affidavits, dated 21 March, 1991 and 23 July, 1991, filed and submitted to the lower court by the appellants (as defendants) disclosed sufficient defence on the merits to warrant the setting aside of the judgment given by the lower court under the undefended list.

He referred to the supporting affidavits, the counter-affidavit and the further and better affidavit and claimed that various sums of money, not being owed by the appellants, were wrongly debited to the appellants’ account.

It is submitted that the averments contained in the appellants’ affidavits show that the amount claimed by the plaintiff/respondent in its writ is in serious dispute and that the appellants have shown that the amount claimed is wrong. Learned Counsel for the appellant cited a number of cases in support of his appeal and urged us to allow the appeal and set aside the judgment of the lower court.

In reply, learned Counsel for the respondent, Chief Ade-muyiwa *Adeniyi* Esq., submitted on Issue 1 that the trial Judge was right by entering the suit in the undefended list on the application of the respondent’s Counsel for the issuance of the writ and the action under the undefended list. He referred to pages 21–22 of the record and submitted that, in the light of the portions of the record referred and reproduced at pages 3 and 4 of the respondent’s brief, it is apparent on the face of the record that the respondent applied for the leave to list the action under the undefended list and obtained the leave after which the action was listed under the undefended list. Counsel contended that the respondent...
complied with the provisions of Order 23 Rule 1 of the Ondo State High Court, 1987. He urged us to resolve Issue 1 against the appellants as the record clearly showed that the case was only listed after the respondent had applied and urged its application to have the action listed on the undefended list.

It is submitted on Issue 2, that the complaint of the respondent is one bordering on the exercise of the discretion of the trial court for the court’s refusal to grant leave to the appellants to defend the action under the general cause list. Citing *Ukwu v Bunge* (1997) 8 NWLR (Part 518) 527, learned Counsel said the Supreme Court has enumerated the special circumstances in which an appellate court will interfere with an exercise of discretion by a lower court, which he enumerated at page 6 of the respondent’s brief. It is further submitted that none of the special circumstances enumerated were applicable to the case. Learned Counsel for the respondent contended that the issue formulated as issue 2 in the appellant’s brief has no direct relationship or bearing to grounds 3 and 4 of the grounds of appeal challenging the court’s exercise of its discretion.

From a critical examination of the issues formulated in this appeal, I find that issue (i) was never canvassed in the trial court; it is therefore a fresh issue. Going by the record, the appellants entered appearance, filed a counter-affidavit and a further and better counter-affidavit and participated in the proceedings without any complaint. The appellants did not only take steps in the proceedings but actively participated. The most important issue here is that there is no complaint about entering the suit under the undefended list, consequently the issue was not tried at the lower court. In my humble opinion, the issue is a fresh issue. The law is well settled that a point raised for the first time in the appellate court can only be argued with the leave of the court. See *Fadiora v Gbadebo* (1978) 3 SC 219. This is because this Court being an appellate court with jurisdiction only to correct the errors of the court below on the issue and to know in
what respect it can exercise its supervisory jurisdiction to correct any errors of that court. See Purnell v The Great Western Railways (1876) 1 QBD 636. In this instant appeal no leave was sought and obtained. I therefore hold that issue (i) is not a competent issue and ought to be struck out and it is hereby struck out.

Again, the grounds of appeal against a decision must relate to the decision and must be a challenge to the validity of the ratio. See Egbe v Alhaji (1990) 1 NWLR (Part 128) 546 at 590. Any argument contained in either the appellant’s brief or the respondent’s brief, which does not conform or relate to the ground of appeal filed, which gives life to the appeal, is irrelevant and must be disregarded. It does not appear to me that issue (ii) formulated by the appellant relates to any of the four grounds of appeal. In other words, the issue does not derive its existence from any of the grounds of appeal, so it is an issue hanging without any ground of appeal to stand on, consequently, it is incompetent and must be struck out. It follows therefore that the argument based on issue (ii) is irrelevant and must be disregarded. As it is there is no issue left upon which the appeal is to be determined. In such a situation, in my view, the proper order for me to make is to strike out the appeal.

Assuming I am wrong, I believe I am not, but to be on the safe side, I will now proceed to determine the appeal on its merits.

Since the controversy is centered on the provision of Order 23 Rules 1, 2 and 3(1) of the Ondo State High Court (Civil Procedure) Rules, I shall start by reproducing the provisions of the said order which reads:

“Order 23
THE UNDEFENDED LIST

1. Whenever application is made to a court for the 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 circumstance of the particular case.

2. There shall be delivered by the plaintiff to the registrar upon the issue of the writ of summons as aforesaid, as many copies of the abovementioned affidavit as there are parties against whom relief is sought, and the registrar shall annex one such copy to each copy of the writ of summons for service.

3(1) If the party served with the 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.”

At pages 21–22 of the record, the learned trial Judge said:—

“This is an application brought under Order 23 of the Ondo State Rules of the High Court for this action to be entered as an undefended list. The application was filed on 23 January, 1991. On 20 February, 1991 Mr MB Alonge learned Counsel for the defendant intimated the court of his intention to defend the action. Therefore at his instance the case was adjourned to 21 March, 1991. On 21 March, 1991 the defendant filed notice of intention to defend. On 21 March, 1991 at the instance of the learned Counsel for the defendants the case was further adjourned to 24 April, 1991.

On 24 April, 1991 learned Counsel for the defendant wrote to inform the court that a letter dated 23 April, 1991 of his inabilities to appear and suggested some dates. The case was thereafter fixed for 30 May, 1991 which is today and which was one of the dates suggested by the learned Counsel for the defendants. It is however, surprising that neither the defendants nor their Counsel appeared in court today in spite of the fact there was proof of service of the hearing notice on the Counsel for the defendants. There I proceeded to hear the application of the plaintiff’s Counsel I have also gone through the affidavit attached to the notice of the defendant referred to as the counter-affidavit and I am not convinced that the defendants have a good defence to the action. Also I have listened to the oral submission of the learned Counsel for the plaintiff and gone through his writ of summons and the affidavit in support and the various annexures thereto. In the circumstances I believe that
therein are good grounds of defence to this action. The suit is therefore entered for hearing in the undefended list and the writ of summons shall be accordingly marked.

Case adjourned to 4 June, 1991 for hearing.”

Dealing with the rules, I am attracted by what Belgore JSC said about the rules in the case of UTC (Nig.) Ltd v Pamotei (1989) 2 NWLR (Part 103) 244 at 296. He said:–

“Rules of procedure are made for the convenience and orderly hearing of cases in court. They are made to help the cause of justice and not to defeat justice. The rules are therefore aids to the court and not masters of the court. For courts to read rules in the absolute without recourse to the justice of the cause, to my mind, will be making the courts slavish to the rules. This certainly is not the raison d’etre of the rules.”

From the portions of judgment reproduced above, taking the provisions of Order 23 of the Ondo State High Court (Civil Procedure) Rules, 1987 and regarding the rules as aids, I am convinced that there was substantial compliance with the provisions of the rules in placing the action under the undefended list.

It should be noted that it was not the respondent that placed the action under the undefended list but the court having considered the application and after being satisfied that the conditions, as provided by Order 23 of the rules, had been fulfilled. I am unable to understand the reason for the appellant’s complaint having regard to the ruling of the trial court. Whatever it may be, I hold that the learned trial Judge acted rightly. Issue (i) is therefore resolved against the appellants in favour of the respondent.

The parties relied on their affidavits and counter-affidavits. I shall only reproduce the ones I consider relevant in the determination of this appeal. In my view, paragraphs 4, 14, 15, 16, 17 and 18 of the supporting affidavit and paragraphs 4, 5 and 6 of what the respondent erroneously titled “counter-affidavit”, instead of further affidavit, appear relevant:–

“4. That the defendant operates a current account no. 010100347 at the plaintiff’s Akure Branch.”
14. That the plaintiff by letter dated 15 January, 1988, informed the 1st defendant of changes in the prevailing interest rate (a copy of the said letter is attached hereto and marked exhibit D).

15. That the plaintiff by letter reference no. 01/82/062/496/88 of 14 October, 1988, requested the 1st defendant to make repayment of its said indebtedness to the plaintiff (a copy of the said letter is herewith attached and marked exhibit E).

16. That the 1st defendant acting through the 2nd defendant acknowledged its indebtedness to the plaintiff vide letter reference no. TOA/S/OB/88/1 of 3 November, 1988, (a copy of the letter no. TOA/S/OB/88/1 is attached hereto and marked exhibit F).


18. That the 1st defendant acting through the 2nd defendant acknowledged its indebtedness to the plaintiff vide letter reference no. S/OB/NW/59/1 of 22 March, 1989 (a copy of the letter no. S/OB/NW/89/1 of 22 March, 1989 is attached hereto and marked exhibit G)."

"COUNTER-AFFIDAVIT"

4. That neither the 1st defendant nor the 2nd defendant has ever disapproved of the interest charged by the plaintiff on current account no. 010100347 in accordance with exhibits D and J of my affidavit dated 23 January, 1991; made pursuant to Order 23 Rule 1 of the Ondo State Rules of the High Court.

5. That the relevant directives governing the revision of interest rate as communicated to the 1st defendant herein vide the aforesaid exhibits D and J attached hereto and marked exhibit L–L1.

6. That it is not customary, nor is it the practice of bankers to charge commission on turnover (C.O.T.) in respect of indebtedness to a bank."

Although the appellants deposed to a counter-affidavit and a further and better counter-affidavit, I find that both merely contain a general denial except paragraphs 3 and 5 of the
counter-affidavit and paragraph 4 of the further and better counter-affidavit.

“Counter-affidavit

3. That when the overdraft was approved for the defendants in 1985 by the plaintiffs the agreed interest rate was 13% per annum subject to Central Bank revision. I attach herewith plaintiff’s letter ADV.01.82.061.424.85 and marked exhibit ‘A’.

5. That further to the matters referred to in paragraph 4 above, the agreed C.O.T. that is, commission on turnover was 2% per mille but unilaterally changed by the plaintiff to 3% per mille.”

“FURTHER AND BETTER COUNTER-AFFIDAVIT

4. That further to paragraph 7 of my first affidavit, the bank has since 1985 been charging compound interest on the sum of N3,867.38k wrongly debited to the defendants’ account.”

I also observed that the appellants did not controvert most of the averments of the respondent particularly those contained in the paragraphs reproduced.

For example, paragraph 18, which referred to an annexure marked exhibit G, a letter from the appellants, while the respondent has effectively countered all the main points averred by the appellants in their counter-affidavit as well as their further and better counter-affidavit as can be seen from the paragraphs herein reproduced.

Exhibit “G” reads:

“I/OB/NW/89/1

The Managing Director

Nation-Wide Credit Adjusters Ltd,

156, Herbert Macaulay Street

Ebute-Metta,

LAGOS STATE.

For the attention of MR KAYODE OLUYIDE – 101 Oyemekun Road, Akure

Dear Sir,

RE: OWENA BANK (NIG.) LTD – AKURE BRANCH VIDE AC-
COUNT NO. 347
a. This is to acknowledge the receipt of your letter ref: NCA/OWENA/AKURE/1- dated 26 January, 1989.

Our dialogue (Mr Kayode Oluyide/the undersigned) subsequent upon several personal calls at both ends refers. As discussed, a tough operational machinery has been set up to recover debts owed us to repay the overdraft taken from the bank.

b. We would however, like to bring to your attention that we took the overdraft to execute various projects for both the Federal and Ondo State Government for which payments have not been made. We are in the interim working and praying very hard to get the overdraft fully liquidated once and for all in order for us to have the peace of mind to achieve success in life. It may interest you to note that we are very anxious more than ever to pay up and collect our documents for a safe keep. We cannot afford to gamble with the property surrendered as collateral security to obtain the outstanding overdraft. PLEASE, accept this letter as an APPEAL to you and Owena Bank to give us sufficient time to allow us deep concentration on those sources from where we can get money to pay up the total outstanding liabilities. We appreciate your concerned efforts and that of the bank too, particularly based on the present economic position of all organisations. We shall, by the special Grace of God get back to you within the year to inform you that we have paid up fully the overdraft.

c. We shall thank you for your understanding and co-operation.

Yours faithfully,

PP: SIMETEQUIP LTD,

SGD.

T.O. ADEJORO

Chief Executive/Authorised Signatory.”

There can be no question of fixing arbitrary rates of interest or rates of interest contrary to C.B.N’s guidelines. The necessary guidelines on the rate of interest on loans are given by the Central Bank from time to time generally and not to a particular bank or in relation to a particular transaction. See U.B.N. Ltd v Ozigi (1994) 3 NWLR (Part 333) 404.

Considering a similar case under the undefended rules but different provision from the rules under consideration, the
Supreme Court in the case of *Nishizawa Ltd v Jethwani* (1984) 12 SC 234 at 299–300, *per* Oputa JSC said:–

“Although I held and still hold that the trial Judge was right in admitting the respondent’s statement of defence as one of the documents from which he can satisfy himself as to whether there are any facts sufficient to entitle the respondents to defend, he was wrong in not looking at all the papers filed – the plaintiff’s statement of claim, the affidavit sworn to on the plaintiff’s behalf, the dishonoured cheques, the guarantee, the confirmation letter. From a cool and dispassionate consideration of all these, he should have been driven to the conclusion that the defendant/respondent has not disclosed a defence on the merits.”

In the instant case, the learned trial Judge, as borne out by the record, satisfied himself having examined the affidavit, counter-affidavit and the annexures that the appellants have not disclosed sufficient defence to warrant granting leave to the appellants to defend. I have also examined the affidavit, counter-affidavit as well as the annexures and I entirely agree with the learned trial Judge that the appellants did not disclose any defence.

I am not in the least impressed by the conduct of the appellants before the trial court, which I believe contributed to the delay in determining the case brought under the undefended list for over one year.

It is trite that an appellate court will not interfere with the exercise of discretion by the lower court simply because, faced with a similar application, it would have exercised the discretion differently. See *University of Lagos v Olaniyan* (No.1) (1985) 1 NWLR (Part 1) 156 at 163 and *Worbi and Others v Asamanyuh and others* (1955) 14 WACA 669 at 671. But it may do so in special circumstances such as where the discretion was exercised wrong or insufficient weight was given to relevant considerations or where the tribunal acted under a misconception of the law or under apprehension of fact and in all other cases where it is in the interests of justice to interfere. See *Gekebe v Enekebe and Others* (1964) 1 All NLR 102; *Demuren v Asuni and others* (1967) 1 All NLR 94 and *Mobil Oil v Federal Board of..."
There is no reason whatsoever for me to interfere in this appeal. I therefore resolved issue (ii) also against the appellants.

In the result, having regard to the aforesaid, I hold that the appeal lacks merit and it is hereby dismissed. The judgment of the learned trial Judge, Olateru Olagbegi J, delivered on 12 February, 1992 is hereby affirmed by me with costs assessed at N5,000 in favour of the respondent against the appellants.

ROWLAND JCA: I have had the privilege of reading now the draft of the judgment just delivered by my learned brother, Ba’aba JCA. In the said judgment the facts leading to this appeal were exhaustively reviewed and the issues raised thereon and the arguments of Counsel were also carefully considered. I therefore agree with his reasoning and conclusion that this appeal lacks merits and should be dismissed. I endorse the consequential orders made therein including the orders on costs.

AKAAHS JCA: I read in draft the judgment of my learned brother, Ba’aba JCA, with which I agree. He considered all the issues raised in the appeal and he dealt with them adequately and I have nothing useful to add. I too hold that the appeal lacks merit and it is accordingly dismissed. I abide by the consequential order made on costs.

Appeal dismissed.
Nigerian Industrial Development Bank Limited v Olalomi Industries Limited

COURT OF APPEAL, ILORIN DIVISION
ONNOGHEN, AMAIZU, OKUNOLA JJCA
Date of Judgment: 19 NOVEMBER, 2001

Company law – Debenture not relating to land – Whether governor’s consent required

Words and phrases – Debenture – Meaning of

Facts
This is an appeal against part of the judgment of Honourable Justice AO Belgore of the Kwara State High Court of Justice, sitting at Offa in Suit No. KWS/OF/27/91 delivered on 31 May, 2000 in which he dismissed the present respondent’s case in its entirety but allowed the appellant’s counterclaim in part.

In the lower court, the respondent contended that the mortgage deed was null and void because the governor’s consent’s approval was conveyed by a permanent secretary, and that the debenture created in the deed was also void because the governor’s consent should have been obtained.

All these contentions were upheld by the lower court, hence this appeal.

Held –
1. Debenture is a company’s security for a monetary loan. In the instant case, the security usually creates a charge on the company stock or property, the debenture deed does not relate to a land transaction at all apart from the agreement in the recital deed to upstamp the principal deed, and neither does the deed state that it is supplemental to the principal deed. The deed of debenture is on floating assets and not a charge on land, which would have required the governor’s consent to be valid.
2. A holder of a statutory right of occupancy does not require the consent of a governor before he can issue or accept a debenture. This is because the mere fact that a person has a legally enforceable right over another property does not mean that the property has been alienated or assigned or mortgaged to that person.

3. There is nothing in the law which prevents someone else other than the delegate from conveying the approval so granted by the delegate. In the instant case, what the Ag. Chief Lands Officer did is merely to convey to the respondent the approval of the commissioner, who is the appropriate authority in that matter, as regards the application of the said respondent for that purpose.

4. Where there is anything or evidence from which the court can infer such an approval under the circumstances, it will be in the interests of justice to do so rather than allow the mortgagee to eat his cake and still have it back. The court should resist at all cost the attempt at using it as an engine to further fraud or cheating or dishonesty. This is because the banks exist to make profit; they are not Father Christmas.

Appeal upheld.

Cases referred to in the judgment

Nigerian

Adedeji v N.B.N. Ltd (1989) 1 NWLR (Part 96) 212

Adeyeri II v Atanda (1995) 5 NWLR (Part 397) 512

Anason Farms Ltd v NAL Merchant Bank Ltd (1994) 3 NWLR (Part 241) 253

Awujugbagbe Light Industries Ltd v Chinukwe (1995) 4 NWLR (Part 390) 378

Ayansina v Co-operative Bank Ltd (1994) 4 NWLR (Part 347) 742
Bamigboye v University of Ilorin (1999) 10 NWLR (Part 622) 290
Enahoro v I.B.W.A. (1971) 1 NCLR 180
Faagol Instruments Ltd v N.B.N. Ltd (1993) 1 NWLR (Part 271) 586
Federal Mortgage Bank Ltd v Babatunde (2000) FWLR (Part 3) 385
Ibekwe v Maduka (1995) 4 NWLR (Part 392) 716
Maximum Insurance Co. Ltd v Owoniyi (1994) 3 NWLR (Part 331) 178
Okonkwo v C.C.B. Nig. Ltd (1997) 6 NWLR (Part 507) 48
Olorunfemi v Asho (2000) 2 NWLR (Part 643) 143
Olufosoye v Fakorede (1993) 1 NWLR (Part 272) 747
UBN Ltd v Ozigi (1994) 3 NWLR (Part 333) 385
UBN Ltd v Sax Nig. Ltd (1994) 8 NWLR (Part 361) 150
Ugochukwu v C.C.B. Ltd (1996) 6 NWLR (Part 456) 524
Under Water Engineering Co. Ltd v Dubefon (1995) 6 NWLR (Part 400) 156

Book referred to in the judgment
Black’s Law Dictionary (7ed) page 408

Counsel
For the appellant: S Duro Adeyele, Esq.
For the respondent: Chief PAO Olorunnisola, S.A.N.

Judgment
ONNOGHEN JCA: (Delivering the lead judgment) This is an appeal against part of the judgment of Honourable Justice AO Belgore of the Kwara State High Court of Justice, sitting at Offa in Suit No. KWS/OF/27/91 delivered on 31 May, 2000 in which he dismissed the present respondent’s case in its entirety but allowed the appellant’s counterclaim in part. Being dissatisfied with the said judgment, the appellant has
appealed to this Court on eight grounds of appeal out of which learned Counsel for the appellant, Duro Adeyele Esq., has in his brief of argument filed on 2 May, 2001 formulated seven issues for the determination of the appeal. The said issues are as follows:

1. Whether the approval of mortgage contained at the last page of exhibit 1 can be rightly held to be null and void in law.

2. Whether the deed of loan and mortgage agreement (exhibit 1) between the parties could be held void for want of appropriate consent in view of the approval of mortgage by the commissioner contained at the last page of the self-same exhibit 1.

3. Whether the trial Judge correctly interpreted the deed of debenture (exhibit 30) when he held same to require the governor’s consent to be valid and thereby declared same null and void for want of the governor’s consent.

4. Whether the project Manager could be rightly held to have acted only as agent of the appellant and not the respondent throughout his stay at the respondent’s factory.

5. Whether the lower court was right in limiting the sum due from the respondent to the appellant on the term loan to N1,5 million with interest at 10% from 25 June, 1997 until the judgment sum is liquidated in view of the admissions by the PW1 and uncontradicted evidence on interest rate applicable.

6. Whether the lower court was not in error when it limited the sum payable to the appellant by the respondent on the working capital loan to N560,000 with interest at 14% per annum from 25 June, 1997 to date of judgment and thereafter at 10% in view of the clauses of exhibits 28 and/or 30; and the admission by the respondent’s sole witness.

7. Whether the lower court was not in error when it refused the declaration sought by the appellant as to exercise of its power of sale under exhibit 1.”

However, learned S.A.N. for the respondent, Chief PAO Olorunmisola, formulated six issues out of the said eight grounds of appeal. The only difference between the issues so formulated by the respondent’s learned Counsel lies in the fact that the learned S.A.N.’s Issue 1 combined the
appellant’s Issues 1 and 2. Otherwise the issues are the same. The said respondent’s Issue 1 is as follows:—

“ISSUE NO. 1 – Whether the deed of loan and mortgage agreement are not void for want of mandatory consent of the commissioner for lands to whom the state governor had delegated the power of approval.”

For the purpose of this judgment, respondent’s Issue 1 is preferred, since it has covered the appellant’s Issues 1 and 2 supra. However, the facts of the case include the following:—

The respondent being an industrial bank engages in the business inter alia of granting loans to corporate bodies engaged in industrial activities in the country such as the respondent who is engaged in the business of carpet production.

The respondent being in need of money to complete the importation of its factory machines and equipments approached the appellant for two loans – a term loan and a working capital loan which were duly granted. The term loan of ₦1.5 million was secured by a deed of loan and mortgage agreement (exhibit 1) while the second loan was secured by a deed of debenture (exhibit 30). As required by the Land Use Act, 1978, the respondent applied for the approval of the Governor of Kwara State of the mortgage transaction as evidenced in exhibit 1. The terms and conditions of the two loan transactions are as contained in exhibits 1, 28 and 30. Exhibit 28 being the letter of offer of the working capital loan.

Later on there was a dispute arising from the respondent’s failure to repay the loans resulting in a staff of the appellant being seconded to the respondent as project Manager in April 1989 following a meeting between the parties and in accordance with the terms of exhibit 28.

Before the respondent could commence production it had to be granted a further loan of ₦200,000 to procure raw materials and to take care of some essentials like outstanding staff salary, NEPA bills etc. The respondent commenced production but the relationship between the parties became
strained resulting in the appellant recalling the project Manager in September, 1990. Thereafter the respondent made a repayment of the sum of N150,000 out of the total loans granted by the appellant.

The respondent subsequently sued the appellant claiming the total sum of N521,413,740 as at 30 April, 1992 plus 10% interest until payment of judgment debt for loss of production based on full capacity production between April, 1989 to 30 April, 1992 etc. Making it necessary for the appellant to counterclaim in the following terms:–

“WHEREOF the defendant counterclaim against the plaintiff as follows:–

i. A sum of N290,931,823.08 being the total sum outstanding against the plaintiff and payable to the defendant on the term loan and working capital loan granted to the plaintiff by the defendant as at the close of business on 31 March, 1996.

ii. Interest on the sum of N290,931,823.08 at the rate of 14% per annum from 1 April, 1996 to the date of judgment and thereafter at the rate of 10% per annum until the whole judgment debt is fully liquidated.

iii. Declaration that the defendant is entitled to exercise her power under the deed of loan and mortgage dated 31 December, 1993 on the assets of the plaintiff to realise the judgment debt.” (See page 40 of the record.)

In arguing Issues 1 and 2, learned Counsel for the appellant submitted that by virtue of the provisions of Kwara State Legal Notice No. 8 of 1978 the Governor of Kwara State delegated his powers under section 22(1) of the Land Use Act, 1978 to the Commissioner in charge of Land and Housing who duly approved the mortgage transaction which approval was conveyed in a document titled “approval of mortgage” signed by the Acting Chief Lands Officer for the permanent secretary. That the lower court erred in not considering the content of the approval document but relied only on the person who signed the document conveying the said approval.
That the maxim “delegatus non potest delegare” does not apply to the case and the trial Judge was wrong in applying same. Learned Counsel further submitted that the content of a document ought to be considered as a whole to know what it purports to convey, not just to look at the signatory. For this Counsel cited and relied on Maximum Insurance Co. Ltd v Owoniyi (1994) 3 NWLR (Part 331) 178 at 193; Anason Farms Ltd v NAL Merchant Bank Ltd (1994) 3 NWLR 241 at 253; and UBN Ltd v Sax Nig. Ltd (1994) 8 NWLR (Part 361) 150 at 165.

That the respondent admitted taking and utilising the term loan of ₦1.5 million for which he mortgaged the property and applied for and obtained the approval of the appropriate authority. That it is morally despicable for the respondent to contend that the deed of loan and mortgage agreement (exhibit 1) was void solely on a perceived technical ground that a wrong authority approved the mortgage. For this learned Counsel relied on Ugochukwu v C.C.B Ltd (1996) 4 NCLC 661, (1996) 6 NWLR (Part 456) 524; Adedeji v National Bank (1989) 1 NWLR (Part 96) 212; Ibekwe v Maduka (1995) 4 NWLR (Part 392) 716 at 725; and Awojugbagbe v Chinukwe (1995) 4 NWLR (Part 390) 378 at 426.

Finally learned Counsel urged the court to hold that exhibit 1 is valid. In his reply learned Counsel for the respondent, Chief PAO Olorunnisola S.A.N., in his brief of argument filed on 18 May, 2001 submitted that the issue in contention is whether the letter of approval signed by the Chief Lands Officer for the permanent secretary satisfies the requirement of the law as stated in section 22(1) of the Land Use Act, 1978 and in view of the delegation of that power by the governor to the appropriate commissioner.

That the appellant pleaded in paragraph 4 of the defence that they will tender the letter of consent but failed to do so and only tendered a letter conveying the approval. That
section 149(d) of the Evidence Act should be invoked against the appellant.

That the cases cited by his learned friend are not apposite to this case neither is the morality of the respondent’s case an issue arising from the pleadings of the parties, learned S.A.N. further submitted, that the appellant who knew that her money is in danger had a higher moral and legal duty to ensure that the deeds were properly consented to. Finally learned S.A.N. submitted that where there is no direct proof of consent by the appropriate authority the purported deed, exhibit 1 is null and void, relying on *Federal Mortgage Bank v Babatunde* (2000) FWLR (Part 3) 385, and urged the court to resolve the issue against the appellant.

I have carefully gone through the submissions of both Counsel, the record of proceedings and the judgment of the learned trial Judge in this matter. It is very clear that both parties agree and the court also found that the powers of the governor to approve mortgage transactions etc conferred by section 22(1) of the Land Use Act, 1978 has been delegated to the Commissioner for Lands and Housing by virtue of the provisions of the Kwara State Legal Notice No. 4 of 1978. However the contention between the parties is whether the document titled “approval of mortgage” dated 25 July, 1983 attached to exhibit 1 and signed by the Acting Chief Lands Officer for the permanent secretary satisfies the requirement of the law. The said document under reference states *inter alia* as follows:

“... I am directed to refer to your application of 21 July, 1983 and to inform you that the mortgage of your landed property at Offa covered by statutory right of occupancy no. 4379 at Offa has been approved by the Honourable Commissioner for N1,500,000 (One Million, Five Hundred Thousand Naira only) with effect from 25 July, 1983.”

In considering this aspect of the case, the learned trial Judge found and held at page 135 of the record *inter alia* as follows:

“It follows then that a State Commissioner is empowered to sign letter of consent. In the instant case, an Ag. Chief Lands Officer
signed for the Permanent Secretary. I do not think this is right. It looks like the adage of a monkey sent with a message who in turn sends its tail to deliver the message to the addressee. This accords with the legal maxim that Delegatus with (sic) protest (sp) Dele-gare. ‘A delegate cannot delegate’. This means that a person to whom a power, trust or authority is given to act on behalf or for the benefit of another, cannot delegate it unless he is authorised to do so. In the instant case, there is multiple delegation of the power conferred on the commissioner. This has made nonsense of the Kwara State Legal Notice No. 41 of 1978. I hold that the consent signed by the Ag. Chief Lands Officer for the Permanent Secretary is invalid and I hold that the maxim Delegatus non protest (sp) delegare is applicable to this case.” (Emphasis supplied.)

It is very obvious that the learned trial Judge is very correct in his exposition of the maxim delegatus non potest delegare but I do not agree that the said maxim is applicable to the facts of this case. It is obvious that the learned trial Judge merely treated or assumed that the person who signed the document under consideration is the person allegedly consenting to or approving the mortgage transaction; in this case the Ag. Chief Lands Officer who signed same for the permanent secretary. If the learned trial Judge had read the body of the document, particularly the portion reproduced supra, he would have seen clearly that what the Ag. Chief Lands Officer did on behalf of the permanent secretary is to inform the respondent of the approval of the commissioner for the mortgage transaction as required by the said respondent in his application. This, it is my considered opinion, does not make either the permanent secretary or the Ag. Chief Lands Officer a sub-delegate of the Honourable Commissioner for the purposes of approval of mortgage transactions, so as to render the maxim “delegatus non potest delegare” applicable. What the Ag. Chief Lands Officer did is merely to convey to the respondent the approval of the commissioner, who is the appropriate authority in that matter, as regards the application of the said respondent for that purpose.

In short the document clearly and loudly speaks for itself and it is the best evidence of its contents. It is my considered
view that the document is sufficient evidence of the approval of the commissioner to the transaction referred thereto since it conveys the said approval. There is nothing in the law which prevents someone else other than the delegate from conveying the approval so granted by the delegate. It follows therefore that the case of Federal Mortgage Bank Ltd v Babatunde (2000) FWLR (Part 3) 385, cited and relied upon by learned Counsel for the respondent, does not apply to the instant case particularly as in that case the attention of this Court was not drawn to any legal notice authorising the delegation of the powers of the governor to approve mortgage transactions, as is the case in the present case on appeal. It is trite law that when an evaluation of evidence does not involve the credibility of witnesses but the complaint is against the non-evaluation or improper evaluation of evidence by the trial court, an appellate court is generally in as good a position as the trial court to do its own evaluation. See Adeyeri II v Atanda (1995) 5 NWLR (Part 397) 512.

It is my view that to hold that the document attached to exhibit 1 does not constitute evidence of the fact that the appropriate authority did approve the transaction, as held by the learned trial Judge, is to be very technical particularly having regard to the fact that it was the respondent who applied for the consent or approval and did present same for the purpose of obtaining the loan which he duly utilised only turning around, when called upon to repay same with interest as previously undertaken, to say that there is no approval to the transaction.

Where there is anything or evidence from which the court can infer such an approval under the circumstances, it is my view, that it will be in the interests of justice to do so rather than allow the mortgagee to eat his cake and still have it back. The court should resist at all cost the attempt at using it as an engine to further fraud or cheating or dishonesty. The banks exist to make profit; they are not Father Christmas.
In view of the facts of this case and the applicable law, it is my view, that the appellant’s Issues 1 and 2, which is the same as respondent’s Issue 1, be and is hereby resolved in favour of the appellant.

On Issue 3, which is whether the learned trial Judge correctly interpreted the deed of debenture (exhibit 30) when he held same to require the governor’s consent to be valid and thereby declared same null and void for want of the governor’s consent, learned Counsel for the appellant submitted that the document created collateral security for the working capital loan advanced to the respondent. That exhibit 30 is not supplementary to exhibit 1 as held by the trial court and that the efficacy of the said exhibit 30 is not hinged on exhibit 1 as also held. That exhibit 30 is charge on the floating assets of the respondent as clearly stated in clause 9 thereof. That no land is mentioned in the said exhibit 30 and that it was wrong for the trial court to have read into the said exhibit 30 what was not stated therein, relying on *UBN Ltd v Ozigi* (1994) 3 NWLR (Part 333) 385 at 400.

That the appellant, having failed to lead any evidence in support of its averments regarding its frustrated attempts at obtaining consent for exhibit 30 and a letter from the military governor’s office in relation thereto, is deemed to have abandoned the averments in the said pleadings and the trial court was wrong in invoking section 149(d) of the Evidence Act against the appellant.

Finally Counsel urged the court to answer Issue 3 in the negative and hold that exhibit 30 is a deed of debenture on floating assets and not a charge on land and as such does not require the governor’s consent to be valid.

On his part, learned Counsel for the respondent submitted that exhibit 30 deals with movable and immovable property of the respondent and as such it needs the governor’s consent. That the pleading on paragraph 7 of the amended statement of defence amounts to an admission that the document was not consented to.
That since it was not so consented to, it is void. That the finding of the trial court that exhibit 30 is hinged on exhibit 1 has not been faulted and urged the court to resolve the issue by upholding the findings of the trial court.

The question now is: What does the trial court say as regards exhibit 30? At page 135 of the record, the trial court found that the said exhibit was only stamped and not registered neither does it contain any consent of the appropriate authority. The learned trial Judge went further to state as follows, *inter alia*:

“...Mr Duro Adeyele, Counsel for the defendant emphasised that since this document does not relate to land transaction, there is no need to obtain the statutory consent. I am not in the least impressed by this submission. Why were efforts being made to obtain consent when the defendant knew that it was not necessary to do so? I hold that if the letter from the military governor’s office dated 28 December, 1990 had been tendered it would have been unfavourable to the defendant (see section 149 of the Evidence Act). A close look at the contents of exhibit 30 reveals that it was hinged on exhibit 1. Exhibit 1 has already been held to be void in this case. Exhibit 30 has nothing on which to hang and it is also a nullity. See *Macfoy v UAC Ltd* (1961) 3 WLR 1405.”

It is trite law that parties are bound by their pleadings. This statement of the law simply means that the parties are not allowed to lead evidence outside the facts pleaded. It does not mean that the parties are bound to give evidence on every fact pleaded. In other words, the parties are at liberty to abandon the averment in their pleadings when they consider the move necessary. See *Olorunfemi v Asho* (1999) 1 NWLR (Part 585) 1, (2000) FWLR (Part 20) 654 at 667.

Another important thing worth noting is the trite law that pleadings is not evidence and a court can only rely on evidence based on pleaded facts to make its findings.

In the instant case, it is clear that the facts pleaded in paragraph 7 of the amended statement of defence and the counterclaim were abandoned since no evidence was called in support of same and that being the case, I am of the view
that, the invocation of section 149(c) of the Evidence Act by the learned trial Judge is erroneous under the circumstances.

It is my view that to resolve the issue under consideration, it necessary to determine whether exhibit 30 in fact deals with both the movable and immovable property of the respondent and thereby needing the consent or approval of the governor in accordance with the provisions of the Land Use Act, 1978 as contended by learned Counsel for the respondent and the trial court. Now, it is not in doubt that exhibit 30 is a debenture which is defined by Black’s Laws Dictionary (7ed) page 408 inter alia as:–

“A company’s security for a monetary loan. The security usually creates a charge on company stock or property . . .”.

Looking closely at exhibit 30 there is no doubt at all in my mind that it does not relate to a land transaction at all apart from the agreement in recital D to upstamp the principal deed (ie exhibit 1), neither does exhibit 30 state that it is supplemental to exhibit 1. The fact of the exhibit not relating to land is made clearer by clause 9 thereof which provides as follows:–

“9. The borrower as BENEFICIAL OWNER hereby charges in favour of the lender by way of first floating charge its undertaking and all its other assets for the time being both present and future wherever situate including its uncalled stock or raw materials, goods in process of manufacture and furnished goods with the payment of the working capital facilities and such charge shall be a floating security.

The charge hereby created shall be shared pari passu with that created or to be created in favour of Commercial Merchant Bank providing additional working capital Facilities to the borrower.”

I am therefore of the firm view that the said exhibit 30 does not need the governor’s consent to make it valid since it does not relate to land. That being the case, it is immaterial that the appellant did not obtain such a consent. Recital D to exhibit 30 is an agreement by the respondent to upstamp the said exhibit 1 – it does not make the said exhibit 30 subject to consent.
In short, having held that exhibit 30 is a deed of debenture on floating assets and not a charge on land which would have required the governor’s consent to be valid, Issue 3 is hereby resolved against the respondent.

On Issue 4 which is: Whether the project Manager could be rightly held to have acted only as an agent of the appellant and not of the respondent throughout his stay at the respondent’s factory, learned Counsel for the appellant submitted that to the extent that the project Manager acted as the chief executive of the respondent, he becomes protanto, an alter ego of the company and that all decisions and actions he took as project Manager in relation to the affairs of the respondent were decisions and actions of the respondent. That, as the alter ego of the respondent, the respondent enjoyed his services and ought to bear liability for whatever wrong decision (if any) he took. That the trial court erred in holding that the project Manager was an agent of the appellant thereby holding the appellant liable for his actions; on the ground that the said project Manager was not appointed a receiver.

That, based on the agreement between the parties, the project Manager is the agent of the respondent. That the parties are bound by their contract relying on UBN Ltd v Ozigi (1994) 3 NWLR (Part 333) 385 at 400. He then urged the court to resolve the issue in favour of the appellant.

On his part, learned S.A.N. for the respondent submitted that the nature of the appointment of the project Manager is determined by the contents of exhibit 3. That the appellant accepts full responsibility for the project Manager’s conduct. That DW1 admitted that PW1 never made any physical withdrawal of money and that the appellant had full control in respect of all the disbursement. That the chairman of the respondent was rendered useless as the decision of the project Manager was final. That there is no evidence that the board of the respondent authorised the appointment of the project Manager nor ratified it. That the project Manager cannot therefore be the alter ego as the position was neither
by consent nor by common law. He then urged the court to resolve the issue against the appellant.

In his reply brief, learned Counsel for the appellant submitted that it is not the law that before one can be alter ego (agent) of a company, his appointment or engagement must have been by board resolution. That PW stated that the project Manager was appointed and in line with his discussion with the appellant. That PW’s quarrel was with the powers given to the project Manager *vide* exhibit 3, not as to his not being accepted.

The decision of the trial court being complained about, in the issue under consideration, is at page 138 of the record where the court held thus:

“The project Manager was not a receiver under any deed, so he cannot be said to be the agent of the plaintiff company. He was sent by the defendant to come and to (sic) bidders and that was exactly what he did. He was the agent of the defendant to whom he was responsible. The defendant took a risk and it is now its turn to bear the responsibility. I hold the defendant liable for the actions of the project Manager during his tenure at the plaintiff’s factory. It is clearly evident that the working capital was actually utilised by the project Manager.”

The next question to be answered is: What does the pleadings say on the matter?

In paragraphs 6 and 7 of the further, further amended statement of claim at page 51 of the record, the respondent pleaded as follows:

“6. The defendant appointed a project Manager as *per* its letter ISP/115/ Vol. 6/89 of 25 April, 1989 which the plaintiff hereby pleads.

7. The powers of the project Manager are contrary to the Companies Act, 1968 as he was superior to the board of Director of the plaintiff company.

9(d) The chairman (managing Director) of the plaintiff, Chief I.B. Abodunrin, protested orally against the appointment of a project Manager by the N.I.D.B. several times but to no avail and had to instruct Ijaodola and Company to write the letter of 20 June, 1990.”
a That is the case of the respondent as pleaded.

However, the appellant in its amended statement of defence and counterclaim paragraphs 10, 11, 12, 13 and 14 thereof pleaded as follows:

"10. In further answer to paragraph 4 of the statement of claim the defendant avers that under the terms and conditions by which the working capital loan was granted to the plaintiff and which conditions the plaintiff accepted completely, the defendant reserves the right to appoint or second to the plaintiff's management one of its staff as a general Manager of the company and who shall be signatory to the company.

11. The defendant avers that on Monday 30 March, 1989 or thereabout in the NIDB House, Lagos the managing Director of the plaintiff attended a meeting where the issue of appointment of project Manager was discussed.

12. The defendant avers that the project Manager was appointed with the knowledge, consent and approval of the plaintiff, the plaintiff is therefore estopped from complaining about the appointment now.

13. The defendant avers that the project Manager was appointed to ensure that the plaintiff company was commissioned within the shortest possible time.

14. The defendant avers that all the powers conferred on the project Manager were exercisable by him in consultation with the plaintiff’s chairman, and none of the said powers conflicted with the Companies Act, 1968."

g The above quoted paragraphs of the amended statement of defence and counterclaim clearly show that the appellant was concerned with meeting the case of the respondent as contained in the claim as regards the appointment of a project Manager and whether that appointment and the powers conferred on the said project Manager are in contravention of the provisions of the Companies Act, 1968. It is very clear from the pleadings reproduced above that the issue as to whose agent the project Manager is does not arise from the pleadings. I have also looked at paragraphs 3 and 4 of the amended reply to statement of defence/counterclaim as contained at page 17 of the record, which paragraphs did not make any difference. It is trite law that the parties are bound
by their pleadings and that evidence that is contrary to the pleadings goes to no issue.

However, the above notwithstanding, is the learned trial Judge right in holding that the project Manager is the agent of the appellant?

In law, an agency relationship arises when a person called the agent acts on behalf of another called the principal whereby the principal undertakes to be answerable for the lawful acts of the agent within the scope of authority given to him by the principal. See *Olufosoye v Fakorede* (1993) 1 NWLR (Part 272) 747. In *Bamigboye v University of Ilorin* (1999) 10 NWLR (Part 622) 290 at 329, an agent is said to mean a person authorised by another to act for him, one entrusted with another’s business. He is one authorised to transfer all business of the principal, all of the principal’s business of some particular kind, or all business of some particular place.

In the instant case, there is no doubt that the appellant approached the project Manager as chief executive of the respondent in accordance with exhibit 3. The appointment is said to be sequel to the discussions between the appellant and the respondent and in accordance with the provisions of exhibits 28 and 30. Even though condition 20 in exhibit 28 and condition 11 of exhibit 30 gave the appellant the right to appoint or second to the management the respondent one of the appellant’s staff, which is said to be the basis of the appointment of the project Manager, there is nothing in the exhibits referred to show expressly that the said project Manager is an agent of either the appellant or the respondent, though it can be inferred from the fact that he is part of the management of the respondent. However, from the contents of exhibit 4 the said project Manager had “... full executive authority” in respect of the respondent. I therefore agree with the submissions of learned Counsel for the appellant that the project Manager was thus the alter ego of the respondent, even though appointed by...
the appellant to the management of the respondent. In fact exhibit 10 by the said project Manager, being the management report to the board of Directors’ meeting of 5 October, 1990, clearly shows that the said project Manager was reporting to the board of the respondent and did seek the approval of that board for proposals. As the chief executive with “full executive authority” the project Manager carried out his duties, he paid “water rate, electric bill, workers salaries” and the allowances of the chairman of the respondent PW1, see page 72 of the record being the testimony of PW1. Also at page 74 PW1 said that “minor repairs were carried out on the leaking tank and fire fighting equipments were bought out of the proceeds from the sales of carpets and not from loan . . . They paid themselves by themselves”.

Apart from these the respondent also said that the said project Manager did some very bad things resulting in an alleged mismanagement of the respondent during his tenure.

It is my view that the project Manager with full executive authority can only be the agent of the respondent, not the appellant even though appointed by the appellant; it is on record that discussions were held between the parties before the appointment was made.

Learned S.A.N. for the respondent stated in his brief thus:–

“The PW1 said exhibit 3 stated that the appellant accepts full responsibility for the project Manager’s conduct.”

This is not correct. In the first place it is trite law that a document speaks for itself and that oral testimony is inadmissible to vary, add to or take away from the contents of document. Now paragraph 4 of exhibit 3 states inter alia:–

“. . . In the final analysis, however, Mr Ariyo-Adekola’s decisions will prevail and NIDB will hold him solely responsible for same.”

That clearly does not say that the appellant accepts full responsibility for the project Manager’s conduct as canvassed by the learned S.A.N.
Therefore, looking closely at the facts before the court and the arguments of both Counsel and the law, it is my view that the issue under consideration be and is hereby resolved in favour of the appellant.

On Issue 5 the Counsel for the appellant submitted that it is common ground that the term loan was advanced in 1982 at ₦1.5 million and that interest was 14% per annum. That PW agreed that the loan and interest are outstanding. PW1 tendered exhibit 11 dated 24 October, 1990 and agreed that the sum of ₦9,292,972.94 was the term loan outstanding as at then.

Learned Counsel then submitted that the lower court ought to have awarded ₦1.5 million together with interest from 1982 at the rate of 14% per annum until judgment and thereafter at 10% until liquidation. That fact admitted needs no proof, relying on Water Engineering Co. Ltd v Dubefon (1995) 6 NWLR (Part 400) 156 at 162.

That to accede to the award of the learned trial Judge is to hold that between 1982 to 1997 the term loan was interest free, which is not in accordance with banking custom on interest as judicially noted in UBN Ltd v Ozigi (supra); UBN Ltd v Sax Nig. Ltd (1994) 8 NWLR (Part 361) 150; and Faagol Inst. Ltd v NBN Ltd (1993) 1 NWLR (Part 271) 586 at 593–594.

Learned Counsel then urged the court to award interest on the term loan of ₦1.5 million at 14% per annum from 2 January, 1985 when repayment was to commence to the date of judgment ie 31 May, 2000 and thereafter at the rate of 10% per annum until liquidation.

On his part learned S.A.N. for the respondent submitted that since the evidence relied upon by his learned friend on the issue of interest on the term loan was based on exhibits 1, 2 and 30, which had been held to be null and void, there is no other evidence in support of same since the appellant
never gave evidence of what the usual custom of the bank is relating to interest.

Relying on the case of Ayansina v Co-operative Bank Ltd (1994) 5 NWLR (Part 347) 742 at 761, learned S.A.N. submitted that the appellant failed to prove the rate of interest. Learned Counsel also relied on Enahoro v IBWA Ltd (1971) 1 NCLR 180. That PW1 did not admit the rate of interest but merely stated what the void exhibits contained. He then urged the court to resolve the issue against the appellant.

In his reply brief, learned Counsel for the appellant submitted that the case of Ayansina v Co-operative Bank Ltd (supra) is irrelevant since exhibit 1 as tendered in this case and the terms of the contract as contained therein. Also that Enahoro v IBWA Ltd (supra) is no longer good law in view of the Supreme Court decision in UBN Ltd v Ozigi (supra) and other cases.

That it is not correct that PW1 only stated what is contained in exhibit 1 because at page 71 of the record the said witness stated unequivocally that the term loan was repayable with interest at 14% per annum. That PW1 therefore admitted that applicable interest rate.

I have gone through the record and the arguments of both Counsel and it is very clear to me that having found that in law exhibits 1 and 30 are valid, they are applicable to this case and constitute some of the terms and conditions of the contract between the parties particularly the term loan of ₦1.5 million. I agree with the learned Counsel for the appellant that PW1 admitted at page 71 of the record that “the first loan was repayable with interest at 14% per annum on the ₦1.5 million”.

Clause 11 of exhibit 1 provides as follows:–

“11. The borrower shall pay to the lender interest on such part of the loan as may, from time to time be outstanding at the rate of 14% per annum payable on 1 January, and 1 July, or on the immediately preceding working day respectively if those days are Sundays or public holidays in each year.”
It is therefore my view that, whether we proceed on the admission of PW1 or the express provisions and clause 11 of exhibit 1, it is beyond any shadow of a doubt that the agreed rate of interest on the term loan of ₦1.5 million is 14% per annum. The next question is when the rate is to begin to run. From exhibit 1, it was entered into on 31 December, 1983. However, by clause 9(1) of exhibit 1 repayment was to be by 12 consecutive and equal half yearly instalments, the first instalment of ₦125,000 being payable on 1 January, 1985. See also the evidence of DW1 at page 75 of the record.

The respondent admits that the term loan and interest are outstanding. Exhibit 11 shows that by 24 October, 1990 the sum outstanding on the term loan was ₦9,292,973.94. There is no evidence on record whatsoever to the effect that the agreed rate of interest is 10% as awarded by the trial Judge.

In fact he did not state how he came to the figure. At page 141 of the record, the trial court held inter alia as follows:–

“The defendant shall have judgment for the sum of ₦1,500,000 and ₦510,000 plus interest at the rate of 10% per annum in respect of the ₦1,500,000 and 14% per annum in respect of the ₦510,000. The interest in the two cases shall run from 25 June, 1997 until the judgment debt is fully liquidated.”

In view of the evidence before the court, both oral and documentary, the learned trial Judge holding in respect of the rate of interest and the time it is supposed to run is not supported by the said evidence and is therefore erroneous. The arbitrary choice of the date of 25 June, 1997 by the trial Judge and the date the rate of interest is to run is neither supported by the pleadings nor the evidence. The learned trial Judge cannot legally award 14% interest on a judgment debt since by the provisions of the appropriate Rules of Kwara State High Court, he can only award a maximum of 10% on post-judgment debt.

In conclusion I resolve the issue under consideration in favour of the appellant and set aside the judgment of the learned trial Judge in respect of the rate of interest on the
term loan of ₦1.5 million and the time it is supposed to run and substitute thereto the rate of interest of 14% on the term loan of ₦1.5 million from 2 January, 1985 till judgment on 31 May, 2000 and thereafter at 10% till judgment debt is liquidated.

On issue 6 learned Counsel for the appellant submitted that from the recital “D” of exhibit 30, the opening paragraph of exhibit 28 and the testimony of PW1 at page 71, the working capital loan is the Naira equivalent of ₦2,262,600. That at page 70 the respondent accepted the terms of exhibit 28 unconditionally. That no part of this loan was repaid except the ₦150,000 paid in October, 1990. That interest on the loan is 13% per annum and that repayment was to commence in 1989. That the working capital loan was disbursed and used for the production and procurement of raw materials and spare parts as stated by PW1.

That the respondent did not explain how he came by the figures of ₦80,000 working capital and ₦430,000 worth of raw materials yet the trial Judge took the figures as correct and awarded the sum of ₦510,000 to the appellant on working capital.

That out of ten containers of imported raw materials, seven were delivered to the respondent while the three, which arrived later, were sold by the appellant and the proceeds paid into the account of the respondent due to the failure of the respondent to clear them on arrival despite the utilisation of the seven containers released to it and the accumulation of demurrage. That interest was calculated on the working capital at 13% per annum plus 2% penalty for default as agreed.

That since the project Manager was the chief executive of the respondent all his actions and deeds were actions and deeds of the respondent and the project Manager’s utilisation of the working capital was for the benefit of the respondent eg buying of ternute fluid fire fighting equipment,
payment of arrears of staff salary and allowances of PW1 etc.

Learned Counsel then urged the court to resolve the issue in favour of the appellant.

In his reply, learned S.A.N. for the respondent submitted that the evidence relating to interest is based on void documents. That the trial court had held that the working capital was actually utilised by the project Manager who failed to pay any creditor “but went on free gift galore of the carpets”. That there is no agreement as to the rate of interest or any bank custom prevailing in Nigeria where the rate of interest is not fixed by the parties. He then urged the court to resolve the issue against the appellant.

At page 71 of the record, PW1 stated as follows:

“The second loan attached 13% interest per annum $500,000.00 U.S. as stated in exhibit 28 and £40,000 amounting to N1,976,600 and N22,000 respectively. We were ordinarily expected to start the repayment of the working capital loan in 1989 with the commencement of production . . .”.

In the first place it is clear, from the above quoted evidence of PW1, that the rate of interest on the working capital loan is 13% and not 14% as “found” and awarded by the learned trial Judge. That apart it is also obvious that the time of repayment was 1989 not 1997 as also “found” and awarded by the said trial Judge.

It has been held earlier in this judgment that exhibit 30, which deals with the working capital loan, is valid contrary to what the trial Judge found. By recital “D” of exhibit 30 the total working capital facility granted is N2,262,000 and by clause 3(a) the said facility was repayable in 12 equal consecutive quarterly instalments with effect from 1 January, 1989; while clause 3(b) fixes the rate of interest at 13% and clause 3(c) provides for the penalty of 2% per annum over and above the interest in respect of the amount due but unpaid.

It has also been held in this judgment that the project Manager, who was the chief executive of the respondent with full
executive authority, was the alter ego of the respondent and as such all actions he took were for the respondent whether good or bad. Even though he is accused of mismanaging the respondent he also did certain positive things and there is evidence that as at the time the said project Manager was appointed, as per exhibit 3, the time for repayment of the working capital loan had been due but unpaid. It is also in evidence that the only sum paid by the respondent in respect of this facility is ₦150,000. It is therefore my view that the learned trial Judge erred in awarding only ₦510,000 to the appellant on the working capital loan. In conclusion, it is my view that the issue be and is hereby resolved in favour of the appellant.

On issue 7 learned Counsel for the appellant submitted that there is no dispute on the fact that the whole term loan granted to the respondent remains outstanding. That to the extent that any sum of money is outstanding on the loan secured by the deed of loan and mortgage agreement (exhibit 1), the appellant is entitled ex debito justitiae to a declaration of its right to exercise its power of sale. That the respondent can only deny the appellant that right by paying the loan. For this, Counsel relied on Okonkwo v C.C.B. (Nig.) Ltd (1997) 6 NWLR (Part 507) 48 at 71 and 72. Learned Counsel then urged the court to resolve the issue in favour of the appellant and also allow the appeal.

On his part learned S.A.N. for the respondent submitted that exhibit 1 is void and as such no remedy can be based on it, such as the right of sale under a mortgage agreement. Counsel then urged the court to resolve the issue against the appellant and dismiss the appeal. In considering the relief in question at page 141 of the record, the learned trial Judge held as follows:—

“The defendant also claims a declaration. In view of my pronouncement regarding exhibits 1 and 30 on which the declaration is anchored, the defendant has failed to prove its entitlement to same. The declaration is hereby dismissed.”
It is obvious that both Counsel and the court below agree that
the relief of declaration can only avail the appellant if exhibits
1 and 30 are valid and subsisting between the parties. By
clause 36 of Exhibit 1 the parties agreed as follows:–

“36. The statutory power of sale shall as between the lender and
a purchaser of the property be exercisable at any time after
the execution of the security but as between the lender and
borrower, the lender shall not exercise the said power of
sale until payment of the money hereby secured has been
demanded and the borrower has made default of one month
in paying the same but this provision is for the protection of
the borrower only and shall not affect a purchaser or put
him upon inquiry whether such default has been made.”

It has been held in this judgment that exhibits 1 and 30 are
valid and subsisting between the parties. The question that
now falls to be decided is whether the conditions stated in
clause 36 of exhibit 1 and reproduced \textit{supra} exist to warrant
the grant of the declaration sought by the appellant. The an-
swer is obviously in the positive. At page 74 of the record,
PW1 stated under cross-examination thus:–

“For loans that have not been paid, I agree that the plaintiff is in-
debted to the plaintiff \textit{(sic)} and all the interests are still out-
standing.”

The next sub-issue is whether the appellant did demand for
the repayment of the outstanding loans and interests. The
answer again is in the affirmative. At page 69 of the record,
PW1 stated \textit{inter alia} thus:–

“The defendants were sending statements of account at irregular
intervals. After giving us terminal demand letter in October, 1990,
all the other statements they sent were discountenanced exhibit 11
page 2 is the terminal demand letter.”

It is obvious from the record that between the issuance of
exhibit 11 on 24 October, 1990 ie the terminal demand note
and the institution of the action; particularly the counter-
claim, is none than the one-month period of grace required
under clause 36 before the right of sale could be exercised.
From the record at page 1, the writ of summons in the action
was issued on 5 December, 1991 while the motion for
extension of time within which to file the statement of defence and the counterclaim and to deem same as properly filed was filed on 22 November, 1994 as can be seen at page 9 also of the record.

In conclusion it is clear that, having regard to the relevant facts and evidence before the lower court, the dismissal of the declaration sought by the appellant is in error and is accordingly set aside. That being the case, issue 7 is hereby resolved in favour of the appellant.

Finally, it is my considered opinion, that there are merits in this appeal which is accordingly allowed. The judgment of the High Court of Kwara State in Suit No. KWS/OF/29/91 delivered by Honourable Justice AO Belgore on 31 May, 2000 is hereby varied to the extent as contained in this judgment. There shall be costs of ₦5,000 in favour of the appellant and against the respondent.

OKUNOLA JCA: I read before now the lead judgment just delivered by my learned brother, Onnoghen JCA. He has adequately covered the issues argued in the appeal. I agree with his reasoning and conclusion that the appeal is meritorious and should be allowed. I therefore allow the appeal.

I abide by the consequential orders in the lead judgment, including the order made as to costs.

AMAIZU JCA: I have had the benefit of reading in draft the leading judgment just delivered by my learned brother, Onnoghen JCA.

I agree with his reasoning and conclusion that the appeal has merit. Under section 22 of the Land Use Act, it is unlawful for the holder of a statutory right of occupancy granted by the governor to alienate his right of occupancy or any part thereof by assignment, mortgage etc or otherwise howsoever without the consent of the governor first had and obtained.

Under section 45 the power of the governor may be delegated to a State Commissioner. In the present case, there is
evidence that the governor delegated his power of approval under the Act to the Honourable Commissioner for Lands who approved the mortgage. It is not the case of the respondent that there is a section of the Act which prohibits the conveyance of the approval given by the governor or the Honourable Commissioner for Lands by an official of the government to an applicant. It follows therefore that exhibit 1 is a valid document.

It is further observed that the section only prohibits the alienation or mortgage by a holder of a statutory right of occupancy of his right of occupancy without the consent of the appropriate authority. A holder of a statutory right of occupancy does not require the consent of a governor before he can issue or accept a debenture. This is because the mere fact that a person has a legally enforceable right over another’s property does not mean that the property has been alienated or assigned or mortgaged to that person.

I also allow the appeal. I abide by the consequential orders made in the said lead judgment including the order as to costs.

*Appeal dismissed.*
Afribank Nigeria Plc v Aminu Ishola Investments Limited

Banking – Banker – When will be liable for conversion or detinue

Banking – Cheque – Wrongful dishonour of – When customer can sue for wrongful dishonour of cheque

Banking – Deposit account – Breach of contract in relation to – When court may grant exemplary damages

Banking – When money deposited with bank could be regarded as chattel

Facts

The trial court in the judgment found that the respondent’s suit was based on the tort of detinue arising from the wrongful detention of the respondent’s money and ordered the return of the sum of ₦467,000 (Four Hundred and Sixty-seven Thousand Naira) which was kept as a fixed deposit to the respondent with interest thereon and further awarded general damages of ₦2,000,000 (Two Million Naira) against the appellant.

Sometime in August, 1998 the respondent as a customer of the appellant opened a fixed deposit account with the sum of ₦467,000 at the Ilorin branch of the appellant. It was agreed by the parties that an initial interest of 12.25% per annum would be payable on the deposit and that the monthly interest on the fixed deposit shall be transferred into the respondent’s current account every month. The parties also agreed that the initial rate of interest of 12.25% per annum could be reviewed upwards at the end of the year by negotiation. The appellant, in compliance with the agreement, paid interest for the months of August and September, 1988.
On 31 October, 1988 the respondent repudiated the fixed deposit agreement and gave notice of its intention to withdraw the whole amount as provided under the agreement but the appellant refused to give the respondent access to the money on the ground that it had received instructions from the Central Bank of Nigeria to freeze the respondent’s account. Dissatisfied with the action of the appellant, the respondent instituted the action at the lower court claiming inter alia, the release of the ₦467,000 deposited with the bank plus interest calculated at the rate of 12.25% per annum from August, 1988 till November, 1989, and also ₦20 million general damages for breach of contract and/or for wrongful detention of the money deposited with the bank.

Held –

1. The relationship that existed between the parties was that of banker and customer which said relationship is founded on contract and nothing more.

2. Where a banker refuses to pay a customer’s cheque when the banker holds in hand an amount equivalent to that endorsed on the cheque belonging to the customer, such an act of refusal to pay amounts to a breach of contract.

3. Money is not to be accounted as goods or chattel because it is not of itself valuable. Money in specie, for example coins and notes, can be converted while money in abstract, for example in a bank, cannot be converted. Thus the former can be the subject in a claim for detinue or conversion, the latter cannot be.

4. Exemplary damages are not recoverable in an action in contract by the customer for the dishonour of his cheque by a banker.

*Appeal allowed.*
Cases referred to in the judgment

Nigerian

7-Up Bottling Co. Plc v Abiola and Sons Co. Ltd (2001) FWLR (Part 59) 1216

African Reinsurance Corp. v Fantaye (1986) 1 NWLR (Part 14) 113

Allied Bank Nigeria Ltd v Akubueze (1997) 6 NWLR (Part 509) 374

Afraine Nigeria Ltd v MA Esthiett (1977) 1 SC 89

Balogun v NBN Limited (1978) 3 SC 155

Bello v A-G Oyo State (1986) 5 NWLR (Part 45) 828

Benin Rubber Producers Ltd v Ojo (1997) 9 NWLR (Part 521) 388

DHL Int. Nigeria Ltd v Chidi (1994) 2 NWLR (Part 329) 720

Ekwunife v Wayne (West Africa) Ltd (1989) 5 NWLR (Part 122) 422

Elochin Nigerian Ltd v Mbadiofe (1986) 1 NWLR (Part 14) 47


FBN Ltd v African Petroleum Ltd (1996) 4 NWLR (Part 443) 438

Ibrahim v Osim (1987) 4 NWLR (Part 67) 965

Jos Steel Rolling Co. Ltd v Bernestieli Nig. Ltd (1995) 8 NWLR (Part 412) 201

Mobil Oil Nigeria Ltd v Akinfosile (1969) NMLR 217

Nwonye and Son Ltd v CCB Plc (1993) 8 NWLR (Part 310) 210

Okongwu v NNPC (1989) 4 NWLR (Part 115) 296

Olaogun Enterprises Ltd v SJ and M (1992) 4 NWLR (Part 235) 361

Ordia v Piedmont Nig. Ltd (1995) 2 NWLR (Part 379) 516

ONNOGHEN JCA: (Delivering the lead judgment) This is an appeal against the judgment of the High Court of Justice of Kwara State in Suit No. KWS/188/91 delivered by Honourable Justice Ahmed Belgore on 21 December, 1999 in favour of the respondent in which he ordered the return of the sum of N467,000 which was kept as a fixed deposit to the respondent with interest thereon and further awarded general damages of N2 million against the appellant.

The facts of the case include the following:

Sometime in August, 1988 the respondent as a customer of the appellant opened a fixed deposit account with the sum of N467,000 at the Ilorin branch of the appellant. It was agreed by the parties that an initial interest of 12.25% per annum would be payable on the deposit and that the monthly interest on the fixed deposit shall be transferred into the respondent’s current account every month. The parties also agreed that the initial rate of interest of 12.25% per annum could be renewed upwards at the end of the year by negotiation. The
a appellant, in compliance with the agreement, paid interest for the months of August and September, 1988.

On 31 October, 1988 the respondent repudiated the fixed deposit agreement and gave notice of its intention to withdraw the whole amount as provided under the agreement but the appellant refused to give the respondent access to the money on the ground that it had received instructions from the Central Bank of Nigeria to freeze the respondent’s account. Dissatisfied with the action of the appellant, the respondent instituted the action in the lower court claiming as per its further amended statement of claim, paragraph 38 thereof, the following reliefs:

“38. WHEREOF the plaintiff claims as follows:–

i. Declaration that the failure or refusal of the defendant to allow the plaintiff to withdraw from its deposit account no. 70-100-029 constitutes a breach of contract and the plaintiff (sic) constitutional right to its property and is therefore wrongful and illegal.

ii. AN ORDER directing the defendant to release to the plaintiff the principal sum of N467,000 deposited into the account plus interest calculated at the rate of 12.25% per annum from August, 1988 till November, 1989.

iii. AN ORDER directing the defendant to pay the plaintiff by way of special damages additional interest calculated at the rate of 25% or any other rate found due by the court on the principal sum plus accrued interest from December, 1989 till the date of judgment.

iv. AN ORDER directing the defendant to pay 10% interest on whatever sum adjudged due to the plaintiff from the date of judgment till liquidation.

v. AN ORDER directing the defendant to pay the plaintiff the sum of N20,000,000 representing general damages suffered by the plaintiff as a result of the failure of the defendant to allow the plaintiff to withdraw money from the deposit account and/or as damages for breach of contract and/or for the wrongful detention of the plaintiff’s money since 1988 to date.”

(See the further amended statement of claim at pages 32–37 of the record.)
I want to point out herein the fact that the respondent was paid the agreed interest of 12.25% per annum for August and September, 1988 as averred at paragraph 12 of the further amended statement of claim but went ahead to claim interest for those months in paragraph 38(u) reproduced supra.

Anyway, dissatisfied with the judgment of the lower court, the appellant has appealed to this Court on five grounds of appeal out of which learned Counsel for the appellant, Duro Adeyele Esq., has formulated three issues for the determination of this appeal in his brief of argument deemed filed on 25 September, 2001, which brief was adopted in argument of the appeal on 21 November, 2001. The issues are as follows:–

“1. Whether the plaintiff’s cause of action is founded in contract or in tort of detinue and whether the learned trial Judge was right to have assessed damages for breach of contract and detinue instead of contract only.

2. Whether the further award of N2 million damages did not amount to double compensation in view of the earlier award for loss of interest.

3. Whether the learned trial Judge was right in awarding interest at rates higher than 12.25% specifically agreed to by the parties.”

On the other hand, learned S.A.N. for the respondent, Yusuf O Ali Esq., in his brief of argument filed on 25 September, 2001 which he also adopted in argument, formulated two issues out of the said five grounds of appeal. The issues are as follows:–

“1. Whether having regard to the whole circumstances of this case, the learned trial Judge was not right to have awarded the damages of Two Million Naira (₦2,000,000) in favour of the respondent on the ground that the appellant wrongfully held on to the money of the respondent under the principle of detinue and whether the award amounted to double compensation.

2. Whether the learned trial Judge was not right having regard to the fact of the case to have awarded more than 12.25% interest on the principal sum.”
It is however my view that, even though the issues as formulated by both learned Counsel arise from and do cover the grounds of appeal, the issues formulated by learned Counsel for the appellant will be preferred. They are very brief and to the point being canvassed.

In arguing Issue 1 learned Counsel for the appellant submitted that the relationship between a bank and its customer is contractual as restated by the Court of Appeal in *Union Bank v Ozigi* (1991) 2 NWLR (Part 176) 677 at 694 *per* Ogundere JCA, learned Counsel also cited and relied on *FBN Ltd v African Petroleum Ltd* (1996) 4 NWLR (Part 443) 438 at 445; *Nwonye and Sons Ltd v CCB Plc* (1993) 8 NWLR (Part 310) 210 at 220. That, from the facts of the instant case, the relationship between the parties is contractual; the terms of which have been stated in paragraph 5(i)–(vi) of the further amended statement of claim which the appellant also admitted in its further amended statement of defence.

That any incomplete, irregular or even non-performance of the terms agreed upon by the parties is a breach of contract. That it is trite law that where a banker refuses to pay a customer’s cheque when the banker holds in hand an amount equivalent to that endorsed on the cheque belonging to the customer amounts to a breach of contract. That a refusal to honour a customer’s cheque is akin to what the appellant did in this case and argued that the same principle ought to apply in both cases.

Referring to the Supreme Court decision in *Balogun v National Bank of Nigeria Ltd* (1978) 11 NSCC 133 *per* Idigbe JSC and *Paget’s Law of Banking* (8ed) pages 69, 83–85 learned Counsel submitted that since it has been held that when a banker accepts money either on current or deposit account, a relationship of debtor and creditor is created, it follows that no fiduciary relationship exists between the appellant and the respondent in respect of the fixed deposit contract.

That the absence of a fiduciary relationship means that the appellant cannot be liable in detinue particularly as the
Onnoghen JCA

appellant was not a bailee of the respondent’s goods or chattel. That money is not chattel capable of being wrongfully detained. That the appellant was a debtor in relation to the money. Learned Counsel then cited and relied on *Ordia v Piedmont (Nig.) Ltd* (1995) 2 NWLR (Part 379) 516 at 532–533.

Learned Counsel further submitted that the court was wrong in holding at page 161 of the record that the respondent’s claim was no longer in contract but in tort which entitled it to exemplary damages. That the case of *Allied Bank (Nig.) Ltd v Akubueze* (1997) 6 NWLR (Part 509) 374 relied upon by the learned trial Judge does not support his judgment. Counsel then urged the court to set aside the findings of the trial Judge on the liability of the appellant in detinue and the consequent assessment of exemplary damages based thereon in that they are not supported by law neither are they justifiable. That the measure of damages in cases of breach of contract is that of foreseeability as established in *Hadley v Baxendale* (1854) 9 Exch. 341. That the award of ₦2 million is contrary to the applicable principle of law to cases of breach of contract and submitted that this is a proper case for this Court to interfere with the assessment and set same aside. That the respondent did not claim exemplary damages in its further amended statement of claim neither did either Counsel address the court on same. That the issue was raised by the trial Judge *suo motu*. Learned Counsel then urged the court to resolve the issue in favour of the appellant.

On his part, learned Counsel for the respondent, YO Ali Esq. S.A.N., submitted that from the pleadings it is clear that the respondent’s case is based on two causes of action namely breach of contract and the tort of detinue. That a plaintiff can found his claim on more than one cause of action if the facts of the case justify it. Learned Counsel then cited and relied on Order 4 Rule 1(1)(a) of the High Court (Civil Procedure) Rules of Kwara State on joinder of causes of action and the case of *Balogun v NBN* (1978) 3 SC 155 at 173 to the effect that a customer, whose cheque is wrongly...
dishonoured, can always bring claims for defamation and breach of contract in the same action.

That the respondent made unequivocal demand for the return of its deposit to no avail. That money is a form of chattel and in the torts of conversion and detinue there are elements of contract because the chattel would normally have come to the possession of the adverse holder by agreement and it is the refusal after demand by the owner that turns it to conversion or detinue. Learned Counsel then submitted that the tort of detinue was clearly made out and cited and relied on Benin Rubber Producers Ltd v Ojo (1997) 9 NWLR (Part 521) 388 at 410; W.A.O.S. Ltd v U.A.C. (Nig.) Ltd (2000) 13 NWLR (Part 683) 68.

That in an appropriate case damages can be awarded in an action for both breach of contract and tortious liability as stated by the learned authors of McGregor on Damages (13ed) paragraphs 537–538.

That a bank can be liable for the tort of conversion or detinue as stated in Paget’s Law of Banking (10ed) page 272.

That if the interest as agreed or varied had been paid and remitted to the account of the respondent, it could have spent same in furtherance of its business apart from the principal sum deposited. That the trial Judge was right to have awarded general damages in addition to the interest, having regard to the peculiar facts and circumstances of this case. That an appellate court will not tamper with the award of damages made by the trial court once the damages are justifiable in the peculiar circumstances of the case. For this Counsel referred to Union Bank Ltd v Odusote Bookstore Ltd (1995) 9 NWLR (Part 421) 558 at 585–586.

That the appellant had not shown that the damages awarded was based on an erroneous estimate or that it was too high in the circumstances when the appellant persisted for 11 years in the unlawful detention of the appellant’s fund. That the appellant has also not shown that he suffered
any miscarriage of justice in the manner the matter was decided by the lower court.

That even if the learned trial Judge was wrong to have based his award of damages on detinue (which is not conceded), the principle of law in the maxim *ubi jus ubi remedium* will avail the respondent regardless of the nomenclature given to such damages. For this learned S.A.N. relied on *Bello v A-G, Oyo State* (1986) 5 NWLR (Part 45) 828 at 889–890. He therefore urged the court to resolve the issue against the appellant.

I have gone through the record of proceedings, the arguments of both learned Counsel on the issue under consideration and it is very clear that, whereas learned Counsel for the appellant’s argument is to the effect that the respondent’s cause of action is in contract and not the tort of detinue, learned S.A.N. for the respondent contends that the respondent has two causes of action – contract and detinue.

The position being as stated above, the first thing to be determined is the question of cause of action. This term has been defined by the courts in very many cases. For instance in *Emiator v Nigerian Army* (1999) 12 NWLR (Part 631) 362 at 369–370 the Supreme Court defined it as the entire set of facts or circumstances giving rise to an enforceable claim. It also includes all those things necessary to give a right of action and every fact which is material to be proved to entitle the plaintiff to succeed. See also *Ibrahim v Osim* (1987) 4 NWLR (Part 67) 965; *Patkun Ind. Ltd v Niger Shoes Mfg. Ltd* (1988) 5 NWLR (Part 93) 138.

I agree with the submission of learned Counsel for the respondent, Ali Esq. S.A.N., that under the provisions of Order 4 Rule 1(1)(a) of the Kwara State High Court (Civil Procedure) Rules, 1989 (hereinafter referred to as the High Court Rules, 1989) and many decide authorities including *Balogun v N.B.N. Ltd* (1978) 3 SC 155 at 173, a plaintiff may in one action claim relief against the same defendant in respect of...
two or more causes of action. Order 4 Rule 1(1)(a) of the said High Court Rules, 1989 provides expressly as follows:—

"1(1) Subject to Rule 3, a plaintiff may in one action claim relief against the same defendant in respect of two or more causes of action:—

(a) If the plaintiff claims, and the defendant is alleged to be liable; in the same capacity in respect of all the causes of action."

The issue to be determined is whether, even though it is a well known and established principle of law and practice that a customer whose cheque is wrongfully dishonoured can always institute claims for defamation and breach of contract in one single action, a customer who maintains a deposit account and demands the payment of his deposit which was refused by the bank can institute a claim for both breach of contract and detinue in respect of that deposit account. It is not in dispute that the respondent did demand the payment of his deposit but the appellant refused to comply on the ground that the Central Bank of Nigeria did freeze the respondent’s account. From the submissions of both Counsel it is clear that they admit that the relationship between a banker and its customer is based on contract but the learned S.A.N. is of the further view that where the same set of facts can equally ground an action in detinue the customer can claim damages for same in addition to damages for breach of contract.

Generally speaking, it is my view that an action in detinue involves goods and/or chattel in its substratum and possession. Thus a claim in detinue for the recovery of goods wrongfully detained presupposes the existence of the following to wit; that the goods were in possession of the plaintiff, that the defendant, without any lawful excuse or consent or permission of the plaintiff, took away the goods and the plaintiff had demanded the return of the said goods and that the defendant had refused to return them. See Rosenthal v Alderton and Sons (1946) KB 374.
The term chattel has been defined in *Black’s Law Dictionary* (7ed) page 229 as follows:

“Movable or transferable property; esp. personal property”.

The learned authors proceeded to quote the following passage from *Thomas Blount, Nomo – Lexicon: A Law – Dictionary* (1670), at the same page 229 to wit:

“That money is not to be accounted goods or chattels, because it is not of itself valuable . . . Chattels are either personal or real. Personal may be so called in two respects: one because they belong immediately to the person of a man, as a bow, horse, etc. The other, for that being anyway injuriously withheld from us, we have no means to recover them, but personal actions. Chattels real, are such as either appertain not immediately to the person, but to some other things, by ways of dependency, as a box with chattels of land, apples upon a tree, or a tree itself growing on the ground . . . (O)r else such as are issuing out of some immovable thing to a person, as a lease or rent for the term of years.”

The above quoted definition and passage clearly show that realty can only be the subject matter of detinue when severed from the land such as coal taken from a coal mine. See *Mills v Brooker* (1919) 1 KB 555. However, the most important thing revealed in that passage is the emphatic statement “that money is not to be accounted goods or chattels”. This is very relevant to the issue under consideration. However, the learned authors of Bullen and Leake and Jacob’s *Precedents of Pleadings* Volume 1 (2001 edition) paragraph 25-07 while commenting on the exclusion of money in the subject matter of conversion under section 14(1) of the Torts (Interference with Goods) Act, 1977 being the Act which abolished detinue in English Law and substituted thereto the tort of conversion by detention stated *inter alia* as follows:

“The exclusion of ‘money’ is slightly misleading. Money *in specie* (ie coins and notes) can be converted. It is money in the abstract eg in a bank account which cannot.”

From the facts of this case, it is beyond any doubt that the subject matter of the alleged detinue is not money *in specie* but money in a deposit account with the appellant.
The learned S.A.N. for the respondent has referred this Court to a passage in *Paget’s Law of Banking* (10ed) page 272 to wit:—

“The conclusion seems to be that there is conversion where the defendant asserts a title adverse to that of the true owner, either in himself or a third party, or where he detains the goods from the rightful owner for an unreasonable time, thereby impliedly doing so. If the depositor himself applies, any delay is unreasonable, and refusal is a negation of his title.”

in support of his contention “that a bank will be liable for the tort of conversion or detinue as the case may be”.

While it is conceded that in an appropriate case a banker can be liable for conversion and detinue the facts of this case do not make the present case one of such instances. As has been earlier demonstrated in this judgment, the subject matter of the action not being money *in specie* cannot ground an action for detinue. That apart, it is very instructive to note that the learned S.A.N. quoted the passage from a chapter dealing with safe custody which in effect deals with the banker’s role or function or duty as a bailee. In such a situation, it is my considered opinion that the banker, like every other bailee, will be liable for conversion or detinue, as the case may be, where he asserts a title adverse to that of the true owner or where he detains the goods from the rightful owner for an unreasonable time. It is therefore my view that the said passage relied upon by the learned S.A.N. is not relevant to the issue under consideration.

From the totality of the facts of the case it is my view that the relationship that existed between the parties, in the instant case on appeal, was emphatically that of banker and customer which said relationship is founded on contract and nothing more. It is trite law that where a banker refuses to pay a customer’s cheque when the banker holds in hand an amount equivalent to that endorsed on the cheque belonging to the customer, such an act of refusal to pay amounts to a breach of contract. In the present case on appeal, both
parties are agreed that there was a contract between them, the terms of which include the following:

(a) That the deposit account of N467,000 shall initially attract an annual interest of 12.25%.

(b) That the annual interest shall be payable at the end of every month from the date of the deposit into the account and credited directly to the plaintiff’s current account no. 36-180-369M with the defendant.

(c) That the duration of the account was to be 12 months with liberty to the plaintiff after giving notice to the defendant to withdraw any amount from the deposit in the account for the purpose of its business during the currency of the agreed period of deposit.

(d) Interest would only be paid on any amount standing to the credit of the account at the end of every month.

(e) Interest payable on the deposit could be reviewed upwards from time to time at any rate agreed by the parties after negotiation.

(f) The account could be renewed for another period of time at the expiry of the first year of deposit. See paragraph 5 of the further amended statement of claim at page 32 of the record and paragraph 1 of the further amended statement of defence at page 45 of same, which expressly admitted the said paragraph 5 of the further amended statement of claim.

It follows therefore that when the respondent demanded for the payment of its deposit and the appellant refused to comply, the appellant committed a breach of its contract with the respondent and I so hold. I therefore do not agree that the action of the appellant in refusing to pay up the deposit as previously agreed between the parties amounts to both a breach of contract and commission of the tort of detinue as canvassed by learned S.A.N. for the respondent.
However, is the learned S.A.N. right in contending that the respondent’s action was based on contract and tort of detinue. In short, what did the learned trial Judge find?

In the judgment of the learned trial Judge particularly at page 160 of the record, his Lordship held inter alia thus:

“. . . I also hold that the defendant is liable to plaintiff in detinue as pleaded in paragraph 37A of the further amended statement of claim. In the assessment of damages, it has been held by the Supreme Court in Elisah Oladeji Kosile v Amusa Olaniyi Folarin (1989) 4 SCNJ (Part 11) 198, 204 that a successful party in an action for detinue is entitled to an order of specific restitution of the chattel, or, in default its value and also damages for its detention up to the date of judgment.”

Again at page 161 the learned trial Judge continued as follows:

“The declaration being sought by the plaintiff in paragraph 38(1) and the general damages for breach of contract now becomes inappropriate in view of paragraph 37A of the further amended statement of claim. The plaintiff’s case is no longer in contract but in tort which entitles it to the award of exemplary damages as adumbrated by the Supreme Court in Allied Bank of Nig. Ltd v Jonas Akabueze (1997) 6 NWLR (Part 509) 374 . . . Since the case is founded on detinue, the plaintiff is outrightly entitled to a refund of deposit in sum of ₦467,000. As agreed by the parties, the plaintiff is also entitled to 12.25% interest rate per annum on its deposit from October, 1988 to July, 1989 being the initial duration of the deposit.” (All emphasis supplied)

From the passages quoted supra, it is very clear that the trial court never found that the respondent had two causes of action – one in contract and another in detinue. Rather the Judge was emphatic throughout his judgment, including the assessment of damages due to the respondent, that the action is founded in detinue. This is a clear finding of fact by the lower court which the respondent has not challenged by way of a cross appeal. Even though it is clear from the pleadings and evidence of the respondent and address of Counsel that the respondent was claiming both in contract and detinue, that is clearly not what the trial court found. It is my considered view that without a cross appeal challenging the copious
findings of the trial court on the issue of the action being grounded on detinue alone, the learned S.A.N. cannot legally be heard submitting the contrary to this Court. In other words, in view of the above findings of the learned trial Judge the judgment of the court can only stand if the relationship between the parties is founded on detinue as decided therein since the issue of the cause of action being also on contract is not properly before this Court, being the Court of Appeal.

Now the other sub-issue within the issue under consideration is whether the trial Judge was right to have assessed damages for detinue instead of breach of contract under the circumstances of this case.

Having held that the relationship between the parties is governed by contract and not detinue, it follows therefore that the measure of damages in this case must be as laid down in the law of contract for breach of contract and nothing else. In the case of Balogun v National Bank of Nigeria Ltd (1978) 11 NSCC 135 the Supreme Court stated clearly that the position of the bank and its customer, when accepting money either in a current or deposit account, is a relationship of debtor and creditor. At page 140 of the report Idigbe JSC (as he then was) had this to say:–

“We think it is necessary, at this stage to trace the history of this aspect of the law relating to damages for breach of contract. The role of predominating business of bankers is a business of banking which consists in the main in the receipt of monies on current or deposit account and the payment of cheques drawn by as well as the collection of cheques paid by a customer – See also Atkin, J. in Joachimson v Swiss Bank Corporation (1922) 3 KB 110 at 127. Therefore, the receipt of money from or on account of his customer by a banker constitutes the latter the debtor of the former (Foley v Hill (1848) 2 HL (as 28): and the banker undertakes to pay any part of the money thus due from him to the customer against the written orders of the customer Joachimson v Swiss Bank (supra). Accordingly, the relation, so constituted is that of principal and agent and therefore a cheque drawn on the banker by the customer represents the order of the principal to his agent to pay, out of the principal’s money in his hands, the amount stated on the cheque to the payee endorsed on the cheque. Therefore, it
has long been established that refusal by a banker to pay a customer’s cheque whether he holds in hand an amount equivalent to that endorsed on the cheque, belonging to the customer amounts to a breach of contract for which the banker is liable in damages. The only question which arose in these circumstances has always been that relating to the quantum of amount of damages. The general rule for the measure or quantifying damages for breach of contract was that established by leading cases of Hadley v Baxendale (1854) 9 Exh. 341 which is that the party in breach is liable in damages in the amount which flows directly and naturally from his failure to keep his own part of the contract or bargain provided that such damages could reasonably have been within the contemplation of the parties at the time when the contract was made.” (Emphasis supplied by me.)

It is therefore my view that the learned trial Judge erred when he held at page 161 of the record that “the claim of the plaintiff was no longer in contract but in tort which entitles him to exemplary damages”. Apart from the fact that it is generally accepted that exemplary damages are not recoverable as a matter of course in an action in contract by a customer for the dishonour of his cheque by a banker or, as in the instant case, for the refusal of the banker to pay over to the customer its deposit, it is trite law that such exemplary damages must be pleaded. See the decision of this Court in Seven-Up Bottling Co. Plc v Abiola and Sons Co. Ltd and Another, Appeal No. CA/J/112/99 delivered on 21 May, 2001 at page 23 thereof where it is stated inter alia:–

“It is my view that before a court can consider the quantum of damages in an unliquidated money demand, whether the damages claimed is general, special, exemplary, punitive, etc, such damages must be pleaded and there must be evidence in proof of the damages to assist the court in assessing the quantum to be awarded.”

See also the judgment of Supreme Court in the case of Eliochin (Nig.) Ltd v Mbadiwe (1986) 1 NWLR (Part 14) 47 at 64–65 per Obaseki JSC (as he then was). In the present case exemplary damages were nowhere pleaded in the further amended statement of claim. To that extent alone the award of exemplary damages by the lower court cannot stand – a court is not competent to award to a party that which he did
not ask – consequently the findings of the learned trial Judge on the liability of the appellant in detinue and the consequent assessment of exemplary damages based thereon is hereby set aside. It is trite law that though an appellate court is not allowed to substitute a figure of its own for that awarded by the lower court simply because it would have a different figure if it had heard the case at first instance, if it is satisfied either that the Judge in assessing the damages applied a wrong law or a wrong principle of law, such as taking into account some irrelevant factor or leaving out of the account some relevant factor or that the amount awarded is either so ridiculously low or so extremely and inordinately high that it must have been a wholly erroneous estimate of the damage, it can intervene and review the damages awarded. In the instant case the learned trial Judge did not only award exemplary damages when none was pleaded but based the award on the principle of law in the tort of detinue which is a wrong principle as opposed to the principles of breach of contract arising from the banker/customer relationship.

I will briefly return to this aspect when considering Issue 2 dealing with the award of ₦2 million general damages. For now, it is my opinion, that in view of the facts which are not in dispute and the applicable law, Issue 1 be and is hereby resolved in favour of the appellant.

On Issue 2, which is whether the further award of ₦2 million damages did not amount to double compensation in view of the earlier award for loss of interest, learned Counsel for the appellant submitted that it was wrong for the learned trial Judge to award ₦2 million as damages in addition to the award of interest on the amount fixed with the appellant. That the basis of the award of ₦2 million is not clear since the trial Judge had expressly recognised that “the business opportunities frustrated by the defendant was ₦550,000”. That if the respondent is entitled to any damages at all, it should not have exceeded ₦550,000.
Learned Counsel further submitted that, assuming the fixed deposit agreement between the parties had run its normal course, all that the respondent would have been entitled to would have been interest at 12.25% per annum which was agreed upon. That under the principle for assessment of damages for breach of contract, the respondent would have been entitled to no more than the interest that would have accrued; relying on *Hadley v Baxendale (supra)* and *Kaycee v P.S.C. Ltd* (1986) 2 NWLR (Part 23) 458 at 468. That the further award of ₦2 million damages after awarding interest from 1989 to the date of judgment amounts to double compensation. For this learned Counsel cited and relied on *Adeola v Olaoba* (1998) 4 NWLR (Part 545) 224 at 229 and *Kaycee v P.S.C. Ltd (supra)* at 468. Still submitting further, learned Counsel stated that since the cause of action is in contract and not in tort, the award of ₦2 million amounted to an award in general damages which cannot go together with that for special damages in contract cases. That to award both amounts to double compensation, which is frowned upon by the law. He then cited the case of *DHL International Nig. Ltd v Udechukwu* (1996) 2 NWLR (Part 329) 720 at 742; *PZ and Co. Ltd v Ogedengbe* (1972) 1 All NLR (Part 1) 202; and *Swiss Nig. Wood Ind. v Bogo* (1971) UILR (Part 3) 337 at 341. That there was no evidence to show that the appellant agreed to pay anything to the respondent other than the agreed rate of interest for the sum placed in the fixed deposit. That whatever angle one looks at the award of ₦2 million as general damages, it is unsustainable and ought to be set aside. Learned Counsel then urged the court to resolve the issue in favour of the appellant.

As regards the submissions of learned S.A.N. for the respondent on this issue, it is as summarised when dealing with Issue 1. However, the learned S.A.N. submitted that, contrary to the submissions of his learned friend that the relationship between the parties was in contract and that general damages cannot be awarded, the learned authors of *McGregor on Damages* (13ed) paragraphs 537–538 have
made the point that, in appropriate cases, damages could be awarded in an action for both breach of contract and tortious liability. That the submission of the learned Counsel for the appellant to the effect that if the respondent was entitled to any damages at all it should have been limited to N550,000 is a concession and an admission by the appellant that the respondent was indeed entitled to damages, the quantum being something else. That the appellant failed to appreciate the fact that the principal sum of N467,000 deposited by the respondent with the appellant in 1988 would have earned monthly interest which could have been available for the immediate use of the respondent as it wished but for the wrongful act of the appellant. That the trial court was right in awarding general damages in addition to the interest, having regard to the peculiar facts and circumstances of this case.

That an appellate court will not interfere with the award of damages made by the trial court once the damages awarded are justifiable in the peculiar circumstances of the case. For this Counsel cited and relied on Union Bank Ltd v Odusote Bookstores Ltd (1995) 9 NWLR (Part 421) 558 at 585–586. That the appellant has not shown that the damages awarded was based on an erroneous estimate nor has it shown that it suffered any miscarriage of justice. He then urged the court to resolve the issue against the appellant.

To begin with it has been held earlier in this judgment that the relationship between the parties is governed by contract simpliciter and as such the measure of damages is as laid down in Hadley v Baxendale (supra). In the present case particularly as regards the issue under consideration, both parties are agreed that the learned trial court awarded interest on the principal sum fixed with the appellant from 1988 till judgment.

It is my considered view that the award of interest for the period stated amounts to an award of special damages arising from the breach of contract committed by the appellant. It is an amount which flows directly and naturally from the
failure of the appellant to keep his own part of the contract or bargain and that award is obviously within the contemplation of the parties at the time when the contract was made.

The question then is: What is the status of the N2 million general damages awarded in addition to the interest? The learned S.A.N. for the respondent has argued that the submission of his learned friend to the effect that if the respondent was entitled to any damages at all it should have been limited to N550,000 is an admission that the respondent is entitled to general damages. This is not supported by the record and the appellant’s brief. In the first place the appellant’s Counsel was only referring to the views of the learned trial Judge on the matter. That apart, from the trend of the argument in this appeal that submission can only be understood as one made in the alternative particularly as it has been the case of the appellant that the relationship between the parties is governed by contract and not detinue or both and as such the respondent is entitled to no other measure of damages except as envisaged in breach of contract cases.

That apart, learned S.A.N. has been talking of the “peculiar facts and circumstances” of this case when the facts of the case are very straight forward and admit of nothing other than a contractual relationship in which the terms and conditions have been agreed upon by the parties.

It is my view that the submission of learned S.A.N. that, in an appropriate case, damages can be awarded in an action for both breach of contract and tortious liability begs the issue which is simply whether in an action for breach of contract, as in this case, damages can be awarded twice for the same breach. Of course where an action is founded both on breach of contract and say libel, as is normally the case where a banker wrongfully dishonours a customer’s cheque, the successful plaintiff is entitled to damages arising from the breach of contract and general damages for libel. However, that is not the position in the instant case where the cause of action is breach of contract with no additional liability, tortious or otherwise.
It is the law, as stated by the Supreme Court in *P.Z and Co. Ltd v Ogedengbe* (1972) 1 All NLR 206 and *Swiss Nigerian Wood Ind. v Bogo* (1971) 1 UILR 337 at 341, that apart from damages actually resulting from the breach of contract, the plaintiff is entitled to no other form of general damages since same could not have been contemplated by the parties at the time of entering into the contract. Therefore, 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 the contract. That being the case, 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. See also *Alraine (Nig.) Ltd v MA Eshiett* (1977) 1 SC 89 at 96; *Mobil Oil (Nig.) Ltd v Akinfosile* (1969) NMLR 217; *Okongwu v NNPC* (1989) 4 NWLR (Part 115) 296; *Ijebu Ode Local Govt. v Adedeji Balogun and Co. Ltd* (1991) 1 NWLR (Part 166) 136; and *DHL Int. (Nig.) Ltd v Udechukwu* (1996) 2 NWLR (Part 329) 720 at 738 and 742.

The position of the law being what it is, it follows that the award of ₦2 million damages in addition to the deposit of ₦467,000 with interest thereon at the rate of 12.25% per annum from 1988 to December, 1989 minus the months of August and September, 1988 already paid is an award in contravention of the principle of law governing award of damages in cases of breach of contract as reproduced *supra*. That being the case, it is my view and I agree with learned Counsel for the appellant that the award of the said ₦2 million damages under the circumstances amounts to double compensation which is frowned upon by law. That being the case, it is my view that the said damages of ₦2 million be and is hereby set aside and issue 2 resolved in favour of the appellant.

The third and final issue is whether the learned trial Judge was right in awarding interest of rates higher than 12.25% per annum specifically agreed upon by the parties.
In dealing with this issue, learned Counsel for the appellant submitted that interest is not payable except it is agreed upon by the parties or the right to it is conferred by statute. For this learned Counsel referred the court to *Jos Steel Rolling Co. Ltd v Bernestieli (Nig.) Ltd* (1995) 8 NWLR (Part 412) 201 at 208–209 and *Olaogun Ent. Ltd v S.J. and M.* (1992) 4 NWLR (Part 235) 361 at 385.

That the learned trial Judge awarded interest on the deposit at the rate of 12.25% per annum from October, 1988 to 14 August, 1989; 18.25% interest from 15 August, 1989 to 14 December, 1989 and thereafter at the rate of 25% up to the date of judgment ie 21 December, 1999. That the award of interest at 12.25% from October, 1988 to August, 1989 is not contestable since it was the agreed rate of interest by the parties.

That the trial Judge’s justification for the award of interest rate other than the agreed 12.25% is, firstly, on the ground that there were no negotiations to vary the rate because the appellant would not entertain them and, secondly, the alleged admission of DW1 during cross-examination that between 1989 and 1992 the lending rate rose between 45% and 60% in “some banks”. That the evidence of DW1 was on the “lending rate” as opposed to the “deposit rate” and that the appellant was not said to be one of the banks that operated within those rates.

That even if the lending rate rose to 200% in some banks, the trial Judge would still not be justified in awarding interest at any rate more than 12.25% because the parties did not agree on any other rate. That what the trial Judge did was to make an agreement for the parties; relying on *African Reinsurance Corp. v Fantaye* (1986) 1 NWLR (Part 14) 113 at 605. Learned Counsel then urged the court to resolve the issue in favour of the appellant and allow the appeal.

In his reply, learned S.A.N. for the respondent referred the court to paragraph 5(v) of the further amended statement of claim where it is pleaded that interest on the deposit could
be reviewed upwards from time to time to any rate agreed by the parties after negotiation and paragraph 27 of the same further amended statement of claim stated inter alia:—

“Interestingly the appellant admitted expressly paragraphs 5 and 27 of the further amended statement of defence.”

That exhibits 28 and 29 were tendered by PW1 in support of the claim for interest and that these documents were not contradicted by the appellant. That since the appellant refused to negotiate with the respondent as regards the upward review of the interest rate the court being a court of law and equity should not allow the appellant to benefit from his wrongful act.

That a party is entitled to claim interest where it is claimed as of right, as in this case, or where such is supported by statute or convention. That the respondent pleaded his entitlement and supported his claim by oral and documentary evidence. Learned S.A.N. then referred the court to the case of *Ekwunife v Wayne West African Ltd* (1989) 5 NWLR (Part 122) 422 at 445.

That the award of interest over and above 12.25% does not amount to setting up a new case for the respondent, as contended by his learned friend. That given the facts of the case and the peculiar circumstances of the same, the learned trial Judge was right to have awarded interest in the manner it was done in this case. He therefore urged the court to resolve the issue against the appellant and dismiss the appeal.

To begin with, while it is correct that the appellant admitted paragraph 5(v) of the further amended statement of claim in its paragraph 1 of the further amended statement of defence, it is not correct that it also admitted paragraph 27 of the said further amended statement of claim. Now the said paragraph 27 pleaded thus:—

“27. By its letter dated 21 November, 1989 the plaintiff demanded for an increase of the interest on the deposit account of 25% per annum but the defendant by its letter dated 22 November, 1989 refused to entertain any negotiation on increased interest.
The plaintiff shall lead oral and documentary evidence of the regime of interest on deposit in commercial banks in Nigeria over the period of 1988 to 1994 and deregulated interest rates on deposits of the period of 1991–1993 in particular.”

However paragraph 1 of the further amended statement of defence, which is alleged to have admitted the said paragraph 27, is as follows:–

“1. The defendant admits paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 13, 14, 19 and 20 and the first sentence of paragraph 27 of the amended statement of claim.” (italics supplied)

Thus it is very clear that the appellant did not admit the whole of paragraph 27 as alleged.

It is trite law, and both Counsel are agreed, that a party will be entitled to claim interest where the claim is as of right eg by agreement or where it is supported by statute or mercantile custom or convention. In the case of Ekwunife v Wayne West African Ltd (supra) at page 445 the Supreme Court stated the position of the law 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) AC 429 at page 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 entitlement in the statement of claim.

In Nigeria, as the law is that a statement of claim supercedes the writ, for which see Udechukwu v Okwuka (1956) 1 FSC 70 at page 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 is, based on the evidence placed before the court. The evidence called at the trial 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. As far as I am aware, there is no law in Plateau State, or indeed in any other State
of the Federation, which regulates the award of this class of interest.”

It is my view that when one says that he is claiming interest as of right, he is saying in effect that it is based on an agreement between the parties. That being the case, the question is: what is the agreement between the parties on which the claims for interest of the respondent is based? The answer is as contained in paragraph 5 of the further amended statement of claim earlier reproduced in extenso in this judgment. Paragraph 5(v) in particular provides that the interest payable on the deposit could be reviewed upwards from time to time to any rate agreed by the parties after negotiation. This provision clearly shows that it is not mandatory but permissive. To my mind, it is the same as saying that the interest payable on the deposit may be reviewed upwards etc from the agreed 12.25% per annum. That being the case, it is my view that until that is done by negotiation the agreed rate of 12.25% per annum will continue to govern the transaction between the parties. There is no provision to the effect that where a party refuses to negotiate the upward review of interest payable the other party can unilaterally impose a rate of interest on the other simply because the contract between the parties did provide for a permissive upward review of the rate of interest as in the present case. The principle of sanctity of contract enjoins us to deal carefully with the agreements as reached by the parties.

In the present case there is no doubt that the respondent is entitled to interest, the issue is at what agreed rate? From the totality of the facts before the lower court, the only rate of interest agreed by the parties to the transaction is 12.25% per annum and I am of the firm view that any award above that rate is contrary to what was agreed and therefore invalid.

I agree with learned Counsel for the appellant that it does not matter whether the lending rate rose to 200% in some banks, the parties are bound by their agreement in so far as
no negotiation took place between them to review upwards the agreed rate of interest of 12.25% per annum.

As regards the alleged admission of DW1 to the effect that between 1989 and 1992 the lending rate rose to between 45% to 60% in some banks, the said evidence has nothing to do with the rate of interest paid by the appellant bank.

That apart, the respondent pleaded in paragraph 27 of the further amended statement of claim, the second statement thereof which was not admitted by the appellant, that it shall lead oral and documentary evidence of the regime of interest on deposit in commercial banks in Nigeria over the period of 1988 to 1994 and deregulated interest rates on deposits of the period of 1991 to 1993 in particular (emphasis supplied). There is no evidence on record that the deposit as pleaded is the same as lending interest as testified to by DW1. Obviously they cannot mean the same thing without evidence to that effect. In effect it is my view that Issue 3 be and is hereby resolved in favour of the appellant. Consequently, any award of interest made by the learned trial Judge over and above the agreed rate of 12.25% per annum is hereby set aside. In their place it is hereby substituted the agreed rate of 12.25% per annum for the period covered by the rates of interest already set aside.

In conclusion, I am of the firm view that there are merits in this appeal which is accordingly allowed. The judgment of Justice A.O. Belgore in Suit No. KWS/188/91 delivered on 21 December, 1999 is hereby varied to the extent contained in this judgment.

Due to the circumstances of this case, it is herein ordered that the parties bear their costs.

OKUNOLA JCA: I have had the opportunity of reading in draft the lead judgment of my learned brother, Onnoghen JCA, just delivered.

I agree with his reasoning and conclusion that there are merits in this appeal which should be allowed.
I too allow the appeal and abide by the consequential orders made in the said lead judgment of Onnoghen JCA, including the order as to costs.

AMAIZU JCA: I had the privilege of reading before now the judgment just delivered by my learned brother, Onnoghen JCA.

My learned brother has dealt adequately with the issues canvassed and I have nothing useful to add.

I adopt his reasoning and conclusion. The appeal has merit and consequently it is allowed. I abide by the order on costs.

*Appeal allowed.*
Union Bank of Nigeria Plc v. E.D. Emole

SUPREME COURT OF NIGERIA

OGUNDARE, EJIWUNMI, KARIBI-WHYTE, ONU, UWAIFO JSC

Date of Judgment: 14 DECEMBER, 2001
Suit No.: SC. 96/1995

Banking – Banker/customer relationship – Customer alleging wrong debits in account – How proved

Banking – Banker/customer relationship – Devaluation of foreign currency – Affecting transaction between customer and banker – Proof of – Onus on banker

Facts

The appellant was the banker to the respondent.

The latter opened a letter of credit on behalf of the former, who deposited the amount covering the required sum.

When the respondent went to collect the shopping documents in April, 1985, the appellant told him that he had to pay an additional sum of ₦16,224.29 due to foreign exchange fluctuation, which he paid and cleared the goods which he sold in 1985. Unknown to him, as he alleged, the appellant debited the respondent’s account with the sums of ₦577,578.18, ₦25,727.19 and ₦42,138.98 respectively on 11/12/86, 31/12/86 and 21/7/88, which the appellant claimed were foreign exchange fluctuations arising from the letter of credit.

In another transaction, the appellant granted the respondent an overdraft facility and for which a mortgage was executed. The respondent alleged that the appellant inundated his account with wrong debits with the result that he was not able to operate the business account, the only one he had.

He instituted this action asking that the wrong debits be reversed and damages for negligence. The lower court granted his claims ordering the reversal of the debits and awarded him ₦200,000 general damages.
The appellant/bank appealed against this judgment in the Court of Appeal but lost and then took the matter further to the Supreme Court.

**Held**

1. In a banker/customer relationship, the onus of proving how the devaluation of foreign currency affected transactions between the banker and the customers, and that the banker is entitled to charge the customer with such devaluation, lies on the banker as such facts are specially within his knowledge.

2. A customer of the bank alleging that his account was wrongly debited must prove it by tendering the debit notes covering the sums or by tendering his statement of account.

*Appeal allowed.*

**Cases referred to in the judgment**

**Nigerian**

- Agaba v Otubusin (1961) All NLR 92
- Armel’s Transport v Transco (Nig.) Ltd (1974) 11 SC 237
- Debs v Cenico (Nig.) Ltd (1986) 3 NWLR (Part 32) 846
- Ekpe v Fagbemi (1978) 3 SC 209
- Ezeani v Ejidike (1964) 1 All NLR 402
- L.C.C. v Unachukwu (1978) 3 SC 199
- Onaga v Micho and Co. (1961) All NLR 324

**Counsel**

For the appellant: ETO Njoku, Esq.

For the respondent: Chief T Nwogu (with him EO Awa, Esq.)
Judgment

OGUNDARE JSC: (Delivering the leading judgment) The plaintiff/respondent was at all times to this appeal a customer of the defendant/appellant bank. He maintained a current account at the Factory Road, Aba Branch of the defendant bank. Sometime in November, 1984, he requested the bank to open some letters of credit in favour of his overseas suppliers of goods. One of such letters was LC No. 72/84 for £92,391.78 pounds (Ninety-two Thousand, Three Hundred and Ninety-one Pounds, Seventy-eight Pence). At the request of the bank, the plaintiff deposited a sum of ₦99,793.15 (Ninety-nine Thousand, Seven Hundred and Ninety-three Naira, Fifteen Kobo) as the full cover for the said letter of credit, based on the exchange rate prevalent on 6 November, 1984. The letter of credit was opened by the bank. In April, 1985 the plaintiff went to the Aba Branch office of the defendant bank to collect the shipping documents relating to the letter of credit. There he was told that due to foreign exchange fluctuations at the time the defendant bank’s correspondent bank cabled instructions that the supplier had been paid he had to pay an extra amount ₦16,224.29 (Sixteen Thousand, Two Hundred and Twenty-four Naira, Twenty-nine Kobo) before he could collect the shipping documents. The plaintiff paid the said sum, cleared the goods and sold them in 1985. That could have been the end of the matter. But it was not. On 11 December, 1986, 31 December, 1986 and 21 July, 1988, the defendant bank debited the plaintiff’s account with the sums of ₦77,578.18, ₦25,727.19 and ₦42,138.98 respectively which the defendant claimed were foreign exchange fluctuations arising from the letter of credit transaction in respect of the LC No. 72/84. The plaintiff protested to the defendant against these debits.

Sometime in 1985 the defendant bank granted the plaintiff an overdraft facility of ₦140,000 in addition to a further sum of ₦200,000 facility granted to cover documentary credits.

The plaintiff executed a deed of mortgage in favour of the
defendant bank over his property situate at 15C Chief Paul Nkoro Avenue, Aba, as security for the facilities granted him.

It was the plaintiff’s complaint that the defendant bank took advantage of the mortgage to inundate his account with arbitrary debits resulting in the account being paralysed. As it was the only business account he had with any bank, his business suffered. In consequence, the plaintiff on 15 March, 1989 instituted the action leading to this appeal claiming, as per paragraph 17 of his statement of claim:

“(a) A declaration that the plaintiff had in 1984 fully and effectually settled all his obligations to the defendant arising under letter of credit 72/84 for £92,391.78 pounds.

(b) A declaration that the sums of ₦77,578.18, ₦25,727.19 debited to the plaintiff’s account by the defendant on the 11th and 31st day of December, 1986, and all other such sums of money also debited to the plaintiff’s account by the defendant were wrongly debited.

(c) An order of the Honourable Court compelling the defendant to pay back to the plaintiff’s account all such sums of money irregularly debited to it including the interest earned by the defendant on the sums irregularly debited to the plaintiff’s account.

(d) A declaration of the Honourable Court that whatever indebtedness, if any, existing after allowance is completely made of the several sums irregularly and unlawfully debited to the plaintiff’s account with the defendant, was not the type of indebtedness contemplated by the parties which the plaintiff entered into a deed of mortgage in respect of his property known as No. 15C Chief Paul Nkoro Avenue, Aba with the defendant, which property was registered as No. 79 at page 79 in Volume 155 of the Lands Registry, in the office at Owerri.

(e) An order of injunction restraining the defendant by itself or through its servants and/or agents from taking steps, including advertisements, to sell or otherwise or dispose of the said property.

(f) An order of the Honourable Court compelling the defendant to return the title deeds respecting the property to the plaintiff.
The plaintiff claims against the defendant the sum of ₦500,000 (Five Hundred Thousand Naira) as general damages for the defendant’s negligence.”

In its statement of defence, the defendant bank pleaded *inter alia* as follows:

3. The defendant denies the averment in paragraph 5 of the statement of claim. The defendant states that the plaintiff paid the sum of ₦99,783.15 (Ninety-nine Thousand, Seven Hundred and Eighty-three Naira, Fifteen Kobo) which amount includes deposit and the bank charges for the establishment of letters of credit. The defendant denies that the said amount covered the full amount payable by the plaintiff for the transaction.

4. In further answer to the said paragraph of the statement of claim the defendant states that owing to the fluctuation in exchange rates it is not possible for the defendant to determine before hand the exact amount to be paid by the plaintiff for the establishment of the letters of credit until the transaction comes to an end, that is to say, until the goods for which the letters of credit were opened had arrived and the plaintiff had taken delivery and the Central Bank of Nigeria paid the suppliers of the goods.

5. The defendant admits paragraph 6 of the statement of claim to the extent that that at the time the plaintiff collected the shipping documents from the defendant to clear his goods from the port he paid a total sum of ₦116,017.44 including the initial deposit paid by the plaintiff at the time the letters of credit were being opened.

6. The said sum of ₦116,017.44 was not all that the defendant was to pay to bring the transaction to a close. The practice in the establishment of letters of credit for a customer is that after a customer had collected or taken delivery of the good he forwards the customs exchange control documents to the bank which documents the bank in turn forwards to the Central Bank of Nigeria. Armed with the exchange control documents the Central Bank makes available the foreign currency value of the goods to the suppliers overseas, while the bank pays to the Central Bank of Nigeria the equivalent in local currency. Until the Central Bank releases the foreign currency to the overseas suppliers it cannot be determined before hand the amount in local currency a customer is entitled to pay for the establishment of letters of credit.
This was the case in the transaction that gave rise to this action.

8. The defendant denies that the sums referred to in paragraphs 8 of the statement of claim were unilaterally, negligently or unjustifiably debited against the account of the plaintiff. The sums were arrived at after the release of the foreign currency by the Central Bank of Nigeria to the overseas suppliers in accordance with the process explained in paragraph 6 of this statement of defence. The defendant in turn paid the said sums to Central Bank. The defendant further states that the plaintiff before the establishment of the letters of credit signed undertaking to pay revaluations of the foreign currency amount as advised by the Central Bank of Nigeria. The defendant will at the trial found on the undertaking. The defendant denies the averment in paragraph 8(a) of the statement of claim and will at the trial put the plaintiff to the strictest proof thereof.”

The defendant further states that if there was a delay in the processing of the letters of credit it was due to the fault of the plaintiff for:–

“(a) The letters of credit were established in November, 1984. The goods were shipped on 28/2/85. In April, 1985, the defendant received the shipping documents and handed them to the plaintiff while the goods arrived in the same April, 1985.

(b) In between the establishment of the letters of credit and the arrival of the goods there was an amendment of the terms of shipment between the plaintiff and the suppliers. The goods were originally to be air freighted but they eventually were sent by sea.

(c) In the whole transaction the defendant acted as an agent to the plaintiff and the defendant duly discharged its obligations by carrying out the plaintiff’s instructions promptly.”

At the trial of the action, the defendant bank led no evidence in proof of the above averments contained in its statement of defence. Its lone witness, MO Okorie, only testified as to the transaction relating to the letter of credit, the subject matter of the action but could not produce the Central Bank’s directive that authorised the bank to make deductions from the plaintiff’s account. At the conclusion of trial and after
addresses by learned Counsel for the parties, the learned trial Judge found for the plaintiff and adjudged:

“On these premises, the judgment of this Court in these proceedings is as follows:–

(i) It is hereby declared that with the payment of the total sum of ₦116,017.44 paid by plaintiff to defendant between 6 April, 1984 and in or about April, 1985, the plaintiff fully and effectually settled all his obligations to the defendant arising under the letters of credit 72/84 for £92,391.78 pounds.

(ii) It is hereby declared that the sums of ₦77,578.18 and ₦25,727.19 debited to plaintiff’s account by the defendant, and all other sums of money debited to plaintiff’s account pursuant to the transaction connected with the said letters of credit 72/84 were wrongly debited.

(iii) It is hereby ordered that the sums wrongly debited in plaintiff’s account be reversed and paid back into his account, including the sums of ₦77,578.18, ₦25,727.19 and ₦42,138.98. The sum of ₦116,017.44 is not affected by this order.

(iv) It is hereby ordered that defendant, having failed to prove plaintiff’s indebtedness to it, is hereby given up to and including 14 December, 1990 to release to the plaintiff his title deed registered as No. 79 Page 79 in Volume 155 of the Lands Office registry at Owerri, connecting and concerning his property known as and called No. 15C Chief Paul Nkoro Avenue, Aba.

(v) The relief seeking a declaration that whatever indebtedness, if any, existing after allowance is completely made of the several sums irregularly and unlawfully debited to the plaintiff’s account with the defendant, was not the type of indebtedness by the parties when the plaintiff entered into a deed of mortgage in respect of his property known as No. 15C Chief Paul Nkoro Avenue, Aba with the defendant, which property was registered as No. 79 at Page 79 in Volume 155 of the Lands Registry in the office of Owerri is hereby dismissed. This item of the claim is vague. The indebtedness not proven for any meaningful order.

(vi) The defendant will pay to plaintiff ₦200,000 general damages.

(vii) The defendant will pay to plaintiff costs fixed at ₦1,500 (One Thousand, Five Hundred Naira).”
The defendant bank appealed against this judgment to the Court of Appeal, Port Harcourt Division. The Court of Appeal dismissed the appeal and affirmed the judgment of the trial court, including all the consequential orders made therein. And being dissatisfied with the judgment of the Court of Appeal, the defendant bank has now, with the leave of the Court of Appeal, appealed to this Court upon five grounds of appeal.

Pursuant to the rules of this Court, the parties filed and exchanged their respective briefs of argument. In the appellant’s brief the defendant formulated three issues as calling for determination in its appeal, to wit:–

“(i) Whether, having found that the respondent did not prove the particulars of negligence by the trial court, learned Justices of the Court of Appeal were right in confirming the decision of the trial court that the appellant was liable in negligence.

(ii) Whether in fact the respondent was not owing the appellant as at 5/12/90 the date of the judgment of the trial court.

(iii) Whether the order on the appellant to release the title deed of the respondent was right.”

The plaintiff reframed the issues thus:–

“1. Whether, from the pleadings and evidence before the trial court, the learned court, the learned Justices of the Court of Appeal were wrong in affirming the findings of fact of the trial court that the appellant was rightly found liable in negligence.

2. Whether from the state of pleadings the respondent needed to tender the debit note for same to prove that the appellant debited his account with ₦42,138.98 as pleaded.

3. Whether the Justices of the Court of Appeal were right in confirming the order to release the respondent’s title deed made by the trial court.”

Both sets of issues raise substantially the same questions. I shall, however, adopt the defendant’s issues in the determinant of the appeal.

“Issue 1:–

Plaintiff had pleaded in paragraph 8 of his statement of claim thus:–
8. The defendant later without any justification, on 11 December, 1986, 31 December, 1986 and 21 July, 1988, unilaterally and negligently debited the plaintiff’s account with the sums of ₦77,578.18, ₦25,727.19 and ₦42,138.98 respectively. The defendant at other times also debited the plaintiff’s account in the name of foreign exchange fluctuation arising from the same L.C.

PARTICULARS OF NEGLIGENCE.

(a) The defendant in breach of its duty to the plaintiff did not expeditiously process the plaintiff’s letter of credit in line with the Central Bank of Nigeria directives.

(b) The defendant’s failure as disclosed above resulted in the plaintiff’s letter of credit to remain outstanding when other letters of credit opened at the same time were settled before 1986 or 1987. At the trial, the plaintiff shall rely on the relevant circular issued by the Central Bank of Nigeria to banks or authorized dealers. Also pleaded hereby is the defendant’s letter dated 5 February, 1987, justifying its actions. The said circular is hereby specifically pleaded.

(c) Another letter of credit which the defendant also opened for the plaintiff on the same date for the sum of ₦187,750 did not attract any fluctuation because it was processed and sent to the Central Bank of Nigeria within the stipulated period.

In his judgment the learned trial Judge observed:—

“Plaintiff pleaded the negligence alleged against the defendant as follows: . . . “.

The learned trial Judge then set out paragraph 8 of the statement of claim and went on to find:—

“From the evidence before me, I do not find that the plaintiff proved items (a), (b) and (c) above.”

There has been no appeal against this finding. The learned trial Judge went on to say:—

“The question which now arises is: Does the debiting of the sums of ₦77,578.18; ₦25,727.19 and ₦42,138.98 by defendant against
the plaintiff amount to negligence? In its letter dated 5 February, 1987, (plaintiff’s exhibit No. 3), the defendant stated as follows:–

‘. . . As bankers our customers are our assets and we always endeavour to protect their interests but not, however, to violate the monetary policy/authority of the nation. The true position is not that we are interested in debiting our customers with rate differences in order to get more interest on overdrawn accounts as pointed out in your letter but, rather that we have Central Bank of Nigeria instructions to revalue outstanding bills/letters of credit as specified rates. The several debits on the particular L/C is as a result of application of wrong rates initially which later has to be corrected.

In my view, I find that where a bank debits the account of its customer, as in this case, with amounts arising from wrong calculations committed by the bank, it would be inferred that the bank had acted in breach of the duty it owed the customer to keep proper and accurate account for the customer. As the case may be this breach may result in violation of the contractual relationship between the bank and the customer or in violation of the duty of care which the bank owed the customer. The bank, in plaintiff’s exhibit No. 3, admitted a violation’."

He considered the issue of damages and concluded:–

“The defendant was negligent when it wrongly believed that plaintiff was indebted to it in respect of the letters of credit and proceeded, under that error, to debit his account with unwarranted amounts. The sums so debited in my opinion constituted part of the monetary value of the ultimate damage done to plaintiff. I do not have evidence to show that defendant actually paid the amounts to the Central Bank as alleged in paragraph 8 of its statement of defence pursuant to the letter of credit transaction in question. Defendant acted in error to block the account of plaintiff and thereby prevented him from having access to the sum of N50,000 he deposited in it. Defendant did not offer any evidence to justify the action. General damages are such as the court can give based on all assessment of the judgment and opinion of a reasonable man in the matter.

I am not in doubt that the plaintiff is entitled to general damages from the defendant, as well as reversal of the debit entry made in error in plaintiff’s account.”

He awarded N200,000 general damages.
The Court of Appeal affirmed the award. On the complaint of the defendant that the trial Judge made contradictory findings on the issue of negligence pleaded by the plaintiff, the Court of Appeal, per Rowland JCA, observed:

“It seems to me that the appraisal given to the above findings of the court below in appellant’s brief of argument is misconceived. There is nothing contradictory or overreach in the above findings by the trial court.”

On damages, the learned Justice of the Court of Appeal who delivered the lead judgment of that court, with which Edozie and Onalaja JJCA agreed, had this to say:

“As to the award of₦200,000 general damages by the court below in favour of the respondent against the appellant, I am of the firm view that the award was properly made by the trial court. A Judge should award damages so far as money can compensate that will give the injured party a reparation to the wrongful act.”

The learned Justice referred to Admiralty Commissioners v Susque Hanna (Owners) (1926) AC 655 where the following passage appears:

“An appellate court will only interfere with an award of damages by a lower court where it is convinced either that the Judge of the lower court acted upon some wrong principle of law, or that the amount awarded was extremely high or so very small as to make it, in the judgment of the court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.”

The defendant bank, in the appeal before us, has questioned the award of₦200,000 damages against it for negligence. It is contended that as the plaintiff failed to prove the particulars of negligence pleaded by him, his action failed. It is further contended that the trial Judge was in error to find for the plaintiff on issues not pleaded. Learned Counsel for the defendant bank, in the brief of argument, criticised the use made of exhibit 3, defendant’s letter to the plaintiff in reply to the latter’s earlier letter, exhibit 2. It is submitted that the Court of Appeal was in error to affirm the judgment of the trial court.
For the plaintiff, it is contended that the finding of the learned trial Judge that negligence as particularised was not proved, did not, in the circumstances of the case, mean the end of the plaintiff’s case. This was so, it is contended, as exhibits 2 and 3 (exchange of letters between the parties) established the negligence pleaded.

I have carefully considered the argument advanced in the briefs of arguments of both parties and the oral submissions made at the hearing of the appeal before us. I think the learned trial Judge acted on a wrong principle of law in awarding the sum of ₦200,000 general damages in favour of the plaintiff. Having failed to prove the particulars of negligence pleaded by him, the plaintiff’s claim for damages for negligence on a tort ought to have been dismissed. It was not for the trial Judge to find reasons, other than those pleaded, to find for the plaintiff in the tort of negligence. He could not make a case for a party different from that party’s case. See Aermachi v A.I.C. Ltd (1986) 2 NWLR (Part 23) 443 at 449. The court below ought not to have affirmed that award of ₦200,000 special damages for negligence.

This, however, is not the end of the matter. Plaintiff’s claim (b) relates specifically to the two sums of ₦77,578.18 and ₦25,727.19 debited by the defendant bank to the plaintiff’s account in respect of the letters of credit No. 72/84. It was the plaintiff’s case that these sums of money ought not to have been debited to his account two years after the transaction. Defendant pleaded, but led no evidence in support, that the debits arose as a result of the directives of the Central Bank.

The law is clear on this point. In a banker/customer relationship, the onus of proving how devaluation of foreign currency affected transactions between the banker and the customer and that the banker is entitled to charge the customer with such devaluation, lies on the banker as such facts are specifically within his knowledge. See FS Yesufu v African Continental Bank (1981) 1 SC 74, (1981) NSCC (Vol. ileadership.
"The evidence of the defendant in court fell far short of offering any effective defence to the positive claim of the plaintiff. Defendant admitted plaintiff paid ₦116,017.44 but failed to give any evidence of any additional sums payable by (him) to justify the debits made by defendant against the plaintiff. The evidence is necessary because in defendant’s exhibit No. 1, the undertaking, the various items and heads constituting the sum of ₦116,017.44 were expressly spelt out. Before defendant could debit any amount against the plaintiff pursuant to the undertaking, (defendant’s exhibit No. 1) it is necessary as a condition precedent that the defendant should first of all show that such amount had become due and payable after the payment of ₦116,017.44 as a result of any exchange variations between the time of calculating the Naira deposit payable (in this case the ₦116,017.44 paid) and the time defendant purchased the required foreign exchange. At paragraph 8 of the statement of defence, the defendant stated it paid the sums debited to the account of the plaintiff to the Central Bank. It failed to pursue this line of its defence in its oral testimony in court. Having admitted it debited the disputed amounts against the plaintiff, the onus to show good and reasonable cause for the debit lay on the defendant. Defendant failed to discharge the onus. There was no evidence that any payments were made to the Central Bank.”

Having failed to discharge that onus in this case, the learned trial Judge was right in finding in the plaintiff’s favour in respect of those two sums. And having so found, it would amount to double compensation to yet award the sum of ₦200,000 as general damages in respect of the same mischief. See Agaba v Otobusin (1961) All NLR 299; LCC v Unachukwu (1978) 3 SC 199, (1978) All NLR 92; Ekpe v Fagbemi (1978) 3 SC 209, (1978) All NLR 107; Armel’s Transport v Transco (Nig.) Ltd (1974) 11 SC 237, (1974) All NLR 863; Ezeani v Ejidike (1964) 1 NLR 402 at 405, (1964) All NLR 395; Onaga and others v Micho and Co. (1961) All NLR 324.

The net result of all I have said above is that I find for the defendant bank on Issue 1 and set aside the award of ₦200,000 general damages made against the defendant.
Issues 2 and 3:

As the answer to question 3 is dependent on the resolution of question 2, I think it is appropriate to take them together. The resolution of question 2 depends on whether the learned trial Judge was right in taking into account the sum of ₦42,138.98 and other sums which the plaintiff claimed were wrongly debited to his account.

I have given careful consideration to the argument advanced on behalf of both parties. On paragraph 8 of his statement of claim the plaintiff specifically mentioned the figure of ₦42,138.98 among other sums claimed by him as having been wrongly debited to his account. In his claim (b) in paragraph 17 this figure was not specifically mentioned. At the trial, the plaintiff’s attempt to prove that this sum of ₦542,138.98 was debited to his account failed as he withdrew the debit note (photocopy) he sought to tender in proof thereof. His statement of account was never tendered in evidence. It is significant to observe that this figure was never mentioned in his letter exhibit 2 written to the defendant on 30 January, 1987, whereas the other two sums he pleaded in paragraph 8 were specifically mentioned in that letter. The result is that there was no proof that the sum of ₦42,138.98 was ever debited by the defendant to the plaintiff’s account.

In his judgment, the learned trial Judge found:–

“With regard to plaintiff’s indebtedness, if any, to defendant, reference must be made of plaintiff’s exhibit No. 2 which though pleaded as a letter of protest, contained facts from which the overall financial relationship between the plaintiff and the defendant could easily be determined as at the date of the letter namely, 30 January, 1987. The amount which plaintiff admitted he owed the defendant therein was ₦180,713.28. The sums which plaintiff claimed were creditable to his account were ₦103,305.37; ₦720; ₦4,898.37; ₦4,665.11; ₦4,804.61; ₦150.08; ₦4,575.82 and ₦50,000 totaling ₦173,119.36. Added to this must be the sum of ₦42,138.98 referred to at paragraph 8 of the statement of claim bringing the total claim to ₦215,258.34. In effect, plaintiff admitted by the said letter it owed the defendant the sum of ₦7,593.92.”
By a strange twist, the learned trial Judge found:—

"From these calculations which arose from the evidence before me, I do not find that the plaintiff is indebted to the defendant of any amount at all."

I need observe that, apart from the sum of ₦103,305.37 (the sum total of the sums ₦77,578.18 and ₦25,727.19), the plaintiff did not prove that the other sums were ever debited to his account. Debit notes covering those sums were never tendered nor the plaintiff’s statement of account, which would have been binding on the defendant bank. Exhibit 2, the plaintiff’s letter to the defendant, could not have been legal proof that his account was debited by the defendant in these sums. At best, exhibit 2 is an admission by the plaintiff that he was still owing some amount to the defendant bank which he put, according to the trial Judge’s calculation, at ₦7,593.92.

Having found in one breath that, on the plaintiff’s showing in exhibit 2, he was still owing the defendant bank the sum of ₦7,593.92, the learned trial Judge in another breath found that the plaintiff was not owing the bank any amount. The learned Judge tried to rationalise this rather contradictory finding by saying:—

"At paragraphs 12 and 13 of the statement of claim, plaintiff pleaded that the present purported indebtedness existing against the plaintiff arose from the combined effect of the wrongful debits and the alleged fluctuation in foreign exchange. At paragraph 11 of the statement of claim the plaintiff pleaded defendant wrongly debited more than ₦230,000 to the plaintiff’s account. At paragraph 10 of the statement of defence the defendant merely denied the plaintiff’s averment. The denial was not sufficient. This mode of denial in law is tantamount to an admission by the defendant of the plaintiff’s case on the issue. The legal principle on this is that any claim or defence pleaded which is not canvassed during the trial is deemed to have been abandoned. See: Shell B.P. v Abedi (1974) All NLR (Part 1) at Page 16; Chief Adedejo Adekeye and Another v Chief O.B. Akin Olugbade (1987) 3 NWLR (Part 60) 214, (1987) 6 SC 268 at 294. Any matter not specifically denied or stated not to be admitted should be regarded as established. See Ahmed Debs and Another v Cenico (Nig.) Ltd (1986) 3 NWLR (Part 32) 846, (1986) 6 SC 179 at 182.”
He, however, failed to advert his mind to paragraphs 10 and 11 of the statement of defence where the defendant pleaded:

"10. Except to admit that there was a legal mortgage executed between the plaintiff and the defendant by which the property of the plaintiff at 15C Chief Paul Nkoro Avenue, Aba, was secured the defendant denies the averments in paragraphs 10, 11, 12, 13, 14, 15 and 16 of the statement of claim. The defendant further states that the said deed of legal mortgage covers all the indebtedness on the plaintiff’s account and all other debts owing to the defendant by the plaintiff.

The defendant further states that the rate of interest charged at any time was in keeping with the Central Bank of Nigeria guidelines which all commercial banks including the defendant must comply with.

11. The defendant states that the defendant is entitled to sell the property of the plaintiff situate at 15C Chief Paul Nkoro Avenue, Aba, covered or secured by the deed of legal mortgage dated 2 December, 1980, and registered as No. 53 at page 53 in Volume 235 of the Register of Deeds kept at Owerri, the plaintiff having failed to pay his indebtedness to the defendant."

With profound respect to the learned Judge, with the state of the pleadings it would be wrong to say that the defendant admitted that it debited the plaintiff’s account with “more than ₦230,000” an indefinite amount.

And had their Lordships of the court below properly evaluated the evidence on record, they would not have affirmed the findings of the trial Judge to the effect that the plaintiff was not owing the defendant bank. That finding is preserve and must be set aside.

In any event, the order that the plaintiff’s title deed be returned to him cannot be a proper exercise of judicial discretion. The mortgage deed was not in evidence. How did the learned trial Judge come to know that the plaintiff had fulfilled all his obligations to entitle him to a return of his title deed? In the light of the finding that the plaintiff was still
In conclusion, I allow this appeal and set aside the judgments of the two courts below. In their stead, I enter judgment for the plaintiff against the defendant bank in the following terms:

(1) It is declared that the sum of ₦77,578.18 and ₦25,725.19 debited to the plaintiff’s account by the defendant pursuant to the transaction connected with the letters of credit no. 72/84 for £92,391.78 pounds, were wrongly debited.

(2) It is ordered that the said sums of ₦77,578.18 and ₦25,727.19 be reversed and paid back into the plaintiff’s account.

(3) All other claims of the plaintiff are dismissed.

(4) Plaintiff is entitled to costs of the trial assessed at ₦750.

The defendant bank is awarded ₦10,000 costs of this appeal and ₦1,500 costs in the Court of Appeal.

KARIBI-WHYTE JSC: I have had the opportunity of reading before now the leading judgment of my learned brother, Ogundare JSC, in this appeal.

I agree with his reasoning and the conclusion allowing the appeal. I will also allow; and hereby allow the appeal of the appellant.

I abide by the costs awarded in the leading judgment.

OUNU JSC: I had a preview of the judgment of my learned brother, Ogundare JSC, just delivered. I so agree with the reasoning and conclusion that I adopt the same as mine.

I have nothing further to add thereto.

UWAIFO JSC: I read in advance the judgment of my learned brother, Ogundare JSC. I agree with it for the reasons he has given. I too allow the appeal in the terms stated, including the order for costs.
EJIWUNMI JSC: I have had the advantage of reading before now the judgment just delivered by my learned brother, Ogundare JSC. In that judgment, the facts and the issues raised thereon have been carefully set down and considered. As I agree with the reasoning that preceded the conclusions reached allowing the appeal of the appellant, the judgment is adopted as my own. Accordingly, I also allow the appeal, and abide with all the orders made in the said judgment.

*Appeal allowed.*