NIGERIAN BANKING LAW REPORTS
[1976 – 1984]
VOLUME 3

Published by Nigeria Deposit Insurance Corporation

2006
## EDITORIAL BOARD

1. **Professor J.O. Anifalaje**  
   *Chairman*
   Dean, Faculty of Law,  
   University of Ibadan

2. **Alheri Bulus Nyako**  
   *Editor-in-Chief*
   Board Secretary/Head of Legal Department  
   N.D.I.C.

3. **Michael Olufemi Olaitan**  
   *Member*
   Legal Practitioner

4. **Ahmed Almustapha**  
   *“*
   Registrar-General  
   Corporate Affairs Commission

5. **Gabriel Olukayode Kembali**  
   *“*
   Legal Practitioner

6. **Adekunle Oladapo Omowole**  
   *“*
   Legal Practitioner  
   Corporate Affairs Commission

7. **Nasiru Tijani**  
   *“*
   Legal Practitioner  
   Senior Lecturer, Nigerian Law School

8. **Belema A. Taribo**  
   *“*
   Legal Practitioner  
   N.D.I.C.

9. **Moses Ter-llumun Adaguusu**  
   *“*
   Legal Practitioner  
   N.D.I.C.

10. **Dan Ike Agwu**  
    *Secretary*
    Legal Practitioner  
    N.D.I.C.
LIST OF JUSTICES OF THE SUPREME COURT
OF NIGERIA AS AT MAY 17TH, 2005

1. HON. JUSTICE MUHAMMADU LAWAL UWAIS, GCON (Chief Justice of Nigeria)
2. HON. JUSTICE SALIHU MODIBBO ALFA BELGORE
3. HON. JUSTICE IDRIS LEGBO KUTIGI
4. HON. JUSTICE SYLVESTER UMARU ONU
5. HON. JUSTICE ALOYSIUS IYORGYER KATSINA-ALU
6. HON. JUSTICE UMARU ATU KALGO
7. HON. JUSTICE AKINTOLA OLUFEMI EJIWUNMI
8. HON. JUSTICE NIKI TOBI
9. HON. JUSTICE DAHIRU MUSDAPHER
10. HON. JUSTICE DENNIS ONYEJIFE EDOZIE
11. HON. JUSTICE IGNATIUS CHUKWUDI PATS-ACHOLONU
12. HON. JUSTICE GEORGE ADESOLA OGUNTADE
13. HON. JUSTICE SUNDAY AKINOLA AKINTAN
LIST OF JUSTICES OF THE COURT OF APPEAL AS AT MAY 17TH, 2005

1. **HON. JUSTICE UMARU ABDULLAHI, CON (President)**
2. HON. JUSTICE ALOMA MARIAM MUKHTAR
3. HON. JUSTICE ISA AYO SALAMI
4. HON. JUSTICE JAMES OGENYI OGEBE
5. HON. JUSTICE RABIU DANLAMI MUHAMMAD
6. HON. JUSTICE MAHMUD MOHAMMED
7. HON. JUSTICE RAPHAEL OLUFEMI ROWLAND
8. HON. JUSTICE MUHAMMAD S. MUNTAKA COOMASIE
9. HON. JUSTICE DALHATU ADAMU
10. HON. JUSTICE IBRAHIM TANKO MUHAMMAD
11. HON. JUSTICE BABA ALKALI BA’ABA
12. HON. JUSTICE SAKA ADEYEMI IBIYEYE
13. HON. JUSTICE ZAINAB ADAMU BULKACHUWA
14. HON. JUSTICE SULEIMAN GALADIMA
15. HON. JUSTICE VICTOR AIMEPOMO O. OMAGE
16. HON. JUSTICE JOHN AFOLABI FABIYI
17. HON. JUSTICE F.F. TABAI
18. HON. JUSTICE PIUS OLAYIWOLA ADEREMI
19. HON. JUSTICE KUMAI BAYANG AKAHHS
20. HON. JUSTICE OLUFUNLOLA OYEOLA ADEKEYE
21. HON. JUSTICE ABOYI JOHN IKONGBEH
22. HON. JUSTICE PATRIC IBE AMAIZU
23. HON. JUSTICE JOSEPH JEREMIAH UMOREN
24. HON. JUSTICE WALTER S.N. ONNOGHEN
25. HON. JUSTICE M. DATTIJO MUHAMMAD
26. HON. JUSTICE CHRISTOPHER M. CHUKWUMA-ENEH
27. HON. JUSTICE AMIRU SANUSI
28. HON. JUSTICE IFYEYINWA CECILIA NZEAKO
29. HON. JUSTICE ISTIFANUS THOMAS
30. HON. JUSTICE JAFARU MIKA’ILU
31. HON. JUSTICE IKECHI F. OGBUAGU
32. HON. JUSTICE AMINA A. AUGIE
33. HON. JUSTICE ABUBAKAR ABDULKADIR JEGA
34. HON. JUSTICE NWALE SYLVESTER NGWUTA
35. HON. JUSTICE MONICA DONGBAN-MENSEM
36. HON. JUSTICE STANLEY SHENKO ALAGOA
37. HON. JUSTICE M. L. GARBA
38. HON. JUSTICE JEAN OMOKRI
39. HON. JUSTICE TIJANI ABDULLAHI
40. HON. JUSTICE UWANI M. ABBA AJI
41. HON. JUSTICE MARY PETER ODILI
42. HON. JUSTICE KUDIRAT M.O. KEKERE-EKUN
43. HON. JUSTICE GERTRUDE IFUNANYA UDOM AZOGU
44. HON. JUSTICE BODE RHODE VIVOUR
45. HON. JUSTICE RAPHAEL CHIKWE AGBO
46. HON. JUSTICE LADAN MOHAMMED TSAMIYA
LIST OF JUSTICES OF THE FEDERAL HIGH COURT OF NIGERIA AS AT MAY 17TH, 2005

1. **HON. JUSTICE R. N. UKEJE** *(Chief Judge)*
2. HON. JUSTICE A. MUSTAPHA
3. HON. JUSTICE D. D. ABUTU
4. HON. JUSTICE I. N. AUTA
5. HON. JUSTICE R. O. OLOMOJOBI
6. HON. JUSTICE M. A. EDET
7. HON. JUSTICE A. A. ABDU-KAFARATI
8. HON. JUSTICE SOBA
9. HON. JUSTICE O. J. OKEKE
10. HON. JUSTICE S. YAHAYA
11. HON. JUSTICE A. BELLO
12. HON. JUSTICE A. B. GUMEL
13. HON. JUSTICE A. O. AJAKAIYE
14. HON. JUSTICE F. F. OLAYIWOLA
15. HON. JUSTICE ADAMU HOBON
16. HON. JUSTICE J. T. TSOHO
17. HON. JUSTICE S. J. ADAH
18. HON. JUSTICE CHUKWURA NNAMANI
19. HON. JUSTICE R. O. NWODO
20. HON. JUSTICE G. C. OKEKE
21. HON. JUSTICE G. K. OLOTU
22. HON. JUSTICE J. E. SHAKARHO
23. HON. JUSTICE L. AKANBI
24. HON. JUSTICE C. M. OLATOREGUN
25. HON. JUSTICE BINTA F. M. NYAKO
26. HON. JUSTICE A. LIMAN
27. HON. JUSTICE S. YAHUZA
28. HON. JUSTICE C. ARCHIBONG
29. HON. JUSTICE I. EJIOFOR
30. HON. JUSTICE A. I. CHIKERE
31. HON. JUSTICE M. L. SHUAIBU
32. HON. JUSTICE SALIU SAIDU
33. HON. JUSTICE G. O. KOLAWOLE
34. HON. JUSTICE A. O. FAJI
35. HON. JUSTICE B. BELLO ALIYU
36. HON. JUSTICE B. I MOLOKWU
37. HON. JUSTICE A. F. ADETOKUNBO-ADEMOLA
38. HON. JUSTICE CHUDI NWOKORIE
39. HON. JUSTICE M. I. AWOKULEHIN
40. HON. JUSTICE R. N. OFILI-AJUMOGOBIA
41. HON. JUSTICE L. ALLAGOA
42. HON. JUSTICE A. O. OGE
43. HON. JUSTICE BABS KUEWUMI
44. HON. JUSTICE UMAR M. GARBA
45. HON. JUSTICE NYAURE BABA
46. HON. JUSTICE A. R. MOHAMMED
47. HON. JUSTICE T. ABUBAKAR
### TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Index</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Index of Table of Cases Reported</td>
<td>xiii</td>
</tr>
<tr>
<td>Index of Subject Matter</td>
<td>xv</td>
</tr>
<tr>
<td>Index of Cases referred to</td>
<td>xxxv</td>
</tr>
<tr>
<td>Index of Statutes referred to</td>
<td>lvii</td>
</tr>
<tr>
<td>Index of Rules referred to</td>
<td>lxiii</td>
</tr>
<tr>
<td>Index of Books referred to</td>
<td>lxv</td>
</tr>
</tbody>
</table>
# TABLE OF CASES REPORTED

<table>
<thead>
<tr>
<th>Case</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Abimbola v. Bank of America (Nigeria) Limited and another</td>
<td>216</td>
</tr>
<tr>
<td>Adeleke v. National Bank of Nigeria Limited</td>
<td>393</td>
</tr>
<tr>
<td>Adetoyin and another v. Bank of the North Limited</td>
<td>191</td>
</tr>
<tr>
<td>African Continental Bank Limited v. Ehiemua and another</td>
<td>349</td>
</tr>
<tr>
<td>African Continental Bank Limited v. Yesufu</td>
<td>354</td>
</tr>
<tr>
<td>Agbafe v. Viewpoint (Nigeria) Limited</td>
<td>242</td>
</tr>
<tr>
<td>Akpene v. Barclays Bank of Nigeria Limited and another</td>
<td>203</td>
</tr>
<tr>
<td>Angus Builders Company Limited v. Bank of America (Nigeria) Limited</td>
<td>467</td>
</tr>
<tr>
<td>Arab Bank (Nigeria) Limited v. Dantata</td>
<td>288</td>
</tr>
<tr>
<td>Attorney–General of the Federation v. Ekpa</td>
<td>173</td>
</tr>
<tr>
<td>Awobotu v. State</td>
<td>73</td>
</tr>
<tr>
<td>Bank of America Nigeria Limited v. Kujore and others</td>
<td>402</td>
</tr>
<tr>
<td>Bank of the North Limited v. Bernard</td>
<td>104</td>
</tr>
<tr>
<td>Barclays Bank of Nigeria Limited v. Abubakar</td>
<td>337</td>
</tr>
<tr>
<td>Barclays Bank of Nigeria Limited v. Ashiru and others</td>
<td>408</td>
</tr>
<tr>
<td>Barclays Bank of Nigeria Limited v. Central Bank of Nigeria</td>
<td>119</td>
</tr>
<tr>
<td>Coker v. Standard Bank of Nigeria Limited</td>
<td>146</td>
</tr>
<tr>
<td>Co-operative Bank Limited v. Otaigbe</td>
<td>587</td>
</tr>
</tbody>
</table>
Federal Republic of Nigeria v. Lawal ........................................ 650
Glanvil Enthoven and Company Limited v. African Continental Bank Limited ........................................ 34
Imarsel Chemical Company Limited v. Africa Continental Bank Limited ................................. 1
Johnson v. Odeku ........................................................................ 165
National Bank of Nigeria Limited v. Are Brothers (Nigeria) Limited ................................................ 278
National Bank of Nigeria Limited v. Fasoro .................. 317
National Bank of Nigeria Limited v. Korban Brothers (Nigeria) Limited and others ....................... 142
National Bank of Nigeria Limited v. Shoyoye and another .................................................................. 229
Odumosu v. African Continental Bank Limited .......... 177
Okafor v. Union Bank of Nigeria Limited .................. 631
Onyechi v. National Bank of Nigeria ...................................... 303
Standard of Bank Nigeria Limited v. Bank of America
Nigeria Limited ......................................................................... 135
State v. Esho ....................................................................... 661
Tradelinks International (Nigeria) Limited for leave to apply for an Order of Certiorari; In the matter of the Senior Magistrate AA Awosanya’s Order of 5th February, 1976 in his capacity as Senior Magistrate sitting at Ikeja on the application of the Inspector–General of Police; In Re: Tradelinks International (Nigeria) Limited ................................................................. 248
Umaigba v. New Nigeria Bank Limited ......................... 508
United Bank for Africa Limited v. Savannah Bank of
Nigeria Limited ........................................................................ 538
Wema Bank Limited v. Okutoro ........................................... 580
Yesufu v. African Continental Bank Limited (1) ....... 17
Yesufu v. African Continental Bank Limited (2) ....... 547
Yesufu v. African Continental Bank Limited (3) ....... 607
INDEX OF SUBJECT MATTER

ACTION

ADMISSION

BANKER

BANKING


BANKING – continued


BANKING – continued


Banker/customer relationship – Duty of bank to honour customer’s cheque if sufficient funds available – What constitutes sufficient funds – Cheque drawn against uncleared cheque honoured only under
BANKING – continued

agreement express or implied Onyechi v. National Bank of Nigeria [1976 – 1984] 3 N.B.L.R. 303 (High Court of Anambra State)


Banker’s books – Application to inspect – When to be made and against whom – Whether can be made against “third party” – Procedure for making application – When affidavit necessary section 7,
BANKING – continued

Banker’s Book Evidence Act, 1879


Banker’s lien – Nature of – Lien over title documents deposited as security for overdraft – Whether particular or general lien – When it does not attach to security deposited


Bankers’ book – Copy of banker’s book – Admissibility of – Conditions for admissibility – What need be proved before admissibility of – Section 96(2)(e) Evidence Act considered


Banking and customer – Customer’s cheque returned unpaid when account in credit – Bank marking cheque “Account frozen under Banking Decree” whereas freezing order had expired – Whether action of bank constitutes negligence – Quantum of damages recoverable


Banking Obligation (Eastern States) Decree No. 56 of 1970 – Jurisdiction of court to inquire into matters thereunder – When ousted – How determined


Bills of exchange – Meaning of – Distinguished from letters of credit

BANKING – continued


Cheques – Dishonouring of – With writing – “Refused for want of funds” – When account is in funds –
BANKING – continued


Cheques – Forged cheque – Duty of paying bank – Whether bank has duty of care to payee to recognise customer’s signature and detect forgery on apparently regular cheque *Umaigba v. New Nigeria Bank Limited* [1976 – 1984] 3 *N.B.L.R.* 508 (High Court of Bendel State)

BANKING – continued

Cheques – Forgery – Ingredients of offence – How intent to forge may be proved – Use of a false or fictitious name – When it will constitute forgery Awobotu v. State [1976 – 1984] 3 N.B.L.R. 73 (Supreme Court of Nigeria)


Cheques – Presumptions that arise when a cheque is drawn Awobotu v. State [1976 – 1984] 3 N.B.L.R. 73 (Supreme Court of Nigeria)

BANKING – continued

Cheques – Wrongful dishonour – Customer who is not a trader must prove actual injury to credit to recover substantial damages – Employee of insurance company not a trader Onyechi v. National Bank of Nigeria [1976 – 1984] 3 N.B.L.R. 303 (High Court of Anambra State)


BANKING – continued


Dishonour of customer’s cheque and payment of sufficient money into customer account done on the same day – Presumption raised thereby Benson v. National Bank of Nigeria Limited [1976 – 1984] 3 N.B.L.R. 12 (High Court of Lagos State)

BANKING – continued


BANKING – continued


Money paid into specified account – Proceeds of account alleged to be from stealing – Power of court to stop payment from account – Whether derivable from section 7, Banker’s Book Evidence Act, 1879 *Tradelinks International (Nigeria) Limited for leave to apply for an Order of Certiorari: In Re: Tradelinks International (Nigeria) Limited [1976 – 1984] 3 N.B.L.R. 248 (High Court of Lagos State)*


BANKING – continued


Overdraft – Implied overdraft – Customer drawing a cheque for a sum in excess of the amounts standing to his credit in his current account – Amounts to loan Barclays Bank of Nigeria Limited v. Abubakar [1976 – 1984] 3 N.B.L.R. 337 (Supreme Court of Nigeria)


Partnership account – Cheque in favour of partnership – Cheque marked “Not Negotiable” and “Account Payee Only” – Cheque endorsed to third party by one partner although all partners required to sign cheques – Effect Abimbola v. Bank of America (Nigeria) Limited and another [1976 – 1984] 3 N.B.L.R. 216 (High Court of Lagos State)


BANKING – continued


COMPANY LAW


CONTRACT

Void contract; its legal effects *Adetoyin and another v. Bank of the North Limited* [1976 – 1984] 3 N.B.L.R. 191 (High Court of Oyo State)


CRIMINAL LAW AND PROCEDURE

CRIMINAL LAW AND PROCEDURE – continued


DAMAGES


Principles of and distinction between general and special damages, a mere academic exercise – Good conscience and contemptuous damages Adetoyin and another v. Bank of the North Limited [1976 – 1984] 3 N.B.L.R. 191 (High Court of Oyo State)


DEBT

DECLARATORY JUDGMENT


DEFAMATION


EQUITY


EVIDENCE


EVIDENCE

When court will prefer one evidence to another in proof of disputed inventory Adetoyin and another v. Bank of the North Limited [1976 – 1984] 3 N.B.L.R. 191 (High Court of Oyo State)

INTERPRETATION OF STATUTE

The word “approve” in the Native Lands Acquisition Law Cap 80, Laws of Western Nigeria and the word “consent” under the Land Instruments Registration

xxx
INTERPRETATION OF STATUTE – continued


JUDGMENT AND ORDER


JURISDICTION


LEGAL PRACTITIONERS


LETTERS OF CREDIT


LIS PENDENS

Application thereof to property under mortgage with bank *Barclays Bank of Nigeria Limited v. Ashiru and others* [1976 – 1984] 3 N.B.L.R. 408 (Supreme Court of Nigeria)
PARTNERSHIP


PRACTICE AND PROCEDURE

Legal basis of action taken suo motu by the court in proceedings Adetoyin and another v. Bank of the North Limited [1976 – 1984] 3 N.B.L.R. 191 (High Court of Oyo State)


When question not raised at the lower court can be raised at the appellate court Akpene v. Barclays Bank of Nigeria Limited and another [1976 – 1984] 3 N.B.L.R. 203 (Supreme Court of Nigeria)

STATUTE OF LIMITATION

TORT


WORDS AND PHRASES


INDEX OF CASES REFERRED TO

Nigerian

A


Awosanya v. Algata (1965) 1 All N.L.R. 228, 230 [1976 – 1984] 3 N.B.L.R. 565 (Supreme Court of Nigeria)

B


BEWAC Ltd v. ACB June 1973 [1976 – 1984] 3 N.B.L.R. 66 (High Court of Lagos State)


Boshali v. Allied Commercial Exporters Ltd (1961) 1 All N.L.R. 917 [1976 – 1984] 3 N.B.L.R. 188 (Supreme Court of Nigeria)


C


D


Index of Cases Referred to

E

G
George v. Dominion Flour Mills Ltd (1963) 1 All N.L.R. 71 [1976 – 1984] 3 N.B.L.R. 599 (High Court of Bendel State)
George and others v. Dominion Flour Mills Ltd (1963) 1 All N.L.R. 77 [1976 – 1984] 3 N.B.L.R. 645 (High Court of Lagos State)
George v. UBA (1972) 1 All N.L.R. 341 [1976 – 1984] 3 N.B.L.R. 561 (Supreme Court of Nigeria); [1976 – 1984] 3 N.B.L.R. 606 (High Court of Bendel State)

H

I
J

K

L
Lawal v. R (1963) 1 All N.L.R. 175 at 178 [1976 – 1984] 3 N.B.L.R. 654 (High Court of Oyo State)

M

N
Index of Cases Referred to


O


P


Q

Quo Vadis Hotel and Restaurant Ltd v. Commissioner of Lands, Mid-Western State and others (1973), 6 S.C. 71 at 93 [1976 – 1984] 3 N.B.L.R. 215 (Supreme Court of Nigeria)
Index of Cases Referred to

R

R v. Abuah (1961) 1 All N.L.R. 155; [1976 – 1984] 3 N.B.L.R. 98 (Supreme Court of Nigeria)


S


Shonekan v. Smith (1964) 1 All N.L.R., 168, 173 [1976 – 1984] 3 N.B.L.R. 205 (Supreme Court of Nigeria)


T


Y

Z

**Foreign**

A
Index of Cases Referred to


Arnott v. Hayes (1887) 36 Ch. D. 731 [1976 – 1984] 3 N.B.L.R. 266 (High Court of Lagos State)


B


Bank of New South Wales v. Milvain (1884) 10 Victorian L.R. 3 [1976 – 1984] 3 N.B.L.R. 382 (Supreme Court of Nigeria)


C

Cape Asbestos Co Lloyds Bank Ltd (1921) W.N. 274 [1976 – 1984] 3 N.B.L.R. 365 (Supreme Court of Nigeria)

Carstairs v. Bates (1812) 3 Camp/301 NP [1976 – 1984] 3 N.B.L.R. 625 (Supreme Court of Nigeria)

Chapman v. Michaelson [1908] 2 Ch. 612 [1976 – 1984] 3 N.B.L.R. 433 (Supreme Court of Nigeria)


Cumberledge v. Lawson (1857) 26 L.J.C. 120 [1976 – 1984] 3 N.B.L.R. 297 (Supreme Court of Nigeria)

D


E

Eaton v. Bell 5 B and Ald 34 [1976 – 1984] 3 N.B.L.R. 347 (Supreme Court of Nigeria)


Ex Parte Bevan 9 ves 223, 224 [1976 – 1984] 3 N.B.L.R. 347 (Supreme Court of Nigeria)

F


Foley v. Hill (1848) 2 HL 28 [1976 – 1984] 3 N.B.L.R. 115 (High Court of Anambra State)


G


Gentel v. Rapps 1902 IKB 160 at 165/166 [1976 – 1984] 3 N.B.L.R. 424 (Supreme Court of Nigeria)


H


Hansard v. Lethbridge (1892) 3 T.L.R. 346 [1976 – 1984] 3 N.B.L.R. 296 (Supreme Court of Nigeria)


Hirschorn v. Evans (1939) 3 All E.R. 491 at 498 [1976 – 1984] 3 N.B.L.R. 624 (Supreme Court of Nigeria)

Holder v. Inland Revenue Commissioners (1932) A.C. 624 [1976 – 1984] 3 N.B.L.R. 345 (Supreme Court of Nigeria)


Howard v. Beal (1889) 23 Q.B.D. 1 [1976 – 1984] 3 N.B.L.R. 266 (High Court of Lagos State)


In the goods of Cowardin [1901] 18 T.L.R. 220 [1976 – 1984] 3 N.B.L.R. 300 (Supreme Court of Nigeria)

Index of Cases Referred to

J


K


Kinsman v. Kinsman (1831) 1 Russ XM 617 [1976 – 1984] 3 N.B.L.R. 431 (Supreme Court of Nigeria)

L

Lawson v. Siffre and another (1932) 11 N.L.R. 100 [1976 – 1984] 3 N.B.L.R. 457 (High Court of Lagos State)


Lloyds Bank Ltd v. Savory (EB) and Co [1933] A.C. 201; (1932) All E.R 106 [1976 – 1984] 3 N.B.L.R. 515 (High Court of Bendel State)


M


Mackay v. Dick [1881] 6 A.C. (HL) [1976 – 1984] 3 N.B.L.R. 301 (Supreme Court of Nigeria)

Index of Cases Referred to


Marvins Junior and Sons v. London and South Western Bank Limited (1900) 1 Q.B.D. 270 [1976 – 1984] 3 N.B.L.R. 69 (High Court of Lagos State)

Midland Bank v. Rickett (1933) A.C. 1 at 14 [1976 – 1984] 3 N.B.L.R. 67 (High Court of Lagos State)

Milward v. Lloyds Bank (Unreported) 1924 [1976 – 1984] 3 N.B.L.R. 390 (Supreme Court of Nigeria)

Morgan v. Ashcroft (1938) 1 KB 49; (1937) 3 All E.R. 92 [1976 – 1984] 3 N.B.L.R. 515 (High Court of Bendel State)


N


Parr’s Banking Company Ltd v. Yates (1898) 2 Q.B. 460 [1976 – 1984] 3 N.B.L.R. 170 (High Court of Lagos State)


Pollock v. Garle (1898) 1 Ch. 1 [1976 – 1984] 3 N.B.L.R. 266 (High Court of Lagos State)


Prince Blucher Ex parte Debtor (1931) 2 Ch. 70 [1976 – 1984] 3 N.B.L.R. 94 (Supreme Court of Nigeria)

R


R v. Barnes Ex parte Lord Vernon 102 LT. 860 [1976 – 1984] 3 N.B.L.R. 266 (High Court of Lagos State)


R v. Kensington Commissioner Ex parte Polignac 1917 (1) K.B. 486 [1976 – 1984] 3 N.B.L.R. 266 (High Court of Lagos State)


Re: Dulles Settlement Trusts (1951) 2T.L.R. 145 at 146
[1976 – 1984] 3 N.B.L.R. 128 (High Court of Lagos State)


S


Shingsby and others v. District bank Ltd (1932) 2 K.B. 544 [1976 – 1984] 3 N.B.L.R. 71 (High Court of Lagos State)


Story v. Challan (1887) 8 C. and B. Page 324 [1976 – 1984] 3 N.B.L.R. 457 (High Court of Lagos State)


Index of Cases Referred to


T
The Elder 1893 Probate 119 at 128 [1976 – 1984] 3 N.B.L.R. 238 (Supreme Court of Nigeria)
Thomas v. Sutter (1900) 1 Ch. 10 [1976 – 1984] 3 N.B.L.R. 420 (Supreme Court of Nigeria)

U
Underhill v. Horwood (10 Ves at 225) [1976 – 1984] 3 N.B.L.R. 300 (Supreme Court of Nigeria)

V

W
Welham v. DPP (1960) CAR 125 [1976 – 1984] 3 N.B.L.R. 98 (Supreme Court of Nigeria)


Wigramy v. Buckley (1894) 3 Ch. 483 at 486 and 492-493 [1976 – 1984] 3 N.B.L.R. 412 (Supreme Court of Nigeria)


INDEX OF STATUTES REFERRED TO

Nigerian

Administration of Justice (Miscellaneous Provisions) Act, 1938
  s 7 ....................................... [1976 – 1984] 3 N.B.L.R. 258
  s 20(5)................................... [1976 – 1984] 3 N.B.L.R. 258

Bankers Book Act, 1879
  s 7 ....................................... [1976 – 1984] 3 N.B.L.R. 263

Bankers Book Evidence Act, 1879
  s 7 ....................................... [1976 – 1984] 3 N.B.L.R. 263

Banking Decree, 1969
  s 1(1)................................... [1976 – 1984] 3 N.B.L.R. 175
  s 1(3)................................... [1976 – 1984] 3 N.B.L.R. 174
  s 27(1)................................... [1976 – 1984] 3 N.B.L.R. 175
  s 27(3)................................... [1976 – 1984] 3 N.B.L.R. 175
  s 41 ....................................... [1976 – 1984] 3 N.B.L.R. 175

Banking Obligations (Eastern States) Decree No. 56 of 1970
  s 4 ....................................... [1976 – 1984] 3 N.B.L.R. 126
  s 6 ....................................... [1976 – 1984] 3 N.B.L.R. 125
  s 8 ....................................... [1976 – 1984] 3 N.B.L.R. 125
  s 8(2)................................... [1976 – 1984] 3 N.B.L.R. 128
  s 9 ....................................... [1976 – 1984] 3 N.B.L.R. 131

Bills of Exchange Act, 1882
  s 2 ....................................... [1976 – 1984] 3 N.B.L.R. 363
  s 3 ....................................... [1976 – 1984] 3 N.B.L.R. 363
  s 49 ....................................... [1976 – 1984] 3 N.B.L.R. 363
  s 60 ....................................... [1976 – 1984] 3 N.B.L.R. 245
  s 82 ....................................... [1976 – 1984] 3 N.B.L.R. 161
Bills of Exchange Act (Cap 21)
  s 22 ..................................... [1976 – 1984] 3 N.B.L.R. 66
  s 48 ..................................... [1976 – 1984] 3 N.B.L.R. 595
  s 49 ..................................... [1976 – 1984] 3 N.B.L.R. 595

Bills of Sales Law, 1959 (Cap 11)
  s 3 ....................................... [1976 – 1984] 3 N.B.L.R. 200
  s 13 .................................... [1976 – 1984] 3 N.B.L.R. 200

Companies Decree, 1968
  s 210 ................................... [1976 – 1984] 3 N.B.L.R. 284
  s 212 ................................... [1976 – 1984] 3 N.B.L.R. 284

  s 8(1)................................... [1976 – 1984] 3 N.B.L.R. 91
  s 8(3)................................... [1976 – 1984] 3 N.B.L.R. 91

Constitution of Mid-Western Region Act, 1964
  s 3(1)................................... [1976 – 1984] 3 N.B.L.R. 211
  s 3(3)................................... [1976 – 1984] 3 N.B.L.R. 211
  s 3(4)................................... [1976 – 1984] 3 N.B.L.R. 211
  s 32(1)................................. [1976 – 1984] 3 N.B.L.R. 211

Criminal Code
  s 1 ....................................... [1976 – 1984] 3 N.B.L.R. 91
  s 359 ................................... [1976 – 1984] 3 N.B.L.R. 661
  s 419 ................................... [1976 – 1984] 3 N.B.L.R. 80
  s 465 ................................... [1976 – 1984] 3 N.B.L.R. 78
  s 467(2)(g)............................ [1976 – 1984] 3 N.B.L.R. 76
  s 468 ................................... [1976 – 1984] 3 N.B.L.R. 81
  s 469 ................................... [1976 – 1984] 3 N.B.L.R. 86

Criminal Justice (Miscellaneous Provisions) Decree

lviii
Index of Statutes referred to

Criminal Procedure Law (Cap 32)
- s 2 ....................................... [1976 – 1984] 3 N.B.L.R. 91
- s 168 ................................... [1976 – 1984] 3 N.B.L.R. 95
- s 337 ................................... [1976 – 1984] 3 N.B.L.R. 89

Dishonoured Cheques (Offences) Decree No. 44, 1977
- s 1(i)(b) ................................... [1976 – 1984] 3 N.B.L.R. 661
- s 1(b) ....................................... [1976 – 1984] 3 N.B.L.R. 662
- s 3 ....................................... [1976 – 1984] 3 N.B.L.R. 664

Evidence Act (Cap 62)
- s 2 ....................................... [1976 – 1984] 3 N.B.L.R. 19
- s 96 ....................................... [1976 – 1984] 3 N.B.L.R. 24
- s 96(1)(h) ................................... [1976 – 1984] 3 N.B.L.R. 19
- s 100 ..................................... [1976 – 1984] 3 N.B.L.R. 276
- s 137(1) ................................... [1976 – 1984] 3 N.B.L.R. 516
- s 141 ..................................... [1976 – 1984] 3 N.B.L.R. 516
- s 148(d) ................................... [1976 – 1984] 3 N.B.L.R. 563

Evidence Law (Laws of Bendel State), 1976 (Cap 57)
- s 96 ....................................... [1976 – 1984] 3 N.B.L.R. 598
- s 96(1)(b) ................................... [1976 – 1984] 3 N.B.L.R. 596
- s 135 ..................................... [1976 – 1984] 3 N.B.L.R. 596

Federal Revenue Court Decree No. 13, 1973

High Court Law (Cap 44)
- generally ..................................... [1976 – 1984] 3 N.B.L.R. 351
- s 2 ....................................... [1976 – 1984] 3 N.B.L.R. 351
- s 28(e) ................................... [1976 – 1984] 3 N.B.L.R. 246
Interpretation Ordinance (Cap 94)
   s 36A........................................... [1976 – 1984] 3 N.B.L.R. 263

Legal Practitioners Decree No. 15, 1975
   s 19 ........................................... [1976 – 1984] 3 N.B.L.R. 389

Limitation Decree, 1966
   s 7 ........................................... [1976 – 1984] 3 N.B.L.R. 172

Limitation Law (Cap 70)
   s 8(1)(a).................................... [1976 – 1984] 3 N.B.L.R. 584

Mid–Western Region (Transitional Provisions) Act No. 19, 1963
   s 4(1)........................................ [1976 – 1984] 3 N.B.L.R. 211

Mid–Western Region Act No. 6, 1962
   s 1 ........................................... [1976 – 1984] 3 N.B.L.R. 210
   s 2(2)........................................ [1976 – 1984] 3 N.B.L.R. 210

Native Lands Acquisition Law (Cap 80)
   generally ................................... [1976 – 1984] 3 N.B.L.R. 208
   s 3(1)........................................ [1976 – 1984] 3 N.B.L.R. 212
   s 3(2)........................................ [1976 – 1984] 3 N.B.L.R. 212
   s 3(3)........................................ [1976 – 1984] 3 N.B.L.R. 209
   s 3(4)........................................ [1976 – 1984] 3 N.B.L.R. 212
   s 3 ........................................... [1976 – 1984] 3 N.B.L.R. 208

Sheriffs and Civil Process Law (Cap 116)

Western Nigeria High Court Law (Cap 44)
   s 22 ........................................... [1976 – 1984] 3 N.B.L.R. 419

Foreign

Civil Evidence Act, 1968
   s 5(1) ....................................... [1976 – 1984] 3 N.B.L.R. 30
   s 5(2) ....................................... [1976 – 1984] 3 N.B.L.R. 30
Index of Statutes referred to

Statute of Frauds, 1677
s 4 ........................................... [1976 – 1984] 3 N.B.L.R. 276

Summary Jurisdiction Act, 1884
INDEX OF RULES REFERRED TO

Nigerian

Companies Winding–up Rules, 1949
rule 36(1) ............................. [1976 – 1984] 3 N.B.L.R. 284

High Court (Civil Procedure) Rules, 1958 (Cap 65)
Order 2, rule 2 ................. [1976 – 1984] 3 N.B.L.R. 198
Order 6, rule 6 ................. [1976 – 1984] 3 N.B.L.R. 239
Order 29, rule 8 ............... [1976 – 1984] 3 N.B.L.R. 351

High Court (Civil Procedure) Rules Eastern Nigeria, 1963 (Cap 61)
Order 33, rule 13 ............. [1976 – 1984] 3 N.B.L.R. 525

High Court of Lagos (Civil Procedure) Rules, 1972

High Court of Oyo State (Civil Procedure) Rules
Order 2, rule 2 ................. [1976 – 1984] 3 N.B.L.R. 198

Judgments (Enforcement) Rules (Cap 116)

Rules of the Supreme Court
Order XLV, rule 1 ............. [1976 – 1984] 3 N.B.L.R. 573
INDEX OF BOOKS REFERRED TO

Chalmer’s *Bills of Exchange* (13ed)

Chitty’s *Contracts* (21ed)

Chitty’s *Contracts* (23ed)

Chitty’s *Contracts*

Chorley and Smart *Leading Cases in the Law of Banking* (3ed)
page 69 ................................. [1976 – 1984] 3 N.B.L.R. 312

Coote *Mortgages* (9ed)

Gatley *Libel and Slander* (3ed)

Gatley *Libel and Slander* (7ed)

Halsbury’s *Laws of England* (2ed)

Halsbury’s *Laws of England* (3ed)
Nigerian Banking Law Reports

vol 2, page 180, para 343 ... [1976 – 1984] 3 N.B.L.R. 62
vol 2, page 181, para 344 ... [1976 – 1984] 3 N.B.L.R. 66
vol 2, page 210, para 390 ... [1976 – 1984] 3 N.B.L.R. 532
vol 36, page 491-492,

Halsbury’s Laws of England (4ed)
vol 3, para 100 ................. [1976 – 1984] 3 N.B.L.R. 139
vol 11, page 818,
vol 11, page 819,
page 100, note 4 .............. [1976 – 1984] 3 N.B.L.R. 365

Jowitt’s Dictionary of English Law

Lord Chorley Law of Banking (6ed)
page 111 ........................ [1976 – 1984] 3 N.B.L.R. 386
page 113 and 123 ............ [1976 – 1984] 3 N.B.L.R. 390
Index of Books referred to

Mayne and Macgregor *Damages* (12ed)

Osborn’s *Law Dictionary*
  generally ............................ [1976 – 1984] 3 N.B.L.R. 144

Paget’s *Law of Banking*

Paget’s *Law of Banking* (7ed)

Paget’s *Law of Banking* (8ed)
  page 84 ............................... [1976 – 1984] 3 N.B.L.R. 624
  page 335 ............................. [1976 – 1984] 3 N.B.L.R. 244

Phipson *Law of Evidence* (13ed)

Robert Lowe *Commercial Law* (5ed)

Sheldon *Practice and Law of Banking* (9ed)
  page 344 ............................... [1976 – 1984] 3 N.B.L.R. 531

Sheldon *Practice and Law of Banking* (10ed)

Stroud’s *Judicial Dictionary*

Winfield *Tort* (8ed)

JB Sanderson *Words and Phrases Legally Defined* (2ed)
Imarsel Chemical Company Limited v. African Continental Bank Limited

HIGH COURT OF LAGOS STATE

JOHNSON J

Date of Judgment: 21 JANUARY 1976

Banking – Account – Statement of showing a constant amount – Presumption that customer has that amount – Whether rebuttable

Banking – Cheques – Dishonoured – Refer to drawer written on cheque – Whether libellous

Banking – Cheques – Dishonoured – “Signatories unauthorised” written on cheque – Whether libellous

Banking – Cheques – Dishonouring of – “Reason assigned” – “Not stated” on a slip attached to a cheque returned to the payee – Not libellous

Banking – Cheques – Dishonouring of – When account is in funds – Libellous

Banking – Cheques – Dishonouring of – With writing – “Refused for want of funds” – When account is in funds – Libellous

Banking – Cheques – Writing on customers cheque “Signatories unauthorised” – Whether libellous

Facts

By its writ of summons the plaintiff’s claim against the defendant is as follows:

1. For the recovery of ₦20,000 being money lawfully paid in and credited into the plaintiff’s account with the defendants as the plaintiff’s banker at their Apapa Branch.

2. For 10% per annum interest on the sum of ₦20,000 from the 14th March, 1974, until judgment; and 5% interest thereafter until the said sum is finally liquidated.
3. For ₦53,500 damages for breach of contract by the defendants wrongfully refusing to honour the plaintiffs' cheque No. 25/E 101246 for the sum of ₦23,500 dated 12th March, 1974, drawn by the plaintiffs on the defendants at their Apapa Branch when there was sufficient funds in the plaintiffs' credit balance with the said branch of the defendants.

4. For ₦100,000 being special and general damages for libellous statement wrongfully contained on the cheque No. 25/E 101246 for the sum ₦23,500 dated 12th March, 1974, drawn on the defendants at their Apapa Branch which said cheque was returned unpaid maliciously and wrongfully marked ‘Signatures unauthorised’.

The defendants refuse or neglected to pay the said sum after repeated demands.”

**Held** –

1. A statement of account showing a credit balance in favour of a customer raises a presumption that the plaintiff has such balance with the bank though such presumption is rebuttable.

   In the instant case the defendant had no justiciable reason for debiting the account of the plaintiff with the said sum of ₦20,000.

2. Words that tend to bring any person into discredit in the opinion of others would be wrongful and such person would be entitled to institute an action for damages.

3. It had been held libellous to write that a cheque had been dishonoured, for such statement import insolvency, dishonesty or bad faith of the drawer of the cheque.

   In the same way, as had been the return of a cheque to the payee with the endorsement “Refused for want of funds.” But where the words “reason assigned – not stated” was written on a slip attached to a cheque returned to the payee, it was held that such words do not amount to a libel of a drawer in the absence of facts and circumstances leading to the reasonable belief that the cheque had been dishonoured through want of funds.
Imarsel Chemical Company Ltd v. African Continental Bank Ltd

4. The endorsement “Signatories unauthorised” is valid in law and acceptable to the banking world to check fraud of unexpected signatories to other people’s cheques and not defamatory.

Cases referred to in the judgment

Foreign

Flach v. London and SW Bank (1915) 31 T.L.R. 334
Pyke v. Hibernian Bank (1950) 1 Irish Report 195

Counsel

For the plaintiff: Agoro
For the defendant: Balogun

Judgment

JOHNSON J: By its writ of summons the plaintiff’s claim against the defendant is as follows:

1. For the recovery of ₦20,000 being money lawfully paid in and credited into the plaintiffs’ account with the defendants as the plaintiffs banker at their Apapa Branch.

2. For 10% per annum interest on the sum of ₦20,000 from the 14th March, 1974, until judgment; and 5% interest thereafter until the said sum is finally liquidated.

3. For ₦53,500 damages for breach of contract by the defendants wrongfully refusing to honour the plaintiffs cheque No. 25/E 101246 for the sum of ₦23,500 dated 12th March, 1974, drawn by the plaintiffs on the defendants at their Apapa Branch when there was sufficient funds in the plaintiffs’ credit balance with the said branch of the defendants.

4. For ₦100,000 being special and general damages for libellous statement wrongfully contained on the cheque No. 25/E 101246 for the sum ₦23,500 dated 12th March, 1974, drawn on the defendants at their Apapa Branch which said cheque was returned unpaid maliciously and wrongfully marked “Signatures unauthorised”.

The defendants refused or neglected to pay the said sum after repeated demands.”
Pleadings were duly filed by the parties. The pertinent portions of the statement of claim as regards the issues in dispute between the parties appear to be paragraphs 5, 6, 7, 8 and 10, which read:

“5. On or before the 12th March, 1974, the plaintiff had to their credit about \( \text{₦}23,719.68 \) and this was communicated to them by the defendants in their letters of 12th June, 1973 and other previous and subsequent letters and statements of accounts.

6. The plaintiffs before the 12th March, 1974 had in writing informed the defendants of the new signatories to their cheques and accounts and specimen signatures of the authorised persons were duly lodged with the defendants.

7. The plaintiffs on the 12th March, 1974 drew a cheque No. 25/E 101246 for the sum of \( \text{₦}23,500 \) in the plaintiffs account No. 1142 in order to reduce the overdraft which the plaintiffs owed to Bank of America Nigeria Limited.

8. Between the 12th and 13th March, 1974 the said cheque was presented to the said Bank of America for payments by the defendants, the defendants wrongfully dishonoured the cheque even though at the time of presentation the plaintiffs had sufficient funds to meet the said cheque.

10. On the 14th March, 1974 the defendants falsely and wrongfully reversed payment of \( \text{₦}20,000 \) which had been lawfully credited into the plaintiffs’ account in November, 1968 without just cause. The plaintiffs aver that the payment was part of the proceeds of the goods sold to South Eastern State in 1968.”

On the claim for libel, paragraphs 11 and 12 of the said statement of claim appear relevant and they read:

“11 Further the defendants falsely and maliciously wrote on the said cheque concerning the plaintiffs the words ‘Signatures unauthorised’ and published the said words to the Bank of America Nigeria Limited.

12. By the said words the defendants meant and were understood to mean that the plaintiffs are dishonest, fraudulent and capable of committing crime, such as false pretence, or stealing and that they were persons whose financial standing was unsound, to whom credit should not be given and with whom no one should have business dealings.”
The defendants in its statement of defence denied paragraphs 5-8 of the statement of claim and put up a plea of justification as regards the claim for libel as averred in paragraphs 11 and 12 of the statement of claim. At the trial the plaintiff called witnesses. The defendant, however, sought and obtained the leave of the court to put its case by examining the 7th plaintiff’s witness. Thereafter both parties closed their cases and both Counsel addressed the court. Several exhibits were tendered in the course of the trial. Among these exhibits, exhibit A, the statement of account in respect of account No. 1142 with the defendant was tendered by the plaintiff as having been received by it from the defendant. So also was exhibit B stamp marked the 23rd March, 1971. In this exhibit a credit balance of £11,859.16.10d otherwise N23,719.68 was shown in favour of the plaintiff. This credit balance was also confirmed by exhibit M, a letter written by the defendant to the Managing Director of the plaintiff.

Relying, no doubt on the strength of this admitted credit balance the plaintiff issued a cheque, exhibit D for the sum of N23,500 on account No. 1142. The said cheque was not honoured by the defendant and was returned with the endorsement “Signatories unauthorised.” Thereafter exhibit F was made out and sent to the plaintiff debiting its account with the defendant with the sum of N20,000. The plaintiff immediately protested by its letter, exhibit O.

It is perhaps at this stage helpful to recount the history of the account of the plaintiff with the defendant. It would appear that the plaintiff had an original account No. 1142 with the defendant. At sometime this account was frozen on the order of the Federal Military Government. Consequent upon this the plaintiff operated another account No. 1460. On the 22nd November, 1968 the plaintiff’s account with the defendant was credited with the sum of £10,000 with the particulars “Amount transferred in your favour” as shown in exhibit A.

This entry is supported by exhibit 1 and 1A prepared by the
defendant. This said amount stood continuously to the credit of the plaintiff from November, 1968 till the 14th March, 1974 when it was unilaterally reversed by the defendant without any reason whatsoever. The question which to my mind the court is called upon at this stage to determine is, “Was the defendant justified in reversing the entry for N20,000?” The court examined the statement of account, that is, exhibit A and exhibit M showing a credit balance of N23,719.68 in favour of the plaintiff with the defendant. Both exhibits raise a presumption that the plaintiff has such balance with the defendant. Such presumption, I am prepared to admit is rebuttable. If however the defendant adduced evidence sufficient to rebut that presumption then the fact of the plaintiff being in funds to that sum would be nullified.

What evidence, if I may ask has the defendant produced to rebut the presumption raised in favour of the plaintiff? My answer to this would be “none.” In fact the 7th plaintiff’s witness is the present manager of the Apapa Branch of the defendant’s bank, admitted in answer to a question put to him by the defendant’s Counsel that he was the manager of the bank at Apapa when the cheque in dispute was presented, and on being questioned by the Counsel for the plaintiff admitted that the plaintiff was in good funds when exhibit D was presented. In short he was unable to explain why it was necessary for the amount of N20,000 already credited to the plaintiff to be debited. In fact by the exhibit Y he confirmed that he did not act on his own deliberate judgment as one would expect a person in his position to do but as he put it, he acted purely on the instruction from their head office. Even though the plaintiff persisted in seeking an explanation for the reversal, the head office itself was unable to offer any reason for the action, as shown in exhibit Y2. Following upon the above situation, I have come to the conclusion that the defendant had no justifiable reason for debiting the account of the plaintiff with the sum of N20,000 already credited to it. It is therefore my judgment on this issue that the said sum of N20,000 was wrongfully debited to the account of the plaintiff and should be refunded. As a follow-up to this I have
also come to the conclusion that the interest claimed by the plaintiff on the said sum from the date it was debited is reasonable and payable by the defendant.

The plaintiffs’ claims as contained in paragraph 13 (i and v) succeed.

The next issue to my mind, which calls for determination, is that of the dishonoured cheque, exhibit D. Does this act constitute libel or a breach of contract? The plaintiff claims that the endorsement of the bank on exhibit D is libellous. See paragraph 11 of the statement of claim. The content of paragraph 12 of the statement of claim shows to my mind that the plaintiff itself appreciated or had doubt as to whether or not the words complained of are libellous. This would explain why paragraph 12 contains an innuendo. I am afraid that one would have to strain reason to be able to import the innuendo alleged by the plaintiff into the words complained of. This I have found difficult to do. There can be little doubt that words, which tend to bring any person into discredit in the opinion of others, would be wrongful and such person would be entitled to institute an action for damages. Several words can be disparaging of the good name of another. It had been held libellous to write that a cheque had been dishonoured, for such statement imports insolvency, dishonesty or bad faith of the drawer of the cheque. In the same way, as had been the return of a cheque to the payee with the endorsement “Refused for want of funds.” But where the words “reason assigned – not stated” was written on a slip attached to a cheque returned to the payee, it was held that such words do not amount to a libel of a drawer in the absence of facts and circumstances leading to the reasonable belief that the cheque had been dishonoured through want of funds. See Frost v. London Joint Stock Bank Ltd (1906) 22 T.L.R. 760. In Flach v. London and SW Bank (1915) 31 T.L.R. 334, Scrotton J doubted whether the words “refer to drawer” written on a cheque returned to payee were libellous. “Refer to drawer” in his opinion, in their original meaning amounted to a statement by the
bank, “We are not paying, go back to the drawer and ask him why.” Although in that case, judgment was entered for defendants on another ground, the views expressed by the learned Judge appear very attractive and sound.

In Pyke v. Hibernian Bank (1950) 1 Irish Report 195, the words “refer to drawer” were held by the trial Judge and two out of four judges of the Supreme Court to be reasonably capable of a defamatory meaning. Coming to the facts of the present case, there can be little doubt as claimed by the defendant in its statement of defence, (I refer to paragraph 8(f)) that the endorsement is valid in law and acceptable to the banking world to check fraud of unexpected signatories to other people’s cheques. It is therefore my ruling that the words complained of, are not defamatory.

Assuming for a moment, but not admitting, that the words are in fact defamatory, the defendant would have an answer to an action for libel if they can establish justification. In fact this would appear to be the defence of the defendant. One then may ask “Are there materials available in support of this defence?” To appreciate this defence, one has to examine and construe the contents of exhibits G, H and J. Exhibit G was the letter written to the defendant by the plaintiff informing it of signatories to the company’s accounts. The exhibit reads:—

“Ref: 32/4/LSEC

24th September, 1973

The Manager,
African Continental Bank Limited,
Apapa.
Dear Sirs,

SIGNATURE OF THE COMPANY’S ACCOUNTS
During the meeting of the Board of Directors of Imarsel Chemical Company Limited held on the company’s premises from the 27th February to second March, 1973 it was resolved that the following persons should be the signatories to the company’s accounts.

MR GABOR FARAGO MANAGING DIRECTOR
PRINCE OLADUNNI OLAOYE EXECUTIVE DIRECTOR
MR NANSEH ENO LEGAL SECRETARY
These appointments nullify all previous appointments. The effective date of these appointments is the first October, 1978.

We forward here documents containing the signatures of the appointees.

Thanks.

Yours faithfully,
IMARSEL CHEMICAL COMPANY LIMITED

(Sgd) (NANSEH ENO) LLB., BL.,
LEGAL SECRETARY
Encl.
NN/EEI.”

To this the defendants reply seeking some clarification by exhibit H, which reads:

“AFRICAN CONTINENTAL BANK LTD
1, CREEK ROAD
APAPA.

3rd October, 1973

The Legal Secretary
Imarsel Chemical Company Limited

P.M.B. 1209
Ikeja
Dear Sir,

SIGNATORIES TO YOUR COMPANY
ACCOUNT NO. 1460

We refer to your letter ref. 32/4/LSEC of 24th September, 1973 and should like to know whether all the three signatories mentioned in the letter should sign all your company cheques at the same time.

Yours faithfully
(Sgd) (For Manager)
KAS/FASH”

The reply of the plaintiff to exhibit H is exhibit J which reads:

“Ref. 32/6/LSEC
9th October, 1973

The Manager

African Continental Bank Limited
1, Creek Road
Apapa

Dear Sir,

SIGNATORIES TO OUR COMPANY ACCOUNTS NO. 1460

Thank you for your letter of 3rd October, 1973 on the above subject.

Please be informed that any two of the signatories mentioned on previous letter are competent to sign any of our cheques.

Yours faithfully,

IMARSEL CHEMICAL COMPANY LIMITED
(Sgd NANSEH ENO) LLB., BL.,
LEGAL SECRETARY.”

An examination of these documents shows that exhibit G would appear to relate to the account of the plaintiffs, which from the available facts would be account Nos. 1142 and 1460. Again, it would appear from exhibit G that all three persons named therein are meant to be signatories to the accounts. This would appear to cover account Nos. 1142 and 1460. Any cheque on any of these two accounts signed by the three signatories would appear duly authorised. If we go by the contents of exhibit G, it is also clear that as at that time when the letter, exhibit G was written, account No. 1142 had not been de-frozen, so that account No. 1460 was solely in operation.

The enquiry in exhibit H appears specifically limited to account No. 1460 and the reply to it by exhibit J equally limited itself to account No. 1460, and in that letter it was clarified that any two of the signatories mentioned in the previous letter are competent to sign any of their cheques. One of the maxims of law relating to the construction of document is expressum facit cessare tacitum. As therefore the general implication of the contents of exhibit G is limited by the contents of exhibits H and J to account No. 1460, only that account would be covered by the clarification in exhibit H. In other words if exhibit D was related to account No. 1460, the endorsement complained of, would have constituted a wrongful act, and an apparent breach of contract on the part
of the defendant provided that account was in sufficient funds.

As it is, for a cheque issued on account No. 1142 to be valid, three signatories mentioned in exhibit G must have signed. As however only two of the said signatories signed exhibit D the bank that is the defendant was in my considered view, justified in refusing the cheque as it did. That to my mind would constitute a complete answer to an action for libel if one was in fact made out. It would also in my view, constitute a valid defence to the alleged breach of contract. The plaintiff’s claims for damages for libel and breach of contract therefore fail, and are dismissed. There would therefore be judgment for the plaintiff for the sum of ₦20,000 with interest at 10% per annum on the said sum from the 14th March, 1974 until today when the judgment is delivered. Thereafter an interest of 5% is to be payable until the said sum of ₦20,000 is finally liquidated.
Benson v. National Bank of Nigeria Limited

HIGH COURT OF LAGOS STATE

DOSUNMU J

Date of Judgment: 2 FEBRUARY 1976

Suit No.: L.D. 986/1974

Banking – Dishonour of customer’s cheque and payment of sufficient money into customer account done on the same day – Presumption raised thereby

Facts

The plaintiff was at the material time, a current account customer of the defendant bank at its Marina Branch. On the 10th September, 1973, he issued a cheque exhibit A in the sum of N42 on the defendant bank payable to Mainland Preparatory School, Surulere in payment of his child’s school fees. The school paid this cheque into its account with Barclays Bank, Surulere on the 11th September, 1973. On the 12th September, 1973 the cheque was dishonoured by the defendant bank with the remarks “refer to drawer.”

The plaintiff is now suing the defendants for wrongfully dishonouring his cheque on the 12th September, 1973 when he had sufficient funds with the bank to meet it. In the alternative, the plaintiff claims damages for libel because of the answer “refer to drawer” written by defendant bank on the same cheque.

In answer to the plaintiff’s pleas that he had sufficient funds at the bank on the 12th September, 1973, when his cheque was dishonoured, the defendant averred that at the time of presentation, the plaintiff had a debit balance of N25.89 and that was why the cheque was not paid.

The statement of account of the plaintiff was tendered as exhibit B and it shows against 12th September, 1973, the following entries, a credit of N400 and a debit balance of N25.89. There was no precise evidence as to what part of the day the plaintiff’s cheque was treated at the defendant bank.
Held –

1. When two things are done on the same day that shall be presumed to have been done first which ought to be done.

2. In the instant case, since the dishonour of plaintiff’s cheque and the payment of the sum of ₦400 were done on the same day, it can be presumed that plaintiff did not have sufficient funds and his cheque was dishonoured before he paid in the sum of ₦400.

Cases referred to in the judgment

Foreign

Flach v. London and South-Western Bank Limited 31 T.L.R. 336

Plunkett and another v. Barclays Bank Limited [1936] 1 All E.R. 653


Parties are absent and unrepresented.

Judgment

DOSUNMU J: The plaintiff was, at the material time, a current account customer of the defendant bank at its Marina Branch. On the 10th September, 1973, he issued a cheque exhibit A in the sum of ₦42 on the defendant bank payable to Mainland Preparatory School, Surulere in payment of his child’s school fees. The School paid this cheque into its account with Barclays Bank, Surulere on the 11th September, 1973. On the 12th September, 1973 the cheque was dishonoured by the defendant bank with the remarks “refer to drawer.”

The plaintiff is now suing the defendants for wrongfully dishonouring his cheque on the 12th September, 1973 when he had sufficient funds with the bank to meet it. In the alternative, the plaintiff claims damages for libel because of the answer “refer to drawer” written by defendant bank on the same cheque. In answer to the plaintiff’s pleas that he had
sufficient funds at the bank on the 12th September, 1973, when his cheque was dishonoured, the defendant averred that at the time of presentation, the plaintiff had a debit balance of N25.89 and that was why the cheque was not paid.

The statement of account of the plaintiff was tendered as exhibit B and it shows against 12th September, 1973, the following entries, a credit of N400 and a debit balance of N25.89. There was no precise evidence as to what part of the plaintiff’s cheque was treated at the defendant bank. I was told, however, that before a cheque is returned unpaid it is the practice in the bank to ascertain from all receiving cashiers whether there was further credit for the drawee of a cheque where an earlier examination of his ledger card had shown him in the red. On the other hand there was no evidence from the plaintiff as to what part of the day he paid in the sum of N400 on the 12th September, 1973. In point of fact his pleadings did not say anything about the payment of N400 on that particular date. But certainly if he paid in the sum of N400 by cash after his cheque had been presented and dishonoured because he had no sufficient funds to meet the amount at the time, he would have no cause to complain. I am inclined to believe that the plaintiff did not have sufficient funds with the defendant bank when his cheque was treated on the 12th September, 1973 because of the circumstances under which he said he paid in the amount. He said that he withdrew the cash from United Bank for Africa on the 11th September, 1973 to pay into the defendant bank on the 12th September, 1973. Why did he not issue the cheque on the bank where his account was good as he himself admitted that he knew that he had no sufficient money with the defendant bank when he issued the cheque on the 10th September, 1973. There were no satisfactory answers from him. I am not satisfied, therefore, that the plaintiff had enough money to pay the amount of his cheque on the 12th September, 1973 when it was dishonoured. In that circumstance there can be no breach on the part of the defendant bank whose obligation is to pay up to the amount of his customer in its hands.
But, all this apart, there is a presumption of regularity when two acts take place on the same day. This presumption was applied in a bill of exchange case by Lord Denning MR in \textit{Raglehill Limited v. Needham Builders Limited} [1972] 1 All E.R. at page 423. This was a case where the dishonour and notice of dishonour of a bill of exchange took place on the same date. The learned Lord said:

\begin{quote}
“It is suggested that we ought to look at the parts of a day, so as to ask this question:

‘If the bill was dishonoured, at the bank at 9.30 am and the notice of dishonour received by the drawer at 9.31 am the notice is good. But if the notice of dishonour was received by the drawer at 9.29 am it is bad. I decline to look into the times so narrowly. It is an absurd exercise. The law has long recognised the difficulty of getting evidence as to the exact time of day when any particular event takes place. For that reason it has laid down the general rule that the law does not have regard to parts of a day when it is a question which of the two acts on one day first, it presumes that everything was done regularly. As Alderson B said in \textit{Aikman v. Conway}: “It is a good rule that when two things are done on the same day that shall be presumed to have been done first which ought to be done.” Seeing that the dishonour ought to take place before the notice of dishonour, we should presume that it did so.

This rule was applied to bills of exchange by Megaw J in \textit{Yeoman Credit v. Gregory} when he expressed the view that a notice of dishonour was valid if given on the same day as the dishonour.’
\end{quote}

Applying this principle, I am of the opinion that we should presume that the bill was dishonoured at Lloyds Bank Limited before the time when notice of dishonour was given to the drawers J Needham Builders Limited. So the notice of dishonour was good.

In the circumstance, it can rightly be assumed in this case that the dishonour of the cheque took place before the paying in of the sum of N400.

In the alternative, the plaintiff claims that the remark “refer to drawer” is libellous of him. There have been many English decisions on the point and in the circumstance of this case, I would prefer to follow Du Parq J (as he then was) in \textit{Plunkett and another v. Barclays Bank Limited} [1936] 1 All E.R. 653
following the language of Scrutton J (as he then was) in *Flach v. London and South Western Bank Limited* 31 T.L.R. at page 336 where the learned Judge said:

“The words ‘refer to drawer’ in his opinion, in their ordinary meaning, amounted to a statement by the bank, ‘We are not paying; go back to the drawer and ask why, or else, go back to the drawer and ask him to pay’. In the view he took of the case the bank was justified in not paying . . . and he did not think that it was possible to extract a libellous meaning from what had been said by the bank.”

This is also my view in this case that there is no libel. The plaintiff’s claim is dismissed. But I make no order for costs in view of the circumstances of the case.
Yesufu v. African Continental Bank Limited (1)

SUPREME COURT OF NIGERIA
FATAYI-WILLIAMS, MADARIKAN, NASIR JJSC
Date of Judgment: 2 April 1976
S.C.: 2/1975

Banking – Banker/customer relationship – Indebtedness of customer – Proof of – Tendering of statement of account – Procedure – Section 96(1)(b) and 96(2)(e) Evidence Act, Cap 62

Banking – “Banker’s book” – What constitutes – Admissibility of – Sections 296(1)(b) and 96(2)(e), Evidence Act, Cap 62 – Whether includes “vouchers” – Admissibility of secondary evidence – Procedure – Section 96(1)(b), Evidence Act, Cap 62

Facts

The plaintiff/respondent’s claim against the defendant/appellant was for the sum of £376,320.10s.10d being debt due from and payable by the defendant to the plaintiff plus interest at the rate of 9% per annum from the date of issue of the writ of summons until judgment or payment.

The plaintiff also sought an order of the court to foreclose for the purpose of sale, either by public auction or by private treaty the two properties at Ward C Lawani Street, Benin City mortgaged by the defendant to the plaintiff by way of deposit of the title deeds.

In the course of trial at the lower court, PW1 tendered a statement of account, which he said was prepared by the machinist from the vouchers day by day. As the vouchers were typed on the statement by the machinist, they were also typed in the ledger card. He also testified that at the end of the month, the statement of account with the ledger card was sent to the supervisor who would check them. They would again be sent to the accountant of the bank who would examine
both the posting and the checking. They are then sent to him as manager to vet to ensure that all the officers had done their duty before the statements leave the bank. After the checking by the manager, the statements would be sent to the customers.

Although the defendant objected to the admissibility of the statement of account showing, the amount claimed as outstanding balance, it was admitted in evidence as exhibit B.

In his judgment, the learned trial Judge found *inter alia* that the PW1 admitted that he did not scrutinise the statement of account (exhibit B) before it went out although he saw it and that up until the time he was testifying, he had still not had the opportunity of scrutinising the said statement of account. However, the learned trial Judge gave judgment for the amount claimed as shown on the statement of account (exhibit B less the sum of £10,123.19.3d) after finding *inter alia* that exhibit B was a true copy of the statement of account kept by the plaintiff for the defendant.

The defendant appealed to the Supreme Court on grounds *inter alia* that the trial Judge erred in law in admitting the statement of account as exhibit B when the plaintiff had not complied with the procedure laid down in section 96(1)(h) and 96(2)(e) of the Evidence Act (Cap 62).

It was argued that “ledger cards” were not “banker’s books” and that even if the ledger cards were considered as “banker’s books”, for the statement compiled to be admissible, the preliminaries prescribed in section 96(2)(e) must be complied with. Moreover, the PW1 stated that the “statements were prepared by the machinist from the vouchers.” As “vouchers” cannot be regarded as “banker’s books” the statements prepared from them were not admissible under section 96(2)(e). It was finally submitted that as the plaintiff’s claim was based on the statement of account (exhibit B), the wrongful admission of the statement had knocked the bottom out of the plaintiff’s claim.
Section 96(1)(h) and 96(2)(e), Evidence Act, Cap 62 provides:

“96(1)(h) That secondary evidence may be given of the existence, condition or contents of a document where the document is an entry in a banker’s book, a ‘banker’s book’ is defined in section 2 of the Act as including “ledgers, day books cash books, account books and all other books used in the ordinary business of a bank.

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, 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. Section 2 of the Evidence Act, (Cap 62) defines a “banker’s book” as including “ledger, day books, cash books, account books and all other books used in the ordinary business of a bank.” Since this definition is not restrictive it could be extended to mean something else which it does not ordinarily mean. Therefore while the phrase “banker’s book” may include “ledger card”, it cannot be extended to mean a “voucher” from which the entries in the statement of account (exhibit B) were obtained in this case.

2. By section 96(1)(h) of the Evidence Act, (Cap 62), secondary evidence may be given of the existence, condition or contents of a document where the document is an entry in a banker’s book. In this case since the entries in the statement of account were obtained from vouchers which cannot be regarded as forming a banker’s book, it
could not be admitted as secondary evidence of the entries in the banker’s book.

3. It is not the length of evidence given in tendering a bank statement of account that matters but the substance of the evidence given nor is it compulsory that the precise words set out in section 96(2)(e) should be used by the witness or the Judge taking down his evidence. It is enough that substantially the requirements of the section are observed, provided:

(i) where it is not possible to produce the books of the bank, a certified copy of the account is enough to satisfy the court that there is a book in existence from where copies were made;

(ii) if certified by an official of the bank giving evidence, this presupposes that he has compared the copy with the original before he certified it; and

(iii) if the books of the bank were produced by the manager or the Accountant, this must have been in the custody and control of the bank.

In the instant case, none of the requirement of section 96(2)(e) of the Evidence Act was complied with by the plaintiffs.

Appeal allowed; non-suit ordered.

Cases referred to in the judgment

Nigerian

Esso West Africa Inc v. Oyegbola (1969) 1 N.M.L.R. 194

Nigerian statute referred to in the judgment

Evidence Act, (Cap 62) sections 2, 37, 96(1)(h), 96(2)(e)

Counsel

For the defendant/appellant: Williams
For the plaintiff/respondent: Larner
Judgment

FATAYI-WILLIAMS JSC: The plaintiffs, now respondents, are commercial bankers. In proceedings commenced by them in the High Court at Benin City, they claimed from the defendant, now appellant, the sum of £376,320.10s.10d being debt due from and payable by the defendant to the plaintiffs plus interest at the rate of 9% per annum from the date of issue of the writ of summons until judgment or payment.

The said amount is shown in the defendant’s account with the plaintiffs as debit balance. The plaintiffs also sought an order of the court to foreclose for the purpose of sale, either by public auction or by private treaty, the two properties at Ward C Lawani Street, Benin City, mortgaged by the defendant to the plaintiffs by way of deposit of title deeds. One deed was registered as No. 41 at page 41 in Volume 48 of the Lands Registry at Benin City and the other as No. 22 at page 22 in Volume 40 of the Lands Registry in the same office at Benin City.

In a reserved judgment delivered after hearing evidence from both parties, the learned trial Judge, rightly in our view, summarised the issues raised both by the pleadings and by the evidence given in support as follows:

“(i) whether a case for foreclosure has been made in respect of the two properties referred to above;

(ii) whether the defendant operated account No. 2285 in the Ring Road Branch, Benin City, of the plaintiffs’ bank, and if so, whether the account is overdrawn or in debit as claimed by the plaintiffs; and

(iii) if the account is overdrawn, the amount for which the defendant is liable.”

He, however, struck out the claim for an order to foreclose on the two properties on the ground that the proper procedure had not been followed.

On the other matters in issue, the learned trial Judge made certain crucial observations with respect to the testimony of Edward Oritseje, the only witness who testified for the
plaintiffs and who produced the defendant’s statement of account (exhibit B) showing the account number given to the defendant as 2285. These observations are, no doubt, based on part of the evidence given by Edward Oritseje in answer to questions put to him first in the examination-in-chief and later under cross-examination. The relevant portion of his evidence-in-chief reads:

“We prepared the statement of account sent to the defendant from the ledger card in which the account is kept by the bank for the defendant. Before the statements are sent out I see them. The statements are prepared by the machinist from the ledger card.

I now say that the statements are prepared by the machinist from the vouchers day by day.

As the vouchers are typed to the statement by the machinist, they are also typed in the ledger card. At the end of the month the statements with the ledger card are sent to the supervisor who checks them. They are later again sent to the accountant of the bank who examines both the posting and the checking. They are then sent to me as the manager to vet to ensure that all the officers have done their duty before the statement leaves the bank. After checking by me they are sent to the customer.

This procedure I have described was adopted in every case before defendant’s statements of account were despatched to him. We do not send statements along with ledger cards to customers. We send only the statements.

I see the document shown to me. It is a true copy of the combined statement of account which we have been sending to the defendant.”

After some arguments, the statement of account showing the amount claimed as the outstanding balance was admitted as exhibit B.

In his judgment, the learned trial Judge observed that Edward Oritseje (first plaintiff witness) admitted that the debit slip (exhibit T) is a duplication of another debit slip (exhibit TI) and was repeated in the statement of account (exhibit B) and that he (the first plaintiff witness) explained that the error was clerical. He also pointed out that the first plaintiff
witness further admitted:

(a) that he did not scrutinise the statement of account (exhibit B) before it went out although he saw it;

(b) that up till August 16th, 1972, when he was still testifying in court he had still not had the opportunity of scrutinising the said statement of account; and

(c) that the commercial transactions of the defendant were in United States dollars and that the conversion of the dollars to sterling (Nigerian pounds) which, incidentally, resulted in a short fall for the defendant, was carried out at the head office of the plaintiffs’ bank in Lagos.

Eventually, the learned trial Judge gave judgment for the amount claimed as shown on the statement of account (exhibit B) less the sum of £10,123.19s.3d after finding the following facts proved:

“(a) that the defendant was at all material times a customer of the plaintiffs’ bank and maintained at their Ring Road, Benin City Branch, account no. 2285;

(b) that the defendant applied for and obtained overdraft facilities in the bank and made use of the liberal overdraft facilities granted to him and that he obtained a heavy overdraft from the bank which he has been unable to repay; and

(c) that exhibit B the certified copy of the statement of account is a true copy of the statement of account kept by the plaintiffs for the defendant.”

Thereafter, the learned trial Judge observed as follows:

“Three points of substance were made by learned Counsel for the defence against the statement of account. These are the debit of £10.5s.0d interest on November 29, 1966, double debit of £14.10s.0d made on March 4, 1971, which was admitted by plaintiffs’ witness, and the debit of £10,099.4s.3d for loss re devaluation of sterling debited to the defendant on August 14, 1969.

There is no counterclaim before me in respect of overseas bills for collections deposited with the plaintiffs and not collected.

The evidence shows that the defendant was not credited with the
value of these bills and as the claim before me is based on the account of monies received and credited to the defendant’s account and monies paid out to him or at his order to others, the bills not realised cannot affect this claim.”

The defendant has now appealed against the judgment. Although, with the leave of this Court four grounds of appeal were filed in substitution for the original grounds of appeal, the only ground argued by learned Counsel for the defendant/appellant reads:

“...The learned trial Judge erred in law in admitting exhibit B (the alleged copy of entries in the statement of the defendant’s bank account) in evidence without any proof that—

(a) there was in existence a banker’s book from which the entries about the said account were made;

(b) the book was, at the time of making the entries, one of the ordinary books of the bank;

(c) the entries were made in the usual and ordinary course of business;

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

(e) the copy of the entries sought to be tendered has been examined with the original entries and found correct.”

In the course of his argument in support of the appeal, learned Counsel referred us to part of the testimony of the first and only witness called by the plaintiffs to which we have referred earlier. He also referred us to the answer given by the witness when he was asked whether he had prepared a certified true copy of the statement of account of the defendant for the purposes of the case at hand which reads:

“I see the document shown to me. It is a true copy of the combined statement of account which we have been sending to the defendant.”

He then pointed out that the statement was admitted in evidence as exhibit B notwithstanding the strong objection of learned Counsel for the defendant/appellant on the ground that the plaintiffs/respondents had not complied with the procedure laid down in section 96 of the Evidence Act, (Cap 62) (hereinafter referred to as “the Act”). Learned Counsel
then referred to the provisions of section 96(1)(h) and
96(2)(e) of the Act which deal with the admissibility of a
document which contains an entry in a “banker’s book” and
submitted as follows. The provisions of section 96 would
not be of any avail to the plaintiffs/respondents because
there was no question of any “banker’s book” in the case in
hand. To make a ledger card admissible, section 96(2)(e) of
the Act would need to be amended, but until it is so
amended, ledger cards which are not banker’s books as de-
defined in the Act, can only be admitted in evidence if they are
brought to court and tendered in accordance with the provi-
sions of section 90(1), (4) and (5) of the Evidence Act. As
the statement (exhibit B) is not shown to be an entry from a
banker’s book but was compiled from a ledger card, it was
wrongly admitted. Learned Counsel further submitted in the
alternative, that even if the “ledger card” is considered to be
a “banker’s book,” for the statement compiled from it to be
admissible, the preliminaries prescribed in section 96(2)(e)
must be complied with. As there is no evidence that this was
done, the statement was admitted in error. Moreover, to
make confusion more confounded, learned Counsel also
submitted, the first plaintiff’s witness said that the “state-
ments were prepared by the machinist from the vouchers.”
As the “vouchers” cannot be regarded as “banker’s books,”
the statements “prepared” from them are still not admissible
under section 96(2)(e) of the Act. Finally, learned Counsel
submitted that, as the plaintiffs’/respondents’ case was based
on the statement (exhibit B), the wrongful admission of the
statement has knocked the bottom out of the plain-
tiff’s/respondent’s claim, and that the only order which the
court could, and should have made in the circumstances is to
dismiss the plaintiff’s/respondent’s claim in its entirety.

In reply, learned Counsel for the plaintiffs/respondents
submitted that where a document is expressly pleaded in the
circumstances set out in paragraph 9 of their statement of
claim, there is no necessity to serve notice to produce the
original in view of the provisions of the *proviso* to section 97 of the Act. When it was pointed out to learned Counsel that section 97 is irrelevant, firstly, because it deals only with notice to produce an original document where a party wishes to prove a copy of the document by virtue of the provisions of section 96(1)(a) of the Act, and secondly, because the original document (the voucher) in the case at hand is with the bank, he did not pursue this argument. Learned Counsel, however, referred us to the letter (exhibit O) written by the defendant/appellant to the plaintiff/respondent which never denied owing the bank some money. That being the case, learned Counsel observed, it would be in the interests of justice, assuming there is merit in the submissions of learned Counsel for the defendant/appellant, to allow the appeal and non-suit the plaintiffs/respondents.

In our view, there can be no doubt, both from the pleadings and from the evidence adduced by both parties, that the plaintiffs/respondents’ claim was based on the statement of account (exhibit B). This view is supported by the averments in paragraphs 10 and 11 of the statement of claim, which read:

“10. At the close of business on January 15, 1972, the defendant’s said account according to the books kept by the plaintiffs showed a total sum of £376,320.10s.10d debit which sum includes interests, bank charges, commissions and other charges as aforesaid.

11. The plaintiffs will at the hearing of this suit tender the said statement of account of the defendant numbered as 2285 on which the suit shall be founded.”

The learned trial Judge also had the statement of account (exhibit B) very much in mind when he was delivering his reserved judgment. In this connection, we think it is pertinent to refer to that part of his judgment which reads:

“Counsel submitted that exhibit B is admissible, being certified true copy of entries in the books of the plaintiff’s bank. I hold it is admissible.

I find as a fact that exhibit B the certified copy of statement of account is a true copy of the statement of account kept by the plaintiffs for the defendant.”
The next question is, was the statement of account properly admitted in evidence and if it was not, to what extent would it affect the plaintiffs’/respondents’ claim?

It must be recalled that the claim is for £376,320.10s.10d, the same amount referred to in paragraph 10 of the statement of claim as the debit balance of the defendant’s “account according to the books kept by the plaintiffs.” Since the evidence adduced by the plaintiffs’ first and only witness showed that the statement of account (exhibit B) was prepared or compiled from a “voucher” can it be regarded as “an entry in a banker’s book” thereby making its contents admissible in evidence by virtue of the provisions of section 96(2)(e) of the Evidence Act? We think not for the following reasons.

Although section 96(1)(h) of the Act provides that secondary evidence may be given of the existence, condition or contents of a document where the document is an entry in a banker’s book, a “banker’s book” is defined in section 2 of the Act as including “ledgers, day books, cash books, account books and all other books used in the ordinary business of a bank.” Admittedly, this definition is not restrictive and could therefore be extended to mean something else which it does not ordinarily mean. Therefore, while the phrase may include “a ledger card,” although even this is far from clear, we do not think it could be extended to mean a “voucher” from which, according to the evidence, the entries in the statement of account (exhibit B) were obtained. That being the case, the statement could not be admitted as secondary evidence of the entries in a banker’s book by virtue of the provisions of section 96(1)(h) of the Act and the learned trial Judge was in error in admitting it as such.

Even if the statement of account (exhibit B) could have been admitted as secondary evidence under section 96(1)(h) of the Act, it could have been so admitted only in accordance
with the procedure laid down in section 96(2)(e) thereof which reads:—

“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 copied 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.”

We have considered the scope of this section in *The State v. Olomo* (unreported but see S.C. 1/1970 delivered on October 29, 1970). We observed in our decision in that case as follows:

“It is not the length of evidence given in tendering a bank statement of account that matters but the substance of the evidence given; nor is it compulsory that the precise words set out in section 96(2)(e) should be used by the witness or the judge taking down his evidence . . . It is enough that substantially, the requirements of the section are observed: eg:

(i) where it is not possible to produce the books of the bank, a certified copy of the account is enough to satisfy the court that there is a book in existence from where copies were made;

(ii) if certified by an official of the bank giving evidence, this presupposes that he has compared the copy with the original before he certified it; and

(iii) if the books of the bank were produced by the manager or the accountant, this must have been in the custody and control of the bank.”

It is sufficient to point out that, in the case in hand, none of the requirements of section 96(2)(e) as explained in *The State v. Olomo* (supra) was complied with by the plaintiffs.
All that the first plaintiffs’ witness did with the statement of account was “to vet to ensure that all the officers have done their duty before the statement leaves the bank.” He did not say that he examined it with the original entries and found it correct or that the “voucher” was one of the books kept by the bank. On the contrary, the witness testified under cross-examination as follows:

“I did not scrutinise exhibit B and exhibit B1 before they went out although I saw them. Up till this morning I have never had the opportunity of scrutinising exhibit B.”

For all these reasons, we think that the statement of account should not have been admitted in evidence under that section and the learned trial Judge was again in error in admitting it as he did.

There is one other point. Could the statement of account have been admitted under section 37 of the Act? The section reads:

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

The section was considered by this Court in Esso West Africa Inc v. Oyegbola (1969) 1 N.M.L.R. 194 where we observed at page 198 as follows:

“Besides, section 37 of the Evidence Act does not require the production of ‘books’ of account but makes entries in such books relevant for purposes of admissibility. The evidence describes the cards sought to be tendered as ledger cards, meaning that they are cards from ledger or constitute a ledger. The law cannot be and is not ignorant of modern business methods and must not shut its eyes to the mysteries of the computer. In modern times, reproduction or inscriptions on ledgers or other documents by mechanical process are common place and section 37 cannot therefore only apply to ‘books of account’ . . . so bound and the pages . . . not easily replaced.”
Again, the entries in the statement of account (exhibit B) cannot be regarded as entries in “books of account” for the purpose of this section because there is positive evidence that they are “prepared by the machinist from the vouchers.” Moreover, the record of proceedings shows that the statement was not tendered under section 37 but under section 96(1)(h) of the Evidence Act. For these reasons, we do not think that the statement of account (exhibit B) could have been admitted under section 37 of the Act.

Finally, while we agree that, for the purpose of sections 96(1)(h) and 37 of the Act, “banker’s books” and “books of account” could include “ledger cards”, it would have been much better, particularly with respect to a statement of account contained in a document produced by a computer, if the position is clarified beyond doubt by legislation as has been done in England in the Civil Evidence Act, 1968. Section 5(1) and (2) of that Act provide that in any civil proceedings, a statement contained in a document produced by a computer would, subject to rules of court, be admissible as evidence of any fact stated therein of which direct oral evidence would be admissible, if it is shown that certain conditions are satisfied in relation to the statement and computer in question. These conditions are:

(a) that the document containing the statement was produced by the computer during a period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period, whether for profit or not by any body, whether corporate or not, or by any individual;

(b) that over that period there was regularly supplied to the computer in the ordinary course of those activities information of the kind contained in the statement or of the kind from which the information so contained is derived;

(c) that throughout the material part of that period the computer was operating properly or, if not, that any respect in which it was not operating properly or was out of operation during that part of that period was not such as to
affect the production of the documents or the accuracy of its contents; and

(d) that the information contained in the statement reproduces or is derived from information supplied to the computer in the ordinary course of those activities.

Be that as it may, it is manifest that, in the case in hand, the document (exhibit B) on which the plaintiff’s/respondent’s claim is predicated was admitted in error. The next question is this. Should the plaintiffs’/respondents’ claim, for this reason only, be dismissed in toto? In considering what order to make, we cannot ignore the contents of the letter (exhibit O) written by the defendant/appellant in reply to the plaintiffs’/respondents’ letter (exhibit N). The letter (exhibit N) dated July 8, 1971, reads:

“F S Yesufu, Esq.
PO Box 151
Benin City
Dear Sir,
Your Outstanding Debt of £274,790.18s.6d.

We write you as solicitors of the African Continental Bank Limited and have instructions to demand your immediate payment to the bank of the sum of £274,790.18s.6d (two hundred and seventy-four thousand, seven hundred and ninety pounds eighteen shillings six pence) being the balance of your debt at Ring Road, Benin City Branch of the bank originating from transactions between you and the said bank in May, 1967.

It is our instruction that several demand notices have been sent to you by the said bank to settle this debt but you have proved adamant. We are instructed therefore to demand your immediate settlement of this outstanding debt to the bank within 14 (fourteen) days from the date of this letter failing which we shall have to carry out our further instruction of taking you to court for the recovery of the said debt with cost thereto. We shall do this without further notice to you.

Yours faithfully,
(Sgd) C.L. Okoye,
Solicitor.”
The reply (exhibit) dated July 21, 1971, reads:

“The Senior Solicitor
African Continental Bank Limited
Head Office, PMB 2466
Lagos
Dear Sir,
Re: My Overall Indebtedness
I intend to liquidate my total indebtedness with the bank on or before the end of September, 1971, or substantially reduce the amount. The two months should be regarded as months of grace to enable me double my efforts towards the clearance of this adverse balance.

Considering my past relationship with the bank, I hope you will use your good offices to make this consideration; I would also like the senior solicitor to give me some time to reconcile some of the outstandings which are expected to be credited to my account to reduce my indebtedness and have not been done.

Litigation as you know is protracted and might not be in the interest of the cordial relationship that has always existed between the bank and myself.

Kindly give this my unflinching proposal your consideration. If I fail, you can go on with your court action for recovery. I give my honour on this transaction and I promise that I won’t fail.

I have outstanding bills and as soon as they mature or the proceeds are received, I will pay same to reduce the balance and I am also expecting some money from Finance Houses for the expansion of my business.

Be rest assured that I will not fail.

Yours faithfully
for: SARAH and YESUFU TRADING COMPANY
(Sgd) F.S. Yesufu
Managing Director.”

In view of the admission made in exhibit O, we do not think that it will be fair or just to dismiss the plaintiffs’/respondents’ claim in its entirety. We must, nevertheless, allow this appeal for the reasons we have stated earlier. The appeal is allowed and the judgment of the learned trial
Judge in Suit No. B/10/72, delivered in the High Court sitting in Benin City on August 16, 1974, including the order made by him as to costs, is set aside. Instead we non-suit the plaintiffs'/respondents' and this shall be the judgment of the court. Costs in favour of the defendant/appellant are assessed in the court below at N500 and in this Court at N364.

Appeal allowed; plaintiff non-suited.
Glanvil Enthoven and Company Limited v. African Continental Bank Limited

HIGH COURT OF LAGOS STATE

GOMES J

Date of Judgment: 8 April 1976

Banking – Negligence – Banker acting in good faith and without negligence – Principles governing – Section 2, Bills of Exchange Act, 1961

Facts

The plaintiff/company is an insurance broker and had their headquarters in Lagos. Their bankers were the National Bank of Nigeria who also held 50% shares in the plaintiff/company on behalf of the Western Nigerian Government. The plaintiff/company had no branch at Warri in the Mid-Western State of Nigeria.

In 1970 some gentlemen appeared in the Warri Branch of the defendant/bank and purported to open an accompanying in the names of the plaintiffs/company and the normal enquiry as regards the opening of account was set in motion. However, without waiting for the result of the enquiry purportedly made to the National Bank of Nigeria in Lagos, the plaintiff’s/company’s bankers, the defendant/bank allowed the gentlemen to start operating the account. The plaintiff/company cheques issued by their customers, companies and individuals, were paid to the defendant/bank, for the account of the plaintiff/company.

At the same time, cheques for various sums including the sum of ₦21,400 were paid in cash over the counter to one Mr Kanu who was not known to the defendant/bank out of the said plaintiff’s/company’s account leaving balance of ₦4,590.92 remaining in the account. The manager and accountant of the defendant/bank signed the withdrawal cheques authorising payment on them.
The plaintiff/company by this action claimed against the defendant/bank the sum of ₦80,373 being amount in various cheques drawn in favour of the plaintiffs/company made payable to their account supposed to be opened with the defendant/bank in Warri, as damages for the wrongful conversion by the defendant/bank of the cheques, properties of the plaintiff/company and for wrongfully depriving the plaintiff/company of them, and in the alternative, the plaintiff/company claimed against the defendant/bank the said said sum as money had and received by the defendant/company to the use of the plaintiff/company with interest.

Held –

1. The banker’s dealings throughout must be in good faith and without negligence. The alternative liability arising from negligence renders the question of good faith practically superfluous; and it is seldom, if ever, raised.

2. Negligence in this connection is breach of a duty to the possible true owner, not the customer, created by the statute itself, the duty being not to disregard the interests of such true owner. The test of negligence is whether the transaction of paying in any given cheque coupled with the circumstances antecedent and present was so out of the ordinary course that it ought to have aroused doubts in banker’s mind and caused him to make inquiry.

3. The banker is bound to make inquiry when there is anything to raise suspicion that the cheque is being wrongfully dealt with in being paid into the customer’s account, but the banker is not called upon to be abnormally suspicious. Disregard of the bank’s own regulations may be evidence of negligence.

4. A banker is not liable for acts of negligence if these are induced or encouraged by the conduct of the true owner.

5. The banker cannot adduce pressure of exigencies of business or shortage of staff to modify what, in ordinary circumstances, would be negligence.
6. The omission to detect an irregularity in the endorsement or to notice that it does not ostensibly conform to what would be the proper endorsement would constitute negligence.

7. It is negligence not to make inquiries as to a customer upon opening an account and collecting a cheque for him. Unless the reference obtained in respect of a customer renders it superfluous, inquiry ought to be made concerning the character and circumstances of the customer.

8. The fluctuations in the account may be a circumstance putting the bank upon inquiry.

9. In the instant case, with all the grave irregularities, the defendants had not only been very negligent, but they had not acted in good faith, hence were not protected by section 2 of the Bill of Exchange Act, (Cap 21).

Cases referred to in the judgment

Nigerian

B.E.W.A.C Ltd v. A.C.B. June 1973
Nigeria Brewery Ltd v. Muslim Bank (Nigeria) Ltd (1963) Lagos High Court Report, page 78

Foreign

Illingley v. District Bank (1932) 1 K.B. 544
Ladbroke and Co v. Todd (1914) 1 L.T.P. 44, paragraph 43
GOMES J: The plaintiffs’ claim against the defendants is for the sum of £40,187.10s now N80,375 being damages for the wrongful conversion by the defendants of 14 cheques the properties of the plaintiffs and for wrongfully depriving the plaintiffs of the same or in the alternative the plaintiffs claimed that the defendants be made to pay the said sum to them as amount had and received by them to the use of the plaintiffs. They also claimed interest on the said sum at the rate of 10% per annum from the first of June, 1971 until payment or judgment.

The plaintiffs gave evidence as well as the defendants and after the close of the case both Counsel addressed the court.

The case for the plaintiffs briefly is as follows:

One Mr Brian Henry Clinton Graham stated that he was the managing director of the Insurance Broker, that is, the plaintiffs and that he had been the managing director in Nigeria since October, 1968 but he became the managing director in 1969. They had a Board of Directors and 50% of the shares of the company were owned by the Nigerian Government whilst the other 50% was held by the plaintiffs in London. The Western Nigerian Government shares were
held by the National Bank Nigeria Limited, which was represented by Messrs Ladehinde, Chief Adeshigbin Banjo and Ewedemi on the board. He was also on the board but he became an alternative director in 1964 and a full time director in 1969. According to him the bankers of the plaintiffs company were the National Bank of Nigeria and he claimed that they had no other branches in Nigeria. The headquarters of their company was at the Western House, Lagos. He stated that they had no branch at Warri in the Mid-Western State of Nigeria. On the 23rd of January, 1970, he stated that they held a board meeting at which he was present and he tendered the minute book after a lengthy argument from both Counsel and it was admitted and marked exhibit L. He stated that the Board of Directors had never, at any time, passed any resolution to open an account with the ACB Warri and had never written any letter or made application to open an account with the ACB Warri. Furthermore, they never held any Board meeting on the 17th of September, 1970. They had letter-heading papers of the company with which they write all letters and he tendered three specimens of these papers which were admitted and marked exhibits M to M2.

As the managing director of the plaintiffs company they were appointed by individuals and companies to arrange their insurance policies with underwriters and by placing their policies with underwriters, they, that is, the underwriters, pay his company, that is, the plaintiff’s commission. The policies from the insurance companies were forwarded with their debit note to their clients. The client would pay them and they in turn pay the underwriters. These amounts called premium were paid by cheques, bank transfer and occasionally in cash. He stated that he went home in February and returned to Nigeria at the beginning of April, 1971 and he noticed on his return that a number of clients were very much in arrears of their payment. He personally wrote to the head of these companies or individuals, asking why there was delay in payments. What he discovered subsequently was that his letters
never left the company. He then contacted the clients and as a result of what the Nigerian Technical Company told him he reported the matter to the police. The Nigeria Technical Company showed him a photostat copy of the cheque with which they paid their premium. He identified the photostat copy of exhibit B which was a United Bank for Africa cheque dated 4th March, 1971 for £5,400.7s.7d now N10,801.51. He tendered the cheque which was admitted and marked exhibit N. Later on Corporal Oni of the Nigeria Police Force went to see him in his house.

Continuing his evidence he stated that he knew one Mr Richard Cameron Low who was his predecessor in Nigeria and the managing director of the company from 1957 to December, 1963. Mr Low was at present working with their company in London and he had been there before he left Nigeria in December 1963 up to the present time. Furthermore he stated that as far as he could remember he was in Nigeria throughout 1970 and that Mr Low was not in Nigeria throughout 1970. He stated that he did not send Mr Low to Warri in 1970 and that he did not send anyone to open a branch at Warri in 1970. He stated that he could recognise the signature of Mr Low if he saw it, and after some argument from Counsel he identified the signature of Mr Low in exhibit O. He furthermore stated that he knew Mr JO Aboderin who was the Chief Accountant of the National Bank of Nigeria and that he was appointed to their company in 1969 as a director but he was no longer one of the directors. The board had never authorised Mr Aboderin to sign any cheque on behalf of the company. He contended that at the present he was No. 1 signatory of any cheque issued by the company and that there was also a second signatory required on all cheques except those under £60 now N120. The chief accountant’s signature was not necessary and that the signatories of their cheques in 1970 were himself, Mr Robinson and Mr McIntosh and he stated that Mr Aboderin was never a member of their staff but he knew his signature, and that he could recognise it as he had signed minutes of the Board of
Directors. He identified the signature in exhibit 12. He continued and stated that he did not know anyone by the name Mr MO Kalu and that he had never met him. Such a name had never appeared on the pay roll. He admitted knowing a company by name Afprint Nigeria Limited and that they acted for them. He stated that he did not know ACM of Nigeria Limited personally but that they were clients and their head office was at Port Harcourt. They normally pay them by cheque. At this stage he tendered the Memorandum and Articles of Association of the plaintiffs’ company which was admitted and marked exhibit P. He also tendered the letter dated 11th May, 1971 to the manager, ACB, Warri which was admitted and marked exhibit Q. Furthermore, he tendered the letters dated 24th May, 1971, 29th May, 1971 and 26th May, 1971 which were admitted and marked exhibits Q to Q3. He identified exhibit E as a copy of the Certificate of Incorporation and he stated that the original was at that time kept in a safe in his office but in 1970 it was hung in a wooden frame in the office. He had to distribute some of the Articles of Association because various Ministries at the Secretariat Ibadan requested for them. He stated that various cheques drawn in their favour amounting to £40,187.10s now ₦80,375 were made payable to their account, which they supposed was opened with the ACB in Warri, were not to their knowledge as they had no account with the ACB at Warri. These cheques had been tendered and marked exhibits R to R11. He was therefore claiming an amount on the writ from the defendants as stated thereon.

Under cross-examination by the learned Counsel for the defendants, this witness stated that his initials were BHC and that directors appointed by the British were referred to as “B” group directors. Those appointed by the Nigerian Government were referred to as group directors. He claimed that he was a “B” group director and that Mr Aboderin was group director in 1971. He stated that he attended the 80th Board Meeting held on 22nd September, 1972. He tendered the minute of the board meeting which was admitted and
marked exhibit 14. He claimed that Mr Low left in 1963 and that Mr G Graham succeeded him. He took over from Mr G Graham about 1965. He admitted however, that Mr Low came to Nigeria from time to time since he left and that whenever he came it was only on a courtesy visit and that he normally attended director’s meetings whenever he came. He stated that he reported the case to the police and investigation stated that he had not sent for Mr Low to be interrogated by the police. He had never been informed by the ACB that there was a credit balance in the account opened for them at Warri. He maintained that they had no account with ACB Warri and that he was never given any authority to open an account with ACB Warri, either in their name or on their behalf.

Furthermore he stated that they had no account in Warri and that he had never been refused by any bank before. He even went so far to say that he had not applied to ACB to open an account with them. He admitted that they have a branch at Cocoa House Ibadan and that they deposited into an account at the National Bank Ibadan where people can deposit into an account but could not withdraw even a dime. He stated that they applied to use the facilities of the National Bank, Ibadan from the National Bank, Lagos and that he made an application in Lagos as they were in partnership with the National Bank in Lagos. The branch at Ibadan was opened sometime in 1965 or 1966 and the deposit account was opened at the same time. He stated that Mr Aboderin was no more the Chief Accountant of the National Bank and that he was not aware of the reason leading to Mr Aboderin leaving the National Bank. He stated that he did not know that the ACB was involved in this matter until police started investigations and it was then that he had reason to believe that his letters did not leave the office. He suspected from the investigation that somebody must be involved and he then decided to lock the Certificate of Incorporation in his safe. Apart from the 11th, 12th, 14th and 15th witnesses for the
plaintiffs all the other witnesses tendered the various cheques paid out by the ACB from the account of the plaintiffs. Their evidence was substantially the same and they were more or less corroborating the evidence of one another. Their evidence had been carefully gone through together with the exhibits tendered with the various objections and replies from the Counsel for the defendant and plaintiffs.

The 11th Prosecution witness, one Akinola Oni, a Police Corporal No. 6974 attached to Nigeria Police, Lagos gave evidence and stated that sometime ago, a case of stealing cheques was reported by Nigeria Technical Company, Apapa and he was detailed to investigate the report. According to him his investigation took him to the African Continental Bank, Warri and he interviewed the manager of the bank one Mr Adiare as well as the accountant and the cashier. He took a photostat copy of the cheque involved from the Nigeria Technical Company which was tendered, admitted and marked exhibit N and he questioned the manager as to how he got the cheque.

In consequence of what the manager told him he demanded for the documents relevant to the account that was opened, and he showed him the Articles of Association of the branch of the plaintiff’s company at Warri. He also showed him the last minutes of the meeting of the company in Lagos and the bank ledger with which the account was opened, exhibit R1 to R11, which were some of the cheques. He stated that he spoke to the accountant in respect of exhibits R1 to R11 which were paid at Warri. He took possession of all the documents and he made photostat copies of them. He later proceeded to Plot 51 Giniwa Road, Warri but on getting there he discovered that there was no company by name Glanvil Enthoven and Co Limited There was only one firm there by name the Cneico and that it was a small shop. He went further and stated that No. 51 Giniwa Road, Warri was a dwelling-house and a small portion cut was being
used as a small shop and the firm was named Cneico. The area according to him was a residential area. He went to the sales clerk of Cneico to find out about the landlord and he took him to a fairly old man. He made investigations about Kalu, Aboderin, Graham and Low and as a result of what the landlord told him he went back to the manager ACB Warri to find out whether he investigated and made enquiries about this company at No. 51 Ginuwa Road, Warri. He found out that no enquiries or investigation was made and that on the day that Mr Kalu cashed exhibit R that is, a cheque for a sum of £10,700 he did not come with a police escort. Nobody in the bank could tell him the registration No. of the car which the said Mr Kalu brought to collect the amount. He then, after further investigation, instructed the manager and the accountant not to pay any amount out of the account again and that whoever came to claim any amount out of the ledger of exhibit R should be handed to the police.

He stated that on his return to Lagos he went to the office of the plaintiffs’ company at No. 10 Broad Street, Lagos and he showed Mr Graham the 9th plaintiffs’ witness the photocopy of exhibit R. He then obtained a specimen signature of Mr Graham and other members of the staff.

Under cross-examination by the learned Counsel for the defendants this witness stated that he had no bank account anywhere although he had investigated cases dealing with cheques. He admitted that there was nothing wrong in the plaintiffs’ company paying the account at their branch, if they have any, in Warri. He also admitted seeing the names of Messrs Graham, Aboderin and Low on some documents with the manager of the defendants company at Warri. He stated that the manager told him that somebody presented himself as Mr Low at Warri, and he further stated that Mr Graham was also one of the signatories to the account. They also showed him a specimen of Mr Graham’s signature as well as some letters. He tendered one of the letters which
was admitted and marked exhibit T. Furthermore, he tendered the signature card for account No. 813, letter dated 6th January, 1971 from the manager of the plaintiffs’ company to manager ACB Warri Trade Enquiry – Bankers Opinion dated 29th December, 1970 from ACB Warri Branch to the manager National Bank, Lagos, Registration of Business Names – Form of Application, forms 1 and 6 dated first July, 1970, Certificate of Incorporation No. 1558 of the plaintiffs’ company and Memorandum and Articles of Association dated first July, 1957 of the plaintiffs’ company. This was admitted and marked exhibits T1 to T6 respectively. According to the documents shown to him by the manager, he stated that the branch of Glanvil Enthoven and Co Limited Warri Branch was opened in 1970 and it was from the documents shown to him that he got the address 51, Ginuwa Road, Warri. He stated furthermore that it was not unusual for bank managers, to go from one customer’s house to another and stated emphatically that none of the documents he saw suggested that Mr Graham was living in Warri. He visited one other place for one Mr Kalu but there was no trace of him. He stated that at the time he visited Warri the sum of £10,700 in exhibit R had been paid out. He also visited the manager UBA, Aba but he could not remember whether or not he told him that he had written to ACB Warri. According to record he stated that he knew that these cheques were paid to ACB Warri before the 17th April, 1971. They were investigating the case of a single cheque but it was when he got to Warri that they discovered that so many cheques had been diverted to ACB Warri. As far as he knew a case file had been sent to the Director of Public Prosecution. He did not see Mr Cameron Low and he was told that he had travelled abroad. He admitted that he had not contacted him through Interpol. Furthermore, he had not seen any of the people mentioned by the manager as having opened this account. As far as he was concerned the plaintiffs’ company was not the complainant in the case that he investigated.
The next witness was Alhaji Lukuman Foluwasho Quadri, a banker under the National Bank of Nigeria. He stated that he was aware of the existence of Nigeria Bankers Committee and that he was very conversant with its directives. The Committee comprises of four managers of all businesses in Nigeria together with Central Bank. He stated that the committee held meetings at the Central Bank, and passed circulars and instructions to each bank which were then passed to every division of the bank to follow and comply with. According to him when a banker was opening an account for any company whether limited or private the banker would require the Certificate of Incorporation of the company or business name duly registered and that the original of the certificate would be returned to the banker after it had been executed. The banker would retain the duplicate of photostat copy. Furthermore, the banker would retain a copy each of the memorandum or articles of association as well as the extract from the minute book of the company appointing them as their banker. This extract from the minute book would be kept by the banker in its file. After the minute had been adopted a copy of the minute would be sent to the banker, signed by the secretary and one of the directors. It would be forwarded with a covering letter on their letter heading paper. The bankers would at times demand for the minute itself. They would also ask for two referees who were two previous bankers of the company. If, however, it was a new company the witness stated that they would accept two referees who were not bankers. He stated specifically that they would always take mandate from the company. It was a special form which would be signed by two of the directors of the company and that these two directors would also sign the signature card. The mandate form can be signed by either the secretary or the director and they would also sign the signature card. These two people would sign the cheques thereon on the company. He stated that no single person could operate the account or cheque because of fraud. Furthermore, the signature card must be signed in the presence of the manager.
of that bank in his office. He stated that the above procedure must be complied with in opening an account for or by limited liability company and they also included Barclays Bank and all banks as well. He continued and stated that when the first cheque or the first amount was paid in it was usual to get reply from the referee before the company was allowed to operate the account that would enable the bank to know whether the company was good or not. Where on the other hand the bank allowed the customer to withdraw an amount before the reply of the referee the customer must be identified by another customer well-known to the bank and he must be of good standing and repute. It was only then that the customer would be allowed to withdraw a small portion of the amount deposited. Where, however, a customer wanted a sum of ₦10,000 or above he must have an escort and it was the duty of the manager to ask the customer whether he had an escort with him. If he had, the money would be passed over to him. Finally, he stated that only five items of withdrawals in exhibit R3 were large amount.

Under cross-examination by the learned Counsel for the defendants this witness stated that he was the head of the paying and bills section. He maintained that in a limited liability company any bank could allow a single person to operate the account and that Standard Bank of Nigeria being one of the well established banks in Nigeria was bound by the rules regarding operation of accounts of limited liability companies and furthermore international banks also observe those rules. He stated that all banks in fact observe them. He maintained that he was speaking the truth and that he studied international banking as well. Although many people form companies with their wives and children, these companies were private companies and not limited liability companies. Limited Liability Company can be formed by many people but must be registered and limited to the share or shares subscribed. He stated that there was nothing like a private limited company. According to him the plaintiffs in this case are
subsidiary to National Bank and they are a very reputable insurance brokerage company and the National Bank, Lewis Street Branch was their banker. The Lewis Street Branch was controlled by its head office at Yakubu Gowon Street, now Broad Street. He maintained that the plaintiffs were trustworthy and suitable to open a current account. Furthermore, they are fit and trustworthy to operate a current account. Finally he stated that whenever a customer paid in a cheque for the credit of his account and it was discovered there that he was not the true owner of the cheque, the owner of the cheque had a right to sue the depositor of the cheque as well as the bank to which the cheque was deposited and the money obtained. The only safeguard for the bank was to sue the man that presented the cheque for conversion. He concluded by saying that all that he had said here had been said as an expert.

The 14th witness for the plaintiffs was one Muniru Olatunde; Longe who was the chief accountant of the plaintiffs’ company. He stated that as he knew, his company never passed any resolution to open an account with any other bank in Nigeria. In fact their shareholders would not allow that. He knew one Mr JO Aboderin a former Chief Accountant of the National Bank and who by virtue of his position was a director of their company although he ceased to be one since 1973. He knew him and he had seen him write. He signed the balance sheet of their company and he stated that the signature on page 2 of exhibit L2, that is, the minute of the Board of Directors dated 12th June, 1970 was that of Mr JO Aboderin. Furthermore he, that is, the witness was responsible for the printing of the letter heading on the company paper and that the letter heading exhibits M1 and M2 were not that of their company. He went further to say that exhibits T1 and T2 were not their letter heading paper. The designs on the two were different although the design on exhibit M2 resembles that of their own. The design of exhibits T1 and T2 was completely different from their own. He stated that he knew Mr BHC Graham, the managing director
of the company and that he knew his signature and he had seen him sign it. The signature of exhibit T was not that of Mr Graham. He went on further to say that the signatories to the company’s cheques were Mr BHC Graham, managing director, who was the first signatory and that there were three other second signatories and any of these can sign as the second signatory. They were himself, Mr YO Oluwole, deputy general manager, JR McIntorsh and Mr MG Brown and any of them can sign as second signatory. All these people were employees of the company. Mr Aboderin was never at any time employed as either an accountant or secretary in the company. He stated definitely that exhibits R to R11 were not his company’s cheques. Their cheque books and cheques were printed with their names and addresses thereon and he stated emphatically that he did not know any Mr Kalu in connection with their company. He stated that he knew Afprint (Nigeria) Limited and the company was one of their clients. That company was one of those that sent them cheques. As a result of the fraud, he went to the managing director of that company and obtained a photostat copy of the cheque which was alleged to have been sent to them. The cheque No. V025961 of 16th March, 1971 for £8,725,10s.6d now ₦17,451.10s was tendered admitted and marked exhibit V. Under cross-examination by the learned Counsel for the defendants this witness stated that he was not a member of the Board of Directors of the plaintiffs’ company in 1970. He was only director of the company by virtue of his appointment as the Chief Accountant of the National Bank and since he resigned his appointment he ceased to be a director. He maintained that he could recognise the signature of Mr Graham as he was familiar with it and that the signature in exhibit B did not look like that of Mr Graham. He furthermore stated that whenever the board of directors held a meeting any of them could be appointed as the chairman for that meeting but that did not make him the chairman of the Board of Directors. He was only the chairman of that particular meeting.
The next witness was James Olubunmi Aboderin. He stated that he knew the plaintiff in this case and that during 1970 and 1971 he was associated with the plaintiffs’ company. He was a director of the company by virtue of his post in the National Bank as the chief accountant. He admitted knowing Mr BHC Graham, the Managing Director of the plaintiffs’ company. He stated categorically that the plaintiffs’ company never sent him to Warri in December, 1970 or at any time to do any work there. He admitted knowing Mr R Cameron Low but he maintained that he never travelled with him to Warri in December, 1970 or at any time. He stated also that the signature in exhibit T was not his, as he had never seen exhibit T before. Furthermore, the signature on exhibit T1 was definitely not his own and as far as exhibit T2 was concerned, he stated that he had never seen it before and that he had no knowledge of the letter. Furthermore, the signature at the bottom of the minutes attached to exhibit T4 was not his. He stated that at the meeting held on the 23rd January, 1970 at 11:30 am at which he was present there was never any discussion as to the appointment of a bank account at Warri at the meeting and that he was never present at a supposed meeting which was alleged to have been held on 17th September, 1970 as indicated on exhibit T4. He denied signing any cheque of the plaintiffs’ company. He went through exhibits R1 to R11 which were cheques and stated that the second signature on any or all the cheques were not his own, and that he did not sign any of the cheques. He denied knowing any Mr Kalu. He also stated that he never worked at any number known as 51, Ginuwa Road, Warri and finally he stated that he did not know the place.

Under cross-examination by the learned Counsel for the defendants this witness admitted that a police officer came to him when they were investigating this case although he could not recollect his name. He furthermore stated that he did not show him the documents that were shown to him that day and that he was seeing them for the first time that day.
He also stated that he remembered faintly that the police officer said something about the cheques stolen from the plaintiffs’ company and that as they held 50% of the shares in the plaintiffs’ company the question of the stolen cheques was taken up at their board meeting. He admitted that Mr Cameron Low was also a director of the company at that time. That, in brief, was the case for the plaintiffs.

The defendants gave evidence and called witnesses.

The first witness for the defendants was one Peter Eni Ediare, a Senior Branch Manager of the African Continental Bank, Ring Road Branch, Benin City and the Currency Manager for the Mid-West Branch. He stated that in December, 1970 he was in Warri as the branch manager for the ACB whilst there he had some transactions with the plaintiffs’ company. In 1970, two gentlemen came to his office and wanted to open an account for the plaintiffs’ company. He asked for the memorandum and articles of association, the resolution of the Board appointing the ACB as their bankers and the Certificate of Incorporation, but he insisted that they should bring the original and photostat copy of the Certificate of Incorporation. They should also produce official letter from their head office introducing that they were authorised to sign cheques. He showed him exhibit T4 as well as the resolution of the Board. He demanded for the memorandum as well as the certificate but as they were not enough they left that day. A week later they came with all these documents and after going through them he was satisfied and called on his accountant and informed him the intention of the gentlemen. He further stated that this accountant was in charge of opening current accounts for all customers. He went further to say that one of the two gentlemen was an expatriate by name Cameron Low and the other was a Nigerian. He went further and stated that before that date he used to know the company when he was working in Lagos as an officer of the UBA. He knew them as a firm of insurance brokers, very reputable in handling business for some insurance companies. An account was opened for them and exhibit R was the ledger card for the account.
After about five weeks later they started operating this card and around the 23rd January, 1971 they started making withdrawals from this account. The accountant told him certain things and he gave the accountant his own opinion and as a result of that they were allowed to start making withdrawals. He stated that the issue was with regards to a letter written to the National Bank to which no reply was received for about a month and he told them that in dealing with limited liability companies they were self introductory. He went further to say that the question of enquiry was a must only in case of an individual, but what was important in the case was the knowledge of the person or persons they were dealing with. Any experienced manager faced with such situation must use his discretion especially when dealing with the firm of that kind, and he contended that his past knowledge of the plaintiffs’ company when he was in Lagos influenced his decision. He was not aware that the cheques paid into the account of the plaintiffs’ company were stolen cheques and as nothing happened that could have made him suspect that the cheques were stolen.

He maintained that the plaintiffs’ company branch at Warri was not a fictitious one. He denied converting the plaintiffs’ cheques to money for his own use. According to exhibit R ie Ledger Card the amount standing to the credit of the plaintiffs’ amounted to £2,259.19s.3d that is, N4,509.92 and the plaintiffs’ account was still open. They were entitled to operate it. He went further to say that the defendants did not pay cheques belonging to the plaintiffs to another company. All the 14 cheques were paid into the account of the plaintiffs’ company and he stated that when there was a withdrawal, what they were concerned about was the signature on the cheques. Furthermore, he stated that they were not negligent and that the defendants were only liable to the plaintiffs’ company only to the amount still outstanding on the Ledger Card.

On being cross-examined by the learned Counsel for the plaintiffs, this witness stated that he had been with the ACB
since 1964 and that he was posted from Sapele to Warri in 1969 as a manager. All that he knew about the plaintiffs’ company was that they existed as insurance brokers and that he had never had any dealings with any of the officers of the plaintiffs’ company throughout his stay in Lagos. He did not know any of the officers of the company personally. He further admitted that the plaintiffs were not using the ACB as their bankers throughout his stay in Lagos. When the two gentlemen came to him in Warri in December, 1970 he admitted that he had never met any of them before and that on several occasions they showed him exhibit T5 as well as the original of the Certificate of Incorporation and that all they were concerned about was the original which must be signed. He maintained that when they brought the original and the copy he compared them and he was satisfied with it. They gave him a photostat copy of a certified true copy. He agreed that the registration under the Company’s Decree was different from the registration under the Business Trade Act and one of the documents submitted to him was exhibit T4 was a registration of the plaintiffs’ company under the Business Trade Act. He further stated that he did not accept it. It was on the second occasion that he came with the other documents together with exhibit T4, as he was satisfied he accepted them together with exhibit T4. He said that he was not concerned with the registration of the business name hence he did not ask any question and that he took the documents from them.

The two gentlemen that came to see him were those that opened the account and they signed their signature on the card although he admitted that they did not sign before him. He even went further to say that he could not say whether or not the signature card was signed in the presence of his accountant. It was on the second occasion that they came to him that he met expatriate Mr Cameron Low. He did not ask to see the second signatory of Mr Aboderin, but as it was his accountant who should see him he did not know Mr Aboderin and he did not know Mr Kalu. It was the police
that told him that the second person that came with the expatriate was one Mr MO Kalu. The expatriate did not introduce to him the Nigerian that came with him. He got exhibits T1 and T2 and according to him it was their signature although it did not bear the signature of Mr MO Kalu. Furthermore the signature of Mr Kalu was not on exhibit T. He contended that it was his accountant who could say anything about Mr Kalu and the cheques exhibits R to R11 were signed by Mr MO Kalu. Somebody must have introduced him to their branch at Warri. He contended that his accountant must have known Mr Kalu. Once the authorised signatories were in order he could make the payments, and that whenever the cashier, in a case of this nature, went on leave his reliever must send to Mr Kalu so that he may know him. He admitted that exhibits A, B, C, T, F and N were countersigned at the back by Mr Kalu. Mr Kalu endorsed the cheque at the back. There was a rubber stamp below it with the words “Glanvil Enthoven and Co Limited”, exhibits R to R11 were endorsed by Mr Low and the rubber stamp on each of them was “Glanvil Enthoven and Co Limited” He stated that the cheques were signed by Low and Aboderin above a rubber stamp “Glanvil Enthoven and Co Limited” and that he was only interested in signatures and not the same name of the company as well as their account number. He admitted that the address of the plaintiffs was 51 Ginuwa Road, Warri. Although he knew Ginuwa Road, but did not know anything about it until the 11th witness for the plaintiffs told him that it was a residential area in the slum area of Warri. He stated that according to him Ginuwa Road, was a commercial area, but he changed his version and stated that only that part of it leading to Warri-Sapele Road, was a commercial area. He admitted seeing exhibit T4 that is, the resolution but he did not ask for the original of the resolution as it was not their practice.

He said further that when the two gentlemen came to him he did tell them that they must have two referees but when they came on the second occasion with all the documents
and that he was satisfied he did not tell them they must have two referees. He admitted that exhibit T3 was a trade enquiry and it was sent to National Bank, Lagos Branch and dated 29th December, 1970. He admitted that he only learnt from his accountant that he did not receive a reply and he told his accountant that he should allow them to make withdrawals from the account. His accountant again told him that he had written to them about a month but there was no reply. The cheque book was issued to them on the 19th of December, 1970, but at that time the trade enquiry had not even gone that the first withdrawal was made on the 23rd January, 1971. He admitted again that the month had not even elapsed before they started withdrawing and tried to reconcile this with the Business Trade Act and he felt that 23 days were enough time. Furthermore, he said that the name of the person that endorsed the application form referred to in paragraph 8 of the statement of defence was Mr Graham and exhibit T was the document he had in mind as the application form. He admitted that he did not know Mr Graham and did not know his signature. He had never before that day seen the letter heading form of the plaintiffs’ company. According to him the letter heading of exhibit T came from a reputable company. He admitted that there was no street address on exhibit T. There was only a post office box number and that there was no reference to Number 51 Ginuwa Road, Warri. According to him there was not much difference between exhibit M1 and exhibit T with regard to the letter heading.

The witness continued under cross-examination and stated that if he did not know that the Certificate of Incorporation of any company were stolen and somebody came to open an account in their name he would open an account for them. He would glance over the documents and pass them to the accountant to open the account, who would examine them in details. Furthermore, he stated that when the accountant came to him and reported that he had not received a reply from the National Bank he could not remember whether or not...
not he asked him if he sought a second reference. He admitted knowing the existence of the directives of the Nigerian Bankers Committee as to opening an account. He stated that their head office told them that they may or may not ask for any reference depending on the knowledge they had of the company they were dealing with and that he relied on his knowledge of the plaintiffs.

When the two gentlemen came they showed him exhibit T4 and as he stated earlier, he casually went over it and he noticed that the chairman of that meeting was one Mr Aboderin. In exhibit T the signatories were stated to be that of Mr Low and Mr JO Aboderin. He admitted that the signature of Mr JO Aboderin on exhibit T and that on the resolution on exhibit T4 were different but they could be signed by one and the same person and as he only glanced through all these documents he did not care to ask why the signatures were different. That was the responsibility of his accountant. He denied that the third signature was put there by his bank as early as the police had started investigations on the case.

He confirmed that although it was the accountant that told him certain things in respect of the withdrawal and he instructed him to allow the men to start withdrawing from the account. He admitted that whenever he signed the cheque it meant that he had authorised payment of that cheque; exhibit R11 was for £10,700 now N21,400 and it was made payable in cash and paid over the counter. He went further and stated that in fact all the cheques were made payable in cash and as far as he was concerned it was unusual. He admitted that when these big amounts were being withdrawn and even though he did not receive any reply from the National Bank with regard to their enquiry it never did put him on suspicion. He admitted that he did not know Mr Kalu since there was already a mandate that money should be handed to Mr Kalu. He furthermore stated that it was not the general rule that the recipient must sign at the back of the cheque made payable by cash or give an indication that they received the amount. He also admitted that cheque No. 32/E512 of 8th
April, 1971 for £2,050 now ₦4,100 was paid out by his bank from the account of the plaintiffs’ company. He denied the suggestion that it was not correct that he failed to get proper reference before he paid out large sums of money in this case. He denied being negligent in allowing these withdrawals of money to continue without proper reference. He denied being privy or taking part in the fraud that was perpetrated.

Under question by the court, this witness stated that he felt that it was when the accountant observed that there were irregularities in the signature of Mr Low that they asked him to sign the second time and that only the signature on exhibit R1, that is, a cheque for £50 now ₦100, appeared to agree with the first signature of Mr Low on exhibit T1.

The next witness was one Sunday Okhuekua, a branch accountant of New Nigeria Bank, Lagos. He stated that he knew the plaintiffs’ company as well as the defendants and that in December, 1970, he was a staff member of ACB Warri Branch, and that in 1971 he was still working for the ACB. He was aware that the plaintiffs took action against the defendants in 1971. He tendered a writ of summons. The writ was admitted and marked exhibits W and W1. He stated that he was a branch accountant until the end of January, 1973. On 19th December, 1970, an account was opened for the plaintiffs’ company in their branch at Warri and he identified exhibit R as a ledger card of the account. He stated that before the account was opened, the manager invited him to his office and introduced a certain expatriate to him as Mr Cameron Low whom he said was to function as a branch manager in Warri for the plaintiffs’ company and after a brief instruction he was advised to take them to his table for the purpose of opening the account and also maintained that he also met a certain gentlemen whom he later knew to be Mr Aboderin with Mr Low. In his office they were joined by another man who was introduced to him as Mr Kalu. He inspected all the documents brought to him by them for the purpose of opening an account and when he was satisfied
he returned the documents to them. He compared the photocopy of the Certificate of Incorporation with the original and he found it to be correct. He identified exhibit T as a completed signature card for the operation of the account which was signed by Mr RC Low and Mr James Aboderin. He maintained that it was signed in his presence. He later sent exhibit T3 the inquiry, to the National Bank but he did not get a reply. On the day the account was opened, a sum of £500 or ₦1,000 in cash was paid in. He went on further to say that they did not start operating the account until 23rd January, 1971 as they did not hear from the National Bank. On that day when he was approached about the operation of the account he decided to meet the manager, who, after his discussion with him agreed to allow them operate the account. He denied remembering anything about the cheque exhibit R11.

Under cross-examination by the learned Counsel for the plaintiffs, this witness stated that he knew of the directives that have been given them in respect of the opening of accounts by Limited Liability Companies. Furthermore, he stated that it was usual, when anybody or company was opening an account, for that bank to send letter of enquiry to the bank which that company had maintained or had an account. He admitted that there was no address on exhibit T3. He also admitted that he heard of Nigerian Bankers Committee and was well aware of their directives. The signature card exhibit T1, he maintained, was signed in his presence and he admitted there was a slight difference in the signature of Mr Aboderin in exhibit T1 and that in exhibit T4, but that he did not ask Mr Aboderin why there was that slight difference. He admitted that he authorised the payments of exhibits R1, R2 and R9. He admitted that he did not ask for the signature of Mr Kalu as according to him he never thought it necessary. Furthermore, he stated that if he knew Mr Kalu he would have asked him to sign. He admitted further that he went to see the manager on 23rd January, 1971, because he was the head of the bank, and he needed his directives. It was
because he failed to get a reply to their enquiries from the National Bank in Lagos that he had to go to the head of their branch for instructions. Furthermore, he admitted that all large amounts were cashed over the counter but it did not strike him as being strange. He went further to say that the signature at the bottom of exhibit T1 was that of Mr Cameron Low as it had the characteristic of his other signatures. He erroneously signed it there and he then directed him to the portion where he should sign and that the two were signed on the same day, but the witness changed and stated that Mr Cameron Low was making frequent withdrawals and he observed that his signature were rather irregular, then he invited him to his office when he signed the second time. He admitted that the two signatories did not look like that of an illiterate, and there was a slight difference between the signatories on exhibits R11 and T1, but he could not remember at what stage he invited Mr Low to his table. He admitted that the person that collected the sum of £10,700 or N21,400 on exhibit R11 had no escort, in fact, he stated that they never had any escort. He maintained that he saw Mr Aboderin and that he signed the signature on exhibit T1 before him. He also stated that he knew Ginuwa Road, Warri and everywhere in Warri was a residential area, and that it would not surprise him to learn that the plaintiffs’ company was in a slum area. He also admitted that there was no address of the company in Warri in exhibit T and that there were no number and street of the plaintiffs; company in Lagos in exhibit T. He further admitted that they did not rely on the recognition of any referee as stated in paragraph 8 of the statement of claim to allow the plaintiffs to make withdrawals. He only relied on his discussion with the manager and according to him 25 days was enough for the National Bank to reply to their enquiry.

The next witness for the defendants was one Suleiman Abubakar Oponobi, the Deputy Chief of Banking Operations Central Bank of Nigeria and the Head of Banking Operationat the Central Bank of Nigeria. He stated that he knew the
Bankers’ Committee in Nigeria which is made up of all licensed banks in the country and that he served as an adviser to this committee on bank matters. He was also familiar with the process of opening a bank account by a Limited Liability Company. He gave a detailed account of the processes that must be passed through in opening an account by a Limited Liability Company, as well as the method by which amounts could be drawn from the bank.

Finally, he stated that the mere fact that open cheques were presented with monotonous regularity over the counter to draw money from the account did not put his manager on his toes to suspect anybody.

Under cross-examination by the learned Counsel for the plaintiffs, this witness stated that he had never had the privilege of opening an account for a Limited Commercial Company in any Commercial Bank. He also admitted that he had not taken part in the deliberation of the Banking Committee. They only needed a resolution in the case of a new company and that no reference was required in case of Limited Liability Company. He admitted that it was so as far as experience was concerned. He went further to say that it was wrong in law to make reference in case of Limited Liability Company and that only where the documents put a person on his guard would references be required. The banks were not bound to reply but the customer usually goes to his bank and asks them to reply. He stated that if it was a Limited Liability Company he could be allowed to make withdrawals and there was practically no time limit. The Central Bank deals with Governmental agencies and companies owned by the Government and that the companies he dealt with were Government Agencies and Corporations. Although he had a personal knowledge of the working of a Commercial Bank but he had no personal knowledge of the working of a private licensed commercial bank and that private companies did not open account with them. Finally he stated that it was not in the banking practice to make enquiries in respect of anybody wanting to open an account.
The last witness was one Wilfred Omofiafe, a bank clerk under the ACB Warri. He stated that in November, 1970 he was working in the Secretary’s office of the ACB Warri Branch. He tendered a dispatched book of the ACB which was admitted and marked exhibit X. In 1970, he dispatched the bank enquiry about the plaintiffs to the manager, National Bank of Nigeria Limited, and that he recorded it in exhibit N. He admitted making the entry himself and that it was his own handwriting.

Under cross-examination this witness stated that he gave it to the messenger and he dispatched it. Finally, he stated that there were several branches of ACB in Lagos and there were several branches of the National Bank in Lagos but he sent the letter to the National Bank Nigeria Limited, Lagos. That also in short was the case for the defendants.

The learned Counsel for the defendants addressed the court and stated that the facts were before the court and referred to the writ of summons and paragraph 3 of the statement of claim. He stated that there was no evidence to support their averment in the statement of claim. He stated that it was nowhere stated in the evidence that any of the cheques were stolen by Mr Kalu as stated in the statement of claim and that it was for the plaintiffs to prove their case. He also referred to paragraph 4 of the statement of claim as well and contended that that averment was not admitted by the defence and yet there was no evidence adduced to show that the plaintiffs’ company was a fictitious company. On the contrary, there was overwhelming evidence that the company for which the defendants opened an account in Warri was a reputable company dealing with reputable Nigerians as shown in exhibit E. Furthermore, there was evidence that on 19th December, 1970, an account No. 8130 was duly opened for Glanvil Enthoven and Co (Nigeria) Limited and referred to exhibit R the Ledger Sheet of this account. There was evidence that money was paid into this account and withdrawals were made. After various deposits and withdrawals a balance of N4,590,92 remained to the credit of the plaintiffs which he could draw out from at any time. The
bank through which the amounts were deposited unpaid testified that payments were made to the account of the plaintiffs’ company through the collecting bank ACB and exhibit R showed that the account of Glanvil Enthoven and Co (Nigeria) Limited Warri branch was credited with these amounts therefore no conversion. Furthermore, there could be no conversion unless it could be shown that the plaintiffs had been deprived of the possession of the cheques by the defendants with intention of ascerting some rights over it inconsistent with the right of the owner. He referred to Clerk and Lindsell, paragraphs 898 and 899 at page 501. He contended that all that the bank had done was to take in the cheques brought in by customers, presented them to the paying bank collected the money and paid it into the account of the plaintiffs. There was no intention to deprive the plaintiffs of the proceeds.

It was at this stage that the learned Counsel for the defendants asked leave of the court to amend paragraph 6 of the statement of claim and this was granted accordingly. He then continued and stated that the bank did what they should do in their normal course of duties and referred to section 2(2) of the Bills of Exchange Act, 1964 and he contended again that the bank was thus protected by the Bills of Exchange Act, 1964 there was no case in which a cheque made payable to “A” was paid into the account of “A” and the bank was held liable. He referred to the case of A.L. Underwood Ltd v. Bank of Liverpool and Martins [1924] All E.R. 230 and the case of BEWAC Ltd v. ACB June, 1973. With reference to negligence alleged by the plaintiffs he referred to paragraph 5 of the statement of claim and stated that the bank did not pay the amount to any fictitious company and that unless there was something on the face of the cheques to put the bank on their guard the banks were free from all liabilities. He referred to the case of Marfari and Co Ltd v. Midland Bank Ltd [1968] 2 All E.R. 573 and that there was
nothing on the face of the cheque to make a reasonable bank suspect that the cheque did not belong to the plaintiffs’ company. He went through the evidence adduced by the witnesses both for the plaintiffs and for the defence and stated that the bank acted in good faith and without negligence.

The question that remained was the identity of the person that opened the account. He submitted that it could be no other than the plaintiffs company and that the bank was also satisfied that the plaintiffs’ company was a reputable one to open a bank account. He referred to the evidence of the witnesses for the defendants in support of his contention. On the question of enquiry, he stated that one need not make any enquiry if it would not lead to revelation of any fraud if made and that the very knowledge of the defendants was very material in this case. The bank manager admitted that he knew the plaintiffs and he also saw the necessary documents including the letter of recommendation from the plaintiffs’ company. There was evidence that exhibit T3 was sent out and after they had waited for over a month without a reply they decided, depending on his knowledge of the plaintiffs’ company, to open the account for them. Enquiries were not really needed for a Limited Liability Company and that the question of exhibit T3 as far as the plaintiffs’ company was concerned was only rhetoric. Any negligence in opening an account did not matter because all that matters was the presentation of the cheques. He then referred to Volume 2 Halsbury’s Laws of England (3ed) paragraph 343 at page 180. There was nothing which on the face of the cheque when they were brought in for collection or circumstances of the opening of the account which could put the bank on enquiry. He referred to Orbit Mining and Trading Co Ltd v. Westminster Bank Ltd [1962] 3 All E.R. 565. A bank could not be held negligent if any loss was induced by the negligence of the true owner. If the bank had taken proper care of their documents, all these unpleasantness
would not have arisen and referred to the evidence of Mr Graham in support of his contention. Furthermore, Mr Low, who featured prominently in this case and who is still in the employment should have been called. The facts of this case and the incidence surrounding the opening of the account did not and could not deprive the bank of the protection granted to it by law. He stated that the action of the plaintiffs should be dismissed. Furthermore, he referred to banker and customer relationship and the accounts of personal customers by LC Mather particularly to page 172. With regard to the cheques paid out he stated that they were open cheques and that the bank acted in good faith and that the bank is protected by section 60(1) and section 90 of the Bills of Exchange Act (Cap 21).

Finally, he referred to the case of Emmanuel Irosojie v. Standard Bank Nigeria Ltd (1974) April Issue of the High Court of Lagos State Selected Judgments page 387 and he concluded that in view of all submission the case of the plaintiffs should be dismissed.

The learned Counsel for the plaintiffs then addressed the court. He referred to the amended writ of summons issued on 25th March, 1972. He stated that from the statement of claim filed by the plaintiffs, the claim was based on two grounds mainly conversion and secondly money had and received by the defendants from the plaintiffs. With regard to wrongful conversion, he referred to paragraphs 3 and 4 of the statement of claim and contended that 14 cheques in exhibits were the property of the plaintiffs. These cheques were presented at the defendants’ bank at Warri and they collected them. Furthermore these cheques were endorsed by one Mr MO Kalu and there was evidence that the said Mr MO Kalu had not the authority of the plaintiffs to pay those cheques to the defendants’ bank at Warri, thus the defendants had exercised control over these cheques inconsistent with the right of the owner, and in his view that amounted to wrongful conversion. He contended that for the defendants to avail themselves of the protection of the statute they must show
that they had acted in good faith and without negligence. They anticipated the defence and then they pleaded paragraph 5 of the statement of claim. He maintained that the defendants in this case had failed to prove that they acted in good faith and without negligence and in this connection he referred to Halsbury’s *Laws of England* Volume 2, (3ed), page 180 paragraph 343 and to Byles in *Bills of Exchange Act* (22ed) 1965, pages 288-289. Where there were circumstances to put the bank on notice they must make enquiries and he referred to the manner that the account was opened at Warri. Furthermore he referred to the evidence of the 12th witness for the plaintiffs, Alhaji Quadris, and now he told the court the procedure as to how to open account for a Limited Liability Company as well as the evidence of the first witness of the defendants who was the bank manager at all material times. He urged the court to discount the evidence of the third witness for the defendants as, according to him, he was totally unreliable. He had never worked in a commercial bank before. He went further and stated that the defendants knew that they should make enquiries hence the issue of exhibit T3 and he referred to paragraph 8 of the statement of defence in support of his contention and stated that it was not reasonable for the bank to go to all that trouble if they knew that there was no reason to make the enquiry. He believed that they failed to make a genuine enquiry. There was no evidence that exhibit T3 ever left the bank and in support of this, he stated that, under cross-examination, the first witness for the defendants stated that the referee he was referring to was Mr Graham, the very person who wrote to them stating that he wanted to open an account and contended that that particular fact affected not only their negligence but *bona fide*, and furthermore he contended that exhibits T to T6 used in opening the account clearly showed that the defendants were negligent. He referred, particularly to the uncontradicted evidence of Mr Aboderin as well as exhibits L and O which contained the real signatures of Mr Aboderin, Mr Graham and Mr Low. He urged the court to go through the
signatures and determine whether Mr Low and Mr Graham went to Warri to open the account. He referred to section 107(1) of Evidence Act in support of his contention. He went further and stated that exhibit T is a forged letter heading containing the address of the plaintiffs’ company and it should have put the defendants on their guard. The genuine ones were exhibits M, M1 and M2. The Certificate of Incorporation was not sufficient documentation on which a bank manager should rely to open an account. He should have asked for more. The signature of Mr Aboderin on exhibit T4 was different from his signature on exhibit T1 and that the bank manager confirmed this under cross-examination yet he contended that no question was asked by the bank manager in respect of this. He then went through the evidence for the witnesses for the plaintiffs as well as that for the defendants and he stressed the fact that the first witness for defence did not know any of the officials of the plaintiffs’ company and from his evidence, his knowledge, if at all, did not warrant him to open an account without due reference. It was this personal knowledge that the manager used in authorising money to be drawn out of this account less than a month from the date the account was opened without waiting for a reply to his so called enquiry. Furthermore, he stated that the way large sums of money were withdrawn made the whole thing suspicious and should have put the defendants on their guard. There was no identification of the person that drew these large sums and there was not even an escort. The cumulative effect of all these was enough to put the bank on enquiry. He contended that the defendants were negligent in not taking proper care before opening the account as well as in dealing with the cheques and the operation of the accounts. All the cheques were drawn for Glanvil Enthoven and Company (Nigeria) Limited. He contended that Glanvil Enthoven and Company (Nigeria) Limited, were different from Glanvil Enthoven and Company Limited and the bank had no record of the signature of Mr MO Kalu and those cheques were signed for by one MO Kalu. He referred to the case of
Mavins Junior and Sons v. South Western Bank Ltd (1899) 81 Law Times 655 or (1900) 1 Q.B.D. 270.

The endorsement by a different person fully fortified lack of care made by the defendants against the plaintiffs. With reference to the Bills of Exchange Act, (Cap 21) he contended that though it was still in operation section 22 had been incorporated into it. The question involved in this case was not merely irregularity in endorsements as there were other irregularities which rendered the whole matter very grave.

If the endorsements were the only act in this case it would not amount to negligence and he contended that the endorsement had only to do with negligence and not good faith. The endorsements on the cheques were “for MO Kalu” and he stated that these were signatures by procuration. He referred to the Bills of Exchange Act, (Cap 21), section 25 and to Halsbury’s Laws of England Volume 2, (3ed), page 181 paragraph 344 as well as the case of Illingley v. District Bank (1932) 1 K.B. 544 and the omission to detect the difference between the two names, that is, the one in front and that at the back was an act of negligence, and the protection given to the bank by section 22 of the Bills of Exchange Act, 1964 did not extend to section 25 of the Bills of Exchange Act, (Cap 21). He maintained that the banker in view of this submission and evidence must be on guard to see that MO Kalu acted within his authority. No authorising had been produced authority Mr MO Kalu to sign cheques and that the signatures “for Mr MO Kalu” at the back of the cheques were signed by different people and that the bank did not care to know who these people were. That also was enough to put the bank on its guard and to make the bank realise that they were dealing with a fictitious company. He referred to the case of United Nigeria Insurance Co v. Muslim Bank (Int) Ltd (1972), judgment of the Supreme Court, April at page 69 and BEWAC v. A.C.B. June, 1963, High Court of Lagos judgment, April, at page 23. Furthermore he referred to the case of Nigeria Brewery Ltd v. Muslim Bank (Nigeria)
Gomes J  
Glanvil Enthoven and Co Ltd v. African Continental Bank Ltd 67

1963, Lagos High Court Report page 78 and A.G. (Northern Nigeria) v. A.C.B. (1964) Northern Region Law Report page 111, and stated that it was obvious that from all these the account was fictitious and that any money that went therein was converted by the defendants. In this connection he referred to Clerk and Lindsell on Torts, (3ed), page 638, paragraphs 1077 and 1078. When the cheques were collected by ACB Warri, they acted in a way inconsistent with the rights of the plaintiffs as they had no authority of the plaintiffs to collect these amounts and furthermore when the defendants parted with the money to some people they acted in the manner inconsistent with the rights of the plaintiffs.

With reference to the second leg of the claim, he contended that once the defendants parted with the money not authorised by the plaintiffs they converted the money. If, in fact, they had collected the amount and did not pay out of it to some unauthorised persons there would be no trouble and the plaintiffs would have gone there to collect their money. It was the duty of the banker to know the signatures of their customers and he stated that exhibits R1 to R11 were all nullity in law and the defendants must be made to pay the amounts withdrawn on these cheques. He referred to Halsbury’s Laws of England (3ed), Volume 2, page 204, paragraph 380. There was no estoppel on the part of the plaintiffs or that they agreed on the frauds perpetrated on them. He finally referred to the case of Midland Bank v. Rickett (1933) A.C., paragraph 1 particularly at page 14 and concluded that the bank had been very negligent and had not acted bona fide in this case and on that ground they should lose the protection given under the 1964 Bills of Exchange Act. The good faith as defined in section 90 of Cap 21 and concluded by saying that the first witness for the defendants was not an honest witness and in view of the evidence and submission, judgment should be entered in favour of the plaintiffs as per their writ of summons.
In Halsbury’s *Laws of England* (3ed), Volume 2 section 343 on page 180, it reads thus:

“Acting in good faith and without negligence. The banker’s dealings throughout must be in good faith and without negligence. The alternative liability arising from negligence renders the question of good faith practically superfluous; and it is seldom, if ever, raised. Negligence in this connection is breach of a duty to the possible true owner, not the customer, created by the statute itself, the duty being not to disregard the interests of such true owner. The test of negligence is whether the transaction of paying in any given cheque coupled with the circumstances antecedent and present was so out of the ordinary course that it sought to have aroused doubts in the banker’s mind and caused him to make inquiry. The banker is bound to make inquiry when there is anything to raise suspicion that the cheque is being wrongfully dealt with in being paid into the customer’s account, but the banker is not called upon to be abnormally suspicious. Disregard of the bank’s own regulations may be evidence of negligence, and the production of a certificate under the Registration of Business Names Act, 1916, has been held sufficient to satisfy a banker put on inquiry.

A banker is not liable for acts of negligence if these are induced or encouraged by the conduct of the true owner. The banker cannot adduce pressure of exigencies of business or shortage of staff to modify what, in ordinary circumstances, would be negligence.

The omission to detect an irregularity in the endorsement or to notice that it does not ostensibly conform to what would be the proper endorsement would constitute negligence.

It is negligence not to make inquiries as to a customer upon opening an account and collecting a cheque for him. Unless the reference obtained in respect of a customer renders it superfluous, inquiry ought to be made concerning the character and circumstances of the customer.

The fluctuations in the account may be a circumstance putting the bank upon inquiry.”

The crux of this case after very careful consideration is based on—

(i) negligence and

(ii) whether the defendants had dealt with these cheques in a manner inconsistent with the wishes of the owner.
The evidence as regards the opening of this account has been given in brief. Some gentlemen purported to open an account in the name of the plaintiff and the normal enquiry as regards the opening of accounts was set in motion. However, without waiting for the result of the enquiry the defendants authorised the first defendants to allow these gentlemen to start operating the account. However, under cross-examination he stated thus, “The signature of Mr JO Aboderin on exhibit T and the resolution on exhibit T4 are different”, although later on he stated that he only glanced through these documents hence he did not ask why the signatures were different. If as he stated that was the responsibility of the accountant why did he as a prudent and responsible officer not take any action when the accountant informed him that no reply had been received to their enquiry.

What would a reasonable man in such a responsible position do? Will he in view of his former observation instruct the Accountant to let them start operating the account or would he make sure that replies were received to their enquiry? He decided to take action relying on the personal knowledge of the plaintiffs even though a certain bit of suspicion must as a reasonable manager be lurking at his subconscious mind. Furthermore, he stated “It is not unusual that a Chairman of the Board of Directors would be sent down to Warri as an ordinary accountant. It is not unusual that he should not have been introduced to me. I did not ask to see the chairman.” Whilst it might not be unusual according to him to see the chairman of the Board of Directors who had travelled from Lagos to Warri to open an account with them and to be one of their customers it appears rather odd and unusual when considered in conjunction with all the subsequent happenings. It was only then that it would be seen that his action was not only unusual but fitted in like the last piece of a jigsaw puzzle. In support of this contention, I refer to the case of Ladbroke and Co v. Todd (1914) L.T.P. paragraph 43, page 44 and the case of Marvins Junior and Sons v. London and South Western Bank Ltd (1900) 1 Q.B.D. 270.
Furthermore, the first witness for the defendants stated that there was no address on exhibit T which according to him was a letter of introduction from the plaintiffs and yet that did not strike him as being odd especially from a reputable company in the evidence of the defendants and surprisingly still, he did not care to ask for the signature of this Mr Kalu as he never thought that to be necessary. He also confirmed that there was a slight difference in the signature of Mr Aboderin in exhibit T1 and exhibit T4 but he also did not care to ask Mr Aboderin why there was a slight difference. The first witness for the defendant signed exhibits R1 and R2 which were for £50 now ₦100 and £30 now ₦60 respectively whilst the manager himself signed exhibit R3, R8 to R10 and R11 which were cheques for £3,032 or ₦6,064, £3,300 now ₦6,600, £8,200 now ₦16,400, £1,750 now ₦3,500, £5,000 now ₦10,000, £3,200 now ₦6,400 and £10,700 now ₦21,400 respectively and the exhibit R4 for £350 now ₦700 was signed by the first witness for the defendants, that is, the accountant. According to the first witness for the defendants, he stated, “When I signed a cheque, it means that I authorised payment.” All these amounts including the sum of £10,700 now ₦21,400 were paid in cash over the counter even though no reply had been received to their enquiry. They were paid to one Mr Kalu, who was neither known to them nor did they have a specimen of his signature in their possession. Furthermore according to the evidence before the court the said Mr Kalu had no escort even when he cashed the sum of £10,700 now ₦21,400. This now brings me to the endorsement at the back of the cheques. Almost all the cheques were endorsed thus “Glanvil Enthoven and Co Limited for MO Kalu.” A very close observation would reveal that it was either Mr Kalu that signed below the words “Glanvil Enthoven and Co Limited” or somebody was signing for him. Even if exhibit T was taken at its face value, and which I have my reservation, the name on top of exhibit T was “Glanvil Enthoven and Co (Nigeria) Limited”, the Certificate of Incorporation reads “Glanvil Enthoven and Co (Nigeria) Limited” and exhibit Q a letter written by the plaintiffs clearly had on top of it the following “Glanvil
Enthoven and Co (Nigeria) Limited.” Whilst the cheques exhibits C, D, F, G to G2, H, J, K, N, R1 to R9, R11 and R12 were endorsed by or supposed to be endorsed by Mr Kalu for “Glanvil Enthoven and Co Limited.” These two names were not the same and they should have put a careful and diligent manager or accountant on his guard. All these were not mere irregularities. The aggregate total of all these irregularities were such as to render them very grave. There was no doubt that the defendants had been, not only very negligent, but they had not acted in good faith. In this connection I refer to the Bill of Exchange Act, (Cap 21), section 25. There was no doubt that the cheques had been materially altered. In support of this contention I refer to the case of Shingsby and others v. District Bank Ltd (1932) 1 K.B. 544 and the defendants were not protected by section 2(2) of the Bills of Exchange, (Cap 21). The case of Marfani and Co Ltd v. Midland Bank Ltd (1968) 2 All E.R. 573 did not apply to the case in issue. In that case the defendants acted with diligence and even made enquiries. On page 573 of the said judgment it was held:

“(i) The bank had, on the evidence, acted in accordance with the current practice of bankers and had discharged the onus of proving that they had acted without negligence, the factors particularly relevant being those mentioned in (ii) below, accordingly the bank was protected by section 4 of the Cheques Act, 1957 from liability (see page 581, letter C page 585 letters A and B and page 586 letter of post);

(ii)(a) When the reference had been given by Mr Ali as to his suitability which was before money was paid out of the newly opened account, the bank were not negligent in enquiring no further of Mr Ali than they did or in acting on only the one reference (see page 582 letter H, page 583, letter B page 585 letter C and page 586 letter E post);

(b) the fact that the bank had not asked for identification by production of a document (eg a passport) or inquired as to K’s employment was not lack of care in view of Mr Ali’s reference concerning him.”

Mr Ali was not the manager of the defendants’ bank. He was only a customer. Besides that there were not all the irregularities
in the case as were revealed in evidence in this case. The bank manager in this case stated that he knew the plaintiffs and according to his evidence he saw all the necessary documents, all the irregularities therein but he decided to close his eyes to these irregularities and even when his attention was drawn to the account by his accountant, he appeared, deliberately in my view, not to take notice of them. These actions, in my view, even bordered on criminal negligence and gave the court the impression which I believe that he knew about the whole game and consequently he acted in bad faith. These actions of the manager left much to be desired and his accountant was no better of. Whichever way the court looked at this case, the part played by the manager was too obvious. The plaintiffs had proved their case against the defendants. The sum of £40,187.10s, now N80,375 was an amount held by the defendants payable by them to the plaintiffs as money had and received by them to the use of the plaintiffs.

In the circumstances, and in the light of my observations above, judgment is hereby entered in favour of the plaintiffs against the defendants for the sum of £40,187.10s now N80,375 with interest at the rate of 10% per annum from the first of June, 1971 until today 8th April, 1976 inclusive.

Court awarded N2,000 costs against the defendant’s bank.
Awobotu v. State

SUPREME COURT OF NIGERIA

OBASEKI AGJSC, SOWEMIMO, BELLO JJSC

Date of Judgment: 9 APRIL 1976

Banking – Cheques – Forgery – Ingredients of offence – How intent to forge may be proved – Use of a false or fictitious name – When it will constitute forgery

Banking – Cheques – Presumptions that arise when a cheque is drawn

Criminal law and procedure – Forgery contrary to section 467(2)(g) Criminal code – Ingredient of offence – Necessary intents to prove – “Intent to defraud” and “Intent to deceive” – Meaning of

Facts

The appellant was arraigned on a 19 count charge of forgery, uttering and obtaining various sums of money by false pretences.


He uttered the cheque and got the amount transferred to the account of his firm purporting same to be signed by G Ola Coker.

On 6th April, 1972, he forged National Bank of Nigeria cheque No. LB-K068950 dated 6th April, 1972 for £3,050 purporting same to be signed by the owner of account No. 8010 with the National Bank of Nigeria Limited. He uttered the cheque and collected the amount from the bank.

On 9th June, 1972, he forged National Bank of Nigeria cheque No. LB-K060883 dated 9th June, 1972 for £500 purporting same to have been signed by owner of account...
No. 8010 with the National Bank of Nigeria Limited. He uttered the cheque and collected the amount from the bank.

On the 15th day of June, 1972, he forged National Bank of Nigeria cheque No. LB-K060884 dated 15th June, 1972 for £762 purporting the same to have been signed by the owner of account No. 8010 with the said National Bank of Nigeria Limited. He uttered the cheque and collected the amount from the bank.

On the 18th day of August, 1972, he forged National Bank of Nigeria cheque No. LB-E098074 dated 18th August, 1972, for the sum of £4,000 purporting the same to have been signed by the owner of account No. 8010 with the said National Bank of Nigeria Limited. He uttered the cheque and collected the amount from the bank.

Finally, on the 14th day of December, 1972, he forged National Bank of Nigeria cheque No. LB-P155903 dated 14th December, 1972, for the sum of £750 purporting the same to have been signed by the owner of account No. 8010 with the said National Bank of Nigeria Limited. He uttered the cheque and collected the amount stated therein from the bank.

The learned trial Judge found that the appellant organised a system of fraud and operated it from April, 1971 to December, 1972 by issuing false cheques for various amounts to deceive and defraud the National Bank.

When confronted, the appellant admitted the fraud on the bank and promised to make restoration. The cheque leaves with which the fraud was perpetuated were never issued to customers, but came into the possession of the accused by virtue of his position in the bank.

The learned trial Judge convicted the appellant on 17 of the 19 counts in the information.

The appellant appealed to the Supreme Court.
Held –

1. The act of drawing a cheque imply at least three things:
   
i. That the drawer has an amount with that bank;
   
ii. That he has authority to draw on it for that amount;
   
iii. That the cheque as drawn is valid order for the payment of that amount, that is, that the present state of affairs is such that in the advancing course of events, the cheque will on its future presentation be duly honoured.

2. The offence of forgery may be complete without any publication or uttering of the instrument, for the very making with a fraudulent intention and without lawful authority, of any instrument which, by statute is the subject of forgery is of itself a sufficient completion of the offence before publication.

   Though the publication of the instrument is the medium by which the intent is usually made manifest, yet it may be proved plainly by other evidence.

In the instant case, there is evidence that the appellant wrote the cheque exhibit F5. He initialled it as genuine and good for payment and the cheque was found in his drawer. The cheque leaf was proved to be property of the bank not sold to anyone. The appellant was the accountant in charge at the bank and the cheque was paid to his firm, the Nigeria Office Equipment Industries Limited.

3. The use of a false name can constitute forgery if identity was a material factor and, or that the accused purported to be some specific other person real or fictitious.

   In the instant case, the appellant is known to all the bank officials not as G Ola Coker but as Christopher A Awobotu. His residential address differs from that stated of G Ola Coker. There was no person known to the bank as G Ola Coker. He was therefore a fictitious person.
4. A person can be convicted for forging the name of fictitious person. G Ola Coker having been found to be a fictitious person, the learned trial Judge was perfectly justified in holding that the cheque exhibit F5, bearing his name, is forged.

5. The intents to be proved for forgery under section 467(2)(g) of the Criminal Code are intents to defraud and intent to deceive.

6. “Intent to defraud” means with intent to practice fraud on someone or other. It need not be anyone in particular. Someone in general will suffice. If anyone may be prejudiced in anyway by the fraud, that is enough.”

7. “Intent to deceive” conveys the element of deceit, which induces a state of mind without the element of fraud which induces a cause of action or inaction.

Appeal dismissed.

Cases referred to in the judgment

Nigerian

AG W/R v. African Press Ltd (1965) 1 All N.L.R. 9
Ligali and Laja v. R 4 F.S.C. 7
Onwuka v. The State (1970) 1 All N.L.R. 159
Okeke v. Commissioner of Police 12 W.A.C.A. 363
Odu v. State (1965) 1 All N.L.R. 25
R v. Abuah (1961) 1 All N.L.R. 155
R v. Aiyeola 12 W.A.C.A. 324
R v. Osakwe 12 W.A.C.A. 366

Foreign

Graddage v. Harringay LBC (1975) 1 W.L.R. 241
London County Council v. Agricultural Food Products Limited (1955) 2 Q.B. 218
Plymouth Corporation v. Hurell (1968) 1 Q.B. 455
Prince Blucher Ex parte Debtor (1931) 2 Ch. 70
Agnostic JSC: (Delivered the judgment of the court) This appeal is against the judgment of Dosumu J delivered on the 30th day of August, 1974, in Charge No. LA/9c/74 in which he found the appellant guilty on 17 of the 19 counts in the information (ie counts 1, 3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18 and 19) charging the accused with the offences of forgery, uttering and obtaining various sums of money by false pretences.

Aggrieved by this conviction the appellant brought this Appeal to this Court.

Four grounds of appeal were originally given in the Notice of Appeal, but before the hearing of this appeal (by leave of this Court), 6 new grounds were substituted. These are as follows:–

(1) The whole trial is illegal and the conviction is accordingly null and void because there was no information filed by or on behalf of the Attorney-General as required by law.

IN THE ALTERNATIVE

(2) The learned trial Judge erred in law and on the facts in convicting the appellant in court.

PARTICULARS OF ERROR

(a) The charge is bad for duplicity.
(b) It was not established, as alleged in the charge that the appellant stole the cheques “between the months of April, 1971 and August, 1971.”

(c) Having found that the presumption under section 148(a) of the Evidence Act is inapplicable to the facts of this case, there remains no valid or rational grounds for the inference that the appellant stole the cheques in question.

(3) The learned trial Judge misdirected himself in law on the facts in convicting the appellant on counts 3.

PARTICULARS OF MISDIRECTION

(a) The learned trial Judge asked himself the wrong question when he said:–

“Can the accused forge the signature of a fictitious person as I have found G Ola Coker to be”?

(b) The facts that G Ola Coker is a fictitious person is relevant only to the issue whether or not a document is a false document. Having found that the document (exhibit 15), was a false document, the only relevant question (as to which the learned trial Judge did not direct himself) was whether there was proof of any of the intents required by section 465 of the Criminal Code.

(c) The learned trial Judge ought to have directed himself that the use of a false name only constituted a forgery if, in all the circumstances of the case (including the acquittal of the appellant on counts 1, 2 and 4) identity was an immaterial factor and/or the appellant purported to be some specific other person real or fictitious.

(4) The learned trial Judge erred in law and on the facts in convicting the appellant in counts 5, 8, 11, 14 and 17 of the information.
PARTICULARS OF ERROR

(a) It was not established beyond reasonable doubts that the pretence laid in each count was the effective cause of the National Bank of Nigeria Limited parting with the amount of money stated in such count.

(b) There was no proof whatsoever that the appellant made any pretence concerning the owner of account No. 8010.

(5) The learned trial Judge erred in law and on the facts in convicting the appellant on counts 6, 7, 9, 10, 12, 13, 15, 16 and 18.

PARTICULARS OF ERROR

(a) The offence alleged in the Particulars of Offence on each count was that the appellant forged and uttered (as the case may be) a cheque “purporting to have been signed by the owner of account No. 8010 with the National Bank of Nigeria Limited, Yakubu Gowon Street Branch, Lagos.

(b) None of the cheques alleged to have been forged purported to have been made by “the owner of account No. 8010 aforesaid.” The decision of the learned trial Judge is unreasonable and cannot be supported having regard to the evidence.

(6) The decision of the learned trial Judge is unreasonable and cannot be supported having regard to the evidence.

As the validity of the information and the conviction on all the 17 counts have been seriously challenged, we are setting out the information in full hereunder before proceeding with this judgment. It reads:

“IN THE HIGH COURT OF LAGOS STATE
IN THE LAGOS JUDICIAL DIVISION

The State v. Christopher Awogbolade Awobotu (m) Charge No. LA/9c/74"
The ................. day of ......... 1974
At the sessions holden at Lagos, on the ........ day of ........., 1974, the court is informed by the Director of Public Prosecutions on behalf of the State that: Christopher Awogbolade Awobotu (m) is charged with the following offences:—

Statement of Offence – first count
Stealing, contrary to section 390 of the Criminal Code.

Particulars of Offence
Christopher Awogbolade Awobotu (m), between the months of April, 1971, and August 1971, at Lagos Judicial Division, stole the following National Bank cheques—

(a) No. LB-K068939;
(b) No. LB-K068950;
(c) No. LB-K060883;
(d) No. LB-K060884;
(e) No. LB-E098074; and
(f) No. LB-P155903.

Total value 12K, property of National Bank of Nigeria Limited.

Statement of Offence – second count
Inducing delivery of money by false pretence contrary to section 419 of the Criminal Code.

Particulars of Offence
Christopher Awogbolade Awobotu (m), on or about the 25th day of August, 1971, at Lagos, in the Lagos Judicial Division with intent to defraud, induced National Bank of Nigeria Limited, to deliver to the Nigeria Office Equipment Industries Limited, a sum of £78,000 now N156,000 to wit: by crediting the account of the said company with the said sum of N156,000 by false pretences, to wit: by falsely pretending that the owner of account No. 90080 with the said National Bank of Nigeria, Yakubu Gowon Street Branch, Lagos authorised that the accounts of Nigerian Office Equipment Industries Limited be credited with the said sum of N156,000.

Statement of Offence – third count
Forgery, contrary to section 467(2)(g) of the Criminal Code.

Particulars of Offence
Christopher Awogbolade Awobotu (m), on or about the 25th day of August, 1971, at Lagos, in the Lagos Judicial Division, forged a Bill of Exchange to wit:
National Bank of Nigeria cheque No. LB-K068939 dated 25th August, 1971, for the sum of £78,000 now ₦156,000 purporting same to have been signed by one G Ola Coker.

Statement of Offence – fourth count

Uttering a false document, contrary to section 468 of the Criminal Code.

Particulars of Offence

Christopher Awogbolade Awobotu (m), on or about the 25th day of August, 1971, at Lagos, in the Lagos Judicial Division knowingly and fraudulently uttered a false document to wit: National Bank of Nigeria cheque No. LB-E068939 dated 25th August, 1971, for the sum of ₦156,000 purporting same to have been signed by one G Ola Coker.

Statement of Offence – fifth count

Obtaining money by false pretences contrary to section 419 of the Criminal Code.

Particulars of Offence

Christopher Awogbolade Awobotu (m), on or about the 6th day of April, 1978, at Lagos, in the Lagos Judicial Division, with intent to defraud, obtained from National Bank of Nigeria Limited, a sum of £3,050 now ₦6,100 by false pretences, to wit: by falsely pretending that the owner of account No. 8010 with the said National Bank of Nigeria Yakubu Gowon Street, Lagos, had authorised that the said sum of ₦6,100 be paid from the said account No. 8010. (Italics are ours.)

Statement of Offence – sixth count

Forgery, contrary to section 467(2)(g) of the Criminal Code.

Particulars of Offence

Christopher Awogbolasde Awobotu (m), on or about the 6th day of April, 1972, at Lagos, in the Lagos judicial Division, forges a Bill of Exchange to with; National Bank of Nigeria cheque No. LB-K068950 dated 6th April 1972, for the sum of £3,050 now ₦6,100 purporting same to have been signed by the owner of account No. 8010 with the said National Bank of Nigeria Limited, Yakubu Gowon Street Branch, Lagos. (Italics are ours.)

Statement of Offence – seventh count

Uttering a false document contrary to section 468 of the Criminal Code.

Particulars of Offence
Christopher Awogbolade Awobotu (m), on or about the 6th day of April, 1971, at Lagos, in the Lagos Judicial Division, knowingly and fraudulently uttered a false document to wit: National Bank of Nigeria cheque No. LB-K068950 dated 6th April, 1972, for the sum of £3,050 now £6,100 purporting same to have been signed by the owner of account No. 8010 with the said National Bank of Nigeria Limited Yakubu Gowon Street Branch, Lagos. (Italics are ours.)

Statement of Offence – eighth count
Obtaining money by false pretences contrary to section 419 of the Criminal Code.

Particulars of Offence
Christopher Awogbolade Awobotu (m), on or about the 9th day of June, 1972, at Lagos, in the Lagos Judicial Division, with intent to defraud, obtained from National Bank of Nigeria Limited, Yakubu Gowon Street Branch, Lagos, a sum of £500 now N1,000 by false pretences to wit: by falsely pretending that the owner of account No. 8010 with the said National Bank of Nigeria, Yakubu Gowon Street Branch, Lagos, had authorised that the said sum of £500 now N1,000 be paid from the said account No. 8010. (Italics are ours.)

Statement of Offence – ninth count
Forgery, contrary to section 467(2)(g) of the Criminal Code.

Particulars of Offence
Christopher Awogbolade Awobotu (m), on or about the 9th day of June, 1972 at Lagos, in the Lagos Judicial Division, forged a Bill of Exchange to wit: National Bank of Nigeria cheque No. LB-K060883 dated 9th June, 1972, for the sum of £500 now N1,000 purporting same to have been signed by the owner of account No. 8010 with the said National Bank of Nigeria Limited, Yakubu Gowon Street Branch, Lagos. (Italics are ours.)

Statement of Offence – tenth count
Uttering a false document contrary to section 468 of the Criminal Code.

Particulars of Offence
Christopher Awogbolade Awobotu (m), on or about the 9th day of June 1972, at Lagos, in the Lagos Judicial Division, knowingly and fraudulently uttered a false document to wit: National Bank of Nigeria cheque No. LB-K060883 dated 9th June, 1972, for the
Obaseki JSC

Awobotu v. State 83

- sum of £500, now ₦1,000 purporting same to have been signed by the owner of account No. 8010 with the said National Bank of Nigeria Limited. Yakubu Gowon Street Branch, Lagos.

Statement of Offence – eleventh count

Obtaining money by false pretences contrary to section 419 of the Criminal Code.

Particulars of Offence

Christopher Awogbolade Awobotu (m), on or about the 13th day of June, 1972, at Lagos, in the Lagos Judicial Division, with intent to defraud, obtained from National Bank of Nigeria Limited, a sum of £762 – now ₦1,524 by false pretences, to wit: by falsely pretending that the owner of account No. 8010 with the said National Bank of Nigeria, Yakubu Gowon Street Branch, Lagos, had authorised that the said sum of £762 now ₦1,524 be paid from the said account No. 8010. (Italics are ours.)

Statement of Offence – twelfth count

Forgery, contrary to section 467(2)(g) of the Criminal Code.

Particulars of Offence

Christopher Awogbolade Awobotu (m), on or about the 15th day of June, 1972, at Lagos, in the Lagos Judicial Division, forged a Bill of Exchange to wit: National Bank of Nigeria cheque No. LB-K060884 dated 15th June, 1972, for the sum of £762 now ₦1,524 purporting same to have been signed by the owner of account No. 8010 with the said National Bank of Nigeria Limited, Yakubu Gowon Street Branch, Lagos.

Statement of Offence – thirteenth count

Uttering a false document contrary to section 468 of the Criminal Code.

Particulars of Offence

Christopher Awogbolade Awobotu (m), on or about the 15th day of June, 1972, at Lagos, in the Lagos Judicial Division, knowingly and fraudulently uttered a false document to wit: National Bank of Nigeria cheque No. LB-K060884 dated 15th June, 1972, for the sum of £762 now ₦1,524 purporting same to have been signed by the owner of account No. 8010 with the said National Bank of Nigeria Limited, Yakubu Gowon Street Branch, Lagos. (Italics are ours.)

Statement of Offence – fourteenth count
Obtaining money by false pretence contrary to section 419 of the Criminal Code.

Particulars of Offence

Christopher Awogbolade Awobotu (m), on or about the 18th day of August 1972, at Lagos, in the Lagos Judicial Division, with intent to defraud, obtained from National Bank of Nigeria Limited, a sum of £4,000 now ₦8,000 by false pretences, to wit: by falsely pretending that the owner of account No. 8010 with the said National Bank of Nigeria Limited, Marina Branch, Lagos, had authorised that the said sum of £4,000–₦8,000 be paid from the said account No. 8010.

Statement of Offence – fifteenth count

Forgery contrary to section 467(2)(g) of the Criminal Code.

Particulars of Offence

Christopher Awogbolade Awobotu (m), on or about the 18th day of August 1972, at Lagos, in the Lagos Judicial Division, forged a Bill of Exchange to wit: National Bank of Nigeria cheque No. LB-E098074 dated 18th August 1972, for the sum of £4,000 now ₦8,000 purporting same to have been signed by the owner of account No. 8010 with the said National Bank of Nigeria Limited, Marina Branch, Lagos. (Italics are ours.)

Statement of Offence – sixteenth count

Uttering a false document contrary to section 468 of the Criminal Code.

Particulars of Offence

Christopher Awogbolade Awobotu (m), on or about the 18th day of August 1972, at Lagos, in the Lagos Judicial Division, knowingly and fraudulently uttered a false document to wit: National Bank of Nigeria cheque No. LB-E098074 dated 18th August 1972, for the sum of £4,000 now ₦8,000 purporting same to have been signed by the owner of account No. 8010 with the said National Bank of Nigeria Limited, Marina Branch, Lagos.

Statement of Offence – seventeenth count

Obtaining money by false pretences contrary to section 419 of the Criminal Code.

Particulars of Offence

Christopher Awogbolade Awobotu (m), on or about the 14th day of December, 1972, at Lagos, in the Lagos Judicial Division, with intent to defraud, obtained from National Bank of Nigeria Limited a sum of £750 – now ₦1,500 by false pretences to wit: by falsely...
a pretending that the owner of account No. 8010 with the said National Bank, Marina Branch, Lagos, had authorised that the said sum of £750 now N1,500 be paid from the said account No. 8010.

b Statement of Offence – eighteenth count

Forgery, contrary to section 467(2)(g) of the Criminal Code.

Particulars of Offence

Christopher Awogbolade Awobotu (m), on or about the 14th day of December, 1972, at Lagos, in the Lagos Judicial Division, forged a Bill of Exchange to wit: National Bank of Nigeria cheque No. LB-P155903 dated 14th December, 1972, for the sum of £750 now N1,500 purporting same to have been signed by the owner of account No. 8010 with the said National Bank of Nigeria, Marina Branch, Lagos. (Italics are ours.)

Statement of Offence – nineteenth count

Uttering a false document contrary to section 468 of the Criminal Code.

Particulars of Offence

Christopher Awogbolade Awobotu (m), on or about the 14th day of December, 1972, at Lagos, in the Lagos Judicial Division, knowingly and fraudulently uttered a false document to wit: National Bank of Nigeria cheque No. LB-P155903 dated 14th December, 1972, for the sum of £750 now N1,500 purporting same to have been signed by the owner of account No. 8010 with the aid National Bank of Nigeria Limited, Marina Branch, Lagos.

(A ADETOYOSE)

Senior State Counsel

For: Director of Public Prosecutions.”

The argument in support of each ground was presented with exceptional brilliancy, eloquence and lucidity that one was tempted to forget that the facts were very much against the appellant. We shall now proceed to examine the grounds in the order in which they appear above. But before we deal with the grounds, it will be helpful if we give a brief resume of the offences charged and the facts of the case.
The appellant was on the 3rd day of June, 1974 arraigned before Dosumu J on information containing 19 counts wherein the appellant was charged:

(a) In count 1, with the offence of stealing contrary to section 390 of the Criminal Code;

(b) In counts 3, 6, 9, 12, 15 and 18 with the offence of forgery of various National Bank cheques contrary to section 467(2)(g) of the Criminal Code;

(c) In counts 4, 7, 10, 13, 16 and 19, with the offence of uttering various false documents to wit National Bank cheques contrary to section 469 of the Criminal Code; and

(d) In counts 2, 5, 8, 11, 14 and 17, with the offence of obtaining various sums of money by false pretences contrary to section 419 of the Criminal Code. It is of particular interest to observe that in count 2, the statement of offence did not use the wording obtaining money by false pretences. Instead it gave the statement describing the offence as inducing delivery of money by false pretences contrary to section 419 of the Criminal Code. However, the appellant was found not guilty on this count and was acquitted. He was also acquitted on count 4 which charged him with the offence of uttering the cheque by which delivery of the amount of money in count 2 was alleged to have been induced.

The opportunity for these offences arose when the appellant was the principal accountant of the National Bank of Nigeria Limited, Marina Branch, Lagos.

He joined the service of the National Bank of Nigeria Limited in September, 1970 and in April, 1971, he was posted to the Marina Branch as the branch accountant.


He uttered the cheque and got the amount transferred to the account of his firm purporting same to be signed by G Ola Coker.
On 6th April, 1972, he forged National Bank of Nigeria cheque No. LB-K068950 dated 6th April, 1972 for £3,050 purporting same to be signed by the owner of account No. 8010 with the National Bank of Nigeria Limited. He uttered the cheque and collected the amount from the bank.

On 9th June, 1972, he forged National Bank of Nigeria cheque No. LB-K060883 dated 9th June, 1972 for £500 purporting same to have been signed by owner of account No. 8010 with the National Bank of Nigeria Limited. He uttered the cheque and collected the amount from the bank.

On the 15th day of June, 1972, he forged National Bank of Nigeria cheque No. LB-K060884 dated 15th June, 1972 for £762 purporting the same to have been signed by the owner of account No. 8010 with the said National Bank of Nigeria Limited. He uttered the cheque and collected the amount from the bank.

On the 18th day of August, 1972, he forged National Bank of Nigeria cheque No. LB-E098074 dated 18th August, 1972, for the sum of £4,000 purporting the same to have been signed by the owner of account No. 8010 with the said National Bank of Nigeria Limited. He uttered the cheque and collected the amount from the bank.

Finally, on the 14th day of December, 1972, he forged National Bank of Nigeria Limited cheque No. LB-P155903 dated 14th December, 1972, for the sum of £750 purporting the same to have been signed by the owner of account No. 8010 with the said National Bank of Nigeria Limited. He uttered the cheque and collected the amount stated therein from the bank.

The learned trial Judge therefore found that he organised a system of fraud and operated it from April, 1971 to December, 1972, by issuing false cheques for various amounts to deceive and defraud the National Bank of Nigeria Limited.

G Ola Coker, registered as owner of account No. 90080 with the bank was a fictitious person apparently registered
by the appellant in the Index Register of customers exhibit D; to facilitate the execution of the fraud. Account No. 8010 was opened by Daudu Salawu, PW4, a building contractor, residing at Abidjan, at the material time. He drew no cheque on the account till December, 1973, but made about 11 payments amounting to about £25,000. He gave evidence and denied the signature in cheques exhibits F to F4 drawn on his account and made payable cash to self or order.

Mrs Ebunlola Olunfunmilayo Sule, PW21, opened her account No. 04166 with the Marina Branch, in March, 1972, and she was supplied with a cheque book, exhibit 00 and a teller, exhibit 001. A month later, she wrote to the bank to transfer her account to I卢peju Branch, and it was transferred. By this time, she had already exhausted the cheque book. She denied being supplied with cheque book containing cheques Nos. 098065 to 098085 on 5th April, 1972, as shown in exhibit MM1. As at 5th April, 1972, she still had four unused cheque leaves in her book.

From the evidence of Mr Lateef Agoro (cashier No. 1) (PW18) (Daudu Salawu PW4), Mrs EO Sule (PW21) and Patrick Nwamanwa, Assistant Superintendent of police, Handwriting Analyst and Photographer (PW22), the learned trial Judge found that the appellant wrote the 5 cheques F, F1 to F4 and passed them to PW18 for payment and was paid. He also found that appellant wrote out exhibit F5 and F6 as well. Thus the findings on exhibits F to F4 disposed of 15 counts in the information.

With regard to exhibit F5, the learned trial Judge found only the offence of forgery proved as required by law. The offences of uttering the cheque, exhibit F5 and inducing delivery by falsely pretending that the owner of account No. 90080 with the said National Bank of Nigeria Limited, Yakubu Gowon Street Branch, Lagos, authorised that the account of Nigerian Office Equipment Industries Limited be credited with the said sum of N156,000 were held unproved.
When the activities of the appellant surfaced and was brought to the knowledge of Samson Olatunde Banjo, PW1, who was the Director of Banking Operations and Acting General Manager of the National Bank of Nigeria Limited, at the time, he contacted the accused and informed him of the information at his disposal. The accused admitted the fraud on the bank and promised to make restoration.

The cheque leaves with which the fraud was perpetuated were never issued to customers, but came into the possession of the accused by virtue of his position of office. Subsequently, the matter came before the police, and prosecution was instituted against the accused for the offences charged in the information. The accused was arraigned before Dosumu J on the 3rd day of June, 1974, when he pleaded to the counts in the information. His plea of not guilty joined issue with the prosecution on all the counts.

The prosecution called 27 witnesses and closed its case. The defence decided not to lead any evidence and called no witness but rested its case on the evidence adduced by the prosecution. The learned trial Judge, after hearing Counsel’s address from both sides, reviewed the evidence, and gave a considered judgment wherein he convicted the accused on all but two of the counts.

Having stated the facts of the case, we shall now deal with the arguments advanced in support of the grounds of appeal.

Chief FRA Williams, learned Counsel for the appellant, arguing in support of ground 1, submitted that the provision of section 337 of the Criminal Procedure Law, (Cap 32) Volume 2, Laws of the Lagos State of Nigeria which prescribed the form any information to be filed in the High Court shall take has not been followed. The said section 337 of the Criminal Procedure Laws reads:

“Every information shall bear the date of the day when the same is signed and with such modifications as shall be necessary to adapt
it to circumstances of such case may commence in the following form:

The State

V.C.D .................................................................

In the High Court of Lagos State.

The .................................................. Judicial Division

The ...................... day of .................. 19 ....

At the sessions holden at ..................................

On the ...................... day of .................. 19 ....

The court by the Attorney–General of the State that C.D. is charged with the following offence or offences.”

He further submitted that it was mandatory that the form he used in view of the fact that it is only in the Attorney–General that power to initiate criminal proceedings in any court of law has been vested by the Constitution of the Lagos State (Interim Provisions) Decree, 1968, No. 13. He also observed that the information was not even signed by the Director of Public Prosecutions and submitted that it is improper for state Counsel to sign for the Director of Public Prosecutions. The learned Counsel then treated us to the historical development of the term “Law Officer” in Nigerian legislation from the colonial era to the present day and finally conceded that the definition of the term Law Officer includes State Counsel. He however submitted that the Senior State Counsel was incompetent to sign the information filed in this matter as the information was laid and filed by the Director of Public Prosecutions. We wish to observe that the Senior State Counsel in this case signed “on behalf of the Director of Public Prosecutions.” This does not make any difference according to Counsel for the appellant.

We find ourselves unable to agree with the submission of the learned Counsel for the appellant as section 341 of the Criminal Procedure Law makes it abundantly clear as to the class of officers who may sign the information.

It reads:

“1. All information shall, subject to the provisions of subsection (2) and section 342 be signed by a law officer.
2. Where the State Commissioner shall for reasons of public convenience think fit, an information may be signed by any other public officer or person whom the State Commissioner may designate.”

The term “Law Officer” in section 2 of the Criminal Procedure Law is defined as bearing the meaning assigned thereto in the Criminal Code.

In section 1 of the Criminal Code, (Cap 31), it is defined as follows:–

“Law Officer in respect of the Lagos State means the Attorney–General and the Solicitor – General of the State and includes the Director of Public Prosecutions and such other qualified officer by whatever names designated to whom any of the powers of a Law Officer are delegated by law or necessary intendment.”

Dealing with the question whether a Senior State Counsel comes within the term “law officer”, the learned Counsel for the appellant at a stage conceded that he comes within the definition, but later withdrew the concession. He however, conceded that the Director of Public Prosecutions is a law officer. It is apparent from the definition given above that the Director of Public Prosecutions comes within the definition. We are of the view that the definition of law officer in the Criminal Code is wide enough to include Senior State Counsel and State Counsel of all grades. The office of the Director of Public Prosecution is an office in the Ministry of Justice of Lagos State by virtue of section 8(1) of the Lagos State (Interim Provisions) Decree, 1968. The office of a State Counsel is similarly an office in the Ministry of Justice of the Lagos State, although of an inferior status to that of the Director of Public Prosecutions. The incumbent of both offices must be legally qualified and are charged with legal duties under the Attorney–General.

By virtue of section 8(3) of the Lagos State (Interim Provisions) Decree, 1968 which reads:

“The powers of the Attorney–General of Lagos State or that of the Legal Secretary thereof, as the case may be, under subsection (2) of this section may be exercised by him in person and through the
Director of Public Prosecutions of the State acting under and in accordance with the general or specific instructions of the Attorney–General or of the Legal Secretary, as the case may be, and through the officers of the Ministry of Justice of that State, acting under and in accordance with such instruction.”

The Director of Public Prosecutions and the Senior State Counsel become officers to whom powers of the Attorney–General (who come within the definitions of a law officer) are delegated by law or necessary intendment and by virtue of section 8(6) which provides that:

“Except at the instance of the Attorney–General of Lagos State or the Legal Secretary thereof, as the case may require, the question whether he was given any instruction in pursuance of this section or what the instructions were shall not be enquired into by any court of law.”

It is to be presumed by the court in the absence of any objection by the Attorney–General that both the Director of Public Prosecutions and the State Counsel were acting in accordance with the instruction of the Attorney–General in filing this information.

The learned Counsel for the appellant cited for the assistance of the court, three authorities which are:

1. *Onwuka v. The State* (1970) 1 All N.R. 159;
2. *AG W/R v. African Press Limited* (1965) 1 All N.L.R. 9; and

They were cited in support of the proposition of law that where there is no competence to file information, the trial on that information is a nullity. We are in agreement with the learned Counsel that that statement represents the true state of the law. But in the most recent case – *Onwuka’s* case, this Court set out clearly the law in respect of the Lagos State, and there is in this case more in support of the respondent than the appellant in his argument on the competence of the Director of Public Prosecutions to file information.
In the case of *Onwuka v. The State* (1970) 1 All N.L.R. 159 which came before the full court, the Supreme Court examined in detail the provisions of various subsections of section 8 of the Lagos State (Interim Provisions) Decree, (No. 13 of 1968) and the competence of the Director of Public Prosecutions to institute criminal proceedings. Coker JSC (delivering the judgment of the court) said at page 166:

“There is only one qualification to the competence of the Attorney–General of Lagos State. He is empowered to institute such criminal proceedings in any court of law in the State.” The Criminal Code operates in Lagos State now as a State law, hence the Attorney–General of Lagos State is competent to institute such proceedings in respect of offences against the Criminal Code as such and by virtue of section (8)3 of Decree No. 13 of 1968, the Director of Public Prosecutions of the State is competent in the circumstances to institute such criminal proceedings including the present one.”

In the earlier case of:

*AG W/R v. African Press Limited* (1965) 1 All N.L.R. 9, Ademola CJN (delivering the judgment of the court) after giving the historical origin of section 47 of the 1963 Constitution of Western Nigeria which is almost *in pari* material to section 8(3) of the Lagos State (Interim Provision) Decree, 1968 (No. 13 of 1968) said at page 11, letters D and E:–

“Since section 47 of the Constitution authorises the Attorney–General to exercise his constitutional powers in person or through the Director of Public Prosecutions or other officers, a prosecution instituted by the Director of Public Prosecutions ranks in law as if it had been instituted by the Attorney–General personally and no further evidence of consent is necessary.”

And in letters G to H, he continued as follows:–

“Generally, there is no need for a judge to know what instructions the Attorney–General has given to the Director of Public Prosecutions in regard to the conduct of a case and the courts do normally take it for granted that if the Director of Public Prosecutions begins a prosecution under section 47 of the Criminal Code, he has done so in accordance with the instructions given him by
the Attorney–General, for subsection (9) of section 47 of the Constitution of Western Nigeria provides that:

‘(9) Except at the instance of the Attorney–General of the Region, the question whether he has given instructions in pursuance of this section or what the instructions were, shall not be enquired into by any Court of Law’.

In the case of *R v. Aiyeola* 12 W.A.C.A. 324 cited before us, the West African Court of Appeal considered at length the definition and meaning of “Institution of Prosecution.”

From the above three authorities, we find nothing to persuade us to the view that the information filed by the Director of Public Prosecution in this case is invalid and or that the trial of the appellant on it was a nullity.

On the question of signature, it is settled law that where a statute or piece of legislation prescribes that a particular document shall only be signed by a particular officer, it is mandatory that only that officer and no other shall sign the document. We have had the opportunity of reading the authorities namely:

3. *Prince Blucher Ex parte Debtor* (1931) 2 Ch. 70 at 72-75; and

The question of competence, whether a Senior State Counsel has authority to sign information on behalf of the Director of Public Prosecutions therefore becomes irrelevant as the signature of a law officer on the information is sufficient compliance with the law. This first ground of appeal fails.

With regard to ground 2 which in (a) complains of duplicity in count 1 in the charge it is conceded by the learned Acting Director of Public Prosecutions of Lagos State that the charge is bad for duplicity. We are in agreement with the submission of Chief FRA Williams, the learned Counsel for
the appellant that the charge is bad for duplicity. This is apparent on the face of the cheques allegedly stolen which bore varying dates.

As these cheques were not physically found in the possession of the appellant at the dates of recovery but were presumed to have been in the possession of the appellant on the dates appearing on them, presumption that they were stolen on the day cannot arise.

Cheque No. LB-K068939 bore the date 25/8/71
Cheque No. LB-K068950 bore the date 6/4/72
Cheque No. LB-K060883 bore the date 9/6/72
Cheque No. LB-K060884 bore the date 15/6/72
Cheque No. LB-E098074 bore the date 18/8/72
Cheque No. LB-P155903 bore the date 14/12/72

It is only in the evidence of Mrs Sule that we find that cheque No. LB-K098074, ie exhibit F1 was removed long before the date it bore. We are however, not in agreement with the Acting Director of Public Prosecutions that an acquittal on the counts should follow the successful submission on duplicity.

If this objection had been raised at the court of trial, we are in no doubt that the information would have been amended. Further, we are unable to find that the conviction on this count has occasioned any miscarriage of justice. We only need to refer to the provision of section 168 of the Criminal Procedure Law, (Cap 32) Volume II, Laws of Lagos State which reads:–

“No judgment shall be stayed or reversed on the ground of any objection which if stated after the charge was read over to the appellant or during the progress of the trial might have been amended by the court.”

We also refer to two decided cases namely:–

1. Okeke v. Commissioner of Police 12 W.A.C.A. 363
2. *R v. Osakwe* 12 W.A.C.A. 366 where the West African Court of Appeal, while upholding the ground, dismissed the appeal on the ground that there was no miscarriage of justice as the objection was not raised in the court below.

With regard to grounds 3, 4 and 5 which deal with the offences of forgery, uttering and obtaining by false pretences, it will be helpful to keep in mind the presumptions that arise when a cheque is drawn. What are the presumptions?


“What is the law in regard to a cheque? It is set out very conveniently and very clearly in Kenny on the *Outlines of Criminal Law* (19ed), 1966 page 359, paragraph 346 and I am indebted to Geoffrey Lane J for its assistance.”

It is put like this—

“Similarly, the familiar act of drawing a cheque (a document which on the face of it is only a command of a future act) has been held to imply at least three things:—

1. That the drawer has an account with that bank;
2. That he has authority to draw on it for that amount;
3. That the cheque as drawn is valid order for the payment of that amount ‘that is that the present state of affairs is such that in the advancing course of events, the cheque will on its future presentation be duly honoured’.”

The learned Counsel for the appellant in arguing ground 3 submitted that the necessary intents to constitute forgery under section 467(2)(g) of the Criminal Code was not proved in relation to exhibit F5 the cheque for £78,000. He submitted that since the appellant was acquitted on counts 2 and 4 as there was no sufficient evidence to prove the offence of inducing the bank to pay the amount of £78,000 by false pretences and the offence of uttering, he should have been acquitted on the count of forgery. We do not accept this submission.
The offence of forgery may be complete without any publication or uttering of the instrument, for the very making with a fraudulent intention and without lawful authority, of any instrument which, by statute is the subject of forgery is of itself a sufficient completion of the offence before publication.

Though the publication of the instrument is the medium by which the intent is usually made manifest, yet it may be proved plainly by other evidence.

It is a question for the jury under all the circumstances of the case whether the instrument or document had been made innocently or with intention to defraud. See *R v. Crocker* (1805) R and R 97, 2 Leach 987. There the note was in the prisoner’s possession and he never attempted to utter it. Le Blanc J held it was a question for the jury.

In this case on appeal before us, there is evidence that the appellant wrote the cheque exhibit F5. He initialed it as genuine and good for payment and the cheque was found in his drawer. The cheque leaf was proved to be property of the bank not sold to anyone. The appellant was the accountant in charge at the bank and the cheque was paid to his firm, the Nigerian Office Equipment Industries Limited.

The findings of the learned trial Judge that:

“There was evidence however that payment was in fact made on this cheque because it was so stamped. The initials of the accused appear in red ink on the left hand side of the cheque signifying his authority to the cashier to pay.

The drawee of the cheque in question is Nigerian Office Equipment Industries Limited, which has been shown to be a company in which the appellant is the authorised signatory completely settled the question.”

From the presumptions arising from drawing a cheque, it follows that any person who forges a cheque in whole by forging the signature on the cheque and stamping or writing an account number on the cheque must be taken to have
made the three representations implied in drawing a cheque as stated above, all falsely.

We agree with the submission of learned Counsel for the appellant that the use of a false name only constituted forgery if identity was an immaterial factor and, or that the appellant purported to be some specific other person real or fictitious. But, is that not the case here? The appellant is known to all the bank officials who testified not as G Ola Coker, but as Christopher A Awobotu. His residential address differs from that stated of G Ola Coker. There is no evidence that in the books of the bank, he held out to the bank as the owner of the account of G Ola Coker. There was no person known to the bank as G Ola Coker. He was, therefore, a fictitious person.

A person can be convicted for forging the name of fictitious person. That was this Court’s decision in the case of R v. Damingo (1963) F.S.C. 286/1962 (unreported). G Ola Coker having been found to be a fictitious person, the learned trial Judge was perfectly justified in holding that the cheque exhibit F5, bearing his name, is forged. The appellant at no time held himself out as G Ola Coker and no bank official knew him to go by the false name of G Ola Coker, as was the case of the appellant in Odu v. The State (1965) 1 All N.L.R. 25.

The intents to be proved under section 467(2)(g) of the Criminal Code are intents to defraud and intent to deceive.

In Welham v. DPP 1960 C.A.R. 125 approved in the R v. Abuah (1961) All N.L.R. 2 by the Supreme Court, Lord Tucker in his judgment at page 255 said of intent to defraud as follows:

“Put shortly ‘with intent to defraud’ means with intent to practice fraud on someone or other. It need not be anyone in particular. Someone in general will suffice. If anyone may be prejudiced in anyway by the fraud, that is enough. At this point, it becomes possible to point the contrast in the statute between an intent to deceive and an intent to defraud. ‘To deceive’ here conveys the
element of deceit, which induces a state of mind without the element of fraud which induces a cause of action or inaction.”

The intents have been sufficiently proved by the evidence led before the learned trial Judge.

Ground 3 therefore fails.

With regard to ground 4, we find ample justification for the leaned trial Judge’s finding that the pretence laid in counts 5, 6, 11, 14 and 17, that the appellant by falsely pretending that the owner of the account No. 8010 with regard to the said National Bank of Nigeria, Yakubu Gowon Street Branch, Lagos, had authorised that the said sum of money stated in the cheques be paid from the said account No. 8010, was the effective cause of the National Bank of Nigeria Limited parting with the amount of money stated in each count.

We have ourselves examined the cheques exhibits F to F5 and find the following appearing on the face and back of the cheques.

(a) Exhibit F dated 14th December, 1972 for £750 was made payable to self or order and signed. It had on it below the signature and to the left “8010” written in ink. There were the initials and “dated 14th December, 1972” in green ink by the appellant. It was signed at the back by the payee. On its face, it bore the cashier stamp and the paid stamp of No. 1 cashier of the bank at 55, Marina Street, Lagos with the date 14th December, 1972.

(b) Exhibit F1 dated 18th August, 1972 for £4,000 was for cash or order and signed. Account No. 8010 was written in ink (biro) at the bottom of the signature. It bore appellant’s initials in green and was dated the 18th August, 1972. It was signed at the back by payee. It bore cashier’s stamp and paid stamp of cashier No. 1 of the bank at 55, Marina Street, Lagos and dated 18th August, 1972 at the back for £720.
(c) Exhibit F2 dated 15th June, 1971 for £720 was for each or order and signed. Account No. 8010 was written in ink below and to the left of the signature. It bore the initials in green ink of the appellant and dated 15th June, 1972 to the left bottom corner of the cheque. At the back it was signed by the payee. It bore at the back the cashier stamp and the paid stamp of cashier No. 1 of the bank and dated 15th June, 1972.

(d) Exhibit F3 for £500 dated 9th June, 1972 was pay cash or order. It was signed and below to the left of the signature was written account No. 8010. It bore the initials of the appellant and date 9th June, 1972 in green ink. At the back it was signed by the payee. It bore the cashier stamp and the paid stamp of cashier No. 1 of the bank and dated 9th June, 1972.

(e) Exhibit F4 for £3,050 dated 6th April, 1972 was made payable to self or order. It was signed at the bottom by the drawer and below the signature and to the left was written account No. 8010. To the left of this are the initials of the accused in green and dated 6th April, 1972. At the back the cheque bore the signature of the payee, the cashier stamp and paid stamp of cashier No. 1 of the bank and dated 6th April, 1972.

(f) Exhibit F5 for £78,000 dated 25th August, 1971 was made payable to Nigerian Office Equipment Industries Limited, and signed. Below the signature “90080” is printed. To the left it bore cashier contra stamp of the bank and dated 26th August, 1971. At the bottom left corner it bore the initials of the appellant in red and dated 26th August, 1971. There was no signature at the back.

We therefore find that the false pretences laid were obvious from the fact that the amount stated in the forged cheques exhibits F, F1-F4 were paid from the account No. 8010 written below the signature of the drawer on the cheques.

The appellant having been proved to have forged the cheques F to F4 which are commands or instructions to the bank to pay
the amounts stated in them by the drawer to himself from account No. 8010 and to have collected them, cannot escape the inference of those pretences arising from drawing of and presentation of a cheque for payment and collection of the payment. The writing of a cheque for payment of cash or to self necessarily implies that the writer is the owner of the account from which the cheque is to be paid. If it turns out that the signature on the cheque is not the owner’s, he has falsely represented himself to be the owner of the account stated therein.

We therefore see no reason to disagree with the findings of the learned trial Judge on this issue.

We agree with the submission of the learned Counsel that the pretence must be proved and must be proved to be the only irresistible influence operating on the minds of the bank and we adopt with approval the decisions of the Court of Appeal in *R v. Barker* 5 C.A.R. 285, *R v. Gail* 30 Cr. App. R. 81 and *R v. Sullivan* 30 Cr. App. R. 132, and we wish to refer on this point to the case of *Ligali and Laja v. R* 4 F.S.C. 7, where this Court cited with approval the case of *R v. Sullivan* (supra). Therein Ademola CJF (as he then was) delivering the judgment of the court, went on at page 12 to say:

“In *R v. Sullivan* (3), it was held that such proof need not in every case be afforded by the direct evidence of a witness to that effect, if the facts are such that the alleged false pretence is the only reason which could be suggested as having been the operative inducement. As it was put by Humphreys J delivering the judgment of the court in Sullivan’s case (3) at page 136–

‘It is, we think, undoubtedly good law that the question of inducement acting upon the mind of the person who may be described as a prosecutor is not a matter which can only be proved by the direct evidence of the witness. It can be, and very often is proved by the witness being asked questions which bring the answer.’

I believe that statement and that is why I parted with my money”, but it is not necessary that there should be that question and answer if the facts are such that it is patent that there was only one reason which anybody could suggest for the person alleged to have
been defrauded parting with his money and that is the false pretence, if it was a false pretence.”

What other reasons in this case could have made Okupe part with his money but the combined effect of the statement made to him by the two appellants in accordance with the original arrangements between the three men? The statements in each case have been proved to be false. We are inclined to think that this is one of the cases in which the rule as stated by Humphreys J should be applied.”

We may likewise ask in this case what reasons could have made the bank to part with the various sums of money, but the command in the cheque from the owner of account No. 8010, and appellant’s instructions to cashier No. 1, Lateef Agotro, PW18 that the amounts were required by the customer or owner of account No. 8010.

This ground of appeal is not made out and therefore fails.

We will now consider the arguments on ground 5. This ground was argued in the main along with ground 3.

It reads as follows:–

“The learned trial Judge erred in law and on the facts in convicting the appellant on counts 6, 7, 8, 9, 10, 12, 13, 14, 15, 16 and 18.”

The offence alleged in the particulars of offence of each count was that the appellant forged and uttered (as the case may be) a cheque purporting to have been signed by the owner of account No. 8010 with the National Bank of Nigeria Limited, Yakubu Gowon Street Branch, Lagos.

“The learned trial Judge’s findings on the 11 counts enumerated in this ground of appeal are fully supported by the evidence adduced before him. The cheques, exhibits F to F4, the contents of which we have reproduced above, speak for themselves.

We therefore find no substance in this ground of appeal.
Ground 6 which is the omnibus ground, that the decision of the learned trial Judge is unreasonable and cannot be supported having regard to the evidence, was argued along with other grounds.

We may at this juncture refer to the fact that although the learned trial Judge arrived at his findings without advertising much to the confessional statements (exhibits C to C3) of the appellant he concluded his judgment with them in this way:

“I have earlier held these to be freely made and they do contain very much that support the evidence of the prosecution witnesses.”

We find the decision of the learned trial Judge amply supported by the evidence which in the absence of any evidence from the defence, stands uncontradicted.

This ground and the other grounds of appeal are not made out and we accordingly dismiss the appeal.

Appeal dismissed.
Bank of the North Limited v. Bernard

HIGH COURT OF LAGOS STATE

BAKARE J

Date of Judgment: 9 APRIL 1976

Banking – Bankers’ book – Copy of banker’s book – Admissibility of – Conditions for admissibility – What need be proved before admissibility of – Section 96(2)(e) Evidence Act considered

Banking – “Loan” and “overdraft facility” – Distinction between banking – Overdraft facility – Nature and meaning of

Evidence – Admissibility of copy of banker’s book – Conditions for admissibility – Matters that must be proved to warrant admissibility – Section 96(2)(e) Evidence Act

Facts

The plaintiff’s claim against the defendant was for the sum of ₦4,834 (four thousand eight hundred and thirty-four naira) being balance of money due and payable as at 28th June, 1974 by the defendant to the plaintiff arising from overdraft facilities granted by the plaintiff to the defendant at its Yakubu Gowon Branch Lagos in the normal course of its business as a banker at the defendant’s request. The plaintiff also claimed bank charges, incidental expenses and interest upon the money due from the defendant to the plaintiff which sum the defendant had failed, refused or neglected to pay in spite of repeated demands. The plaintiff further claimed 12% interest on the sum of ₦4,834 from 29th June, 1974 until judgment and 5% per annum thereafter until final liquidation of the whole debt or any part thereof.

On her part, the defendant maintained that the statement of account filed with the statement of claim does not represent her
account with the plaintiff. She contended that the statement of claim does not disclose any reasonable cause of action.

The plaintiff’s sole witness testified that the defendant at her request was granted an overdraft facility to the tune of £1,000 (₦2,000) in October, 1971, and that the defendant subsequently applied for the renewal of the overdraft facility on 4th September, 1972. Another application for renewal of overdraft facility was made in the defendant’s letter dated 23rd October, 1972 which request was granted vide the bank’s letter dated first August, 1973. Admitted in evidence included statement of account exhibits J and J1. No evidence was held for the defence. Counsel for the defence submitted that the plaintiff’s case was not proved as there were no entries in exhibits J and J1 of the overdraft granted to the defendant. He also submitted that cognisance should not be taken of exhibits J and J1 as the document was not proved in accordance with the requirements of the Evidence Act, section 96(2)(e).

Held –

1. An overdraft facility is not a loan in the sum approved which may be withdrawn at once and which is to be debited against the customer’s account. Rather, it is a credit facility to be enjoyed by the customer to the tune of the amount approved as the customer wishes.

2. A customer may borrow from a banker by way of loan or by way of overdraft. A loan is a matter of special agreement. In the absence of agreement express or implied from a course of business, a banker is not bound to allow his customer to overdraw. An agreement for an overdraft must be supported by good consideration and it may be express or implied. In the instant case, the submission that the overdraft facilities granted should have been reflected in exhibits J and J1 (statement of account) is therefore fallacious.
3. By virtue of section 96(2)(e) of the evidence act the matters which must be proved in order to admit a copy of a banker’s book under the said section are that:

(a) the book in which the entries copied were made was at the time of making one of the ordinary books of the bank;
(b) the entry was made in the usual and ordinary course of business;
(c) the book is in the custody and control of the bank; and
(d) the copy has been examined with the original entry and is correct.

In the instant case the four ingredients necessary for the admission of exhibits J and J1 were established.

Judgment for the plaintiff.

Case referred to in the judgment

Nigerian

Yasin v. Barclays Bank DCO Ltd (1968) 1 All N.L.R. 171 at 177-178

Nigerian statute referred to in the judgment

Evidence Act, (Cap 62), section 96(2)(e)

Book referred to in the judgment


Counsel

For the plaintiff: Impey and Coker
For the defendant: Lawal

Judgment

BAKARE J: The plaintiff’s claim against the defendant is for the sum of N4,834 (four thousand eight hundred and thirty-four naira) being the balance of money due and payable as at 28th June, 1974 by the defendant to the plaintiff being overdraft granted by the plaintiff to the defendant at its Yakubu
Gowon Branch, Lagos in the normal course of its business as a banker at the defendant’s request and for bank charges, incidental expenses and interest upon money due from the defendant to the plaintiff as per attached statement of account which said sum the defendant has failed, refused and/or neglected to pay in spite of repeated demands.

And the plaintiff also claims 12% interest on the said sum of N4,834 (four thousand, eight hundred and thirty-four naira) from the 29th June, 1974 until judgment is given and 5% per annum thereafter until final liquidation of the whole debt or any part thereof.

It is averred in paragraphs 3 and 4 of the statement of claim as follows:

“3. As at 28th June, 1974 the defendant’s account with the plaintiff stood at a debit balance of N4,834 representing overdraft facilities granted the defendant by the plaintiff.

4. That the statement of account attached to the plaintiff’s writ of summons which will be relied upon by the plaintiff at the trial of this action represents entries in the defendant’s account between December, 1973 and 28th June, 1974.”

The defendant averred in paragraphs 2 and 3 of the statement of defence as follows:

“2. The defendant will contend at the trial of this action that the statement of account filed with the writ of summons, and referred to, in paragraph 4 of the statement of claim does not represent her account with the plaintiff.

3. The defendant will contend at the trial of this action that the statement of claim does not disclose any reasonable cause of action against the defendant and ought to be dismissed.”

The only witness for the plaintiff testified that in January, 1971 the defendant opened a current account with the plaintiff. It was a business account and the defendant complied with the formalities necessary for the opening of the said account. In October, 1971 the defendant at her request was granted overdraft facility to the tune of £1000 (N2,000). The defendant’s letter of request was received in evidence as exhibit D. The defendant in another letter dated 4 September,
1972 applied for the renewal of the overdraft facility. Another application for renewal of overdraft facility was made in the defendant’s letter dated 23 October, 1972. The request was granted and the plaintiff wrote to confirm the grant in the bank’s letter to the defendant dated 1 August, 1973. The defendant thereafter operated the account for about six months and ceased. The witness continuing his evidence stated as follows:

“Customers accounts are recorded in ledgers kept in the bank. I have access to the ledgers. Statements of account of customers are copied from the ledgers and compared to see that they are in order. Statements of the defendant’s account were made and forwarded to her. I produce the statement of account of the defendant prepared in January, 1975. It was prepared in the way I narrated at the request of our solicitor.”

The statement of account referred to above was admitted as exhibits J and J1.

No evidence was led for the defence. Learned Counsel for the defence submitted that the plaintiff’s case was not proved as there were no entries in exhibits J and J1 of the overdrafts granted to the defendant. It was also his submission that cognisance should not be taken of exhibits J and J1 as the document was not proved in accordance with requirements of Evidence Act, section 96(2)(e).

That the relationship of banker and customer exists between the parties was in my view amply established by the evidence of the plaintiff’s witness and the documents, exhibits A, B and C submitted for the opening of the defendant’s account.

In exhibit D the defendant was advised that an overdraft of £1000 (N2,000) was approved on her application. In exhibits E and F the defendant applied for the renewal of the overdraft facility.

In exhibit H the defendant’s application was granted in the sum of N4,000. My understanding of an overdraft facility is not of a loan in the sum approved which may be withdrawn...
at once and which is to be debited against the customer’s account. Rather, it is a credit facility to be enjoyed by the customer to the tune of the amount approved as the customer wishes. “A customer may borrow from a banker by way of loan or by way of overdraft. A loan is a matter of special agreement. In the absence of agreement, express or implied from a course of business, a banker is not bound to allow his customer to overdraw. An agreement for an overdraft must be supported by good consideration and it may be express or implied.” Halsbury’s *Laws of England* (4ed) Volume 3, page 115 paragraph 155. The submission that the overdraft facilities granted should have been reflected in exhibits J and J1 is therefore fallacious.

It is the learned defence Counsel’s submission regarding the admission of exhibits J and J1 on the evidence led that I consider crucial.

I need not set out verbatim section 96(2)(e) of the Evidence Act. It is sufficient to say that the matters which must be proved in order to admit a copy of a banker’s book under the said section are:

(a) the book in which the entries copied are made was at the time of making one of the ordinary books of the bank;

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

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

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

I have quoted the relevant portion of the evidence of the plaintiff’s witness as to the making of the statement of account, exhibits J and J1.

In *Yassin v. Barclays Bank DCO Ltd* (1968) 1 All N.L.R. 171 the Supreme Court of Nigeria dealt with the same issue.

Lewis JSC (as he then was) delivering judgment of the court observed at page 177 as follows:–

“Whilst we agree with Mr Bently that Mr Perritt, according to the record, did not use the precise words set out in section 96(2)(e), it must be kept in mind that the judge writing down evidence does not necessarily record every exact word of a witness but often
paraphrases unless there is a dispute as to what he is saying. In any case, here we consider that when Mr Perritt said that he had compared the statement with “the books of the bank kept in the ordinary course of business” it is established that they were ordinary books of the bank, ie item (a) above. From the same phrase we think that it is clearly implied that the entries there were made in the usual and ordinary course of business, so item (b) was complied with. Finally though we agree that Mr Perritt 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 and in our view it should, in the circumstances, have been specifically put to him that they were not in the custody and control of the bank if the appellant wished to dispute it.”

The plaintiff’s witness is an officer of the bank. Learned Counsel for the defendant did not challenge the admission of the statement of account and did not cross-examine on it.

In the last paragraph of the said judgment at 178 it was held:

“So here we consider that we can give a liberal interpretation to the words of the officer of the bank showing that the only natural and unchallenged inference is that the books to which he was referring were in the custody and control of the bank. If the defendant had challenged this then more searching question could have been asked to discover exactly what Mr Perritt was meaning to say, but as this was not done we consider that the learned trial Judge was perfectly entitled to admit the statement as complying; prima facie, with section 96(2)(e) of the Evidence Act, (Cap 62).”

I am bound by the decision and hold that the four ingredients necessary for the admission of exhibits J and J1 were established. I accept the uncontradicted evidence of the plaintiff and find the case proved.

There will be judgment for the plaintiff against the defendant for the sum of N4,834 with interest at the rate of 12% per annum from the 29th June, until today and interest at the rate of 5% per annum from today until liquidation.

Judgment for plaintiff.

HIGH COURT OF ANAMBRA STATE

OKAGBUE J

Date of Judgment: 31 May 1976

Banking – Banker and customer – Duty of bank to honour cheques of customer – Limitation of

Banking – Cheques – Dishonour of – Marking of cheque “Re-present” – Whether amounts to dishonour – Writing in “Present Again” – Libellous

Banking – Collecting bank – Bank collecting cheque on behalf of customer – Duty of bank to exercise reasonable care and diligence – Liability for loss caused by negligence

Banking – Wrongful dishonour of cheque – Quantum of damages – Trader can recover substantial damages without proof of special damage

Facts

The plaintiff company brought an action against the defendant bank for damages for wrongfully dishonouring the plaintiffs’ cheque.

The plaintiff company kept an account with the defendant bank. A number of cheques drawn in their favour were paid into the bank during 1970 and 1971 but, because of unexplained delays of up to 21 months, their account was not credited with the amounts of the cheques until June, 1972.

Meanwhile, a cheque drawn on the defendant bank by the plaintiffs in favour of one of their suppliers was dishonoured, being returned to them marked “re-present.”

The plaintiffs brought the present proceedings for damages for wrongful dishonour of the cheque. They alleged that when the dishonoured cheque was presented for payment, the bank had sufficient funds standing to their credit to pay
it; and they adduced evidence to show that the cheques paid in by them in 1970 and 1971 were cleared by the paying banks within weeks of being paid in, yet the amounts were not credited to their account by the defendant bank until many months had elapsed. They therefore contended that the defendant bank had acted negligently and, having dishonoured their cheque without justification, was liable to pay damages for injury to their credit.

The defendants admitted that there had been long delays in clearing cheques paid in by plaintiffs, but did not adduce evidence to explain why they had occurred. They contended that: (a) as collecting bankers their only duty was to send cheques to the proper banks for payment and to credit their customer’s account when the money was received, but that they had complete discretion in deciding when to credit the account; (b) the plaintiffs had not proved negligence on the part of the defendants; (c) a banker was not obliged to honour a cheque when the drawer did not have sufficient funds in his account, and (d) the plaintiffs’ cheque had not in fact been dishonoured since their supplier had merely been requested to represent the cheque, and that they should not therefore be ordered to pay damages.

Held –

1. A banker is bound to pay cheques drawn on him by a customer in legal form provided he has in his hands at the time sufficient and available funds for the purpose or provided the cheques are within the limits of an agreed overdraft.

2. One of the principal functions of a banker is to receive instruments including cheques from his customers in order to collect the proceeds and credit his customer’s account. While acting in this capacity he is called the collecting banker.

3. In acting as its customer’s agent in the collection of cheques a banker will be expected to bring reasonable care and diligence to bear in presenting the effects for
payment, in obtaining payment and in crediting his customer’s account. If the customer suffers any loss through the negligence of the banker in any of these matters the banker will be liable to the customer to the extent of the loss. Any other view would make commerce impossible.

4. A collecting banker is not obliged to pay on a cheque unless the drawer has sufficient funds in his account.

5. Where a customer alleges that a collecting banker has not shown reasonable diligence in collecting and crediting the customer’s account, since the relevant facts are peculiarly within the knowledge of the banker, and a prima facie case of negligence is established, the banker has the burden of proving that he was not negligent.

6. Once a cheque has been presented and payment refused, the holder is entitled to treat the cheque as dishonoured even if he is requested to represent the cheque later.

7. Where a cheque is dishonoured when a customer has funds in his account and the bank writes “Present Again”, it is libellous.

8. A banker who, without justification, dishonours his customers cheque is liable to the customer in damages for injury to his credit but while a trader whose cheque is wrongfully dishonoured does not need to prove special damages to secure substantial damages, a customer who is not a trader must prove actual injury to his credit. In the instant case, the plaintiffs are business customers. They are entitled to substantial damages.

Judgment for plaintiff.

Cases referred to in the judgment

Foreign


Foley v. Hill (1848) 2 H.L. Case 28; 9 E.R. 1002
Joachimson v. Swiss Bank Corporation (1921) 3 K.B. 127; A.E.R. 100
Marzetti v. Williams and others (1830) 1 B. and Ad. 415; 109 E.R. 842
Rouse v. Bradford Banking Co Ltd (1894) A.C. at 596; 71 L.T. at 525

Book referred to in the judgment
Sheldon: The Practice and Law of Banking (10ed) at 30

Counsel
For the plaintiff: Obegolu
For the defendant: Okolo and Akpamgbo

Judgment
OKAGBUE J: The plaintiff company is Ide Chemists Limited, a limited liability pharmaceutical company with its registered office at 5 Arochukwu Street, Ogbete, Enugu, and the defendants are the National Bank of Nigeria Limited, who carry on banking business throughout Nigeria but maintain a branch at Ogui Road, Enugu.

The plaintiff company kept a bank account with the defendants at their Ogui Road branch and it is their claim that they have:

“suffered damage by the defendants’ breach of contract in not paying, out of moneys of the plaintiffs in their hands applicable to that purpose, a cheque drawn by the plaintiffs on the defendants and duly presented for payment at the defendants’ bank at Enugu by JL Morrison Sons and Jones (Nigeria) Limited, a company entitled to receive the amount of such cheque. Wherefore they are demanding from the defendants the sum of ₦100,000 being damages for breach of contract.”

The statement of claim was later amended with leave by adding an alternative claim in negligence.

The learned Judge reviewed the evidence, which showed that a number of cheques drawn in favour of the plaintiff
company were paid into the bank during 1970 and 1971. They were cleared by the paying banks within weeks of being paid in, yet the defendant bank did not credit the amounts to the plaintiffs’ account until many months had elapsed. Meanwhile, a cheque drawn on the defendant bank by the plaintiffs in favour of one of their suppliers was returned to them marked “Re-present.” He continued:

“The issues raised in this suit are so straightforward that the time and energy spent on the action are in my view out of all proportion to the result sought to be achieved.”

The customer of the bank claims that the banker has committed a breach of contract in dishonouring his cheque. The banker replies quite rightly in my view that he is not obliged to honour a customer’s cheque if there are not sufficient funds in his account. It is established law that a banker is bound to pay cheques drawn on him by a customer in legal form provided he has his in his hands at the time sufficient and available funds for the purpose (Foley v. Hill (2); Whitaker v. Bank of England (6) and Joachimson v. Swiss Bank Corporation (3) per Atkin LJ (1921) 3 K.B. at 127; [1921] All E.R. 100) or provided the cheques are within the limits of an agreed overdraft (Rouse v. Bradford Banking Co Ltd (5) per Lord Herschell LC (1894) A.C. at 596; 71 L.T. at 525).

The plaintiff states that on the material date when his cheque was presented for payment his banker had sufficient funds of his in his hands. This he supported by listing a number of cheques made out in his favour which he lodged with the bank between August 31st, 1970 and March 20th, 1971. These amounted to a total of £2,198.17s.6d.

The defence Counsel pointed out that these were all up-country cheques by which he meant, I presume, that the paying banks were all based outside Enugu. They then said that on the material date these cheques had not been cleared and were not available for payment. Counsel for the defendant bank submitted that the duty of the bank in relation to up-country cheques consisted solely in sending out the relevant
banks for payment and in crediting the account of the cus-
tomer with the amount as soon as it was received or the bank
was advised that it was ready to pay. On this view it did not
matter how long it took. The bank is not responsible for any
delay.

One of the principal functions of a banker is to receive in-
struments including cheques from his customers in order to
collect the proceeds and credit his customer’s account. While
acting in this capacity he is called the collecting
banker. In acting as his customer’s agent in the collection of
cheques a banker will be expected to bring reasonable care
and diligence to bear in presenting the effects for payment,
in obtaining payment and in crediting his customer’s ac-
count. If the customer suffers any loss through the negli-
gence of the banker in any of these matters the banker will
be liable to the customer to the extent of the loss. Any other
view would make commerce impossible.

It would be expected that even on their own hypothesis the
defendants would produce evidence of the dates when the
cheques were lodged, when they were sent for collection and
the dates when the respective paying banks advised them
about the fates of the cheques. This they failed to do. Coun-
sel for the defence raised an ingenious argument which, of
course, cannot bear scrutiny. He rightly pointed out, as I
have said, that a collecting banker is not obliged to pay on a
cheque unless the drawer has sufficient funds in his account.
He goes on however, to say that the collecting bank which
has the duty to pay also has the final word as to when to
credit the customer’s account. I have shown that there is a
duty on the collecting banker to show reasonable diligence
in collecting and crediting the customer’s account. Counsel
further stated that the plaintiffs should show negligence on
the part of the banker, by evidence. This is a matter which is
peculiarly within the knowledge of the banker and it is for
him to produce the evidence which would exonerate him
from what on the face of it is a glaring piece of negligence.
But over and above that, the plaintiffs have by confronting
the defence with the cheques exhibits 16, 17, 18 and 20,
shown that they were treated by the paying banks long be-
fore they were credited.

In these days when indigenisation of business and industry
are the keywords, it is the duty of everybody to see that
nothing is done to tarnish the good name or business integ-

Finally it is inconceivable that the advice in respect of all
the cheques complained about should all arrive at the bank
within a space of four days in 1972 and that after periods
varying from 10 to 20 months. The only inference, in the ab-
sence of evidence from the defendants, is that somebody has
been trying to cover up.

Exhibits 16, 17, 18 and 20 show that they were treated by
the paying banks in 1971 but not credited to the plaintiffs’
account till June, 1972.

An attempt was made to put the blame on transport diffi-
culties. This was quashed by the cheque, exhibit 19, which
was lodged on February 25th, 1971 bears two Owerri Bar-
clays Bank stamps dated March 24th, 1971 and was credited
to the plaintiff’s account on April 1st, 1971. The plaintiff
does not quarrel with this. In my view the defendants have
been guilty of the worst type of negligence, I hesitate to use
stronger language, and this has in turn occasioned their
breach of their contract with the plaintiff.

It should be emphasised that the banker returning a cheque
is only at risk if the answer is incorrect. Hence, before re-
turning cheque for lack of funds the banker should check
and double check that there has not been some mistake in his
accounting or recording.

Before taking such a serious step as dishonouring a cheque
for lack of funds the banker must absolutely certain that the
State of the account justifies him in so doing. Substantial
damages would usually be awarded against a banker who had
improperly dishonoured a cheque and thereby impaired the credit of a trader.

The plaintiff company are traders within the meaning of the law and do not need to prove special damage even though the court was told that they suffered damage in their business.

An attempt was made to minimise the significance of the action of the defendants by suggesting that the cheque was not really dishonoured but was only marked “Re-present.” In this connection the learned editors of Sheldon, *The Practice and Law of Banking* (10ed), at 30 (1972) said:

“Once a cheque has been presented and payment refused, the holder is entitled to treat the cheque as dishonoured, even if he is requested to re-present the cheque later.”

Indeed in a New Zealand case *Baker v. Australian and New Zealand Bank* (1) it was held that the answer “Present Again” was libellous.

It is trite law that if a banker without justification dishonours his customer’s cheque he is liable to the customer in damages for injury to his credit: *Marzetti v. Williams* (4).

It is true that later cases tend to show that save in the case of a business customer proof of actual injury to credit is necessary to secure substantial damages. In the instant case it is not denied that the plaintiffs are business customers.

The claim is for N100,000 as damages. I do not intend to award anything like that. I have the duty of holding the balance between protecting the plaintiffs and crippling the power of the bank to help other businessmen. I assess the damages at N30,000 with costs at N300.

*Judgment for the plaintiff.*
Barclays Bank of Nigeria Limited v. Central Bank of Nigeria

SUPREME COURT OF NIGERIA
FATAYI-WILLIAMS, IRIKEFE, BELLO JJSC
Date of Judgment: 4 JUNE 1976

Banking – Banking Obligation (Eastern States) Decree No. 56 of 1970 – Jurisdiction of court to inquire into matters thereunder – When ousted – How determined

Jurisdiction – Jurisdiction of court – Ouster clause in a statute – How construed – Sections 6 and 8 of the Banking Obligations (Eastern States) Decree No. 56 of 1970 considered

Words and phrases – “Banking obligation” – Meaning of – Section 9 Banking Obligations (Eastern States) Decree No. 56 of 1970

Facts

The appellant’s case was that monies held on suspense account at Aba and Port Harcourt Branches represented undisputed liabilities which will not be extinguished by the Banking Obligations (Eastern States) Decree No. 56 of 1970, and that accordingly the amount of such liabilities should be included when calculating the residue of banking funds, whilst the respondents maintained the contrary.

Pleadings were yet to be settled when the respondents took objection to the competency of the action on the ground that the trial court lacked jurisdiction to hear the summons. The supporting affidavit to the challenge of jurisdiction was to the effect that the Governor of Central Bank of Nigeria (respondents) had following the appellants statutory application given directives on the matter in line with the provisions of sections 6 and 8 of the Decree No. 56 of 1970. The affidavit sworn to by one Sikiru Agboola Lasisi, a law clerk in the firm of Counsel to the respondent further averred that the
appellant had since complied with the directives of the Governor of the respondent.

The learned President of the Federal Revenue Court, based on the affidavit evidence, held that the court had no jurisdiction to hear the case and accordingly dismissed same.

Aggrieved, the appellant appealed to the Supreme Court. Counsel to the appellant contended *inter alia* that it was opened to the respondent to prove by evidence facts which ousted the courts jurisdiction to hear the matter. The only evidence considered being the affidavit evidence of a law clerk which consisted of what he was told by an unnamed person, being hearsay should not have been relied upon. Referring to the provisions of sections 6 and 8 of Decree No. 56 of 1970, Counsel also argued that had the learned trial Judge construed the provisions properly, he would have realised that he could not determine whether or not the court had jurisdiction without first determining whether the payments made by the London and New York Branches of the appellants on behalf of their customers in Aba and Port Harcourt represented undischarged liabilities, which were not extinguished by the Decree No. 56 of 1970.

In reply Counsel to the respondent submitted that the provisions of section 8 of Decree No. 56 of 1970 be given a literal interpretation. He maintained that the governor of the respondent having given a directive as contained in the letter of 20th January, 1971 (exhibit SAL 2) the court was robbed of the jurisdiction to hear the matter.

**Held**

1. While a person’s right of access to the courts may be taken away or restricted by statute, in considering whether or not a court has jurisdiction to entertain any claim, the language of any such statute will be watched by the courts and will not be extended beyond its least onerous meaning unless clear words are used to justify such extension. Therefore, a provision in a statute ousting the ordinary
jurisdiction of the court must be construed strictly. This means that if such a provision is reasonably capable of having two meanings, that meaning shall be taken which preserves the ordinary jurisdiction of the court.

2. There is a clear distinction between stating that the court has no jurisdiction to hear a case, and stating that that court has no jurisdiction to determine whether or not it has jurisdiction to hear the case. Thus, a court may, by statute, lack jurisdiction to deal with a particular matter, but it has jurisdiction to decide whether or not it has jurisdiction to deal with such matter.

3. By virtue of section 9 of the Banking Obligations (Eastern States) Decree No. 56 of 1970, banking obligation means any banking transaction with either a commercial bank or the Central Bank of Nigeria whereby the commercial bank or Central Bank of Nigeria incurs a liability to a customer, or vice versa.

4. By virtue of section 8 of Decree No. 56 of 1970, the jurisdiction of the court is ousted on account of or in respect of any act, matter or thing done or purported to be done by any person under the Decree and in respect of any rights which are extinguished under the Decree. In the instant case, the originating summons was not in respect of any matter or thing done purported to be done by the Governor of the Central Bank. Rather, it was brought to determine which of the views – the commercial bank’s view or the Central Bank’s view as to the undischarged liabilities was correct. The letter of the governor dated 20th January, 1971 (exhibit SAL 2) contained no directives on the point. Even if it did, it would be ultra vires the Governor’s powers under section 6 of the Decree, because the appellants were never in doubt as to their views on the application of the Decree to their banking obligations. Therefore, the first part of the provision of section 8(2) could not be invoked to oust the jurisdiction of the court. With respect to rights
extinguished under the Decree, the section could only be invoked if the court is satisfied from the evidence before it that such rights are extinguished. Moreover, before the court can be so satisfied, it must be proved by evidence that the rights of the customers concerned do not come within claims relating to banking obligations which the commercial bank concerned is obliged to honour by virtue of the provisions of the decree.

Appeal allowed and retrial ordered.

Cases referred to in the judgment

Foreign

Anisminic v. Foreign Compensation Commission (1969) 2 A.C. 147 at 170
Asante v. Tawia (1949) W.N. 40
Forfie v. Seifah (1958) 1 All E.R. 289
Re: Dulles Settlement Trusts (1951) 2 T.L.R. 145 at 146
tallack v. tallack (1972) P. 211 at page 222
Wilkinson v. Banking Corporation (1948) 1 K.B. 721 at 725

Nigerian statute referred to in the judgment

Banking Obligations (Eastern States) Decree No. 56 of 1970 sections 6, 8 and 9

Counsel

For the appellants: Williams
For the respondents: Egbe

Judgment

FATAYI-WILLIAMS JSC: By an originating summons issued in the Federal Revenue Court sitting in Lagos, the plaintiffs, now appellants:–

“1. Seek against the defendants the determination of the court, on the following questions, namely:
Whether or not the right of the plaintiffs to be reimbursed for payments made by its branches in London and New York in circumstances specified in the particulars to this originating summons was–
(a) extinguished by the Bank Obligations (Eastern State) Decree, 1970; and
(b) extinguished by the Banking Obligations (Eastern States) Decree 1970; and

(b) properly treated by the Central Bank of Nigeria pursuant to section 4 of the Decree aforesaid by excluding it in calculating the residue of banking funds of Barclays Bank of Nigeria Limited.

2. If the answers to 1(a) and (b) are in the negative an order for the refund to the plaintiffs of such sum as may be agreed by the parties or determined by the court to be due as not having been properly treated when calculating the residue of such banking funds.”

The particulars given in support of the originating summons are as follows:–

“PARTICULARS

1. At the written requests of the Aba Textile Mills Limited, the Aba Branch of Barclays Bank DCO on various dates prior to 30th May, 1967, opened irrevocable documentary letters of credit payable in London and New York amounting to £846,729 in favour of various overseas suppliers or sellers of goods. In each of the said letter of credit Barclays Bank DCO guaranteed that drafts and documents drawn in strict conformity with the terms of the credit would be honoured at maturity.

2. In accordance with the terms of each of the documentary credits aforesaid, the various sellers shipped goods to Aba Textile Mills Limited and drew bills of exchange (totalling 71 in number) in appropriate foreign currencies (amounting to £911,817 Sterling and U.S. $60,027) on the Aba Textile Mills Limited which the said Aba Textile Mills Limited duly accepted. The aforesaid shipment as well as the drawing and acceptance of each of the said bill of exchange took place prior to 30th May, 1967.

3. Between 31st May, 1967, and 28th September, 1967, the branches of Barclays Bank DCO in New York and London paid the amount payable on each of the aforesaid bills on due dates in the appropriate foreign currency to the overseas banks which, had negotiated the sellers’ or suppliers’ bills. These payments are now represented by a debit suspense account in the books of the Head Office of the plaintiffs; and in accordance with the instructions of the Aba Textile Mills Limited in their applications for
the documentary credits aforesaid, the Aba and Port Harcourt Branches of, the Barclays Bank DCO between the said dates debited the current accounts of the said Aba Textile Mills Limited, with the Nigerian currency equivalent of the bills; together with exchange and other bank charges and returned these amounts on credit suspense accounts at these branches.

4. On the 30th day of May, 1969, the plaintiffs were incorporated pursuant to the provisions of section 369 of the Companies Decree, 1968 and succeeded to the assets in Nigeria of Barclays Bank DCO as provided for under section 369(5) of the said Decree.

5. The plaintiffs have maintained at all material times that the monies held on suspense account at Aba and Port Harcourt Branches represent undischarged liabilities which are not extinguished by the Banking Obligations (Eastern States) Decree, 1970 and that accordingly the amount of such liabilities should be included when calculating the residue of banking funds whilst the defendants have maintained the contrary. The plaintiffs however paid the sum represented by such liabilities as part of the residue of banking funds on the defendants’ assurance that, in the event of adjustments in their favour being made to the amount properly due, necessary funds will be made to the plaintiffs.”

The summons also states that if the defendants do not enter an appearance, such judgment may be given or order made against or in relation to it as the court may think just and expedient.

On the receipt of the summons, the defendants entered an appearance *simpliciter* on 15th October, 1973. The effect of this is that an unconditional appearance has been entered. However, pursuant to an application made to it on 5th November, 1973, the court granted the defendants leave to amend the memorandum of appearance by the insertion of the word “conditional,” before the word “appearance” therein so that the memorandum would read “Memorandum of Conditional Appearance.” It is pertinent to observe that this amendment was allowed in spite of very strenuous opposition.
on the part of learned Counsel for the plaintiffs who had therefore appealed against the interlocutory order.

While that appeal was pending, the defendants, on 28th November, 1973, applied to the court to set aside the originating summons on the ground that the court lacks jurisdiction to hear it: paragraphs 1 and 7 to 12 of the affidavit in support of the application, sworn to by one Sikiru Agboola Lasisi, legal executive (another name for a lawyer’s clerk), read:

“1. That I am legal executive in the firm of Messrs. Fred Egbe and Co, solicitors acting for the defendants in the above matter and have authority of the defendants to swear to this affidavit:

... 

7. That on the 9th day of January, 1971, the plaintiffs’ bank, being a bank in doubt as to the application of the Banking Obligations (Eastern States) Decree No. 56 of 1970, to the subject matter of the originating summons, made a statutory application to the governor of the defendants’ bank for directives.

8. That the document now shown to me and marked exhibits SAL1, SAL1A and SAL1B is a photostat copy of the said application.

9. That in furtherance of the said application for directives by the plaintiffs’ bank the Governor of the Central Bank of Nigeria by letter dated 20th January, 1973 made a statutory determination, from which appeals are expressly excluded.

10. That the document now shown to me and marked exhibits SAL2 and SAL2A is a photostat copy of the said letter of 20th January, 1973.

11. That the defendants inform me, and I verily believe them that the above accords with the provisions of sections 6 and 8 of the Banking Obligations (Eastern States) Decree (No. 56 of 1970).

12. That the defendants inform me, and I verily believe them that the plaintiffs have since complied with the directives of the governor of the defendants’ bank concerning the subject matter of this application.”
The letter, dated 20th January, 1971, from the Governor of the Central Bank, containing the directives was exhibited as exhibit SAL2 and it reads:

“The General Manager
Barclays Bank of Nigeria Limited
40, Marina,
Lagos.

Dear Sir,

Banking Obligations (Eastern States) Decree, 1970 (Decree No. 56)

It has been ascertained on the basis of the returns submitted by your bank in respect of its assets and liabilities in the Eastern States (excluding Calabar) as at 30th May, 1967 that your residue of banking funds as defined under section 4 of the abovementioned Decree amounted to £3,355.120 (see attached schedule for details).

I am informed that this figure of residue has been discussed and agreed with you, with a reservation that minor errors of compilation on your part may exist in the returns submitted. Such errors, if any should be reported to us for verification with an aview to making the necessary refunds in appropriate cases.

Meanwhile, you are requested to effect the payment of the aforementioned residue amounting to £3,355.120 not later than Monday, 25th January, 1971 to the Central Bank of Nigeria for the account of the Federal Government in accordance with the provisions of section 4 of Decree No. 56.

Yours faithfully
GOVERNOR.”

We think it is relevant, at this stage, to point out that there is nothing in the above letter to indicate that it is in reply to the letter dated 9th January, 1971, which the plaintiffs wrote to the defendants concerning the undischarged liabilities of their Aba and Port Harcourt Branches. The relevant portion of this letter (exhibit SAL1A) reads:

“The amounts held in suspense at our Aba and Port Harcourt Branches were frozen by the Bank Moratorium (Eastern States) Decree 1970, but it is our view that they are freed under Decree 56 and can be utilised to liquidate the outstanding liabilities of £790,966.13.6d and Sterling £14,259.15.0d referred to in (d)"
Fatayi-Williams JSC
Barclays Bank of Nigeria Ltd v. Central Bank of Nigeria

a. above, thus extinguishing our claim against our customers. We base our argument on section 3 of Decree 56 which extends the provisions of the Decree to all banking obligations: these obligations were incurred before secession, and the amounts held in suspense should now be released at par to meet them. We shall be glad if you will confirm as soon as possible that our interpretation of the Decree is correct.

b. We, of course, do not require funds released in excess of the existing liabilities of customers totaling £803,242.13.7d made up of £790,966.13.6d and the equivalent at today’s rate of Stg. £14,249.15.0d mentioned in (d) above ie £12,276.0.1d. Regarding the latter sum we would initially credit it to the Barclays Bank DCO account in our books, pending a decision whether to capitalise it, or request exchange control approval to remit to U.K. There is naturally no question of our asking permission to remit part or all of the large sum (£790,966.13.6d) to London.”

c. There is clearly nothing in the record to show that any decision was taken by the Governor of the central bank on any of the points raised by the plaintiffs in their letter.

d. Furthermore, no doubt was expressed by the plaintiffs in the letter (exhibit SAL1A) as to their position vis-a-vis the application of the Banking Obligations (Eastern States) Decree. The significance of this will be seen later in this judgment.

e. Nevertheless, after hearing the arguments of learned Counsel for both parties, the learned President of the Federal Revenue Court, in a reserved judgment, ruled that the court had no jurisdiction to hear the case and dismissed it. Before coming to this conclusion, the learned President observed –

f. “In contending that the court has no jurisdiction to entertain the summons, the defence contended that, in resolving plaintiffs’ doubt under section 6(1) as to the application of Decree No. 56 to the types of Banking Obligations specified therein, directives given by the Governor of the Central Bank were duly complied with by the plaintiffs, in keeping with section 6(2) thereof. This fact is succinctly contained in paragraph 12 of the defence affidavit of 13th November, 1973 to wit:

i. ‘that the defendants inform me and I verily believe them, that the plaintiffs have since complied with the directives of
the Governor of the defendants’ bank concerning the subject matter of this application.

This fact was not denied in plaintiffs’ Counsel’s counter-affidavit of the 21st of November, 1973. The governor’s directives, with which we are concerned, are contained in his letter (exhibit SAL 2) of the 20th of January, 1971, in which he directed the plaintiffs to pay a stated amount of over N6 million to the defendants not later than the 25th of January, 1971.”

After considering the provisions of section 8(2) of the Banking Obligations (Eastern States) Decree (hereinafter, referred to as the Decree) which deal with the ousting of the jurisdiction of the court, the learned President observed that he did not find anything ambiguous in the said provisions, that the provisions are plain, that they admit of only one meaning and that is that they bar the jurisdiction of the court. He thereupon dismissed the claim.

This appeal is against both the interlocutory order by which the learned President allowed the defendants to amend the memorandum of appearance and the final judgment in which he held that the Federal Revenue Court had no jurisdiction to hear the originating summons.

With respect to the appeal against the interlocutory order, it is our view, and Chief Williams who appeared for plaintiffs/appellants did concede the point, that, in the particular circumstances of the present case, where the defence put forward by the defendants/respondents is that the court lacks jurisdiction to hear the case, it is immaterial whether the appearance entered by the defendants is unconditional or conditional. The reasons for this view are not far to seek. Firstly, a person who did nothing and allowed judgment to go against him in default of appearance did not thereby submit to the jurisdiction of the court (see Re: Dulles Settlement Trusts (1951) 2 T.L.R. 145 as per Denning LJ at page 146; Tallack v. Tallack (1927) P. 211 at page 222). Secondly, a plea of lack of jurisdiction raised for first time on appeal
would be entertained, (see Asante v. Tawia (1949) W.N. page 40). Finally, where the court, on its own, discovers that it has acted without jurisdiction, it has an inherent power to set aside its own decision in the matter (see Forfie v. Seifah (1958) 1 All E.R. 289 (P.C.)). Since an objection to the court’s jurisdiction could be raised at any stage of the proceedings in the case, we do not consider it necessary for us to deal with the complaint as to whether the order was valid or erroneous.

We will now deal with the appeal against the decision of the Federal Revenue Court that it has no jurisdiction to hear the summons. The main complaints of Chief Williams may be summarised as follows. It is open to a party who contends that the court lacks jurisdiction to hear a case to prove by evidence, facts which oust the jurisdiction of the court. To do so, the party must call witnesses who know about the facts. The only evidence which the learned President considered is the affidavit evidence of one Sikiru Agboola Lasisi, the legal executive. As Lasisi is not an employee of the defendants/respondents, his affidavit consists of what he was told by an unnamed person and being clearly hearsay, the learned President should not have relied either on it or on the letter (exhibit SAL2) attached to it. Chief Williams also referred to the provisions of sections 6 and 8 of the Decree and submitted that had the learned President construed the provisions properly, he would have realised that he could not determine whether the court has jurisdiction or not without first determining whether the payments made by the London and New York Branches of the plaintiffs/appellants’ bank on behalf of their customers in Aba and Port Harcourt represent undischarged liabilities which are not extinguished by the Decree. As the plaintiffs/appellants, on the face of their summons, based their claim on a right which they contend had not been extinguished, before the court can hold that its jurisdiction has been ousted, it must first of all determine whether the plaintiffs/appellants’ rights had been extinguished or not. In
other words, the only matter before the court at that stage of the proceedings is not whether the court has jurisdiction to hear the case but whether the plaintiffs/appellants have the right to ask the court to decide whether it has jurisdiction. Finally, Chief Williams submitted that section 8 of the Decree did not say that no person can come to court or that in any matter concerning the Decree, the person must go to the Governor of the Central Bank.

In reply, Mr Egbe, for the defendants/respondents, asked that the provisions of section 8(2) of the Decree should be given a literal interpretation. If this is done, he further contended, it will be seen that the language of the section is very wide. Anything done by the governor of the defendants/respondents’ bank cannot be questioned in any court. When asked as to what the Governor has done in the case in hand, he referred to the action taken by the governor in the letter (exhibit SAL 2), dated 20th January, 1971, and submitted that once the Governor has given the directive stated therein, the jurisdiction of the Federal Revenue Court to hear the plaintiffs/appellants’ summons is ousted.

In considering whether or not a court has jurisdiction to entertain any claim, it is our view that while a person’s right of access to the courts may be taken away or restricted by statute, the language of any such statute will be watched by the courts and will not be extended beyond its least onerous meaning unless clear words are used to justify such extension (see Halsbury’s Laws of England (4ed), Volume 10, paragraph 720): That is why it is now well established that a provision in a statute ousting the ordinary jurisdiction of the court must be construed strictly. This means that if such a provision is reasonably capable of having two meanings, that meaning shall be taken which preserves the ordinary jurisdiction of the court (see Anisminic v. Foreign Compensation Commission (1969) 2 A.C. 147 at page 170). Moreover, there is a clear distinction between stating that the court has no jurisdiction to hear a case, and stating that that court has...
no jurisdiction to determine whether or not it has jurisdiction to hear the case, thus, a court may, by statute, lack jurisdiction to deal with a particular matter, but it has jurisdiction to decide whether or not it has jurisdiction to deal with such matter (see Wilkinson v. Barking Corporation (1948) 1 K.B. 721 at page 725).

It now remains for us to consider the relevant provisions of the relevant Decree in order to see whether the stage had been reached when the learned President could rule on the issue of jurisdiction to hear the case.

Section 6 of the Decree provides as follows:

“6 (1) Where a bank is in doubt as to the application of this Decree to any deposit accounts, deposit balances or any other types of banking obligations with that bank, it shall refer the matter to the governor of the Central Bank of Nigeria who may give such directives thereon as he deems fit.

(2) Where the Governor of the Central Bank of Nigeria has given any directives under the foregoing provisions of this section it shall be the duty of the bank concerned to comply with the directives.”

“Banking Obligation” is defined in section 9 of the Decree as—

“Any banking transactions with either a commercial bank or the Central Bank of Nigeria whereby the commercial bank or the Central Bank of Nigeria incurs a liability to a customer or vice versa.”

“Bank” is also defined in the same section as “the Central Bank of Nigeria and any bank licenced, under the Banking Decree, 1969.”

It is not disputed that the plaintiff/appellant is a bank so licenced.

To our mind, the operative words in section 6 are “where a bank is in doubt.” In the case in hand, paragraph 5 of the particulars in the originating summons and the letter of 9th January, 1971 (exhibit SAL 1) show clearly that the plaintiffs/appellants are not in any doubt as to whether their undischarged liabilities are extinguished by the provisions of the Decree. Their view is that they are not while the Central
Bank held the contrary view. In these circumstances the governor cannot give any directives as to which view should prevail, particularly in view of the provisions of section 8 as to jurisdiction. It will clearly be for the court, after hearing evidence, to determine, which of the two views should prevail.

Section 8 of the Decree provides as follows:

“(1) Except to the extent to which a bank is obliged under the provisions of this Decree to honour any claim of a customer relating to banking obligations, the rights of the customer in respect of any banking obligations to which section 2 or 3 of this Decree applies are hereby extinguished.

(2) No civil proceedings shall lie or be instituted in any court, for or on account of or in respect of any act, matter or thing done or purported to be done by any person under this Decree or in respect of any rights which are extinguished thereunder and if any such proceedings have been or are instituted before or after the commencement of this Decree, the proceedings shall abate, be discharged and made void.”

A close look at the provisions of subsection (2) of section 8 shows that the jurisdiction of the courts is ousted:

“(a) on account of or in respect of any act, matter or thing done or purported to be done by any person under this Decree; and

(b) in respect of any rights which are extinguished under the Decree.”

The originating summons is brought, not in respect of any “act, matter or thing done or purported to be done” by the Governor of the Central Bank; it is brought in order to determine which of the two views – the commercial bank’s view or the Central Bank’s view – as to the undischarged liabilities is correct. In our view, the letter of the governor dated 20th January, 1971 (exhibit SAL2) contained no directives on this point. Even if it did, it would be *ultra vires* the governor’s powers under section 6 because, as we have pointed out earlier, the plaintiffs/appellants are never in
doubt as to their views as to the application of the Decree to their banking obligations. For this reason, the first part of the provisions of section 8(2) could not be invoked to oust the jurisdiction of the court.

As for the second part which provides that the jurisdiction of the court is ousted in respect of any rights which are extinguished under the Decree, it is our view that this part can only be invoked if the court is satisfied from the evidence before it that such rights are extinguished. Moreover, before the court can be so satisfied, it must be proved by evidence that the rights of the customers concerned do not come within claims relating to banking obligations which the commercial bank concerned is obliged to honour by virtue of the provisions of the Decree. In other words, the defendants/respondents must first prove that the rights of the plaintiffs/appellants’ customers do not arise out of any banking transactions with the plaintiffs/appellants whereby the plaintiffs/appellants incur liability to the said customers or vice versa.

It, therefore follows, that before the learned President of the Federal Revenue Court can determine whether or not the court has jurisdiction to entertain the claim, he must first of all examine what the plaintiffs/appellants contended to be their undischarged liabilities to their customers and determine, after pleadings have been delivered and evidence adduced in support of the facts pleaded, whether these undischarged liabilities relate to banking obligations, and, if they are, whether they are banking obligations which have been extinguished. In our view, it is only after he has determined that these obligations have been extinguished that he can rule that the court has no jurisdiction to order the refund asked for in the originating summons.

Since the learned President has not followed this procedure, we think that his ruling on the issue of jurisdiction is premature. We, therefore, allow the appeal, set aside the ruling of the learned President in Suit FRC/L/M1/73, including
the order as to costs, delivered in the Federal Revenue Court on 21st January, 1974. We further order that the case be re-
mitted to the said court where pleadings should be ordered and delivered and evidence taken in order to determine whether the court has jurisdiction to entertain the originating summons or not.

*The plaintiffs/appellants are awarded costs assessed in the court below at ₦32.00 and in this Court at ₦176.*

HIGH COURT OF LAGOS STATE

DOSUNMU J

Date of Judgment: 7 JULY 1976

Suit No.: L.D. 880/74

Banking – Collecting bank – Customer’s cheque – Agent for customer to receive payment of cheques – Duty of care owed to customers – Bank receiving payment on forged cheque – Liability to true owner were proceeds paid out before notice of fraud

Facts

The plaintiff/bank keeps an account for customer A while the defendant/bank keeps another account for customer B. Customer B opened their account with defendant/bank in November, 1972 with an initial deposit of ₦50. In the month of January, 1973 within a period of 6 days two forged cheques were paid into the account of customer B with the defendant/bank drawn on customer A’s account in the plaintiff/bank for the sums of ₦6,540 and ₦16,750. The defendant/bank presented the forged cheques to the plaintiff/bank who paid them. None of them being aware of the forgeries.

In February, 1973, the forgeries came to light and plaintiff/bank alerted the defendant/bank but a sum of ₦20,000 had already been withdrawn for the account of customer B. The defendant/bank laid an embargo on the account of customer B which now stood at ₦7,000.

Customer B had no hand in the forgeries and there was no negligence on the part of defendant/bank. The plaintiff/bank took action against the defendant/bank alone to recover the total of ₦23,200 as money had and received by the defendant/bank or in conversion. The plaintiff/bank alleged they paid under a mistake of fact. The defendant averred they owed no duty of care to the plaintiff/bank.
Held –

1. The defendant/bank in collecting cheques for its customer and presenting the cheque to the plaintiff/bank was acting as the agent of its customer to receive the payment of the cheques from the plaintiff/bank on whom the cheques were drawn and will hold the proceeds at the disposal of its customer.

2. There is a duty of care which the defendant/bank owes to the possible true owner not to disregard the interests of the true owner by not making enquiries as to the customer before opening an account for him.

3. Where the customer has no title to the amount on the face of the cheques because the cheques were forged, the bank which collects the proceeds for such customer will be liable for money had and received or in conversion at the instance of the true owner, unless the bank did so in good faith and was not negligent. But if the collecting bank had paid out the proceeds before being notified of any fraud, it would incur no liability unless it was aware of the forgeries or ought to be so aware.

4. In this particular case, the defendant/bank admitted crediting the customer’s account with the proceeds of the cheques which by itself did not mean a prejudicial change of their position, but they did not further plead or prove that they had paid out the money to their customer before the notification or at any time. In the circumstances, it will be inequitable not to ask them to refund the money.

Judgment for the plaintiff/bank.

Cases referred to in the judgment

Nigerian

United Nigeria Insurance Co v. Muslim Bank (W.A.) Ltd (1972) 1 All N.L.R. 314
The facts of this case are not very complicated. The plaintiff/bank keeps an account in its branch at Broad Street, Lagos for a company known as Matzen and Timm (Nigeria) Limited which I shall henceforth refer to as customer A. The defendant/bank also keeps an account for another company by the name of Niger Contacts International, which I shall henceforth be referring to as customer B. The account is kept in the defendant’s office also along Broad Street, Lagos. It was said that customer B opened this account on 21st November, 1972 and with an initial payment of ₦50. Sometime in February, 1973 when customer A was going through its account with the plaintiff bank, they discovered certain cheques drawn on this account in favour of customer B. These cheques were, undoubtedly, forgeries because the only authorised signatory to the accounts of customer B, Mr Deubet, who is the General Manager of the company, denied the signatures on them as his own. The copies of the cheques were, with consent, admitted in evidence as exhibits A and B. A comparison of the forged signatures of Mr Deubet on them with his genuine signatures shows that the forgery was skillfully done. There can be no
question therefore that they were forged and therefore mere pieces of paper. Customer B has therefore no title to the amount on the face of the cheques. A bank who collects for such customer will be liable for money had and received or conversion at the instance of the true owner unless the bank did so in good faith and was not negligent. This is settled law.

Earlier on the 17th January, 1973 customer B had paid the first cheque, exhibit A for the sum of N6,540 into its account with the defendant/bank. Similarly, on the 23rd January, 1973 they lodged exhibit B for the sum of N16,750.50 with their bank. Through the normal process of clearing house, the plaintiff/bank not detecting the forgeries, paid out the cheques. No one suspected any fraud, as I said, until about a month later in February, 1973, and immediately the plaintiff/bank wrote to the defendant/bank to alert them of the fraud.

This was done in a letter of the 7th February, 1973, exhibit G, but it was rather late because it was said that customer B had already withdrawn a substantial sum, about N20,000 from its account with the defendant. I was told that as at the date of the letter, their account stood at N7,000 and of course, the defendant/bank put an embargo on any further withdrawals from it. The pleadings are silent on this or any other amount that the defendants held for customer B in their hands.

The plaintiff has now instituted the present action against the defendants claiming to recover from them the total sum of N23,200.50 as money had and received or in conversion. They alleged that the payment was made under a mistake of fact, for one reason or the other the plaintiffs did not join the payees of the cheques, customer B in this action as happened in the case of National Westminster v. Barclays International (1975) Q.B.D. 654 cited by their Counsel. I might as well add, at this stage, that I found that case extremely helpful in many respects but in so far as the dispute therein was essentially between the
paying bank, as in the present case, and the payees of the forged cheques, it will not cover the present case. In that case, the collecting bank, unlike the present defendant took no active part in the debate, but chose to abide by the court’s decision primarily because it had not, at the time of the action, paid out the proceeds to its own customer. But before proceeding any further, I wish to refer to the defence, and in particular, the averment that they owe no duty of care to the plaintiffs. This is not correct. There is the duty of care which the defendant/bank owes to the possible true owner not to disregard the interests of the true owner by not making enquiries as to a customer before opening an account for him. The Supreme Court found the breach of that duty in the United Nigeria Insurance Co v. Muslim Bank (W.A.) Ltd (1972) 1 All N.L.R. 314. I shall come back to the point.

Now what the facts of this case seems to establish is that the defendant as the collecting bank was acting as the agent of its customer, in presenting these cheques to the plaintiff/bank for payment. Halsbury’s Laws of England (4ed) Volume 3, paragraph 100 puts it more clearly:

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

Unless the collecting bank is aware of the forgeries or ought to be so aware, they incur no liability if they paid out the proceeds before being notified of the fraud, relying of course, on the cheques being honoured before paying out. This is also the view of Kerr, J in the case of National Westminster Bank v. Barclays Bank (supra) when he said at page 677:

“As regards Barclays, the first defendant, they have to submit to any order which the court may make and have not in fact parted with the money in reliance on the cheque being honoured, then they would in my view have had a good defence on the basis that as collecting bank they were in the same position as agents who
have parted with the money to their principal, so that it is then no longer recoverable from them.”

In *Kleinwort Sons and Co v. Dunlop Rubber Co* (1912) 97 L.T. 263 Lord Atkinson reviewing all the authorities on the matter said:

“They seem to establish that, whatever may in fact be the true position of the defendant in an action brought to recover money paid to him under a mistake of fact, he will be liable to refund it if it be established that he dealt as a principal with the person who paid it to him. Whether he will be liable if he dealt as an agent with such a person will depend on this, whether, before the mistake was discovered he had paid over the money which he received to the principal, or settled such an account with the principal as amounts to payment, or did something which so prejudiced his position that it would be inequitable to require him to refund.”

In this particular case, while the defendants admitted crediting their customer’s account with the proceeds of the cheques which by itself did not mean a prejudicial change of their position, they did not plead further that they had paid out the money to their customer before the notification or at any time. They did not plead any act which so prejudiced their position, that it will be inequitable not to ask them to refund the money. This is the defence open to them, which they have not availed themselves of.

In *Admiralty Commissioner v. National Provincial Union Bank of England* (1922) 127 L.J. 452, money was paid into the account of a customer under a mistake of fact. The bank refused to refund it without the representatives of the customer, he being dead. The bank contended that it had incurred an obligation to honour cheques to the amount of the payment in which absolved it from any liability to repay.

Sarquant J rejected the argument saying that the undertaking to honour cheques did not extend to amounts standing to the credit of a current account if and in so far as it was swollen by the inadvertent payment in mistake of fact.

This ought to dispose of the action, which succeeds to this extent. It becomes unnecessary to examine the claim in conversion.
which is in the alternative. But I shall need to add a few words on the allegation in the reply filed, that the defendant/bank at the time the account of customer B was opened, did not take any or adequate reference. The evidence that I had at this trial was that the bank did exactly what is normal and reasonable in opening the account. Two references were obtained and these came from the customers of the bank. They also examined the certificate of registration of the business names of their customer. The law does not require them to do more and as a collecting bank they are entitled to protection under Bill of Exchange Act, 1962 unless they are negligent which I have not found. But I have found them liable because there is no plea or proof that they have parted with the proceeds of these cheques or that they have changed their position such that it will be inequitable to ask them to refund the sum. There will therefore be judgment for the plaintiffs against the defendants in the sum of ₦23,200.50 with costs assessed at ₦300.
National Bank of Nigeria Limited v. Korban Brothers (Nigeria) Limited and others

HIGH COURT OF KWARA STATE

EKUNDAYO J

Date of Judgment: 23 JULY 1976

Suit No.: K.W.S.13/74

Banking – Power of attorney – Post of bank manager appointed as an attorney – Whether power of attorney valid

Facts

The first defendant gave a power of attorney to “the manager of the National Bank of Nigeria, Ilorin Branch” authorising the said manager to collect on its behalf money due to it (1st defendant) from the Ministry of Finance, Kwara State of Nigeria in respect of some contract awards. A preliminary objection was raised as regards to the validity of this power of attorney.

Held –

That it is obvious from the document itself that the Korban Brothers purported to have appointed the post of the National Bank Manager, Ilorin as its attorney, which cannot be done as only a person or legal individual (juristic person) may be so appointed. The power of attorney is therefore null and void.

Cases referred to in the judgment

Nigeria

Agbonmagbe Bank Ltd v. General Manager GB Ollivant Ltd and others (1961) All N.L.R. 116
Shitta v. Ligali (1941) 16 N.L.R. 23

Books referred to in the judgment

Chitty on Contract (21ed) page 11, paragraph 21
Osborn’s Law Dictionary
Counsel
For the plaintiff: Ijaodola
For the fourth defendant: Yusuf

Judgment

EKUNDAYO J: This objection has been taken by way of a preliminary issue against the validity of the power of attorney relied upon by the plaintiff in this case and a copy of which the plaintiff has attached to the writ of summons as “Appendix IV.” The original is lodged with the Registrar.

Mr Saka Yusuf for the fourth defendant arguing the objection of which he gave notice to the plaintiff in paragraph 5 of the fourth defendant’s statement of defence said that the purported power of attorney is no power of attorney having been given to a non-juristic person ie “the manager of the National Bank of Nigeria Ilorin Branch.”

He said that a power of attorney can only be given to a legal individual. For saying that “The Manager National Bank Limited” is not a legal person, he cited these two cases:

1. Agbonmagbe Bank Ltd v. General Manager GB Ollivant Ltd and others (1961) 1 All N.L.R. 116.


Finally, he submitted that a power of attorney is an agency agreement where the donor is the principal and the donee the agent. He said that only a legal person can be appointed an agent in law. He then referred the court to:–

Chitty on Contract (21ed) page 11 paragraph 21.

Mr Ijaodola, in reply, submitted that the objection lacks substance because the authorities cited do not say that a power of attorney cannot be given to a post. He also submitted that a “manager” is not a post but a person occupying a managerial post.

Mr Ijaodola then referred me to a number of decided cases which he said would assist me to agree with his line of reasoning. I have read the cases cited and, if anything, they
It goes without saying that the words “The Manager National Bank” are just the name for a post to which a person with the requisite qualification may be appointed or promoted. That post may or may not be filled at any given time. It may be occupied by a substantive holder or in an acting capacity.

The only question that is really there for me to decide then is whether or not a power of attorney can be validly given to a post or to a non-juristic person. A power of attorney has been defined thus in Osborn’s *Law Dictionary*:

“A formal instrument by which one person empowers another to represent him, or act in his stead for certain purposes . . .

The donor of the power is called the principal or constituent, the donee is called the attorney.”

There is no doubt then that an attorney is an agent who acts under a written authority given to him by the person for whom he acts. A post cannot be called upon to act for a person. The expression: “by which one person empowers another” shows that both the donor and the donee must be “persons” or legal individuals. And since any agent including an attorney can be sued by his principal for certain malpractices affecting or relating to the agency or power, it follows that a non-juristic person, who cannot be sued, cannot be appointed an agent or attorney.

In this particular case the power of attorney read, in its relevant parts, as follows:

“By this Power of Attorney the Korban Brothers Nigeria hereby appoint the bank manager of the National Bank of Nigeria Ilorin Branch its lawful attorney in its names and on its behalf to do the followings acts:

1. To receive for the company money due to the company from the Ministry of Finance, Kwara State of Nigeria, in respect of . . .
2. To bank the said money . . .
3. To do all such things that are necessary for collecting the said money as mentioned in paragraphs 1 and 2 of the power of attorney.”

It is obvious from the very document itself that the Korban Brothers Limited has purported to have appointed the post of the National Bank Manager, Ilorin as its attorney, which I have already said cannot be done because only a “person” may be so appointed.

In the result the objection succeeds and the purported power of attorney given on the 2nd of November, 1970, to the National Bank Manager, Ilorin, by the first defendant in this case authorising the said manager to collect on its behalf money due to it (first defendant) from the Ministry of Finance, Kwara State of Nigeria, in respect of contract awards K.W.S.T.B. No. 15/70-71 and K.W.S.T.B. No. 17/70-71 is hereby declared null and void.
Coker v. Standard Bank of Nigeria Limited

HIGH COURT OF LAGOS STATE

KAZEEM J

Date of Judgment: 5 AUGUST 1976

BANKING – CURRENT ACCOUNT – ENDORSEMENT “REFER TO DRAWER” ON A CHEQUE – IMPUTATION OF DAMAGES

DAMAGES – DISHONOUR OF CHEQUE – WHEN THERE IS SUFFICIENT FUNDS IN CUSTOMER’S CURRENT ACCOUNT – NO SPECIAL DAMAGE PLEDGED – ENTITLEMENT OF CUSTOMER THEREOF

DEFAMATION – ENDORSEMENT “REFER TO DRAWER” ON A CHEQUE WHEN CUSTOMER HAD SUFFICIENT FUNDS IN HIS ACCOUNT – WHETHER LIBELOUS

Facts

The plaintiff was a legal practitioner at the Federal Ministry of Justice, Lagos State, and also the executor and trustee of the estate of his late father. In his position as personal representative, obtained a judgment for the sum of £3,956.01 in respect of a parcel of land. The said amount was paid into his personal savings account opened with the defendant bank. Consequently upon an action instituted by his co-executrix of the estate in respect of the said amount, the Ikeja High Court made an order that the money be deposited with the court. In compliance with this order, the plaintiff drew a cheque on the defendant to cover the said sum. At the time the cheque was issued the plaintiff had sufficient funds in his account to meet the payment of the cheque.

Later, the plaintiff was informed by the registrar of the court that the cheque was returned with the endorsement “Referred to Drawer” written on it.

At the trial, learned Counsel for the plaintiff submitted that the only imputation to be drawn from the endorsement on the cheque was that the plaintiff was not only in serious financial...
difficulties, but also as a trustee of an estate, he had stolen the money entrusted to him.

Replying, the learned Counsel for the defendant submitted that as far as the bank was concerned, it was not proved that the plaintiff was a trustee. He submitted further that since no actual injury to the plaintiff was pleaded and proved, all that the plaintiff would be entitled to was nominal damages.

Held –

1. Since the plaintiff had sufficient funds in his current account with the bank to meet the payment of the cheque, the only imputation proved with the endorsement “Refer to Drawer” was that the plaintiff was in serious financial difficulties and unable to satisfy his creditors.

2. The endorsement “Refer to Drawer” written on the cheque was libelous.

3. The plaintiff has proved that when the cheque was dishonoured he was not only embarrassed, but he felt also humiliated because he was portrayed to the High Court Registry, Ikeja as a high Government official who was in serious financial difficulties having regard to the amount of the cheque. The law therefore allows for his injured feeling to be taken into consideration as a specific element of damages.

Judgment for the plaintiff.

Cases referred to in the judgment

Nigerian

Oyewole v. Standard Bank of West Africa (1968) 2 All N.L.R. 32

Uyo v. Egware (1974) 1 All N.L.R. (Part 1) 293

Counsel

For the plaintiff: Ajayi (with him Miss Bassey)

For the defendant: Oduba
Judgment

**KAZEEM J:** The plaintiff’s claim is for a sum of ₦100,000 as damages for libel written and published by the defendants of the plaintiff on or about the 1st February, 1972 concerning the plaintiff’s cheque.

The plaintiff at the material time was a legal practitioner and legal adviser in the Federal Ministry of Justice, Lagos. He was also an executor and trustee of the estate of his late father. He had previously, in his position as one of the personal representatives of his late father, obtained judgment for a sum of £3,956.10 in respect of litigation for a parcel of land in the estate which he paid into the personal savings account he had opened with the defendant/bank. Later, consequent upon an action instituted against him by his co-executrix of the estate in respect of the said amount, an order was made by the High Court, Ikeja that the amount be deposited in court. In compliance with that order, the plaintiff drew a cheque dated 25th January, 1972 on the defendant/bank for the said sum of £3,956.10 (exhibit A) and paid it to the High Court Registry, Ikeja. Simultaneously, he caused a sum of £3,960 to be transferred from his personal savings account with the bank into another personal current account which he had opened with the bank, see exhibit J. Thus at the time when the cheque, exhibit A was issued by the plaintiff, he had sufficient fund in his personal current account with the defendant/bank to meet the payment of the cheque.

A few days after the payment of the cheque into the High Court Registry, Ikeja by the plaintiff, he was informed by the senior Registrar of that court that the cheque was returned with the endorsement “Referred to Drawer” written on it, see exhibit A. Consequently, he became embarrassed by the endorsement and he had to see both the senior Registrar and the Judge who made the order of court; and as a result of what transpired at the interview, he had to pay another amount into court.
The senior Registrar said that when the cheque was returned with the endorsement, he at first in accordance with the normal routine wanted to call in the police, but later after consultation with the Judge who made the order, he summoned the plaintiff to come and discuss the matter with him. He further said:

“... When his cheque was returned by the treasury as having been dishonoured, I believed that because of his position as a trustee, he could not issue me with a dishonoured cheque.”

However, apart from saying that he could not believe that the plaintiff had sufficient funds in his account, no other evidence was adduced as to what the Judge thought of the plaintiff when the matter of the dishonoured cheque was brought to his notice. There was also no evidence before the court that when the plaintiff opened the two accounts with the defendant/bank, they were aware of the fact that he was an executor of an estate or that the cheque was issued in payment of any estate transaction.

The defendants in their amended statement of defence averred inter alia as follows:

1. The defendants admit paragraph 1 of the statement of claim to the extent that the plaintiff is a member of the English and Nigerian Bars and that he is a Legal Adviser in the Federal Ministry of Justice, but the defendants had no knowledge of the fact that the plaintiff was one of the executors of the will of JK Coker (deceased) and put the plaintiff to strict proof thereof.

4. The defendants will contend with further reference to paragraph 8 of the statement of claim that the remark ‘Refer to Drawer’ was in fact put on the cheque in error and in good faith since the cheque was mistaken for that of another customer named Oke whose signature resembles that of the plaintiff and who was a long–standing current account customer, the current account of the plaintiff having been opened only a few days before.

5. Paragraph 7 of the statement of claim is denied. The defendants will contend that the remark ‘Refer to Drawer’ did not
mean and cannot be construed to mean that the plaintiff is in serious financial difficulties and unable to satisfy his creditors and that he is a person to whom credit ought not to be given and that no one ought to have any business dealings with him.”

But at the trial, they did not call any evidence in support of those averments.

At the conclusion of the trial, learned Counsel for the plaintiff submitted that the endorsement on the cheque exhibit A was libellous and that the imputation proved that the plaintiff was not only in serious financial difficulties, but also that as a trustee of an estate, he has stolen money entrusted to him. On the question of damages, he urged the court to take into account the injured feelings of the plaintiff and have regard to the embarrassment and humiliation which he suffered as a result of the libel. The court was also asked to take notice of the fact that the defendants did not offer any amends in compliance with section 6 of the Defamation Law, (Cap 34) of the Laws of Lagos State.

In his reply, learned Counsel for the defendants submitted that it was not proved that as far as the bank was concerned that the plaintiff was a legal practitioner or a trustee; but to them he was a mere private person. Although he did not seek to contend that the endorsement was not libellous, he pointed out that of the two persons to whom the libel was published, it was only the senior registrar who testified and he said that he did not believe that the plaintiff could issue a dishonoured cheque. He therefore submitted that since no actual injury to plaintiff’s credit was pleaded and proved as special damage, all that, the plaintiff would be entitled to was nominal damages. He cited Oyewole v. Standard Bank of West Africa (1968) 2 All N.L.R. 32 in support.

The first point for consideration is whether the endorsement “Refer to Drawer” written on the cheque, exhibit A by the defendants was libellous of the plaintiff. I am satisfied from the evidence before me that at the material time, the
plaintiff was not only a legal practitioner, but he was also a legal adviser in the Federal Ministry of Justice. That much was admitted by the defendants themselves in paragraph 1 of their amended statement of defence; but I am not satisfied from the evidence that the defendants were aware at that time that the plaintiff was an executor or a trustee of any estate. I am also satisfied that when the endorsement came to the notice of the senior registrar of the High Court Ikeja, he knew the plaintiff to be at least, a senior state Counsel of the Federal Ministry of Justice; he took the view that the plaintiff was in serious financial trouble and he was out to defraud the registry; otherwise he would not have wished on the first impulse to report the matter to the police.

It was proved satisfactorily that at the material time, the plaintiff had sufficient funds in his current bank account to meet the payment of the cheque. Hence having regard to all the other factors, I am satisfied that the only imputation proved was that the plaintiff was in serious financial difficulties and unable to satisfy his creditors.

Consequently, I find the endorsement “Refer to Drawer” written on the said cheque exhibit A to be libellous.

On the question of damages, learned Counsel for the defendants had urged that only nominal damages should be awarded because no actual injury to credit was pleaded as special damages and proved and he cited the decision in Oyewole v. Standard Bank of West Africa [1968] 2 All N.L.R. 32 in support. But in that case, a legal practitioner sued a bank for breach of contract for dishonouring a cheque when he had an arrangement for an overdraft with that bank. He did not proceed with his other claim for libel on the cheque. Taylor CJ *inter alia* after reviewing many authorities on the point held that where a bank dishonours the cheque of a customer who is not a trader, actual injury to credit must be pleaded and proved as special damage in order to succeed. However, since in that case special damages were not pleaded, the plaintiff who was not a trader was awarded only nominal damages of five guineas.
In the present case, the position is however different. The plaintiff here was not only known to the defendant/bank as a legal practitioner, but also as a legal adviser in the Federal Ministry of Justice, a very senior post in that Ministry. He sued here for libel and not for breach of contract. Hence he need not prove that he has suffered any special damages. He had sufficient funds in his current bank account at the material time to meet the payment of the cheque and it was not a case of his having asked to be given overdraft by the bank. He has proved to my satisfaction that when the cheque was dishonoured he was not only embarrassed, but he felt also humiliated because he was portrayed to the High Court Registry, Ikeja as a high Government official who was in serious financial difficulties having regard to the amount of the cheque. The law, therefore allows for his injured feelings to be taken into consideration as a specific element of damages: See Gatley on Libel (6ed), paragraph 40. Moreover, the defendants did not prove what was pleaded in paragraphs 4 and 5 of their amended statement of defence.

Also, in Uyo v. Egware (1974) 1 All N.L.R. (Part 1) 293 the Supreme Court of Nigeria said at page 296 that in assessing damages in cases of this nature:

“... whatever method of assessment is employed, a great part of the exercise of assessment must be arbitrary but the entire exercise must at all stages have reference to the evidence in the case and the subject matter of the action. Such an award must be adequate to repair the injury to the plaintiff’s reputation which was damaged; the award must be such as would atone for the assault on the plaintiff’s character and pride which were unjustifiably invaded; and it must reflect the reaction of the law to the imprudent and illegal exercise in the course of which the libel was unleashed by the defendant.”

Having regard therefore to all the circumstances in this case, I will award the plaintiff a sum of £2,000 as general damages as was done in Uyo’s case (supra).

The defendant will in addition pay costs assessed at £250.

HIGH COURT OF LAGOS STATE
ADEFARASIN CJ
Date of Judgment: 7 October 1976

Banking – Collecting bank – Cheques – Banker’s duty of care – Paying an uncleared effect to a customer hardly ever in credit – Negligence – Protection afforded by sections 2 and 9, Bills of Exchange Act – When it will avail – Relevant time to determine if banker complied with duty of care to true owner

Facts

The plaintiffs brought an action against the defendant’s bank for damages for negligence and for conversion, or alternatively for money had and received.

The first plaintiff bank regularly paid out large sums of money upon cheques drawn by the Lagos Sub-Treasury. Two cheques, which appeared to be signed by Lagos Sub-Treasury officials, were presented to the defendant, made payable to the defendant in favour of a company which was one of their customers.

The company’s account was known to be unsatisfactory, it was in debit and had been for some time.

The defendant paid out a large sum upon the first of the cheques on the day it was presented while it was still uncleared. The first cheque was cleared by the first plaintiff but soon afterwards it was discovered that the two cheques were stolen and forged, and payments were stopped upon the second one.

The plaintiffs brought the present proceedings against the defendants, contending that they had been negligent in that
they had paid out upon an uncleared crossed cheque without properly scrutinising it or making inquiries.

The plaintiffs contented that the defendants had a duty to make inquiries and to scrutinise the cheque with reasonable and proper care but that they had offered their facilities to a fraudulent person in obtaining the proceeds of a cheque to which he was not entitled, and which had in fact been stolen. The defendant denied negligence or conversion.

They contended that they were not negligent in paying the proceeds of the cheque to the customer in that all necessary precautions and inquiries were made before payment was effected. The defendants further contended that even if the payment had been effected negligently the plaintiffs had themselves cleared the cheque as genuine and that the plaintiffs had been responsible for such negligence or mistake.

Held –

1. By section 90 of the Bills of Exchange Act, (Cap 21) a thing is deemed to be done in good faith when it is in fact done honestly. That section offers no protection to the defendants in this case because they had in their hands a crossed cheque drawn upon themselves for a very large sum of money in respect of a customer who had hardly ever been in credit. In their hands the cheque was an uncleared effect.

2. Any bank that pays out to a customer upon an uncleared effect in the circumstances such as here, does so at its own risk because if the cheque should be dishonoured then any payment made on account of it would have been made at the peril of the bank. In all the circumstances of the payment here the defendants’ servants who had made the payment had been grossly negligent. They had been too quick and eager to effect payment upon a cheque which must have been obvious to them to be extremely suspicious. The defendant bank neglected to make any inquiries when the circumstances suggested
3. By section 2(2) of the Bills of Exchange Act, 1964 a banker does not incur liability to the true owner of an instrument by reason only of his having received payment on it and is not to be considered as having been negligent by reason only of his failure to concern himself with the absence of irregularity in endorsement of a prescribed instrument of which the customer in question appears to be the payee.

4. A banker who pays upon a crossed cheque shall not incur liability to the true owner by reason only of having received such payment, provided they had acted in good faith and without negligence. In the instant case, the evidence establishes to my satisfaction that the bank officials who dealt with the cheque and paid out on it did not do so in good faith and in any case were negligent.

5. The relevant time for determining whether the banker has complied with his duty of care towards the true owner of the cheque is, in my opinion, the time at which he pays out the proceeds of the cheque to his own customer, so depriving the true owner of his right to follow the money into the banker’s hands.

Cases referred to in the judgment

*Foreign*

*Commissioners of Taxation v. English, Scottish and Australian Bank Ltd* (1920) A.C. 683; (1920) 123 L.T. 34


Orbit Mining and Trading Co Ltd v. Westminster Bank Ltd (1963) 1 Q.B. 794

Counsel

For the plaintiffs: Sofola
For the defendant: Ajayi

Judgment

ADEFARASIN CJ: In this action the Central Bank of Nigeria and the Attorney–General of the Federation as plaintiffs have brought their claim against the National Bank of Nigeria Limited for the sum of ₦50,313.75 being the loss suffered by the plaintiffs as a result of the defendant’s negligence and for conversion in collecting “purported” cheque No. 737452 of July 3rd, 1969 from the first plaintiff. Alternatively, they claim the same sum of ₦50,313.75 as money had and received to the use of the plaintiffs under a mistake. The facts are briefly these. The first plaintiff, the Central Bank of Nigeria, is a body corporate under the Central Bank of Nigeria Act, (Cap 30). The second plaintiff, the Attorney–General of the Federation, is the person authorised to prosecute and defend claims on behalf of the Government of the Federal Republic of Nigeria. The first plaintiff (“the Central Bank”), made out payments of large sums of money upon cheques drawn by the Lagos Sub-Treasury. Such cheques were to be signed by two officers specially authorised to sign cheques. At the material time the officers were Mr Maleghemi Edun Fregene, second witness for the plaintiffs, who was the sub-treasurer at the time and also one Mr Awoye. On July 7th, 1969 it was discovered by the Lagos Sub-Treasury that two cheque Nos. 737452 and 737453 had been removed from their cheque book which was in use for the payment of tax to the Department of Inland Revenue, once a month, in respect of officers from whose salaries
there had been income tax deductions. The cheque leaves and their counterfoils were removed altogether so as to prevent an early detection of the removal. As soon as the theft of the two cheque leaves was discovered Edun Fregene and his subordinate officials took immediate step to stop payment on either of the two cheques.

It turned out that the two stolen cheque leaves are crossed cheques of the Government of the Federal Republic of Nigeria drawn upon the Central Bank of Nigeria, Nos. 737452 of July 3rd, 1969 for £25,156.17s.6d, and 737453 of July 5th, 1969 for £35,300. They were purported to be signed by Mr Awoye and Edun Fregene. Neither of these had been authorised by anyone in the Lagos Sub-Treasury. Mr Fregene denied having signed either of the cheques or that Mr Awoye had signed any of them. I accept the evidence that neither Fregene nor Awoye authorised or signed the two cheques. These two cheques were drawn upon the Central Bank of Nigeria in favour of the defendant on account of the same customer, Dudubo Transport and Shipping Lines, and marked “Account Payee only.” The first cheque was presented on July 4th, 1969. It was crossed and was to have been credited to the account of Dudubo Transport and Shipping Lines whose account with the defendants had been most unsatisfactory and been in debit most of the time. The statement of account of Dudubo and Shipping Lines shows that it was in debit to June 9th, 1969 and continued to be in the red till the defendants credited it with the sum of £25,156.17s.6d the subject matter of the first cheque on July 4th, 1969, the day it was presented. More than that, the so-called company was allowed to draw almost the whole of the proceeds of the cheque on the day it was presented. It drew £24,200 on 4th July, 1969 and £600 on July 7th, 1969. The payment to Dudubo Transport and Shipping Lines on July 4th, 1969 of the uncleared effects on the crossed cheque, made payable to the account of payee only, forms the basis of the plaintiffs’ claim in this action. The plaintiffs’ contended that the defendants had a duty to make inquiries
and to scrutinise the cheque with reasonable and proper care but that they had offered their facilities to a fraudulent person in obtaining the proceeds of a cheque to which he was not entitled and which had in fact been stolen. The defendant denied negligence or conversion. They contended that they were not negligent in paying the proceeds of the cheque to the customer in that all necessary precautions and inquiries were made before the payment was effected. The defendant further contended that even if the payment had been effected negligently the plaintiffs had themselves cleared the cheque as genuine and that the plaintiffs had been responsible for such negligence or mistake.

I have considered the evidence adduced on both sides carefully and I have come to the conclusion that the cheques had been stolen from the sub-treasurer’s office and that the signatures on them were forgeries. It has been clearly established that Dudubo Transport and Shipping Lines had performed no service to the Government of the Federal Republic of Nigeria for which they were entitled to £25,156.17s. on the first cheque or £35,300 on the second cheque. It has also been established to my complete satisfaction that neither Mr Edun Fregene nor Mr Awoye signed either of the two cheques or had any intention of making any payment in favour of the National Bank of Nigeria in favour of Dudubo Transport and Shipping Lines. The cheque book from which the leaves were stolen was for drawing up cheques in respect of tax payments in favour of the Inland Revenue Department, a purpose entirely different to the one for which the forgeries were made. The defendant pleaded in paragraph 4 of their statement of defence that they had made the payments to the customer after necessary precautions and inquiries had been made by them. Not only did the defendants not establish this at the trial, their own witnesses gave evidence showing that the senior bank officials who dealt with the first cheque, rather than make any inquiries on the cheque or take any precautions to prevent a fraud upon themselves and the central bank, collaborated with the customer and enabled
him (or them) to make away with most of the proceeds on
the cheque to which he was not entitled prior to the time
when the cheque might have been cleared. The first witness
for the defendants, Kayode Olaribigbe, admitted that a col-
lecting bank has a duty to perform, accepting to collect upon
a crossed cheque. He said cheques are crossed in order to
prevent fraud. He admitted also that if the bank had a doubt
about a crossed cheque it has a duty to make inquiries. He
said that if he was faced with a customer with a bad record
with a cheque in a large sum he would be suspicious and
make inquiries including telephoning the drawer to make
inquiries from him. He said he would not allow such a cus-
tomer to draw on the big cheque on the same day it was pre-
sented unless the cheque had been cleared. Dudubo Trans-
port and Shipping Lines were admitted to be an unsatisfac-
tory customer on behalf of whom a crossed cheque had been
presented in circumstances calling for an inquiry. That com-
pany broke all the rules laid down by Mr Olaribigbe regard-
ing payment on a crossed uncleared cheque and yet it was
paid, almost in full, in respect of cheque drawn in its favour
which had not been cleared.

The testimony of the second witness for the defendants,
Batorudiki Orupa, was even more damaging to the case of
the defendants. Mr Orupa had received the first cheque on
July 4th, 1969 together with a bank advice in triplicate. He
had stamped the bank advice and prepared a national bank
teller which he passed on to the central cashier. From the
evidence of this witness it was obvious that a senior official
of the defendants’ bank, Mr Coker, had known that the
cheque was on its way and had asked Mr Orupa to let him
know as soon as it arrived. The following facts emerged in
the testimony of Mr Orupa, now a medical student.

“Mr Coker was the accountant then. He asked me about the first
cheque and I said it had not yet arrived. He told me that when the
cheque arrived I should let him know. When the cheque arrived I
told him. He asked if I had passed the entry and I said I had
done . . . I took the cheque to Mr Coker because that was his in-
struction to me . . .”
It seems clear upon the evidence adduced on both sides that the officials of the defendant’s bank who dealt with the cheques, with the result that substantial payment was made upon the first cheque when it had not been cleared had not dealt with it honestly or in good faith. By section 90 of the Bills of Exchange Act, (Cap 21) a thing is deemed to be done in good faith when it is in fact done honestly. That section offers no protection to the defendants in the circumstances with which we are dealing. The defendants had in their hands a crossed cheque drawn upon themselves for a very large sum of money in respect of a customer who had hardly ever been in credit. In their hands the cheque was an uncleared effect. The argument at the trial turned on whether a bank in the position of the defendant here was entitled to permit a customer, always in debit, to draw upon a crossed uncleared cheque. Mr Olaribigbe stated that a customer could be allowed on such a cheque unless there is a doubt in which case the collecting bank has a duty to make inquiries. Felix Atiba, third witness for the plaintiffs, stated that a crossed cheque marked “Account Payee Only” is a restricted cheque upon which no credit should be given until it is cleared. He said it was untrue to say that a bank is entitled to pay against an uncleared cheque.

I must say that I have considered the evidence of these witnesses and prefer that of the plaintiffs’ witness Mr Atiba. Quite apart from that I have considered very anxiously the circumstances in which the defendants permitted Dudubo Transport and Shipping Lines to draw substantially on the first cheque, in spite of all the circumstances surrounding the cheque. The customer in question was a very poor and unsatisfactory customer judging from his statement of account. No one from the defendants’ side said anything about the circumstances in which the payment was made or what knowledge, if any, they had of Dudubo Transport Lines or whatever inquiries they made before paying that company on the day the first cheque was presented a sum of £24,200 out of the uncleared proceeds of a crossed cheque for
£25,156.17s.6d marked “Account Payee Only.” The averments in the defendants’ statement of defence, paragraphs 4 and 6, were not proved. No attempt whatsoever was made to lead any evidence on these averments or to show they accepted the cheque from their so-called customer. The circumstances of the cheque were such that a prudent bank official would be put on an inquiry. In the light of the evidence of Kayode Olaribigbe there were many cases of forged and stolen cheques. In my view a bank that pays out to a customer upon an uncleared effect in the circumstances here does so at its own risk because if the cheque should be dishonoured then any payment made on account of it would have been made at the peril of the bank. In all the circumstances of the payment here the defendants’ servants who had made the payment had been grossly negligent. They had been too quick and eager to effect payment upon a cheque, which must have been obvious to them to be extremely suspicious. The defendants’ bank neglected to make any inquiries when the circumstances suggesting fraud would stare anyone, let alone a banker, in the face. Mr Fregene said, and I believe him, that where a cheque is to be drawn in favour of the bank for the benefit of its customer the cheque would be drawn in favour of the bank clearly making out the name of the customer for whom it is intended, viz “National Bank of Nigeria for the account of Dudubo Transport and Shipping Lines.”

Learned Counsel for the defendants relied heavily on the English decision in Penmount Estates Ltd v. National Provincial Bank Ltd (6) in which liability under section 82 of the Bills of Exchange Act, 1882 in England was considered. That provision was similar to section 82 of our own Bills of Exchange Act which was repealed by the Bills of Exchange Act, 1964, section 2(3). By section 2(2) of the Bills of Exchange Act, 1964 a banker does not incur liability to the true owner of an instrument by reason only of his having received payment on it and is not to be considered as having been negligent by reason 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 be the payee. In the *Penmount* case, however, the point was made in the judgment of MacKinnon LJ that a banker who pays upon a crossed cheque shall not incur liability to the true owner by reason only of having received such payment, provided they had acted in good faith and without negligence. In the instant case the evidence establishes to my satisfaction that the bank officials who dealt with the cheque and paid out on it did not do so in good faith and in any case were negligent. The facts in the *Penmount* case are not similar to those in the instant case. Learned Counsel also relied on *Commissioners of Taxation v. English, Scottish and Australian Bank Ltd* (1). I don’t consider the facts in that case applicable in that it was also established in that case that the test is whether the payment of any given cheque, could with the circumstances antecedent and present, was so out of the ordinary course that it ought to have aroused doubt in the banker’s mind and caused him to make inquiries. In my view the facts in the instant case were so extraordinary that the bank should have made inquiries. Rather than that, it would seem that some of these officials of the bank aided the customer in the fraud. In such a case as this it is the duty of the court to look to the circumstances of each cheque in determining the question of negligence. The circumstances here show negligence and a lack of good faith on the part of the defendant bank’s officials. The defendants failed to prove that they had acted without negligence: See *Orbit Mining and Trading Co Ltd v. Westminster Bank Ltd* (5) (1963) 1 Q.B. at 822-824; (1962) 3 All E.R. at 578 and *Marfani and Co Ltd v. Midland Bank Ltd* (3) on the need for a bank in order to be protected to have acted with the ordinary practice of careful bankers and to have discharged the onus of showing that they acted without negligence. If I may say so the facts in the instant case are different from those in *Marfani’s* case. The court is entitled to examine the banking practice in question and to form its own judgment as to whether it conforms with the standard of care which a prudent banker should adopt. See
the Court of Appeal decision in Marfani’s case (1968) W.L.R. at 975; (1968) 2 All E.R. at 581; Hedley Byrne and Co Ltd v. Heller and Partners Ltd (2) (1964) A.C. 465 at 486 (1963) 2 All E.R. at 583; *ibid* at 494; 588; *ibid* at 514; 601; Motor Traders Guar Corp Ltd v. Midland Bank Ltd (4) (1973) 4 All E.R. at 95-96; 157 L.T. at 500-501 In Marfani’s case on appeal the test for determining whether the banker had complied with the duty of care was stated as follows (1968) 1 W.L.R. at 975; (1968) 2 All E.R. at 580-581:

> “The relevant time for determining whether the banker has complied with his duty of care towards the true owner of the cheque is, in my opinion, the time at which he pays out the proceeds of the cheque to his own customer, so depriving the true owner of his right to follow the money into the banker’s hand.”

While taking up learned Counsel for the defendant on his arguments on the issue of negligence, learned Counsel for the plaintiffs, Mr Sofola, referred to the observations of the court of Criminal Appeal in *R v Kritz* (7) on the practice of drawing on uncleared cheques. This to my mind throws some light as to whether there is negligence with regard to a banker who permits a customer to draw on uncleared effects. As I had said earlier each case should be considered on its own facts but the circumstances in the present case renders the permission by the defendants for Dudubo Transport and Shipping Lines to draw almost all the proceeds of the crossed and uncleared cheque highly negligent and irresponsible. In *R v. Kritz*, to which I referred, the court said, in reference to uncleared cheques [1949] 2 All E.R. at 407:

> “Drawing against uncleared cheques is one of the oldest forms of fraud. Generally, bank managers are too much on their guard to let it go on, but in this case by means of specious lies which the appellant told the bank manager . . .” (These words do not appear in the report of the case at (1950) 1 K.B. 82).”

I am quite satisfied here that the payment was due to the negligence and lack of good faith on the part of the defendants’ official for which the defendants are liable. The fact
that the central bank’s official, Mr Atiba, subsequent to the
defendants making payment in respect of the first cheque,
gave payment on the cheque in question does not, to my mind,
affect the liability of the defendants. The defendants had at
their disposal numerous materials to put them on inquiry but
they did not make one. Had the first cheque been allowed to
go through the normal banking process the fraud would have
been detected as indeed it was before the second cheque came
up for payment. I accept the evidence that collecting bankers in
the position of the defendants and the circumstances of the
first cheque were impliedly representing that they were col-
lecting upon the cheque having made such inquiry and scru-
tiny of the cheque as was unnecessary. In my judgment the
defendants are liable in negligence to the plaintiffs and I
would enter judgment in favour of the plaintiffs against them
for ₦50,313.75 with costs which I assess at ₦800. I want to
place on record the scholarship and industry shown by
Counsel on both sides, which has been of tremendous assis-
tance to me in the case.

*Judgment for the plaintiffs.*
Johnson v. Odeku

HIGH COURT OF_LAGOS STATE

TAYLOR CJ

Date of Judgment: 23 OCTOBER 1976

Banking – Banker and customer – Action for money lent – Condition precedent thereof

Banking – Loans and overdraft – Repayment thereof

Statute of Limitation – Actions for money lent – When right of action accrues

Facts

The plaintiff claimed the sum of £1,373.17s.2d as balance due in respect of money loaned to the defendant by the Merchants Bank Limited (now in liquidation) between January 1st, 1956 and September 23rd, 1960 inclusive, together with interest at the rate of 5% per annum.

The defendant considerably overdrew his account with a bank over a period of years. His account ceased to be in credit in 1958 and he made his last withdrawal in 1960. The bank then went into liquidation and in 1966 the plaintiff liquidator instituted proceedings on its behalf against the defendant to recover the amount of the overdraft plus interest.

The plaintiff contended that: (a) the bank’s right of action did not accrue until notice was given or demand was made upon the defendant to pay the debt; (b) a demand was made by the bank when the writ was issued a year before; and (c) as the limitation period was six years from the date on which the cause of action accrued by virtue of section 7 of the Limitation Decree, 1966, the claim was not statute-barred.

The defendant contended that the action was statute-barred as time began to run from the last time that the account was in credit in 1958, or, alternatively, from the date of the defendant’s last withdrawal in 1960 or from the last date on
which interest was charged in 1960; and admitted part of the debt as shown in the account books produced in court.

**Held** –

1. There is an implied term between banker and creditor, where an overdraft is given that there should be no right of action until notice is given and demand made.

2. In the absence of a special agreement, a demand by the customer was a necessary ingredient in the cause of action against the banker for money lent.

3. It would be unreasonable for a bank, after having granted an overdraft to immediately proceed to sue for it, without making a demand, and giving the customer a reasonable time to pay.

4. A demand, either by the issue of a writ or otherwise is an essential ingredient in the cause of action, and without such demand no cause of action accrues; and no right of action accrues until notice is given or demand made.

**Cases referred to in the judgment**

**Nigerian**


**Foreign**

*Joachimson v. Swiss Bank* (1921) 3 K.B. 110

*Paar’s Banking Co, Ltd v. Yates* (1898) 2 Q.B. 460

**Counsel**

For the plaintiff: Ademakinwa

For the defendant: *No appearance stated*

**Judgment**

*TAYLOR CJ*: The plaintiff claimed the sum of £1,373.17s.2d as balance due in respect of money loaned to the defendant by the Merchants Bank Limited (now in liquidation) between January 1st, 1956 and September 23rd, 1960 inclusive, together with interest at the rate of 5% per annum.
The suit was filed on September 21st, 1966, and pleadings were ordered on November 21st, 1966. The plaintiff was at liberty to file his pleadings within 30 days and the defendant within 30 days of service on him. The plaintiff duly filed his pleadings on December 7th, 1966, but no statement of defence was filed by the defendant. Consequent upon this, the plaintiff moved the court on July 24th, 1967 for judgment to be entered against the defendant for failing to file a defence. It is deposed to by learned Counsel for the plaintiff, in paragraphs 8, 9, 10 and 12 of the affidavit in support of the motion, that the defendant was duly represented by learned Counsel when pleadings were ordered; that the court’s order was to the effect that service on solicitors would be deemed to be sufficient service on the parties; and that Mr AA Adesanya for the defendant was fully served on December 7th, 1966 with a copy of the statement of claim.

On July 27th, 1967, the defendant filed a motion in court for an order for extension of time to file a defence that was some six months out of time. In the affidavit it is admitted that Mr AA Adesanya did appear for the defendant on the day pleadings were ordered by Caxton-Martins J. It is also admitted that enquiry showed that the pleadings were served on Mr AA Adesanya, but it is said that the latter refused service. It is relevant at this stage to draw attention to the order of Caxton-Martins J, which was addressed to Mr Ademakinwa for the plaintiff and Mr AA Adesanya for the defendant. It gave 30 days to the plaintiff to file and serve a statement of claim, and thereafter 30 days to the defendant to file and serve a statement of defence. Service on their solicitors was deemed to be good and sufficient service.

The plaintiff had therefore done all that was required of him by serving Mr AA Adesanya for the defendant on December 7th, 1966. In the affidavit supporting the motion for extension of time, the only mention made by the defendant as to his defence is obtained in paragraph 14, which states that: “I have looked through the statement of account attached to the motion and I have a good defence to this action.” What
that defence is, the defendant did not disclose; nor was a copy of the intended statement of defence attached to the motion and affidavit. In the counter affidavit filed in reply to the motion, and in particular paragraphs 20 and 21, Counsel for the plaintiff deposed not only that the copy of the statement of claim was left in Mr Adesanya’s office, but that later a conversation with Mr Adesanya confirmed that he had received the statement of claim. The clerk in the chambers of the plaintiff’s solicitor who served the statement of claim swore to an affidavit confirming service on Mr AA Adesanya.

On September 18th, 1967, Counsel for the defendant; now Mr Souza, while still denying receipt of the statement of claim, went on to say that: “We are not sure whether the amount we are sued for is the amount due from us. If the parties meet, we would go through the bank records and whatever is due we will agree on it.”

From this it became apparent that the defendant, while admitting that he had taken money on loan or on an overdraft from the bank, was in no position to say what the true amount was until he had seen the bank records. If the defendant was in any way sincere in this statement, he had some 12 months between the service of the writ on him and September 18th, 1967 to have fully satisfied himself about this. He did nothing.

I therefore ordered that in the absence of any defence, this suit should be set down for hearing on October 4th, 1967.

On October 4th, 1967 I gave the defendant every liberty to cross-examine the plaintiff’s witnesses and to address me at close of proceedings. My record shows that the only real defence he sought to raise was the legal defence that the claim was statute-barred. Even though this was a legal defence that should be raised on the pleadings, I heard Mr Ademakinwa in reply to this point as I was duty-bound to consider this point even if the defendant had not raised it.
The liquidator of the bank tendered a copy of the statement of account compiled by him from the bank’s books and verified it as correct. Four of the bank’s books were brought to court and were made available to the defendant, should he choose to make use of them for purpose of cross-examination. The only books of the bank relating to this account which were not available were those dealing with the period beginning July, 1959 and ending September 23rd, 1960. These books, the liquidator stated, were part of the exhibits in a case now on appeal to the Supreme Court. He did, as I said, swear that he had prepared the account from the books in court at the hearing and those in another case now on appeal to the Supreme Court, and that they were correct. No application was made by the defendant, who is a legal practitioner, for the production of those books and no cross-examination was conducted in respect of those available in court.

The defendant seemed in his address to be quite prepared to admit the sum of £277.3s.2d, plus interest, which the liquidator said was the sum owed up to June, 1959, as contained in the account books in court. If he admits that, I cannot see how, in the absence of payment, he can deny the rest of the sums contained at folio 4 of the account up to March 31st, 1960, which represent nothing but interest due on the sum owing. This same line of argument applies to the first four statements at page 5 of the same account. The rest of the seven items are as follows:

<table>
<thead>
<tr>
<th>Date</th>
<th>Description</th>
<th>£.</th>
<th>s.</th>
<th>d.</th>
</tr>
</thead>
<tbody>
<tr>
<td>August 12th</td>
<td>to J.A. Odeku (32801)</td>
<td>600</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>August 13th</td>
<td>to cheque book (32801-32825)</td>
<td>4</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>August 15th</td>
<td>to J.A. Odeku (32802)</td>
<td>400</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>August 27th</td>
<td>to S.O. Olabode (32803)</td>
<td>50</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>August 31st</td>
<td>to interest on overdraft</td>
<td>6</td>
<td>15</td>
<td>8</td>
</tr>
<tr>
<td>September 23rd</td>
<td>to C.O.T. September 1960</td>
<td>1</td>
<td>6</td>
<td>3</td>
</tr>
<tr>
<td>September 23rd</td>
<td>to interest on overdraft</td>
<td>8</td>
<td>11</td>
<td>11</td>
</tr>
</tbody>
</table>
The plaintiff has given evidence that, on August 12th, and August 15th, 1960, the defendant drew on overdraft the sums of £600 and £400 respectively by cheques Nos. 32801 and 32802. The item of 4/2d shows that the defendant was debited with the cost of a cheque book, Nos. 32801-32825, on August 13th, 1960, and the cheque issued on August 27th to one SO Olabode for £50 was No. 32803.

There is no defence on the facts to the claim before the court. The only point that arises for decision is whether the claim is statute-barred or not. On the account as filed the last payment made by the defendant to the credit of his account on April 23rd, 1958, when he paid in a sum of £8,760. On payment in of this sum, his account, which had previously been in debit, was credited to the extent of £8,456.4s.2d and remained in credit for barely one month. It was in debit again by May 9th, 1958, and has progressively been in debit from then till the account was prepared. The question that has to be answered is, from what period does the Statute of Limitation begin to run? Does it begin to run as from the last time the account was in credit, ie May 7th, 1958, or from the first time after May 7th, 1958 that it was in debit, ie May 9th, 1958, or from the last withdrawal made in debit by the defendant, ie, December 27th, 1960, or from the last date on which the interest was charged, ie, September 23rd, 1960, or finally, from the date of the last demand made by the bank to the defendant for payment?

My attention was drawn by Mr Ademakinwa, learned Counsel for the plaintiff, to the law as stated in Parr’s Banking Co, Ltd v. Yates (3), Official Receiver and Liquidator v. Moore (2) and Joachimson v. Swiss Bank Corp (1).

These authorities, with the exception of Official Receiver and Liquidator v. Moore (Nigerian Farmers’ Bank case), deal with cases where the position is the converse of that in issue in this case. They deal with cases where money was standing to the credit of a customer on a current account
with a banker, and in the absence of special agreement a
demand by the customer was a necessary ingredient in the
cause of action against the banker for money lent. The
above-mentioned case deals with a position similar to this
except in one respect, to which I shall refer later. In that case
Dickson J upheld the submission of Mr Harvey-Robson for
the plaintiff as follows (1959 Lag. L.R. at 50):

“Mr Harvey-Robson, in what I may call an attractive argument
points out that the Court of Appeal in Joachimson’s case, gave
cogent reasons for holding as they did, and submits the reasons
are just as cogent when the boot is on the other leg. He submits it
is common and proper for business to be financed by overdrafts
provided it is done properly, and if the banks were free to issue
writs, in those circumstances business would be ruined. He con-
tends that in the light of Joachimson’s case, and for practical con-
siderations there is an implied term between banker and creditor,
where an overdraft is given that there should be no right of action
until notice is given and demand made.

In view of the decision in Joachimson’s case, I would be inclined
to take the view that it would be unreasonable for a bank, after
having granted an overdraft to immediately proceed to sue for it,
without making a demand for it, and giving the customer a rea-
sonable time to pay. I can hardly think that it would be in the con-
templation of a customer to whom an overdraft was given that the
bank would without warning issue a writ.”

I take it that the principle in Joachimson v. Swiss Bank Corp
(1) were applied, “on the other leg”, to use the words in the
above quotation, the following proposition as to the nature of
the demand as stated by Warrington LJ would equally apply
on the other leg. (1921 3 K.B. at 126; [1921] All E.R. at 99):

“All these matters seem to me to distinguish the contract between
banker and customer from the ordinary case of a loan I think we
are at liberty to hold, and ought to hold, that a demand, either by
the issue of a writ or otherwise, is an essential ingredient in the
cause of action, and that without such demand no cause of action
accrues.”

Mr Ademakinwa concedes that he has not successfully
proved a written demand such as was pleaded, and must
therefore fall back on the demand as made by the writ of September 21st, 1966. Now by virtue of section 7 of the Limitation Decree, 1966 all actions on contract or quasi-contract are barred after the expiration of six years from the date on which the cause of action accrued. I would accept the law as laid down by Dickson J in *Official Receiver and Liquidator v. Moore* (2) and would hold that no right of action accrues until notice is given or demand made. This means therefore that the defence must fail and the action is not statute-barred.

Looking at this matter even in a light most favourable to the defendant, and it is in this way that this differs a little from that of *Official Receiver and Liquidator v. Moore* (2), the bank went into liquidation in April, 1961. From this I think it can be inferred that once a liquidator was appointed on September 7th, 1962, it would be his duty to demand all sums then due to the bank. The plaintiff’s witness says that such a letter was sent to the defendant in 1961. The defendant denies it. From 1961 till the time the action was brought in 1966 would only be a period of five years.

For the reasons stated above I am satisfied that the plaintiff has proved his case and I give judgment for him for the sum of £1,373.17s.2d, but make no order for interest as the plaintiff has failed to give satisfactory reasons why he did not enforce his claim before 1966.

The plaintiff is entitled to his costs which I assess at £43.2s.6d, out-of-pocket expenses and Counsel’s costs of 45 guineas, making a grand total of £90.7s.6d.

*Judgment for the plaintiff.*
Attorney–General of the Federation v. Ekpa

FEDERAL HIGH COURT, PORT-HARCOURT
AKANBI J

Date of Judgment: 28 October 1976
F.R.C./P.H./25C/75

Banking – “Banking business” – What constitutes – Mere receiving of money as deposit from outside source – Whether an offence under section 1(1) of the Banking Decree, 1969

Criminal law and procedure – Issuing advertisement to the public to deposit money without banking licence – Whether an offence – Section 27(1) Banking Decree, 1969 construed

Facts

Mr John Umoh Ekpa, the accused was arraigned on a two count charge of transacting banking business and for issuing advertisements inviting for deposits from the public without a banking licence contrary to sections 1 and 27 of the Banking Decree, 1969.

The accused was at all times material to the criminal prosecution the proprietor of Global Savings Syndicate. The accused, through his agents or employees, collected money from market women and a few other persons. Such daily collections as were made were paid into an account held by the accused with the Mercantile Bank of Nigeria Limited, Calabar. The accused was entitled to draw as his commission, an agreed amount by way of promoting the business. The accused also issued out advertisement in the form of hand-bills and radio announcements, hence the criminal prosecution.

Held –

1. The business carried on by the accused even by the loose definition of banking business under section 41 of the
Banking Decree was not a banking business. Even if section 41 is given the literary meaning, mere receiving of money as deposit from an outside source, is not sufficient to constitute the offence. In the instant case the accused was in the strict sense of the word not carrying out a banking business.

2. The pith and substance of the Banking Decree is to prevent the establishment of financial institutions like commercial banks, acceptance houses, discount houses, at which normal banking business may be transacted, without a valid licence to do so. It is not to prevent people from making little savings which was the idea behind the establishment of the Global Savings Syndicate ran by the accused. In the instant case therefore, the two documents exhibits J and D33, tendered in support of the allegation of advertisement cannot be construed to be a sort of advertisement contemplated by section 27 subsection (1) of the Banking Decree.

Accused discharged and acquitted.

**Nigerian statute referred to in the judgment**

Banking Decree, 1969, sections 1(1) and (3), 27 (1) and (3)

**Counsel**

For the prosecution: Osolake

For the accused: Akparanta

**Judgment**

AKANBI J: The accused is charged as follows:

First Count:–

“That you John Umoh Ekpa carried on business in the name of Global Agency and Savings Syndicate between July and October, 1972 at Calabar in the South Eastern State, transacted business without a valid license contrary to the provisions of section 1 subsection (1) of the Banking Decree, 1969, and thereby committed an offence punishable under section 1 subsection (3) of the said Banking Decree, 1969.”

Second Count:–

“That you John Umoh Ekpa carried on business under the name of Global Agency and Savings Syndicate between 24th and
17th October, 1972 at Calabar in the South Eastern State not being a licensed bank, issued advertisement inviting public to deposit money with you contrary to the provisions of section 27(1) of the Banking Decree, 1969.”

The facts of the case are in the main, not in dispute. The accused was at all material times the proprietor of a business named, Global Savings Syndicate. There is evidence which I accept, that accused, through his agents or employees, collected money from market women and a few other persons. Such daily collections as were made were paid into an account held by the accused with the Mercantile Bank of Nigeria Limited, Calabar. The accused was entitled to draw as his commission, an agreed amount. By way of promoting this business, accused also issued out advertisement in the form of hand-bills and radio announcements.

The prosecution said the nature of the accused’s business is caught by the provision of section 1 subsection (1) of the Banking Decree. Having given thorough consideration to the evidence adduced, even by the loose definition of “banking business” under section 41 of this Decree, is in fact a banking business for it is my view that if that section is given the literary meaning which State Counsel had asked me to place on it, that is, mere receiving of money as deposit from outside source is sufficient to constitute the offence, then very few people in this country will not be caught in the grip of that Decree. It is also my view that the pith and substance of the Banking Decree is to prevent the establishment of financial institutions like commercial banks, acceptance houses, discount houses, at which normal banking business may be transacted without a valid license to do so. It is not to prevent the people from making little savings which it appears to me is the idea behind the establishment of the Global Savings Syndicate run by the accused. That being so, I also do not think that exhibits J and D33, the two documents tendered in support of the allegations of advertisement, can be construed to be sort of advertisement contemplated by section 27 subsection (1) of the Banking Decree.
I accept the explanation of the accused with regard to his evidence in promoting his agency and I am unable to say that he was in the strict sense of the word, carrying out a banking business. Accordingly, I find him not guilty of the charges laid in counts 1 and 2.

He is acquitted and discharged.
Odumosu v. African Continental Bank Limited

SUPREME COURT OF NIGERIA

SOWEMIMO, IRIKEFE, IDIGBE JJSC

Date of Judgment: 19 NOVEMBER 1976

S.C.: 266/74

Banking – Banker and customer relationship – Overdraft – Deposit of title deeds for safe keeping – Failure of bank to return upon demand – Guiding principles – Bank alleging that deposit of title deeds was for security for loan – Request by customer for return of title deeds – Effect of failure of bank

Damages – Measure of – Guiding principles in a case of detinue

Facts

The plaintiff, a dealer in electrical and allied products, was a customer of the defendant and enjoyed overdraft facilities up to a limit of £20,000 on his own personal guarantee, and on the terms that subject to “satisfactory operation of his account” the overdraft was subject to “automatic renewal” at the end of every calendar year. This was for the period prior to January, 1970. Sometime in January, 1971, consequent upon a burglary committed in his house, he lodged with the defendant bank four documents: three conveyances and a life policy for safekeeping.

In early February, 1971, the plaintiff was granted a short term loan of £25,000 for a period of three weeks which he alleged he had repaid. Thereafter he continued to operate the account, but by July, 1972 his account was overdrawn beyond the limit allowed. With the account still overdrawn, the plaintiff concluded business dealings with a foreign company for supply of goods. He approached two banks for facilities to pay for the goods. The banks requested security to cover the loan.
The plaintiff therefore demanded from the defendant the return of the four documents explaining the purpose for which they needed them. The defendant refused to return the documents claiming that they were deposited by way of security, ie equitable mortgage to secure the loan of £25,000, which the plaintiff asked for in February, 1971 at a time when his account was already overdrawn to the tune of £8,000.

The plaintiff’s claims at the trial Court were for the return of his four documents deposited with the defendant for safe custody which the defendant had refused or failed to surrender to the plaintiff despite repeated demands and the sum of £50,000 being special and general damages for wrongful detention by the defendant of the said documents.

The trial Court entered judgment for the plaintiff. The defendant appealed to the Supreme Court and the plaintiff cross-appealed. The defendant’s appeal was struck out for procedural error. Only the cross-appeal of the plaintiff was considered by the Supreme Court. The plaintiff in the cross-appeal contended that the amount of N8,000 awarded by the learned trial Judge as damages was inadequate and that the Judge erred in law in holding that the evidence before him fell far short of establishing special damages.

Held –
1. Where the documents of a customer deposited with the bank for safe keeping are wrongfully detained, a claim for *detinue* will lie.
2. A claim for *detinue* is not for damages but for the return of the specific goods wrongfully detained (or their assessed value). However, if damages are proved to have been sustained, it will in addition to an order for the delivery of the chattels (or specific goods) be awarded.
3. The measure of damages for detention of goods of documents as in this case, ie *in detinue* is peculiar and the normal measure is usually:–
   (i) the market value of the goods where delivery of
the specific goods detained has not been ordered; and

(ii) even in the cases where an order for the return of the goods has been made, a sum of money representing the normal loss through the detention of the goods; and this (when applicable) quite often is the market rate at which the goods could have been hired during the period of detention.

4. A customer of a bank is entitled to damages for loss arising from his liability to make use of the specific goods or documents deposited with the bank and this can be recovered under either head of damages general or special.

Appeal dismissed.

Cases referred to in the judgment

Nigerian

Boshali v. Allied Commercial Exporters Ltd (1961) 1 All N.L.R. 917
Oshinjinrin v. Elias (1970) 1 All N.L.R. 15

Foreign

Anderson v. Passman, Gent (1835) 173 E.R. 86
Prehn v. The Royal Bank of Liverpool (1870) L.R. 5 Exch. 92
The Medianna (1900) A.C. 113
The Susquehana (1962) A.C. 655

Counsel
For the appellant: Ajayi
For the respondents: Adesanya

Judgment

IDIGBE JSC: In this action the plaintiff is Chief JK Odumosu and the defendants are African Continental Bank Limited. We have before us an appeal by the plaintiff from a judgment of Bakare J dated the 5th of June, 1974, in favour of the plaintiff by which it was ordered:

(1) that defendants should return to the plaintiff three documents of title to land and a life policy of insurance deposited with the defendants by the plaintiff; and
(2) that the defendants should pay to the plaintiff the sum of N8,000 (eight thousand naira) as “general damages.”

The award is a sequel to the plaintiff’s action in detinue in which he claimed from the defendant:

“(1) the return to the plaintiff of the documents, the particulars of which are hereinafter given, which the plaintiff deposited with the defendant for safe custody and which the defendant has refused or failed to surrender to the plaintiff despite repeated demands by the plaintiff.

(Particulars of the documents in question were then set out).

(2) the sum of fifty thousand pounds (£50,000.0d) being special and general damages for the wrongful detention by the defendant of the said documents.”

Summarily, the plaintiff contends that the amount of N8,000 awarded by the learned trial Judge as damages was inadequate and that he (the learned judge) erred in law in holding “that the evidence before him fell far short of establishing special damages.”

We will now set out the facts, not only so much of them as are material to the issues raised in this appeal, because it is our considered view that a detailed review of the entire facts before the trial Court not only assists in throwing adequate light on the arguments urged upon us, but certainly explains some of the observations which we have found necessary to make in some of the passages in this judgment.

The case for the plaintiff, who is a dealer in electrical and allied products, may be summarised thus: Prior to January, 1970, he as a customer of the defendant bank enjoyed overdraft facilities up to a limit of £20,000 (twenty thousand pounds) on his own personal guarantee (ie without producing for the benefit of, or, depositing with, the bank any form of security), and on the terms that subject to “satisfactory operation of his account” the overdraft was subject to “automatic renewal” at the end of every calendar year. In or
about January, 1971, consequent upon a burglary committed in his house, he lodged with the defendants, for purposes of “safe keeping” (i.e. safe custody) some of his precious documents which “survived the burglary” (i.e. three conveyances, instruments of title to land and one life policy the particulars of which were duly set out in the endorsement on his writ of summons and in his pleadings). These documents which consist of:

- **(a)** two land certificates of title to two landed properties situate in the Surulere district of Lagos valued at £45,000 and £35,000 respectively;
- **(b)** one instrument of title in respect of landed property situate at Bashua village in the Shomolu district of Lagos valued at £25,000; and
- **(c)** a Life Policy of Insurance for £3,000, shall hereafter in this judgment be together referred to as ‘the four vital documents’.

In early February, 1971, a few weeks after the deposit of these documents with the defendants he (the plaintiff) asked for, and was granted by the bank, what he described as “a short term loan of £25,000 for a period of three weeks” and he claimed that this was repaid on 15th February, 1971. Thereafter plaintiff continued to operate his account “within the agreed overdraft limit” but by July, 1972, his account with the defendants was overdrawn “to the tune of £17,531.11. (seventeen thousand, five hundred and thirty-one pounds and eleven shillings).’’ He emphasised both in his pleadings and testimony that the four vital documents were not deposited with the defendants “by way of equitable mortgage.”

In 1972, after an “overseas business tour” during which several business contacts were made by him, the plaintiff asked for letters of credit to be opened by the defendants first, in favour of a Taiwan trading firm (hereinafter referred to as “The Taiwan Firm”) with whom he successfully arranged for a “standing order for various table and standing fans to the value of $26,298.76 (i.e. twenty-six thousand two
hundred and ninety-eight dollars and seventy-six cents"
and, later, in favour of another Taiwan electrical firm – “IH
SHIN Electrical Works” – (hereinafter referred to as the “IH
SHIN Company”) for the supply of goods worth $24,000
twenty-four thousand dollars); thus the plaintiff has asked
the defendant bank for letters of credit to the total value of
$50,298.76 which, inclusive of bank charges at the time, was
the equivalent of about £23,000. Letters of credit were duly
opened, as requested, in favour of the Taiwan firm and IH
SHIN Company (hereinafter referred to as the “Taiwan
Companies”) who refused to accept the defendants as credit
worthy. As the plaintiff did not have ready cash he ap-
proached two other banks (the National Bank and the Bank
of America) who each promised to “accommodate him” (ie
lend money to him by opening letters of credit in favour of
the Taiwan Companies) if he produced adequate and satis-
factory security to cover the loan. Consequently, the plaintiff
demanded from the defendants the return of the four vital
documents making it clear to them the purpose for which
they were required; but the defendants refused to return the
documents. Later the plaintiff arranged with another firm,
Messrs Adebowale Electrical Industries (hereinafter referred
to as “Adebowale Company”), who, as the plaintiff claimed,
were willing to extend credit facilities to the tune of £40,000
and 25% discount to the plaintiff on all purchases of electri-
cal goods, provided he deposited with the firm adequate se-
curity to cover the facilities extended to him. Similarly, Phil-
lips Nigeria Limited to which the plaintiff was heavily in-
debted was prepared to resume trade with him, extend credit
facilities to him and allow him, as well, 25% discount on all
purchases provided he deposited with them adequate secu-
ity. Once again, he demanded the return of his four vital
documents from the defendants who refused to deliver them
to him.

The defendants who did not call any witnesses at the trial
stated inter alia in their pleadings that the deposit of the fourvital documents by the plaintiff “was by way of
security” (ie “equitable mortgage”) to secure the loan of £25,000 which the plaintiff asked for in February, 1971, at a
time when his account was already overdrawn “to the tune of £8,000.” As earlier on pointed out, the learned trial Judge
held that the documents were deposited “for safe custody” with the defendants who “mistakenly” considered they had
an equitable charge over them; and having held on to these documents “unjustifiably,” the plaintiff’s claim against them
(the defendants) must, in his judgment, succeed. The defendants appealed from the said judgment on the grounds, *inter alia*,
that they had a *lien* on the four vital documents; the plaintiff cross-appealed from the said judgment for the rea-
sons already stated.

At the hearing, the appeal by the defendants was struck out on grounds of procedural error and a subsequent application
before us, to regularise the error and thereby restore their appeal, was withdrawn by learned Counsel for the defend-
ants who considered that such an application had been overtaken by events; the events culminating in the creation,
in the interim between the striking out of the defendants’ appeal and the subsequent application for restoration of the
same, of the intermediate Appeal Court, “the Federal Court of Appeal”, to which the defendants intend to pursue their
appeal. The subsequent application by the defendants for restoration of their appeal was accordingly, struck out. The
defendants’ appeal having been struck out we feel bound—

1. to consider this appeal on the basis that the defendants unjustifiably held on to the four vital documents; and

2. will say nothing in this judgment which is likely to, or could in any way, reflect on the merits of any subsequent
   appeal by the defendants.

Henceforth, all reference in this judgment to an appeal will be to the cross-appeal of the plaintiff who, hereafter will be
referred to as the “appellant”, and the defendants will be re-
ferred to as the “respondents.” On the 20th October, 1976,
after listening to the arguments and submissions from both Counsel for the appellant and the respondents we dismissed this appeal for reasons we are now about to give.

A number of grounds, unduly *prolix* and in many respects irregular and improper, as in the main they were really arguments or contentions in support, rather than grounds of appeal, were filed; and we do not propose to set them out here since, in the end, learned Counsel for the appellant offered to argue, and indeed argued, all the grounds together. The sum of his argument was that the learned trial Judge erred in law in regarding the evidence proffered in support of the appellant’s claim for special damages as “speculative” and consequently failed to evaluate properly and adequately the said evidence. Had he properly directed himself on the law relating to proof of special damages, in circumstances similar to this case, the learned trial Judge would have made an award in respect of special damages claimed by the appellant; and we were directed to a number of cases, most of which were hardly relevant to the issues and facts in this appeal. The portion of the judgment of the learned trial Judge which is the subject of the foregoing complaint reads:

“... while I have no doubt that the plaintiff would have made some profit if he had succeeded in the importation of the electrical goods from Taiwan, I am not impressed with his speculation of a hundred percent profit. The evidence before me falls far short of establishing special damages . . .”

Earlier on, the learned trial Judge had said in a passage of his judgment:

“The plaintiff claims £50,000 (₦100,000) special and general damages. He gave evidence that if he had succeeded in importing the goods for which he required Letters of Credit, he would have made more than a hundred percent profit which he estimated at ₦18,000 from the transaction with IH SHIN Electrical Machinery Works Limited.

Adebowale Electrical Industries Limited was prepared to allow the plaintiff credit facility to the limit of £40,000 . . . and twenty-
five percent discount on all purchases from the company. The plaintiff estimated that he lost N20,000 on that deal.

The plaintiff had had business dealings with Phillips Nigeria Limited: “to which he was indebted. The company was prepared to allow him credit facility with twenty-five percent discount on purchases...”

The learned trial Judge then referred to a passage in the judgment of Coker JSC delivering the judgment of this Court in *Oshinjinrin v. Elias* (1970) 1 All N.L.R. 153 dealing with the issue of proof of special damages, which reads:

“... what is required is that the person claiming should establish his entitlement to that type of damages by credible evidence of such a character as would suggest that he indeed is entitled to an award under that head, otherwise the general law of evidence as to proof by preponderance or weight usual in civil cases operates.”

We pause to observe, once again, that this claim is in detinue, primarily the claim in this type of action is not for damages but for the return of the specific goods wrongfully detained (or their value as assessed). Damages, however, if any is proved to have been sustained, will, in addition to an order for delivery of the chattels (or specific goods) be awarded, (see *Anderson v. Passman, Gent* (1835) 7 C. and P. 193; also 173 E.R. 86 as per Coleridge J). The measure of damages for detention of goods (ie in detinue) is peculiar and the normal measure is usually:–

1. The market value of the goods where delivery of the specific goods detained has not been ordered; and

2. Even in the cases where an order for the return of the goods has been made, a sum of money representing the normal loss through the detention of the goods; and this (when applicable) quite often is the market rate at which the goods could have been hired during the period of detention.

In those cases, therefore, where the goods, the subject matter of the action for detinue, have not (as such) been profit earning, it is extremely difficult to assess the damage to the
plaintiff (see Somervell and Romer LJJ in *The Medianna* (1900) A.C. 113 at 246, 252 and 257). However, the plaintiff is entitled to damages for loss arising from his inability to make use of the specific goods; and this can be recovered under either head of damages – *general* or *special*. Dealing with the subject of damages in detinue, the learned authors of Halsbury’s *Laws of England* in Volume 38 of the (3ed) (1962) at page 795, article 1321, states:

“Apart from the question of the general value of the goods the plaintiff may be able to show that he has suffered special damage by their detention or conversion. Such damage, if claimed, and if the reasonably foreseeable result must establish the same by evidence.”

At this stage, we will draw attention to the observations by the learned authors of Mayne and McGregor on *Damages* on the expression “General and Special damages” to the effect that:

“the terms are used in a variety of meanings and if these meanings are not kept separate the indiscriminate use of the terms only spells confusion” (see Mayne and McGregor on *Damages* (12ed) (1961), articles 9, 10, 11 at pages 11, 12 and 13).

Thereafter the learned authors dealt with three meanings of the expression and it is with what they describe as the second and third “meanings” (and these relate to pleadings and proof) that we are concerned in this appeal. Much of the contention and submission in support of this appeal, in our view, stems from failure on the part of learned Counsel (for the appellant) to draw a clear line of distinction between the rules relating to proof of special and general damages:

“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 reasonable men . . .” (*Prehn v. The Royal Bank of Liverpool* (1870) L.R. 5 Exch. 92 per Martin B).

From the point of view of proof (evidence), general damages are classified into two categories:

1. That in which they (damages) may either be inferred (eg in cases of defamation or of personal injury to plaintiff when pain and suffering may be presumed); and
2. That in which they will not be inferred but must be proved (for instance, damages arising by way of general loss of business following an injury).

Even in regard to this later category evidence will not be allowed to be given by a plaintiff of loss of a particular transaction or customer (following the injury) with a view to showing specific loss for that is a matter which falls in the realm of special damages; and—

“If there be any special damage which is attributable to wrongful act that special damage must be averred and proved, and if proved will be awarded . . . (See The Susquehanna (1925) A.C. 655 at 661 per Lord Dunedin).

Special damages, therefore, consist of items of loss which have to be particularised or specified in the plaintiff’s pleadings (as the appellant has done in the instant case) in order that he may be permitted to give evidence thereof and recover thereon. The significance of our observations in the above two paragraphs will appear later in this judgment when we make reference to the award by the trial Court of £8,000 as ‘general damages’.”

Now, what was the evidence produced in support of the appellant’s claim to special damages (the particulars whereof were set out in his pleadings)? With regard to his arrangements with the Taiwan Companies, and Adebowale Company, the appellant put in evidence:

1. Exhibits H and H1 “the pro forma invoice” of the goods (the table and standing fans) which the Taiwan firm was to send to him had he produced letters of credit acceptable to that trading company; and

2. Exhibit L a letter from the manager of the IH SHIN Company which made reference to “pro forma invoices” for all classes of goods ranging from “talcum and dusting powder”, “cable rope and twine” and such vague items as “electrical insulating equipment”, “other articles of glassware £3,000”, “other bottles” to “mosquito and sandfly nets” described in the said “pro forma invoice” (exhibit M2).
He did say in his evidence that—

“I lost as possible profit over £9,000 from the transaction with IH-SHIN as a result of the refusal of the defendants to return my title documents . . . I know Messrs Adebowale Electrical Industries . . . “I approached the Managing Director (who was called by the appellant to confirm that appellant had been asked to produce some security to cover credit facilities to be extended to him) to extend credit facilities to me to purchase goods from the firm up to a limit of £30,000 . . . (sic) I lost about £10,000 over this period if I had succeeded in doing business with Adebowale Electrical Industries . . .”

So much was the evidence adduced in support of the claim for special damages by the appellant. While the above is, indeed, evidence on which to make some award in respect of general damages, it certainly cannot be regarded, no matter howsoever stretched, as evidence in support of special damages in the context of the present case; therefore, in so far as they were proffered to bolster the appellant’s claim to his “particular losses” (ie items of special damages) they are no doubt “speculative.” The situation here does not in any way compare with that in the case Adel Boshali v. Allied Commercial Exporters Ltd (1961) 1 All N.L.R. 917 to which we were referred. In that case, the contract between the parties was executed, even if inadequately or improperly; as the goods ordered had actually arrived, even though they failed to conform to contract, the matter had gone beyond the “speculation stage.” In the instant case, the contract was still, at best, executory; the goods not having been covered by letters of credit could not, on the strict terms of the arrangement between the overseas vendors and the appellant, be delivered; nor was there any proper evidence (at least the learned trial Judge neither found nor accepted any) of the market value or selling price of any such goods at the time the contract was due for execution (ie 1972). The entire evidence on the subject was completely speculative and we think the learned trial Judge was justified in his attitude to the claim for special damages and, in our view rightly declined to make any award on that head of claim.
There is need, we think, for comment on the award in respect of general damages. Although there is no appeal from that award, we may mention, in passing, that the award is seemingly inordinate. As already pointed out a claim in detinue is basically for the return of the specific chattel detained or its value (as known or assessed); general damages for unlawful detention may, if any is established, be awarded (for they are not to be presumed in this type of action); and even then they are, generally, nominal, unless the evidence establishes a case for substantial award under this head of damages. In the circumstances of this case, the respondents knew the purpose for which the documents were required by the appellant; when, therefore, the appellant failed to pursue and conclude his arrangements with his overseas and local business associates because he could not get the documents, the respondents ought to be liable for damages following, by way of general loss, his inability to do so. The question really is whether the damages suffered in this category (i.e., general damages) scaled as high as N8,000. In other words, in the light of our earlier observations on the measure and proof of damages in actions for detinue in particular, and, generally, on proof of general damages whether the evidence in this case supports the award of as much as N8,000 under this head of damages? That, however, is a question we are not called upon to answer in this appeal. However, with regard to the question raised directly in this appeal, damages which may result from the appellant’s inability—

1. to sell (de facto) the goods which he might have received had he concluded his local and overseas business arrangements; and

2. to sell the same at a profit, the credit facilities extended to, or discounts allowed in favour of the appellant notwithstanding,

are clearly matters which cannot be presumed; they are matters which call for specific proof (within the principles
clearly stated by this Court in *Oshinjinrin’s case (supra)* and such proof was, unquestionably, absent in the instant case. Accordingly, we had no difficulty in dismissing this appeal immediately at the end of the arguments urged upon us on the 20th October, 1976. The respondents will have the costs of this appeal payable to them by the appellant which we fix at ₦213.
Adetoyin and another v. Bank of the North Limited

HIGH COURT OF OYO STATE
APARA J
Date of Judgment: 22 NOVEMBER 1976

Facts

The plaintiffs who traded as tailors under the name of “Benbro and Co” entered into a charge on the goods of the partnership in favour of the defendant bank in respect of a loan of £1,500 (now ₦3,000) in the form of overdraft facilities. The contract which created the said charge was admitted in evidence at the trial as exhibit B. By section 14 of the Bills of Sale Law, (Cap 11), Laws of the Western Region, if a bill of sales is not attested to and registered, it would be void in respect of personal chattels comprised therein. By Clause I and Clause II(a) of exhibit B the plaintiffs charged every property in their shop and factory. The defendant seized the goods of the plaintiffs and removed them to the defendant’s premises that same day when the plaintiffs defaulted in their loan obligation to prepare or join in the preparation of an inventory...
of the goods seized. Consequently, the staff of the defendant bank prepared an inventory of the goods seized.

After the inventory had been prepared it was signed by some members of the staff of the defendant bank and two policemen who accompanied them to carry out the operation and one of whom gave evidence on behalf of the other to confirm the accuracy of the account of the incident and of the inventory. The defendant bank’s inventory, was admitted in evidence as exhibit K. The plaintiffs’ own version of the inventory was a schedule of the property allegedly removed by the defendant bank from the plaintiffs which was admitted in evidence as exhibit A. The plaintiffs admitted in court that notwithstanding that they were making an average profit of N50 a day, they paid nothing to the defendant bank to liquidate the loan that the defendant bank gave them. The plaintiffs brought this action to allege that the seizure of their goods by the defendant bank was wrongful and that same should be returned to the plaintiffs with general damages of N10,000 (ten thousand naira). Neither the plaintiffs nor the defendants appreciated until at the trial, that their contractual relationship was a Bill of Sale which was subject to strict statutory rules. The defendant bank initially resisted the court’s application of the Bills of Sales Statute in this case and also initially contested the legal consequences of their void contract.

**Held** –

1. The inventory prepared by the defendant bank which is exhibit K is the correct inventory of the goods seized by the defendant bank because it was signed not only by the staff of the defendant bank but also by two police officers who were independent parties in this transaction.

2. The process whereby the trial Court has raised points of law as to the legality or otherwise of a disputed contract and Counsel for both parties have been duly invited to address the court on the points of law, in law the trial Court would be justified in its action taken *suo motu* in the case.
3. Under section 3 of the Bills of Sales Law, (Cap 11), Laws of the Western Region of Nigeria, 1959, exhibit B which is the contract which created the charge on the goods of “Benbro and Co” is a Bill of Sale which must be duly attested and registered.

4. Exhibit B was void because it did not conform with the provisions of the Bills of Sales Law and the act of seizure of goods subject to the Bills of Sales Law is another vitiating contravention.

5. The defendant bank had acted on a void document or invalid authority.

6. The goods of the plaintiffs seized by the defendant bank as contained in exhibit K should be returned forthwith to the plaintiff.

7. The plaintiffs have succeeded in this action and they deserve some kind of award by way of damages.

8. Where the plaintiffs deserve some kind of award by way of damages, its description of that damages to be awarded is of no consequence and the description as special or general damages, is mere academic exercise.

9. The plaintiffs have neither done equity nor come to equity with clean hands and are therefore entitled to contemptuous damages of one naira.

Judgment for the plaintiffs.

Cases referred to in the judgment

Nigerian

Lahan v. Lajoyetan (1973) 1 N.M.L.R. 44
Laniyi v. Abidogun (1971) 1 N.M.L.R. 261 at 265

Ochoma v. Unosi (1965) N.M.L.R. 321
Okafor and others v. Okitiakpe (1973) 1 N.M.L.R. 317

Foreign

Burham-Carter v. Hyde Park Hotel (1948) 64 T.L.R. 177
Nigerian statute referred to in the judgment
Bills of Sales Law, (Cap 11), Laws of Western Region, 1959 sections 3, 14

Nigerian rules of court referred to in the judgment
High Court of Oyo State (Civil Procedure) Rules, Order 2, rule 2

Counsel
For the plaintiffs: Babalola
For the defendant: Akinjide

Judgment
APARA J: According to the endorsement at the back of their writ of summons, the plaintiffs’ claims against the defendant are as follows—

1. The plaintiffs’ claims jointly and severally against the defendant is for the return of the articles of trade and money totalling ₦23,970.58 (twenty-three thousand, nine hundred and seventy naira and fifty-eight kobo) or the value of the goods which were wrongfully seized by the defendant at Ibadan on the 19th of July, 1973.

2. The plaintiffs also claim ₦10,000, (ten thousand naira) general damages.”

Pleadings were ordered and filed by both parties. According to the first two plaintiffs, they have brought this action for themselves and on behalf of 33 other plaintiffs whose authority they claimed they had. According to their pleadings and the evidence adduced in court, the case for the plaintiffs is that on the 30th day of October, 1971, the plaintiffs, trading as tailors under the name of “Benbro and Co” entered into a charge with the defendant bank in respect of a loan of £1,500 now ₦3,000 in the form of overdraft facilities. This charge was reduced to writing in the form of a contract. The contract was tendered in evidence by the defendant bank and admitted in evidence as exhibit B. According to the plaintiffs, they operated their account with the defendant bank for
sometime until in 1972 when their business suffered some reverses. These reverses, they claimed, were known to the defendant bank. Sometime in December, 1972 one Mr Nelson, the then manager of the defendant invited the plaintiffs for a discussion about their accounts with the bank. During the discussion, the manager indicated his intention to reduce the overdraft facilities granted to the plaintiffs. According to the plaintiffs, they pleaded with the manager and he agreed to leave matters as they were. The second plaintiff gave evidence in court inter alia, that on the 19th of July, 1973 Mr Nelson, the manager of the defendant bank without prior notice as contained in the terms of exhibit B, paid a surprise visit to the premises where the plaintiffs carried on their business. Mr Nelson came with some members of his staff and two armed police constables. There, he informed the plaintiffs that he had come to seize their goods according to the terms of exhibit B. The plaintiffs pleaded with Mr Nelson not to seize their goods but all to no avail. This witness claimed he was not allowed to take an inventory of his goods being seized by Mr Nelson but that the staff of the defendant bank just packed the goods into a van and removed them that day from the premises with the van doing a few trips. This witness claimed that he was later able to determine the goods which Mr Nelson removed from their premises because it was their practice to take stock of the goods in their shop at the end of every month and also take a “spot checking stock” at the middle of every month. The seizure by the defendant bank took place on the 19th of July, 1973 and they had just taken their “spot-checking stock” on 15th July, 1973. He then produced some papers which he referred to as a schedule of the property removed from the shop by Nelson. These papers were tendered and admitted in evidence as exhibit A. The witness further testified that most of the goods removed from the shop by Mr Nelson on behalf of the defendant bank were not the personal goods of the plaintiffs but the goods of their various customers they kept in their course of business. The witness admitted under cross-examination that he saw exhibits
C, D and E which were letters addressed to them by the defendant bank about their state of accounts being poorly or improperly operated and warning them that legal action would be taken against them. He said that those letters would not be sufficient notice to them according to the terms of exhibit B. The witness also testified in court that although their company was making a nett profit of about ₦50 a day, they did nothing to repay the loan which they took from the defendant bank. The other witnesses called by the plaintiffs gave evidence of how their respective properties given to the plaintiffs by them were later wrongfully seized by the bank. Although this witness itemised the articles he claimed the defendant bank removed from their premises and specified the amount each article cost, he gave no evidence of how he arrived at the prices.

According to the statement of defence and the evidence led in court on behalf of the defendant, the case of the defendant tallied with that of the plaintiff up to a point. The defendant agreed with the case of the plaintiffs as regards the amount of money loaned to the plaintiffs on the terms contained in exhibit B. The defendant agreed that the goods of the plaintiffs were seized on the 19th of July, 1973 from the premises of the plaintiffs and moved to the defendant’s premises that same day. The defendant also agreed that the then manager, some members of his staff and two armed policemen went to the premises of the plaintiffs to carry out this operation. From this point, the story of the defendant differed. The case for the defendant was that exhibits C, D and E constituted sufficient notice under the terms contained in exhibit B and that when the staff of the defendant bank arrived at the premises of the plaintiff on the day of the operation, rather than the plaintiffs being co-operative, their attitude was hostile. The plaintiffs refused to prepare or join in the preparation of an inventory of the goods which the defendant bank seized. Consequently the staff of the bank prepared an inventory of the goods seized. The evidence led in court by the defendant was to the effect that a lady member of the plaintiffs’ staff assisted the...
defendant’s staff in preparing the inventory. After the inventory had been prepared it was signed by some members of the staff of the defendant bank and the two policemen who accompanied them in carrying out the operation. This inventory taken by the bank was tendered and admitted in evidence as exhibit K. This evidence was given in the main by one Faruk Labaran the present manager of the defendant bank at Ibadan. Other members of the staff of the defendant’s, a bank, also gave evidence to corroborate the evidence of Faruk Labaran. One John Elo a Nigerian Police Constable also gave evidence to corroborate the testimony of Labaran. This constable said he was one of the two constables who accompanied Mr Nelson and his staff to carry out the operation and that he and his colleague signed exhibit K after it had been prepared.

At the close of the case learned Counsel for the defendant bank submitted that the first two plaintiffs could not possibly have sued on behalf of the other 33 plaintiffs because they did not comply with procedural technicalities. He again submitted that as the cause of action was based on contract, the plaintiffs cannot get general damages but special damages which must be strictly proved as flowing from the breach of contract. Learned Counsel further submitted that the articles seized by the defendant bank were seized on the authority of exhibit B and as such the articles were not unlawfully seized. He submitted that the terms of the contract in paragraph 1(a) were complied with by the defendant bank vide exhibits C, D, E and F before the seizure. Under Clause 1 and Clause 11(a) the plaintiffs charged every property in their shop and factory and as such the defendant bank was quite in order to remove everything found on the premises. He submitted that as there was no privity of contract between the 3rd-35th plaintiffs and the defendant bank, the 3rd-35th plaintiffs could not possibly claim anything from the defendant. Learned Counsel for the plaintiffs submitted that the defendant bank did not comply with the terms of exhibit B before the seizure. He submitted that on a reasonable construction of exhibit B, only the goods of the first two
plaintiffs were charged and not the goods of their customers which could be in their possession from time to time.

According to their writ of summons, the first two plaintiffs claimed to have sued for themselves and on behalf of the remaining 33 plaintiffs. Order 2, rule 2 of the High Court (Civil Procedure) Rules makes it mandatory that, in an action taken in a representative capacity, the endorsement at the back of the writ of summons must specifically so indicate. In the present case the endorsement at the back of writ of summons did not comply with this provision. Even looking at the statement of claim which could supersede the writ of summons and thereby cure this procedural defect not much help can be derived. Paragraph 2 of the statement of claim states as follows:

“2. The plaintiffs take this action on behalf of themselves and have the authority of the other 33 persons mentioned on the writ of summons.”

On a simple construction of this paragraph its connotation to me is that the first two plaintiffs have taken this action on behalf of themselves and that they have the authority of the other 33 persons to take the action. That is that the first two plaintiffs can take the action at all. On this ground I uphold the submission of the learned Counsel for the defendant that the 3rd-35th plaintiffs are not properly before the court. They have not sued and the first two plaintiffs have not technically got their authority to sue on their behalf. For this reason, the 3rd-35th plaintiffs are dismissed from this action.

I have considered carefully the evidence led before me and the pleadings filed by both parties. As I have reiterated earlier on in this judgment, the two parties to this action have presented two different inventories of the articles seized by the defendant bank. One was presented by the plaintiffs because it was prepared as a result of the stock which they took on 1st July, 1973 and 15th July, 1973. It was possible that between 15th July, 1973 and 19th July, 1973 when the
seizure was made, this stock might have depleted or increased as a result of sales or restocking by the plaintiffs. The plaintiffs said nothing about this one way or the other. Furthermore, there was no independent party to testify to the correctness or otherwise of this inventory. On the other hand, the defendant bank presented a different inventory which was signed, not only by the staff of the defendant bank but also by two police officers who were independent parties to this transaction. For these reasons I accept the inventory prepared by the defendant bank, that is, exhibit K as the correct inventory of the goods seized by the defendant bank on the day in question.

The pivot around which this case revolves is exhibit B that is, the contract which created a charge on the goods of “Benbro and Co” the first two plaintiffs in favour of the defendant bank. Although certain legal points touching exhibit B were not raised in the pleadings of both parties or canvassed in court at the hearing of this case, I studied the document myself and a result I asked the two learned Counsel for both parties to address me on certain legal points thereon. Mr RAO Akinjide learned Counsel for the defendant bank submitted preliminarily that the court could not take up a point of law in a case on its own motion if that point of law had not been pleaded nor canvassed at the hearing by either party. He cited the case of *Ochoma v. Unosi* (1965) N.M.L.R. page 321 in support of this proposition. I have looked at this authority and I do not agree with Mr Akinjide because the facts and circumstances in that case are not on all fours with the present one. The decision in that case was that the trial Judge was wrong to base his judgment on facts, ie the interpretation of a transaction between the parties, which neither of them had pleaded nor testified to in evidence. In this case I am not independently considering extraneous facts between the parties. Some points of law have arisen on exhibit B as to its legality or otherwise. Furthermore, I have asked Counsel for both parties to address me on the points of law in question and I hold that I am perfectly justified in adopting this stand. I
Apara J

have the authority of *Lahan v. Lajoyetan* (1973) 1 N.M.L.R. page 44 in support of this. The points of law on which I asked Counsel to address me in this case with regard to exhibit B were on its legality or otherwise. Under section 3 of the Bills of Sales Law, (Cap 11), Laws of the Western Region of Nigeria 1959, exhibit B is a Bill of Sale. Section 5 of this law makes it a mandatory provision that Bills of Sales should be duly attested and registered. Section 14 of this Law states that if a Bill of Sale is not attested to and registered, it would be void in respect of the personal chattels comprised therein. Mr ROA Akinjide agreed with this proposition of law and also agreed that exhibit B was void because it did not conform with the provisions of the Bills of Sales Law; it was not attested. Although there is a portion on exhibit B which purported to show that the document was executed in the presence of an independent person, this particular portion was signed by the plaintiffs themselves. Also all the other portions of exhibit B were signed by the two plaintiffs. According to the Schedule to the Bills of Sales Law, which schedule must be strictly followed in preparing any Bill of Sale, Form B thereof makes provision for including in the Bill of Sale that it has been registered. There is no such format in exhibit B. There is no evidence either way whether it was registered or not. Furthermore section 13 of the Bills of Sales Law provides that after seizure of goods under a charge, such goods must remain on the premises where they were so seized or taken possession of and must not be removed or sold, until after the expiration of five clear days from the day they were so seized or so taken possession of. In the present case, the evidence led on behalf of the defendant bank admitted that the goods were seized. This is another contravention of the Bills of Sales Law.

Having agreed to the proposition that exhibit B was void in law Mr Akinjide’s submission on behalf of the defendant bank in consequence of this was that in the circumstance, the plaintiffs’ case must fail because it has been based on a void contract. Mr Obe who held brief for Mr Babalola, learned
Counsel for the plaintiffs also agreed that exhibit B was void and also submitted that notwithstanding that the contract which was the source of this action was void, the seizure by the defendant bank was wrongful.

To bring this matter into its proper perspective, it is necessary once again to mention the endorsement at the back of the writ of summons filed by the plaintiffs. In simple language what the endorsement says is that the plaintiffs want the defendant bank to return their articles of trade etc, which are wrongfully seized by the defendant bank. Again paragraph 25 of their statement of claim also stresses that they want back their articles which the defendant bank wrongfully seized. Bearing all these in mind and shorn of legal technicalities, my appraisal of the case is this: The plaintiffs are claiming that the defendant bank wrongfully seized their goods and the defendant bank is asserting that the seizure was not wrongful because the defendant bank derived its authority to seize these goods under exhibit B. This exhibit B I have found is void. The result in my view is that the defendant bank had acted on a void document or invalid authority. This to my mind destroys the defence of the defendant bank. In the net result the case of the first two plaintiffs succeeds and judgment is hereby entered in their favour.

I do not have any evidence before me to assess the value of the articles of trade seized as contained in exhibit K. My order therefore is that the goods of the plaintiffs seized by the defendant bank and as contained in exhibit K should be returned forthwith to the plaintiffs. With regard to the N10,000 damages claimed by the plaintiffs, learned Counsel for the defendant bank submitted that general damages cannot be claimed in an action founded on a contract but special damages which must be strictly proved as flowing from the breach of that contract. Bearing in mind the decision in Burham-Carter v. Hyde Park Hotel (1948) 64 T.L.R., 177, I agree that special damages must be strictly proved. The plaintiffs have succeeded in this action and they deserve some kind of award by way of damages. At this stage, the description of the damages to be
awarded, be it special or general, in my view becomes a mere academic exercise. In *Laniyi v. Abidogun and another* (1971) 1 N.M.L.R. 261 at 265, it was held that items indicated separately under special damages and have not been so proved could be considered in the award of general damages. In *Okafor and others v. Okitiakpe* (1973) 1 N.M.L.R. 317, it was held on appeal that where the learned trial Judge did not award general damages under the various heads claimed but awarded a lump sum to cover all the sub-heads claimed but would not be disturbed as it was neither unfair nor violated any fundamental principle of law. I have referred to those authorities in support of my view that at this stage, where the plaintiffs deserve some kind of award by way of damages, the description of the damages to be awarded is of no consequence.

The second plaintiff admitted in his evidence in court that notwithstanding that they were making an average profit of ₦50 a day, they paid nothing to the defendant bank to liquidate the loan that the bank gave them. Up till now, they still owe the defendant bank. In the first place, the plaintiffs’ case has succeeded purely on a point of law which this Court took up of its own motion. I have also reflected on the attitude of the plaintiffs of making no effect to liquidate this loan before the seizure, though making an average profit of ₦50 a day. Two maxims of equity apply here: “He who wants equity must do equity” and “He who comes to equity must come with clean hands.” The first two plaintiffs have neither done equity nor come to equity with clean hands. I therefore award them contumacious damages of one naira.
Akpene v. Barclays Bank of Nigeria Limited and another

SUPREME COURT OF NIGERIA
FATAYI-WILLIAMS, BELLO, OBASEKI JJSC
Date of Judgment: 21 JANUARY 1977
S.C.: 308/74

Banking – Banker/customer relationship – Security for banker’s advances – Mortgage deed in respect of executed without approval of appropriate authority – Consequence of – Banker exercising power of sale under a mortgage deed – Mortgage deed declared void – Effect of Interpretation of statute – The word “approve” in the Native Lands Acquisition Law, (Cap 80), Laws of Western Nigeria and the word “consent” under the Land Instruments Registration Law, (Cap 56), Laws of Western Nigeria, 1959 – Interpretation of Practice and procedure – Section 2 of Mid-Western Region (Transitional Provisional) Act, 1963, (No. 19) and the Constitution of Mid-Western Region, 1964 – Appropriate authority to approve transaction under Native Lands Acquisition Law

Practice and procedure – When question not raised at the lower court can be raised at the Appellate Court

Facts

The appellant’s full brother by name JE Akpene who was the plaintiff’s first witness at the lower court was a customer of the first defendant/respondent, an alien banking company registered in Nigeria. In 1963, he applied for overdraft facilities to the limit of £1,000 from the first respondent and presented the appellant as his surety. The appellant then offered his property at No. 51, Obahor Street, Warri as security for the overdraft and deposed by affidavit that the property was worth £2,800. A legal mortgage deed in respect of the property exhibit 1 was
drawn up. This deed, embodying the proposed transaction was on the 7th day of January, 1964 presented for approval by the Minister of Lands and Housing Western Nigeria as shown by the approval endorsed on the deed which reads:

“APPROVED THIS 7TH day of January, 1964
Signed
For: Minister of Lands and Housing, Western Nigeria”

Subsequently, the appellant who is an illiterate executed the Deed, exhibit 1 on the 2nd day of April, 1964.

The defendant/respondent bank exercised the power of sale as per the deed of legal mortgage and the plaintiff/appellant brought an action to challenge the sale for want of proper and regular exercise of power asking the court to declare the sale invalid, set it aside and grant injunction to restrain the first defendant from conveying the property to the second defendant or in the alternative damages against the first defendant. As at the date the mortgage deed was approved and subsequently executed, the Mid-Western State had been created and excised from the Western Region and the appropriate authority to grant approval with respect to land in the new region was the Administrative Council of the plaintiff that the mortgage deed was void.

The trial Court dismissed the claim of the plaintiff. He appealed to the Supreme Court.

Held –

1. That the mortgage transaction and the Deed exhibit 1 not having received the approval from the Administrative Council or Governor or Minister of Lands of Mid-Western Nigeria, the transaction and the deed are null and void and of no effect.

2. That exhibit 1 on which the sale of the premises to the second defendant/respondent was made is null and void and of no effect and consequently, the sale transaction founded upon it cannot stand as there would have been no power to sell.
3. The court is not prepared to read the word “approve” under the Native Lands Acquisition Law as “consent” under the Land Instrument Registration Law. Consent is required previous to an act or deed and so expressed on a document whereas approval comes subsequently and is so expressed on a document.

4. That the material date, the appropriate authority to approve any transition under the Native Lands Acquisition Law was the Administration Council of Mid-Western State but from the day of coming into effect of the constitution of the Mid-Western Nigeria, the power became vested in the Governor and by delegation from the Governor to the Minister of Lands and so approval ought to have been obtained from either, whichever was exercising the power.

5. Where a question involves substantial points of law substantive or procedural and it is this plain that no further evidence could have been adduced which would affect the decision of them, the court will allow the question to be raised and the points taken and prevent an obvious miscarriage of justice. (Shonekan v. Smith (1964) All N.L.R. 168, 173).

Per Curiam

“We are unable to accept the proposition that the founding of the plaintiff’s appellant’s case on the Deed exhibit 1 conferred on the Deed the validity it did not have under the law, moreso as the law declares it null and void and of no effect. In the words of Lord Denning if an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without much ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there, it will collapse. (Per Lord Denning in Macfoy v. United Africa Company Ltd (1961) 3 W.L.R. 1405 P.C. at 1409).”
Cases referred to in the judgment

Nigerian

Shonekan v. Smith (1964) 1 All N.L.R. 168, 173
Stool of Abibabina v. Eyimadu (1953) A.C. 209 at 215
Quo Vadis Hotel and Restaurant Ltd v. Commissioner of
Lands, Mid-Western State and others (1973) 6 S.C. 71 at 93

Nigerian statutes referred to in the judgment

Constitution of Mid-Western Region Act, 1964, sections 3(1), 3(3), 3(4), 32(1)
Laws of Western Nigeria, 1959, section 11, 26
Mid-Western Region (Transitional Provisions) Act, (No. 19) 1963, sections 1(2), 3, 4(1), 4(2)
Mid-Western Region Act, 1962, (No. 6), sections 1, 2(2)
Native Lands Acquisition Law (Cap 80) section 3(1), (2) and (4)

Counsel

For the appellant: Ajayi
For the first respondent: Obi
For the second defendant: Mowoe

Appeal

This case first came up before the High Court Mid-Western State before Atake J where the claim of the plaintiff was dismissed. The Supreme Court unanimously allowed the appeal and set aside the sale and restrained the 1st respondent from conveying the property.

Judgment

OBASEKI JSC: The general rule adopted in this Court is that an appellant will not be allowed to raise on appeal a question which was not raised or tried or considered by the trial court (Shonekan v. Smith (1964) 1 All N.L.R. 168, 173), but where the question involves substantial points of law, substantive or procedural, and it is plain that no further evidence could have been adduced which would affect the decision of them, the court will allow the question to be raised and the points taken (Shonekan v. Smith (supra); Stool of Abinabina v. Enyimadu
Guided by the above principles, we allowed the substantial points of law taken in this appeal to be argued before us, although the points were not raised in the court below the High Court of Mid-Western (now Bendel) State of Nigeria Holden at Warri.

The appeal is against the judgment of Atake J in Suit No. W/31/71 delivered on the 30th day of March, 1973 in which the claim of the plaintiff/appellant was dismissed. The claims were in terms endorsed on the writ of summons as follows:

“(1) A declaration that the purported sale by private contract on or about 18th January, 1971, by 1st defendant of plaintiff’s premises at 51, Obahor Street, Warri, within the Warri Judicial Division pursuant to alleged power of sale contained in a mortgage deed registered as No. 7 at page 7 in volume 9 of the Land Registry Benin City is invalid for want of the proper and regular exercise of the power of sale and the absence of good faith in the exercise of the power of sale and at a gross undervalue.

(2) An order setting aside for invalidity the purported sale of plaintiff’s premises referred to in (1) above.

(3) An order of injunction to restrain 1st defendant from taking steps to convey plaintiff’s to second defendant in pursuance of the purported sale referred to in (1) above and granting leave to the plaintiff to redeem his aforesaid premises upon paying to first defendant the monies due under the mortgage referred to in (1) above.

Alternatively

As against 1st defendant only, £4500 being damages for improper and irregular exercises of power of sale and for selling in bad faith and at an undervalue.”

Pleadings were ordered, settled, filed and exchanged by the parties.

Evidence was adduced by the parties and their witnesses and in the course of the evidence the mortgage deed dated
2nd day of April, 1964 and registered as No. 7 at page 7 in volume 9 of the Land Registry was admitted as exhibit 1. It is obvious from the pleadings that both the plaintiff/appellant and the first defendant/respondent founded their claims and defence on this document. The plaintiff/appellant did not however specifically plead “that the mortgage deed was void” and when this point was raised in the ground set out hereunder and argued before us, it drew a wave of protest from the two Counsel for the respondents.

Of the 3 grounds of appeal filed, it was ground 3 which raised the question and it reads:

“The learned trial Judge erred in law in dismissing the plaintiff’s claim herein when the mortgage deed under which the purported sale was made was absolutely void in law in that the consent of the Governor of the then Mid-Western State or of its Minister of Lands had not been obtained to the transaction as required by the provisions of the Native Lands Acquisition Law, (Cap 80), Laws of Western Nigeria then applicable in the Mid-Western State.

PARTICULARS

1. The mortgage deed exhibit 1 was executed on the 2nd day of April, 1964;
2. The relevant consent required as at that date was that of the Governor or other appropriate functionary of the Mid-Western State;
3. The approval which had been obtained earlier from the Ministry of Lands and Housing, Western Region, did not constitute an approval within the meaning of section 3 of the Native Lands Acquisition Law applicable in the Mid-Western State on the 2nd day of April, 1964, when the mortgage deed was executed.”

We may pause here to state briefly the facts of the case.

The appellant’s full brother by name JE Akpene, who was the plaintiff’s first witness in these proceedings in the court below, was a customer of first defendant/respondent, an alien banking company registered in Nigeria. In 1963, he applied for overdraft facilities to the limit of £1000 from the first respondent and presented the appellant as his surety.
The appellant then offered his property at No. 51 Obahor Street, Warri, as security for the overdraft and deposed by affidavit that the property was worth £2800.

A legal mortgage deed in respect of the property exhibit 1 was drawn up. This deed, embodying the proposed transaction was on the 7th day of January, 1964 presented for approval by the Minister of Lands and Housing, Western Nigeria, and it was approved by someone on behalf of the Minister of Lands and Housing, Western Nigeria, as shown by the approval endorsed on the deed which reads:

“APPROVED THIS 7th day of January, 1964
Signed
For Minister of Lands and Housing, Western Nigeria.”

Subsequently, on the 2nd day of April, 1964, the appellant, who is an illiterate, executed the deed, exhibit 1.

Arising from this approval, the learned Counsel for the appellant contended before us that the whole transaction embodied in the document exhibit 1 was null and void and of no effect by virtue of section 3(3) of the Native Lands Acquisition Law, (Cap 80), 1959. This, he submitted, was because:

1. The approval was not obtained from the appropriate authority.

2. As at the date the approval was endorsed on the deed, the Mid-Western Region had been created and excised from the Western Region; Warri land area was part of the Mid-Western Region and no longer part of the Western Region.

3. That the appropriate authority to approve the transaction was the person vested with the executive authority of the Region or persons to whom he has so delegated his powers to give approval.

4. That the appropriate authority at the time of the approval was the Administrative Council of Mid-Western Region or
the Commissioner in the Council to whom responsibility for land was assigned.

We were referred to the Mid-Western Region (Transitional Provisions) Act, 1963 to support this contention. Section 1 of that Act set up the Administrative Council consisting of the chairman styled Administrator the Mid-Western Nigeria, the Deputy Chairman styled Deputy Administrator of the Mid-Western Nigeria, and members styled Commissioners of the government of Mid-Western Nigeria (see sections 2, 3 and 4 of section 1 of the Act, 1963, No. 19), who shall be charged with the general duty of administering the Government of the Region until such time (not being later than the expiration of a period of 6 months beginning with the date of the establishment of the Region) as the Governor-General may determine (subsection 1(a) of section 1 of the Act, 1963, No. 19). The Mid-Western Region was created by the Mid-Western Region Act, 1962, No. 6, which by section 1 provides that:

“There shall be a New Region of the Federation which shall be known as Mid-Western Nigeria and shall consist of the area specified in the Schedule of this Act.”

The Schedule reads:

“Benin Province including Akoko Edo District in Afenmai Division and Delta Province, including Warri Division and Warri Urban Township area.” (Italics are ours.)

The birthday of the new region was provided by section 2(2) of the Act which reads:

“This Act shall come into operation on such date as the Governor-General may by order appoint.”

Subsequently, in pursuance of section 2(2) of the Act, the Governor-General appointed the 9th day of August, 1963 and this was notified by Legal Notice No. 96 of 1963 dated 12th day of August, 1963 on page B397, 1963 Laws of the Federation. The Mid-Western Region of Nigeria therefore came into existence on the 9th day of August, 1963 and Warri Urban Township area and Warri Division were part of it.
Following the creation of the Mid-Western Region of Nigeria, the functions of certain Western Region authorities who had hitherto exercised authority over the area were by section 4 of the Mid-Western Region (Transitional Provisions) Act, 1963 transferred to the Administrative Council and it reads:

(1) The Council may exercise in relation to the Region and to the exclusion of any other person, any function which immediately before the appointed day was a function of the Governor of Western Nigeria or any Minister of the Government of Western Nigeria or the Public or Judicial Service Commission of Western Nigeria; and subject to the provisions of any directions given by the Prime Minister under section 1 of this Act, the Council shall act in accordance with its own deliberate judgment in performing the functions exercisable by the Council by virtue of this subsection.

(2) All existing law shall have effect subject to the modifications necessary to bring it into conformity with the provisions of the foregoing subsection.

Subsequently, the Constitution of Mid-Western Nigeria Act, 1964 was passed and in respect of certain matters to enable elections to the House of Assembly to be conducted, it came into force on the 1st day of November, 1963 (see section 3(1) of the Act) and in respect of other matters it came into force on the 7th day of February, 1964 (see section 3(3) of the Act) and LN 70/1964. Therein provision was made for the establishment of a legislature as well as for the appointment of a Governor in who shall be vested the executive authority of the Region. In this respect, section 4 of the Constitution provides that “There shall be a legislature for the Region which shall consist of the Governor, a House of Chiefs and a House of Assembly and which shall have powers to make laws for the peace, order and good government of the Region,” and section 32(1) of the Constitution provides that “the executive authority of the Region shall be vested in the Governor and subject to the provisions of this Constitution may be exercised by him either directly or through officers subordinate to him.”
The plaintiff/appellant is a Nigerian and this is admitted in the pleadings. The first defendant/respondent is a body corporate and an alien within the provisions of the Native Lands Acquisition Law, (Cap 80), 1959. To acquire any interest or right in or over land from a Nigerian in the Mid-Western Region, the first defendant/appellant must comply with the provisions of section 3 of the Native Lands Acquisition Law, (Cap 80). Subsections (1), (2) and (3) of section 3 of the Native Lands Acquisition Law, (Cap 80), form the basis of the objection to the judgment of the learned trial Judge. These sections declare any transaction or instrument requiring approval of the Governor null and void and of no effect if the approval required is not obtained and the transaction is not exempted from the requirement of approval. More particularly, the section reads:

“(1) Except as provided by any regulations or orders made pursuant to section 7, no alien shall acquire any interest or right in or over any land from a native unless the transaction under which the interest or right is acquired has been approved by the Governor in accordance with the provisions of this law.

(2) Except as provided by any regulations or orders made pursuant to section 7, where any such interest or right has been lawfully acquired by an alien, that right shall not be transferred, alienated, demised or otherwise disposed of to any other alien, or be sold to any other alien under any process of law, without the approval of the Governor of the transaction or sale, as the case may be in accordance with the provisions of this law.

(3) Any agreement and any instrument in writing, or under seal by or under which an alien purports to acquire any interest in or right over any land (other than a right or interest acquired pursuant to any regulation, or order made under subsection (1) or subsection (2) of section 7) and which forms part of or gives effect to a transaction that has not been duly approved in accordance with the provisions of this law shall be void and of no effect.”

The short point raised by the learned Counsel for the appellant is that the first defendant/appellant did not comply with the provisions of subsections (1) and (3) of section 3 of the
Native Lands Acquisition Law and as such acquired no interest or right in the 51 Obahor Street, Warri, the land and house of the plaintiff/appellant.

As at the 7th day of January, 1964, the date exhibit 1 bears as the date the transaction evidenced thereby was approved by someone on behalf of the Minister of Land and Housing, Western Nigeria, the Governor and Ministers of the Government of the Western Region of Nigeria had ceased to exercise any executive function in relation to the Area comprising Mid-Western Region of Nigeria and any purported exercise of any function being without any legal or constitutional authority was null and void and of no effect.

By virtue of section 4(2) of the Mid-Western Region (Transitional Provisions) Act, 1963, (No. 19), wherever the word “Governor” or “Minister” occurs in the Native Lands Acquisition Law, the words administrative council was to be read and it thus became obvious that at the material date, the appropriate authority to approve any transaction under the Native Lands Acquisition Law was the administrative council. However, as from 7th February, 1964, when the Constitution of the Mid-Western Nigeria came into force, and a Governor, Premier and Ministers appointed, the power became vested in the Governor and, by delegation from the Governor, in the Minister of Lands. Approval of the transaction could still have been regularly obtained from the Governor or the Minister of Lands, but no effort was made before execution.

The mortgage transaction and the deed exhibit 1 not having received any approval from the administrative council or Governor or Minister of Lands of Mid-Western Nigeria, the transaction and the mortgage deed are null and void and of no effect. The respondent’s Counsel conceded that the document required approval under the Native Lands Acquisition Law but contented that whether there was approval or no approval was a triable issue and that it should have been raised on the pleadings and not having been raised, it was incompetent of the appellant to raise it.
We observed from the pleadings that the plaintiff/appellant made the mortgage deed exhibit 1 the basis of his claim, while the first defendant/respondent founded his defence on it. The deed was therefore continuously under the searchlights at all material times since the institution of this action and whatever opinion as to its validity the parties may have held, we are unable to accept the proposition that the founding of the plaintiff’s/appellant’s case on the deed exhibit 1 conferred on the deed the validity it did not have under the law, more so as the law declares it null and void and of no effect. In the words of Lord Denning:

“If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse” (per Lord Denning in *Macfoy v. United African Company Ltd* (1961) 3 W.L.R. 1405 at 1409).

The learned Counsel for the respondents in a desperate effort to save their case, finally referred the court to section 11 of the Land Instruments Registration Law, (Cap 56), 1959, applicable in the Mid-Western, now Bendel State, which reads:

“No instrument requiring the consent of the Governor or of any public officer to the validity thereof shall be registered unless such consent is endorsed thereon or the Registrar is otherwise satisfied that such consent has been given.”

They further submitted that since the deed was duly registered by the Registrar of Deeds, the presumption created or raised by section 11 of the Land Instrument Registration Law that the Registrar has satisfied himself that consent has been obtained has not been rebutted. This Court has previously held that it is not prepared to read the word “approve” in the Native Lands Acquisition Law as consent and we see no reason to depart from that view in this appeal. In any case, section 26 of the same Cap 56 provides that “Registration
(1976 – 1984) 3 N.B.L.R. (SUPREME COURT OF NIGERIA)

Obaseki JSC

Akpene v. Barclays Bank of Nigeria Ltd and another

shall not cure any defect in any instrument, or subject to the provisions of this law, confer upon it any effect or validity which it would not otherwise have had.”

b Coker JSC, delivering the judgment of the court in Quo Vadis Hotel and Restaurants Ltd v. Commissioner of Lands, Mid-Western State and others (1973) 6 S.C. 71, said at page 93:

“...We are of course not prepared to read the word ‘approve’ as consent. The learned trial Judge himself spotlighted the enormity of the difference between them and it is ridiculous to equate act or deed and so expressed on a document with an ‘approval’ which should come subsequently and is so expressed on the document.”

c We find great merit in the only Ground of Appeal argued before us.

The point of objection has been made out. Exhibit 1 on which the sale of the premises to the second defendant/respondent was made is null and void and of no effect, and consequently, the sale transaction founded on it cannot stand as there would have been no power to sell.

d Appeal is allowed.
Abimbola v. Bank of America (Nigeria) Limited and another

HIGH COURT OF LAGOS STATE

SAVAGE J

Date of Judgment: 15 APRIL 1977

Banking – Cheques – Marking a cheque “Account Payee Only” or “Not Negotiable” – Implication of – Effect of payment of the cheque by bank – Whether evidence of negligence – How proved

Banking – Partnership account – Cheque in favour of partnership – Cheque marked “Not Negotiable” and “Account Payee Only” – Cheque endorsed to third-party by one partner although all partners required to sign cheques – Effect

Partnership – Partnership property – Cheques marked “Account Payee Only” and “Not Negotiable” in partnership name – Endorsement of by one partner in favour of third-party – Validity of – Payment of cheque by bank – When bank negligent

Facts

The plaintiff brought an action against the defendants jointly and severally for the sum of ₦8,850 being half of the sum of ₦17,700 paid by a Federal Government of Nigeria cheque in favour of the partnership of “Henrietta Osborne and Co” The plaintiff also claimed in the alternative damages for conversion.

The plaintiff and the second defendant were partners in a firm called “Henrietta Osborne and Co” which entered into a contract with the Nigerian Army to supply generators. Payment was made by the army in instalments as and when each generator was supplied, in the form of cheques which were crossed “and Co,” and marked “Account Payee Only” and
“Not Negotiable.” The partnership’s deposit account card with the partners’ bank was marked “All parties to sign cheques.”

One of the cheques made out to the partnership by the Nigerian Army was taken by the second defendant to the first defendant (“the bank”) endorsed by her to one of the partnership’s creditors who had an account at the bank. The bank collected the cheque and, when it had been cleared credited the proceeds to the creditor’s account. The plaintiff sought to recover the sum in question from the bank and, on failing to do so, instituted the present proceedings.

The plaintiff contended that the proceeds of the cheque belonged to the partnership, and that the bank had been negligent in collecting a cheque marked “Account Payee Only”, “Not Negotiable” and “and Co” and subsequently crediting its proceeds to another account when only one of the two partners in the company had endorsed the cheque. He claimed either half the proceeds for himself, or alternatively a refund of the whole sum to the partnership.

The bank denied negligence but offered no evidence in support. The second defendant alleged that the plaintiff had no interest in the company, and that one generator which the plaintiff had collected had not been delivered to the army, but she offered no evidence in support either.

**Held –**

1. Marking a cheque “Account Payee” is an effective direction to the collecting banker and if ignored, the banker does so at its peril. The effect is to put the banker on inquiry, and this is more so where a large sum of money as in the cheque in this case which is an order cheque, is involved.

2. Where a cheque made payable to a partnership in its name, crossed and marked “Account Payee Only”, “Not Negotiable” and “and Co”, the proceeds should be paid into the partnership account. It cannot be endorsed for payment to a third-party.
In the instant case, since on the evidence the partnership still existed and the cheque was non-negotiable and clearly made out to it, the proceeds should have gone into the partnership account of “Henrietta Osborne and Co”, and the second defendant had not authority to endorse it to one of the partnership’s creditors.

3. The bank had been negligent in collecting the cheque and crediting the proceeds to another account after it had been cleared by the partners’ own bank. Both “Account Payee Only” and “Not Negotiable” are directions warning the collecting banker to be on inquiry, and although failure to obey either of one of them is not in itself enough to prove negligence, in the present case where the sum of money involved was a large one and there were multiple directions to put the bank on inquiry, it was negligence to ignore the directions, so that the bank must be held jointly liable with the second defendant.

Judgment for the plaintiff.

Cases referred to in the judgment

Foreign

Bewan v. National Bank Ltd (1906) 23 T.L.R. 65

Counsel

For the plaintiff: Akinjide
For the first defendant: Adeleke
For the second defendant: Shokoya

Judgment

SAVAGE J: The plaintiff’s claim reads:
“The plaintiff’s claim against the defendants jointly and severally is for the sum of ₦8,850 being half of the sum of ₦17,700 paid on the Government of the Federal Republic of Nigeria cheque No. 828313 of August 3rd, 1970 in favour of the partnership firm
of ‘Henrietta Osborne and Co’ duly registered (under which name and style the plaintiff and the second defendant were trading).”

The cheque issued on the Central Bank of Nigeria was “crossed”, written “and Co”, “Account Payee Only” and “Not Negotiable.” Or in the alternative, the plaintiff claims “in conversion jointly and severally against the defendants the sum of ₦8,850 being the plaintiff’s half share . . .” of the said sum of ₦17,700.

The plaintiff pleads in paragraphs 3, 4, 5, 11, 13 and 14 of the statement of claim as follows:

“3. The second defendant is a partner of the plaintiff in ‘Henrietta Osborne and Co’ registered with the Registrar of Business Names. The plaintiff will rely on a certified true copy of the application form for registration and the certificate of registration. The said Henrietta Osborne and Co is hereinafter referred to as the ‘partnership’.

4. In pursuance of its principal objects the partnership executes contracts. It was a condition of the partnership that all proceeds from sales and/or contracts must be paid into the partnership account with the African Continental Bank Limited, Idumota Branch, in Lagos, where the plaintiff and the second defendant are joint signatories.

5. In or about 1970 ‘Henrietta Osborne and Co’ entered into a contract with the Nigerian Army to supply the army with diesel generators for the sum of £8,850 (₦17,700).

11. The plaintiff will contend at the trial that in paying or clearing the cheque in breach of the crossing and restrictions on the cheque and without verification the first defendant acted negligently and/or in bad faith.

13. The plaintiff avers that he is entitled to ₦8,850 as his own half-share of the proceeds of cheque No. 828313 for the sum of ₦17,700 drawn on the central bank and made payable to ‘Henrietta Osborne and Co’, being a partnership of himself and the second defendant and the proceeds of which cheque the defendants jointly and severally converted in or about 1970.
14. The plaintiff also avers that, by the clearance of the cheque for Narsons (Nigeria) Limited, he has suffered damage to the tune of and/or in excess of ₦8,850 which is his share of the proceeds of the cheque and the plaintiff therefore claims damages and interest at 10% from the day of receipt by the first defendant.

Wherefore the plaintiff claims as follows:

(i) A refund to the partnership of the ₦17,700 being the process of the Government of the Federal Republic of Nigeria cheque No. 828313 of August 3rd, 1970 as money had and received by the first defendant; damages and 10% interest.

Alternatively

(ii) ₦8,850 being his own half of the proceeds of the cheque No. 828313 drawn in favour of the partnership of which the plaintiff and the second defendant are members and which the two defendants wrongfully converted in or about 1970; damages and 10% interest.

Paragraph 4 of the first defendant’s statement of defence reads as follows:

“4. With reference to paragraphs 11, 12, 13 and 14 of the plaintiff’s statement of claim the first defendant will aver at the trial that Narsons Nigeria Limited was its customer at the material time, and that the cheque in question was cleared by the first defendant on behalf of the said Narsons Nigeria Ltd in the normal course of the first defendant’s business in good faith and without negligence . . . .”

The second defendant subjoined in her statement of defence a counter claim for ₦2,568.12 against the plaintiff; apart from this, the second defendant’s defence to the plaintiff’s claim, in my view, appears to be summed up in paragraph 10 of her statement of defence. The paragraph reads: “The second defendant will aver at the trial that the plaintiff had no financial interest in the company called ‘Henrietta Osborne and Co.’”

In paragraph 8 of the plaintiff’s reply and reference to the counterclaim, the plaintiff pleads as follows:

“8. The plaintiff specifically denies all the statements of fact alleged in paragraphs 1, 2, 3 and 4 of the second defendant’s
counterclaim and puts the second defendant to the strictest proof of all the allegations.”

The pleadings referred to above, to my mind, have put in a nutshell the respective claims of the parties and the defence to such claims.

It is the plaintiff’s case that both he and the second defendant are partners in “Henrietta Osborne and Co” in pursuance of whose principal objects the partnership executes contracts. They have in fact executed some contracts. “Henrietta Osborne and C”o is registered with the Registrar of Business Names. The partnership, that is “Henrietta Osborne and Co”, maintained an account with the Idumota branch of the African Continental Bank. Both the plaintiff and the second defendant jointly operated the account, the plaintiff said. The plaintiff added also that all cheques meant for the partnership were paid into “Henrietta Osborne and Co” account with the African Continental Bank, Idumota Branch. Whenever it was necessary to make any withdrawal from this account, both the plaintiff and the second defendant had to sign before such withdrawal could be effected.

Sometime in 1970, “Henrietta Osborne and Co” entered into contract with the Nigeria Army to supply the army with diesel generators. The contract was executed and the generators were supplied by installments. Payments were made as and when the generators were supplied. The cheques thus obtained, the plaintiff said, were paid directly into the “Henrietta Osborne and Co” account with the African Continental Bank at Idumota. The plaintiff told the court that neither he nor the second defendant had authority individually to endorse any cheque to a third-party. They always acted together. In fact, the plaintiff led evidence and established through the third witness for the plaintiff, Ngozi Anyogu, of the Idumota Branch of the African Continental Bank that, in accordance with the company’s current deposit account card which was endorsed with the following words, written boldly in red both at the top and bottom of it, “All parties to
sign cheques”, the plaintiff and the second defendant signed cheques together. Two such cheques signed jointly by the plaintiff and the defendant were shown in evidence. The second defendant must know therefore that the two of them sign in these cases.

The plaintiff said that it was the practice for any payment for the benefit of Henrietta Osborne and Co to be made directly to the partnership account with the African Continental Bank, he was surprised that the Government of the Federal Republic of Nigeria crossed cheque No. 828313 of August 3rd, 1970 for the sum of £8,850, made payable to “Henrietta Osborne and Co” and marked with the words “Account Payee Only”, “Not Negotiable”, was not paid into the partnership account with the African Continental Bank, Idumota Branch as it should have been. The cheque was endorsed at the back by the second defendant to Narsons (Nigeria) Limited. The second defendant, the plaintiff added, had no authority to endorse it to a third-party. As a result of the discovery by the plaintiff that the second defendant had endorsed the cheque for £8,850 or N17,700 to Narsons (Nigeria) Limited and that the first defendant, the Bank of America (Nigeria) Limited, had paid out the proceeds of the cheque, the plaintiff instructed his solicitor to write a letter, dated March 27th, 1972, to the first defendant. The letter reads:

“Central Bank Cheque No. 828313 of August 6th (sic), 1970 for £8,850.0s.0d in favour of Henrietta Osborne and Company. We act for the firm of Henrietta Osborne and Co, a partnership. The partnership account is with the Idumota Branch of the African Continental Bank Limited.

The partnership executed a contract for the Nigerian Army and one of the series of cheques paid to the partnership was one for £8,850 drawn in the partnership name, duly crossed ‘and Co’ and marked ‘Account Payee Only.’ It was a Central Bank cheque leaf. This cheque for £8,850 was never paid into the firm account but intensive enquiries revealed that your bank has collected cash
Savage J

Abimbola v. Bank of America (Nigeria) Ltd and another

for the cheque and credited it to the account of one Mr Narsons with your bank.

Our case is that you acted wrongly and in bad faith in collecting the proceeds of a crossed cheque marked ‘and Co’ and ‘Account Payee Only’ and crediting it to an account other than the drawer’s account. We have instructions to recover the money from you and we are writing to hear early from you please.”

The plaintiff’s case against the Bank of America (Nigeria) Limited is that the cheque in question was crossed and marked “and Co” between two traverse lines with the words “Account Payee Only” and Not Negotiable” also written clearly on it, the second defendant negotiated or allowed the cheque to be negotiated through it, cashed it and passed the proceeds to a party other than the true owners, “Henrietta Osborne and Co”.

Although the first defendant pleaded in paragraph 4 of its statement of defence that the cheques were cleared on behalf of Narsons (Nigeria) Limited, a customer, in the normal course of business, it did so in good faith and without negligence, only one witness was called by the defendant, and apart from admitting all the obvious facts on the face of the cheque such as that it was a crossed cheque, that it was marked “Account Payee Only” and “Not Negotiable,” that it was payable to “Henrietta Osborne and Co Lagos”, that it was an order cheque, etc., all the witness said was that the first defendant accepted the cheque and sent it for clearing. The cheque was cleared for Narsons who was then a customer of the first defendant and that was all the evidence adduced on behalf of the first defendant in answer to the plaintiff’s charge of negligence against it. No explanation whatsoever was offered for clearing the cheque in those circumstances.

The second defendant, Henrietta Osborne, gave evidence on her own behalf. She claimed to be the proprietor of “Henrietta Osborne and Co”. She obtained contracts from the Ministry of Defence for the supply of generators. She agreed under cross-examination that all four batches of generators mentioned by her were shipped to “Henrietta
Osborne and Co”. The Nigerian Army made four different payments for the consignments supplied. She agreed that all the four cheques issued were made in the name of “Henrietta Osborne and Co”, and that of all the four cheques, only the one was not paid into the African Continental Bank account of Henrietta Osborne and Co and that all the others were paid into that account.

Now, in the form of application for registration of a business name, “Henrietta Osborne and Co” is given as the business name; and with regard to the particulars required in respect of each of the partners, the names Bola Abimbola followed by particulars of his address and occupation, and Miss Henrietta Osborne followed by particulars of her address and occupation, in that order, also appear on the form, and finally at the back of the form the column provided for the signatures of all partners in the firm shows the names B Abimbola and H Osborne as signatories in that order. The certificate of registration of “Henrietta Osborne and Co” shows the general nature of the business as being import, export, and general contractors. On the evidence I have no hesitation in holding and I do hold that “Henrietta Osborne and Co” is a firm of which the plaintiff and the second defendant are partners. The plaintiff, therefore, has financial interest in the business, contrary to the averment, in paragraph 10 of the statement of defence of the second defendant.

There is, however, no written partnership agreement; no articles of partnership. In the absence of agreement to the contrary, partners share equally both the profits and losses. The evidence before the court shows quite clearly that the Central Bank cheque was made payable to “Henrietta Osborne and Co” as payment for the army contract after execution, and not to the second defendant, Miss Osborne personally. The proceeds of the cheque, in my view, should have gone into the partnership account. There is no evidence before the court that “Henrietta Osborne and Co” has been dissolved, and such sum of money must necessarily belong to
the firm. The second defendant knew, as evidenced by two other cheques jointly signed by the plaintiff and the second defendant, that in these matters both she and the plaintiff must sign together, and in breach of this, she endorsed the cheque in question to a third party, Messrs Narsons (Nigeria) Limited. She had no authority to do this.

This brings one to the consideration of the positions of the first defendant, the Bank of America (Nigeria) Limited, who cleared the proceeds of the cheque drawn on the Central Bank of Nigeria with the words “and Co”, “Account Payee Only” and “Not Negotiable” on it, and made payable to “Henrietta Osborne and Co”.

In *House Property Co of London Ltd v. London County and Westminster Bank Ltd* (3), Norman, the solicitor to the trustees, wrote to the company calling in the mortgage on grounds of depreciation. After negotiation, the plaintiff company arranged to repay £800 of the mortgage moneys, and sent to Norman, the solicitor, a cheque for this amount, payable to the trustees FS Hanson and others “or bearer,” and crossed “Account Payee.” The solicitor paid the cheque to the credit of his account at the St. Mary Axe of the defendant bank, and it was collected for him. It was held in that case that the bank had been negligent. In the account of the case in the *Times Law Reports* (31 T.L.R. at 480), Rowlatt J is reported as saying that:

“(Counsel for the defendants) had argued that the cheque was made out to Hanson and others or bearer, and that Norman was the bearer, and that the defendants in collecting it for his account were collecting it for the payee. That was a shallow argument, as ‘payee’ did not mean the owner of the cheque at the time it was presented, but the name written across the face of the cheque, in this case, FS Hanson and others. No evidence had been called by the defendants, and they contended that they had not been guilty of negligence in allowing this cheque to be collected for a gentleman whom they knew to be a solicitor to be credited to his account. The defendants offered no sort of excuse for so doing, and if he (his Lordship) were to say that they were entitled to do so without any explanation, he would be practically saying that a
bank could not be negligent in respect of a cheque of that kind.”
(These words do not appear into the report of the case at 113 L.T. 817).

It is clear from the above decision that marking a cheque “Account Payee Only” is an effective direction to the collecting banker, and if he ignores it, he does so at his peril. It seems the effect is to put the banker on inquiry, and this is more so, in my view, where a large sum of money, as in the cheque in this case, which is an order, is involved.

The first defendant, as I have observed, led no evidence to prove absence of negligence. It has been held in another case, Bevan v. National Bank Ltd (1), where cheques payable to Malcolm Wade and Co, which were crossed and marked “Account Payee” were in fact paid to the private account of Malcolm Wade, that the bank had not been negligent in so collecting them, as it had been reasonable for them to accept Wade’s statement that he was trading as Malcolm Wade and Co although he was only the manager of that firm. The first defendant in the case presently before the court did not say through the only witness called what made the bank clear the cheque for Narsons. All that was said was that Narsons was a customer at the material time; there was no further explanation. Furthermore, the cheque was also marked “Not negotiable” and this is quite clearly another factor amongst others to be considered in deciding whether a collecting banker has been negligent, having regard to all the circumstances of the particular case. In fact in Crumplin v. London Joint Stock Bank Ltd (2), where the cheques “Not Negotiable” were small cheques paid at long intervals, it was held that there had been no negligence, and that having regard to the circumstances, it was not negligence in the bank not to have made inquiry.

In the present case, however, the crossing on the cheque is not just a simple one, for it is also marked “Account Payee” and the cheque was made out for a large sum of money, ₦17,700. I certainly hold the view in these circumstances that these matters ought to have put the first defendant on
inquiry and they ought to have provoked the banker into asking one or two questions of the second defendant, and if the inquires were reasonably answered, then such answers, in my view might afford some protection to the banker. But there was practically no defence to the charges of the plaintiff against the first defendant, having regard to the evidence of the only witness called by the first defendant. I do not think that the first defendant had discharged the burden of proving due care in clearing the cheque. In the circumstances, I must find and do find that the first defendant has failed to prove absence of negligence.

Narsons (Nigeria) Limited is not a party to these proceedings. The second defendant pleaded in paragraph 11 of her statement of defence that “... the second defendant will contend at the trial that Narsons (Nigeria) Limited was entitled to the proceeds of the cheque for the sum of ₦17,000 which was endorsed to the said company.” I may here mention that, in the true tradition of the bar, learned Counsel for the second defendant was forthright enough to admit in court that he was satisfied that the plaintiff was entitled to some of the proceeds of the cheque. It certainly cannot be correct that Narsons (Nigeria) Limited was entitled to all the proceeds. I must reject and do reject the defence of the second defendant. With regard to the counterclaim the second defendant has alleged that the plaintiff collected one generator on behalf of the second defendant to be delivered to the Nigerian Army but failed to do so. There is no proof whatsoever of this. The plaintiff and the second defendant cannot claim to be operating the business personally. There is no evidence in any event that the plaintiff had paid for the generator from the partnership account, or that he was the agent of the second defendant. The counterclaim must fail. I find it not proved and it is accordingly dismissed.

The plaintiff’s claim is against the defendants jointly and severally and by his statement of claim the sum of £17,700 for the partnership account or in the alternative half of that
amount being his own half of the proceeds of the cheque. It is well established that generally all partners are entitled to share equally in the capital and profits of their business, in the absence of any agreement to the contrary. There is the ipse dixit of the plaintiff that the amount of ₦8,850 represented his half share of the proceeds resulting from the partnership transaction for which the cheque was issued. This piece of evidence has not been controverted in so far as the plaintiff’s share in the business is concerned. I have no reason to doubt the plaintiff in this regard. I accept his evidence as correct. I am fortified in this view by the admission in court of learned Counsel for the second defendant, to which I have already made reference, that the plaintiff was entitled to some amount, contrary to the defendant’s averment in paragraph 11 of her statement of defence that Narsons (Nigeria) Limited was the party entitled to all the proceeds of the cheque.

I find the plaintiff’s claim proved and to this effect, judgment is hereby entered in favour of the plaintiff against the defendants jointly and severally in the sum of ₦8,850. The plaintiff will have the costs of this action assessed at ₦200.

Judgment for the plaintiff.
National Bank of Nigeria Limited v. Shoyoye and another

Facts

The plaintiff/appellant instituted an action against the defendants/respondents at the High Court of Western State, Abeokuta for an amount owing to it by the latter.

At the hearing, the defendants/respondents objected to the jurisdiction of the court contending that the proper venue should have been the High Court of Lagos State as they were resident in Lagos and the plaintiff’s headquarters was in Lagos.

The High Court overruled the objection, and the defendants appealed to the Western State Court of Appeal which overruled the decision of the lower court. The plaintiffs, however, appealed the decision at the Supreme Court.

Held –

It is the law where no payment is expressly or impliedly specified by the contract, the general rule is that, it is the debtor’s duty to seek the creditor in order to pay him at his place of business or residence if it is within the country or realm. In the instant case, since the debt had been assigned to the plaintiff who resided in Ibadan, the matter was within the jurisdiction of the High Court of Western State.

Appeal upheld.
Cases referred to in the judgment

Nigerian

Ndaeyo v. Ogunsanya S.C. 395/75 of 14/1/77
Timitimi v. Amabebe 14 W.A.C.A. 374

Foreign

Attorney-General for Trinidad and Tobago v. Erichie (1893) A.C. 513 at 522-523
The Elder 1893 Probate 119 at 128

Nigerian statute referred to in the judgment

High Court Law, (Cap 44), Laws of Western Region of Nigeria, 1959 section 2 8, 9(1) and 11S

Nigerian rules of court referred to in the judgment

High Court (Civil Procedure) Rules, Order 6, rules 4 and 6

Counsel

For the appellant: Shomolu
For the respondent: Toye

Judgment

OBASEKI JSC: This appeal is against the judgment of the Western State Court of Appeal delivered on the 10th day of January, 1975 reversing the interlocutory decision of the High Court of the Western State (Adewale Thompson J) sitting at Abeokuta on the 30th day of April, 1971 overruling the defendants/respondents’ objections as to jurisdiction on the ground of incorrect venue.

The point of objection, we may observe was not raised in the pleadings which had been filed and duly delivered. The case had been set down and called for hearing when the learned Counsel for the defendants/respondents raised the point by way of preliminary objection that the action was instituted in the court (High Court of Justice, Western State, and holden at Abeokuta) that had no jurisdiction to hear it. He contended that the proper court or venue was the High Court of Lagos State.
The grounds on which he founded the objections were:

1. That the defendants were resident in Lagos and were served there;
2. That the first plaintiff’s headquarters was Lagos; and
3. That the overdraft was taken from the first plaintiff in Lagos.

In a considered ruling, the learned trial Judge, Adewale Thompson J held that the objection was misconceived and overruled and dismissed it with £10.10 (ten guineas) costs to the plaintiff.

The defendants with leave of the High Court, appealed to the Western State Court of Appeal. After hearing Counsel, the Court of Appeal allowed the appeal and struck out the suit. In allowing the appeal, the learned Justice of the Western State Court in penultimate paragraph of the judgment delivered by Adegboyega Ademola JA said:

“All we would say is that on the facts of this case no Judicial Division of the High Court of the Western State had jurisdiction to entertain this case. The action should have been instituted in the High Court of Lagos State. We therefore allow the appeal and strike out the action of the plaintiffs/respondents.” (Italics are ours.)

Against this judgment, the appellant filed five grounds of appeal but argued only three of them (grounds 1, 2 and 5) which reads:

1. The learned Judges of the Appeal erred in law in their wrongful admission and/or assumption of evidence to arrive at their decision and thereby occasioned a miscarriage of justice.
2. The learned Judges of Appeal erred in law in their conclusions that the action was wrongly commenced in the Abeokuta Judicial Division when it was the most proximate judicial division to the last known place of residence or trading address of the defendants at the institution of the action.
5. The learned Judges of Appeal erred in law in not considering the submission of the applicant’s Counsel as to the nature of the plaintiffs/appellants’ case on the ground that it was not preferred in the arguments in the court below when it is always open to a respondent to meet preliminary objections on any general grounds available from the facts of the case at any stage of the proceedings.

We may observe that no evidence was adduced before the High Court in support of the preliminary objection. The point as we pointed out earlier was not even raised in the pleadings. The High Court and Western State Court of Appeal were therefore left to an examination of the writ of summons, the claim endorsed on the writ and the statement of claim and the statement of defence to ascertain whether the objection was well founded.

The claims endorsed on the writ of summons reads:

“The plaintiff claims against the defendants jointly and severally the sum of £15,433.0.11d (fifteen thousand, four hundred and forty-three pounds and eleven pence) being balance of overdraft and the accrued interest thereon received by the defendants at Lagos owing the plaintiffs as at 31st December, 1966 by the said defendants who trade as partners under the style and business name of Subuola Trading and Transport Service.”

The body of the writ of summons reads:

“To John Shoyoye, Justus Adeoye Akinkunmi of Abeokuta Motor Road, Ifo.

You are hereby commanded to attend this Court holden at Abeokuta on Monday the 25th day of April, 1967 at 9 o’clock in the forenoon to answer a suit by the National Bank of Nigeria Limited, Western Nigerian Marketing Board of Cocoa House, Ibadan against you.”

It is therefore clear from the face of the writ of summons that the addresses for service of the plaintiffs and defendants were within the Western Nigeria and within the jurisdiction of the High Court of Western Nigeria.

The statement of claim, although addressed for service in Lagos, did not plead the residential address of the defendants.
but gave the address of the headquarters of the partnership in Lagos. It pleaded the assignment of the debt by the first plaintiff to the second plaintiff with the concurrent of the defendants. It finally pleaded facts showing that the defendants entered into arrangements with the first plaintiff for payment of the money owed to and in this regard we may now refer to paragraphs 1, 3, 6, 7, 9, 10, 11, 12, 13, 14 and 15 or to the statement of claim which reads as follows:

“(1) The first plaintiff is a banking company incorporated in Nigeria with its head office in Lagos and several branches throughout the Federation of Nigeria;

(3) The second plaintiff is a Board incorporated under the Laws of Western Nigeria with its head office in Ibadan;

(6) The defendants are business partners who traded under the name of Subuola Trading and Transport Service with its head office in Lagos;

(7) The defendants as such parties under the name of Subuola Trading and Transport Service applied to the second plaintiff for appointment as Licensed Buying Agents under the plaintiff;

(9) The defendants were so appointed and for several years thereafter they were appointed from year to year as Licensed Buying Agents under the plaintiff;

(10) The application of the defendants were granted and from that time the first plaintiff granted produce overdraft to the defendants...stood also as debt of £5,522.19.0d at 30th March, 1961 to bring the load of their indebtedness to the first plaintiff at £15,433.0.11d (fifteen thousand, four hundred and forty-three pounds no shillings and eleven pence);

(11) When the defendants defaulted on the payment of the outstanding balance of the overdraft granted to them up to March, 1961 the first plaintiff asked to assign the debt to the second plaintiff since the defendants were still a Licensed Buying Agent under the second plaintiff;

(12) The defendants were consulted by the second plaintiff and the defendants agreed to the assignment proposal in writing;
(13) The first plaintiff made an equitable assignment of the said debt of £15,443.0.11d to the second plaintiff on the 1st day of April, 1961 with the knowledge and consent of the defendants;

(14) The defendants entered into several arrangements with the second plaintiff since then for the liquidation of the money but none has materialised;

(15) The defendants have since failed to pay the said sum of £15,443.0.11d despite repeated demands.”

The statement of defence filed did not plead as to jurisdiction or raise any objection to the jurisdiction of the court although it traversed the above averments. It is clear then that, without notice of motion on the day set down for hearing but before the hearing of evidence, Counsel for the defendants/respondents raised the point of objection to the jurisdiction of the court. It is, however, settled law that such an objection can be taken at any time by the court. Even without pleadings the court can order preliminary points of law to be taken (Ramage and another v. Womach (1900) 1 Q.B. 114).

Counsel for the plaintiffs/appellants in his reply submitted that the objection was premature and pointed out that the objection was not raised in the statement of defence ie by the defendants’ pleadings.

The learned trial Judge (Adewale Thompson J) considered the arguments on the objection and dismissed it in his ruling, he observed:

“Mr Kayode Somolu for the plaintiffs contended that the objection was premature in that the mere fact that the defendants were served in Lagos, and had their head office in Lagos does not affect the plausibility that at the time the suit was commenced in 1967 they carried on their business within this Judicial Division and that it will be necessary for the defendants to be examined on oath on that point before the fact could be established to exclude the court’s jurisdiction. It is learned Counsel’s submission that the objection cannot be entertained unless the defendants make it the subject of a special plea in their defence as provided by Order 6, rule 6 ... When a litigant files an action and gives as place of

Obaseki JSC
National Bank of Nigeria Limited v. Shoyoye and another 235

a

business of a defendant’s firm, a particular address, that address at the date the writ was filed determines the venue of the trial and in Western State such an address determines the Judicial Division in which the cause or matter is to be heard.”

b

The learned trial Judge in conclusion said:

“I agree with Mr Somolu that unless the defendants could be properly examined as to their place of business at the time the summons was filed, they cannot take advantage of Order 6, rule 5 of the High Court of (Civil Procedure) Rules.

In this case, it is even not necessary to undertake such an exercise. Defendants filed their statement of defence as far back as 25th September, 1968. Sometimes in 1969 defendant’s Counsel applied to have the statement of defence amended by including as paragraph 10 the special plea that the action is statute-barred under Limitation Law of Western Nigeria. The amendment was granted. Nowhere in the statement was any plea as to venue as provided by Order 6, rule 6 of the High Court Civil Procedure Rules . . .

I hold that the objection is misconceived and is overruled with 10 guineas cost to the plaintiff.”

c

The defendants appealed against the ruling to the Western State Court of Appeal. The Western State Court of Appeal in its judgment (delivered by Adegboyega Ademola JA) allowing the appeal observed inter alia:

d

“Before us, Chief Toye Coker for the defendants/appellants, in effect repeated his submissions before the learned Judge Adewale Thompson. He did not add anything new. On the contrary, Mr Kayode Somolu who appeared for the plaintiffs/respondents submitted that the case was one of an assignment of a debt and as the second plaintiff has its office in Ibadan, the case could be taken in this State. He referred to Order 6, rule 4. He submitted that the defendants resided in Ifo and so, the Abeokuta Judicial Division had jurisdiction to try the case. We do not share Counsel’s view on the facts of this matter and so we do not think his submission is valid. But more important is the fact that this was a point not taken in the court below as the record which we have quoted clearly show . . .

e

To go further as the learned Judge did and ask the question “where is the evidence that the defendants in 1967 when the writ was filed were not trading as Subuola Trading and Transport Service with
their office at Abeokuta Motor Road Ifo?" was, with respect to the learned Judge a clearly wrong approach. We ask, where is the evidence that they were trading in Ifo? . . .

We think that it was for the plaintiffs to have pleaded facts which could show where the defendants traded and/or resided in 1967 at the time the writ was taken out. It is true that the defendants did not raise the question of venue “in their statement of defence” but we venture to suggest that they were the defendants and not the plaintiffs. There is no legal duty on the defendants to do what the learned Judge suggested. That duty clearly rests with the plaintiffs. More important we are of the view that it would be wrong merely to confer jurisdiction on the High Court of this State, to state a defendants address on the writ to be within a Judicial Division of the High Court of this State when in fact that defendant resides or carries on business in another state. That seems to have been precisely what happened in this case.”

It is against this decision that this appeal has been lodged.

The learned Counsel for the appellants argued the 3 grounds (grounds 1, 2 and 5) together.

He repeated the submissions he made both before the High Court and the Court of Appeal and emphasised the fact that at no time was evidence adduced to found the submission that the defendants were at no time resident within the Abeokuta Judicial Division of the High Court of Western Nigeria. He also submitted that since the debt has been assigned to the second plaintiff/appellant, the High Court of Western Nigeria at Abeokuta had jurisdiction to entertain the matter as the debt had to be paid to them in the Western State. In other words, the agreement to pay the second plaintiff has to be performed in the Western State of Nigeria.

Chief Toye Coker repeated his grounds of objection in reply. He also drew our attention to certain passages in the learned trial Judge’s ruling on the effect of Order 6, rule 6 which were most inapposite as Lagos State was and is not part of the Western State.
The civil jurisdiction vested in the Western State High Court by law is contained in section 8, section 9(1) and section 11 of the High Court Law, (Cap 44). They read:

8. To the extent that such jurisdiction shall be conferred by the regional legislature, the High Court shall be a superior Court of Record, and in addition to any other jurisdiction conferred by this or any other law or Ordinance, shall within the limits and provisions of this law, posses and exercise all the jurisdiction, powers and authorities, which are vested in or capable of being exercised by her Majesty’s High Court of Justice in England.

9 (1) To the extent that such jurisdiction may be conferred by the regional legislature, the jurisdiction by this law vested in the High Court shall include all Her Majesty’s civil jurisdiction which at the commencement of this law was, or at any time may be exercisable in the Western State, for the judicial hearing and determination of matter in difference or, for the administration or control of property and persons . . .

11. The jurisdiction by this law vested in the High Court shall be exercised (so far as regards procedure and practise) in the manner provided by this law . . . or by such rules and orders of Court pursuant to this or any other law or Ordinance.”

It is pursuant to this section that the High Court (Civil Procedure) Rules were made.

What then is the meaning of this jurisdiction? It is defined in Volume 10, Halsbury’s Laws of England (4ed), paragraph 715 at page 323 as follows:

“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it, or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the court is constituted and may be extended or restricted by similar means. If no restriction is imposed, the jurisdiction is said to be unlimited, a limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance or as to the area over which the jurisdiction extends or it may partake of both these characteristics.”

The High Court sat over this matter in exercise of its original jurisdiction.

“The original jurisdiction of the High Court is general, it extends to all causes of action and is unlimited in amount . . .” (See
The combined effect of sections 8 and 9 of the High Court Law of Western State referred to and set out above is to give the High Court unlimited powers to hear and determine causes and matters brought before it anywhere in the Western State only. Jurisdiction to hear cases and matters outside the Western State was not conferred on it. The place of instigating and of trials of suits is however regulated by Order 6 of the High Court (Civil Procedure) Rules and this action being one of payment of debts (an overdraft assigned by the first to the second plaintiff) the relevant rule is rule 4 of Order 6. This Rule deals with suits arising out of contracts, and it reads:

“All suits for specific performance or upon the breach of any contract may be commenced and determined in the judicial division in which such contract ought to have been performed or in which the defendant resides.”

We may once more turn our attention to the writ of summons. The defendant’s address for service therein stated lies within the jurisdiction of the court and in the absence of evidence to the effect that at the date of the issue of the writ the defendants were not resident in or carrying out business within the jurisdiction of the court or that the agreement for payment of the money was not to be performed within the jurisdiction of the court, the court has no legal justification to decline jurisdiction. It is the law that where no payment is expressly or impliedly specified by the contract the general rule is that it is the debtor’s duty (his place of residence notwithstanding) to seek his creditor in order to pay him at the place of residence or business if it is within the country or realm. In other words, “It is a general principle that money is paid to a creditor by a debtor where the creditor is” (see Sir Francis Jeune in the The Elder (1893) Probate 119 at 128; also Robey v. Snaefell Mining Co (1888) 20 Q.B.D. at 154). Stephen J citing the authority of Sir Edward Coke to the effect that the
Obaseki JSC
National Bank of Nigeria Limited v. Shoyoye and another 239

a. Obligor of a bond must go to the obligee in order to pay it; and here the allegation is that the second appellant to whom the debt due from the respondent was assigned now resides in Ibadan within the jurisdiction. We may also observe that there is no evidence that leave of the judge was obtained to seal the writ for service out of jurisdiction as is required by Order 4, rule 16 of the High Court (Civil Procedure) Rules if and when a writ is to be served on a respondent who resides out of jurisdiction.

b. We are therefore firmly of the view that the Western State Court of Appeal erred in its approach to the question before it and erred when, in the absence of any evidence, it held that the plaintiffs/appellant inserted the address “Abeokuta Motor Road, Ifo” as address of service of the writ on the defendants in order to bring the matter within the jurisdiction of the court. Such a finding which to the plaintiffs and their Counsel alleges an important and far-reaching damaging and damnifying misconduct must be based on evidence on oath fully tested during cross-examination. We are of the view that, having regard to the pleaded facts establishing the business relationship between the plaintiffs and the defendants, until there is evidence to the contrary, it is reasonable for the learned Judge of the High Court to assume that the defendants must have been the source of knowledge of that address.

c. It is true that the objection taken by Counsel did not fall squarely within the purview of Order 6, rule 6 of the High Court (Civil Procedure) Rules which reads:

d. “6. In case any suit shall be commenced in any other Judicial Division than that in which it ought to have been commenced, the same may, notwithstanding, be tried in the Judicial Division in which it shall have been so commenced, unless the court shall otherwise direct, or the defendant shall plead specially in objection to the jurisdiction before or at the time when he is required to state his answer or to plead in such cause.”

But we are of the view that it could similarly have been raised in the pleadings and, or, if not in the pleadings, by
motion supported by affidavit giving the full facts on which defendants relied. The point of time at which the objection was taken deprived the court below of the evidence necessary for proper decision by the Western State Court of Appeal and has delayed the hearing of this case of overdraft/debt instituted in 1967 till now May, 1977. If there had been evidence in support of the objection, we would have had no hesitation in following the judgment of this Court in the case of *Ndaeyo v. Ogunsanya* S.C. 395/75 delivered by Idigbe JSC on the 14th day of January, 1977. That was the case commenced in the High Court of East Central State at Owerri (now High Court of Imo State) instead of the High Court of Rivers State at Port Harcourt where the defendant carried on business or the High Court of South Eastern State at Uyo (now Cross River State) where the defendant resided and also carried on business. This Court was able to hold that the action was instituted in the wrong venue and in the High Court that had no jurisdiction to hear and determine it because there was evidence on record on which the court could so find.

This Court in that case said in the penultimate paragraph:

“The evidence on record, however, is that the appellant (ie the defendant in these proceedings) neither resides, nor carries on business, within Imo (formerly East Central) State. Where therefore, a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing.” (See Volume 10, Halsbury’s *Laws of England* cit paragraph 715; Attorney–General of Trinidad and Tobago v. Erichie (1893) A.C. 513 P.C. 522-523. See also *TimiTimi v. Amabebe* 14 W.A.C.A. 374).”

In the instant case, there was no such evidence and we say no evidence at all.

This appeal succeeds and is hereby allowed.
is hereby set aside and the suit is hereby ordered to be listed before the High Court of Ogun State for hearing.

The defendants/respondents shall pay the plaintiffs/appellants cost of this appeal assessed at one hundred and fifty naira (₦150).
Agbafe v. Viewpoint (Nigeria) Limited

HIGH COURT OF PLATEAU STATE

FIEBAI J

Date of Judgment: 9 June 1977

Banking – Cheques – Endorsement of – What constitutes
Liability of bank for payment where endorsement improper – When bank can enjoy the protection of section 60, Bills of Exchange Act, 1882

Banking – Cheques – Payment of – Proof of payment – Whether mere production of uncrossed cheque stamped “paid” proof of receipt by or payment to named payee – Relevant consideration

Banking – Cheques – Payment over counter of uncrossed bearer cheque for a large sum – Whether evidence of banker’s negligence

Facts

The plaintiff’s claim against the defendant was for the sum of N3,700 being the value of 3,000 “bush poles” and gravel supplied to the defendant. The claim for the sum of N1,700 for the gravel was withdrawn.

The plaintiff’s claim was that upon supply of the goods, the defendant made part payment in three instalments, details of which were indorsed on the plaintiff’s local purchase order.

The defendant on the other hand, alleged that in addition to the three instalments admittedly received by the plaintiff, a further substantial payment had been made and that, consequently, its liability was considerably less than claimed by the plaintiff. In support of this allegation the defendant produced a cheque, which was not crossed, made payable to the plaintiff. On the back of the cheque was written...
“Mrs Theresa Agbafe” (the plaintiff’s name) and the plaintiff’s address. On the face of the cheque was stamped the word “Paid.” There was no evidence that the plaintiff herself had cashed the cheque, and she denied having received the payment.

**Held** –

1. The mere production of a bearer cheque made payable to a payee is not conclusive evidence of receipt by or payment to him. In the instant case, the defendant had the onus of proving that it was the plaintiff who received the cash which onus they were unable to discharge.

2. A bank would be justified in making payment over the counter, notwithstanding that the cheque was for a large amount but the fact that the cheque was not crossed is indicative of business ineptitude on the part of the drawer.

3. The name endorsed at the bank of the cheque in this case is the name which appears on the face of the cheque as the payee. It is not a signature. Therefore the endorsement was irregular.

4. Payment by the New Nigeria Bank Limited, Jos might be justified if it was made in good faith and if there was proper endorsement. Without a proper endorsement it fails to enjoy the protection afforded by section 60 of the Bills of Exchange Act, 1882 which being a pre-1900 imperial statute of general application applies to the Plateau State by virtue of section 28(c) of the High Court Law.

**Judgment to the plaintiff.**

**Case referred to in the judgment**

**Foreign**

*Auchteroni and Co v. Midland Bank Ltd* (1928) 2 K.B. 294

**Nigerian statute referred to in the judgment**

Bills of Exchange Act, 1882, section 60
Book referred to in the judgment
Paget’s Law of Banking (8ed), page 335

Counsel
For the plaintiff: Ihenacho
For the defendant: Ikongbeh

Judgment

FIEBAI J: The plaintiff claims from the defendant N3,700 being the value of 3,000 “bush poles” and gravel. The claim in respect of the gravel was N1,700 but, as Mr Ihehanacho, the plaintiff’s Counsel, gallantly submitted, there was no evidence in proof of it. It is accordingly disallowed.

The plaintiff’s evidence on the balance of the price due on the bush poles was that in 1975 she supplied to or on the order of the defendant 3,000 poles each valued at N1.20. She was paid N1,600 in three installments of N100 and N1,000, N500 in September, October and December, 1976 respectively. In proof of the defendant’s liability, the plaintiff produced a local purchase order No. 170. The defendant admitted the authenticity of this local purchase order, but explained that, in reduction of its liability, the sum of N1,020 had been paid by cheque earlier in May, 1976. The plaintiff denies this.

The defendant’s other witness, Toma Jat, described himself as a supervisor in the New Nigerian Bank Limited, Jos. To this bank, the cheque for N1,020 was allegedly presented for payment and by it it was honoured. But Toma was not the paying cashier and he was unable to say who cashed the cheque. At the back of the cheque appears the following manuscript endorsement: “Mrs. Theresa Agbafe, S.A. 18 Apata Street, Jenta New Layout, Jos.” On the face of it is stamped “Paid.” The cheque is a bearer cheque and the defendant pleaded in paragraph 7 of its statement of defence as follows: “On May 13th, 1976 the defendant paid to the plaintiff the sum of N1,020 on its New Nigeria Bank cheque No. LC006446.”
The defendant did not produce evidence of payment in the form of a receipt issued by the plaintiff. The cashier who paid cash on the cheque was not called to confirm payment or identify the plaintiff as the payee. My attention was not drawn to any authority and I know of none myself in support of the proposition that mere production of a bearer cheque is conclusive evidence of receipt by or payment to a particular individual. From the particular circumstances of the case which suffers from a paucity of evidence, I am unable to hold that the defendant company discharged the onus which rested on it to prove payment.

It is significant that the amount indorsed on the cheque is quite substantial but it was not crossed. In the case of Auchteroni and Co v. Midland Bank Ltd (1) Wright J held that a cashier’s payment of £876.9s over the counter was justified. I adopt the same principle and hold that if exhibit A was paid over the counter as it was, *ex facie*, such payment was justified. But the fact that it was not crossed was indicative of business ineptitude on the part of the drawer.

The purported endorsement at the back of the cheque raises, yet again the question whether or not it is genuine. The name indorsed is the name which appears on the face of the cheque as the payee. There is no evidence that the plaintiff indorsed the cheque and I cannot hold that she did. In Paget’s *Law of Banking* (8ed) at 335 (1972) the law is stated thus:

“A cheque payable to Mrs. AB is not properly indorsed ‘Mrs. AB’; one payable to ‘General CD’ is not properly indorsed ‘General CD’; on one to the ‘Duke of E’, ‘Duke of’ would be rejected as an endorsement. These are not signatures, nor do they ‘purported to be’, within section 60 of the Bills of Exchange Act, 1882.”

I conclude that the endorsement at the back of the cheques is irregular. It is not a signature. Payment by the New Nigeria Bank Limited Jos, might be justified if it was made in good faith and if there was a proper endorsement. Without a proper endorsement it fails to enjoy the protection afforded
by section 60 of the Bills of Exchange Act, 1882, which being a pre-1900 imperial statute of general application, applies to the Plateau State by virtue of section 28(c) of the High Court Law. In so stating, albeit obiter, I am aware of the provision of section 4(3) of the Cheques Act, 1957, that a banker’s failure to concern himself with the absence of, or an irregularity in, endorsement does not, by itself, constitute negligence: See Halsbury’s Laws of England (4ed) at 79, paragraph 103, but this is a post-1900 statute of England and it does not apply here.

Now, on the local purchase order which the defendant company admitted issuing in favour of the plaintiff the following endorsements appear: “Paid ₦100 cheque No. 245943 of September 30th, 1976. Paid ₦1,000 cheque No. 026304 of October 18th, 1976. Paid ₦500 cheque No. 040993 of December 20th, 1976.” Mrs Acka’a, the managing director of the defendant company, admitted making the endorsements which she further admitted were payments she made to the plaintiff. She did add the qualification that the plaintiff did not always produce her local purchase order for endorsement. But the cheque for ₦1,020 is dated May 13th, 1976, and if the local purchase order was not produced in May (hence Mrs Acka’a’s failure to endorse) she could have indorsed it when it was later thrice produced. To hold otherwise would defy human reason.

I accept evidence of the plaintiff that the defendant company paid her ₦1,600 only. I reject the evidence of the defence, as it purported to establish that the plaintiff cashed the cheque. Mrs Acka’a did say that the cheque was incomplete but she did not herself produce her office copy on which she said she indorsed the full facts of payment. And she had ample notice that it was necessary for her proof of payment because in paragraph 8 of her statement of claim the plaintiff pleaded thus: “On September, 30th, 1976, October 18th, 1976 and December 12th, 1976 the defendant paid by cheques ₦1,000 and ₦500 respectively to the plaintiff making a total of ₦1,600 . . .”
It is my view that the evidence of Toma Jat was of no assistance to either party.

Judgment is entered for the plaintiff against the defendant in the sum of ₦2,000 with costs.

*Judgment for the plaintiff.*
Tradelinks International (Nigeria) Limited for leave to apply for an Order of Certiorari; In the Matter of the Senior Magistrate AA Awosanya’s Order of 5th February, 1976 in his capacity as Senior Magistrate sitting at Ikeja on the application of the Inspector–General of Police; In Re: Tradelinks International (Nigeria) Limited

HIGH COURT OF LAGOS STATE
BALOGUN J
Date of Judgment: 13 JUNE 1977 Suit No.: ID/7M/77

Banking – Banker’s books – Application to inspect – Pursuant to section 7, Banker’s Book Evidence Act, 1879 – Power of court to make order – Extent of – Applicability of the laws to Lagos State

Banking – Banker’s books – Application to inspect – When to be made and against whom – Whether can be made against “third party” – Procedure for making application – When affidavit necessary section 7, Banker’s Book Evidence Act, 1879

Banking – Money paid into specified account – Proceeds of account alleged to be from stealing – Power of court to stop payment from account – Whether derivable from section 7, Banker’s Book Evidence Act, 1879

Facts

There was pending in the Magistrates’ Court of Lagos State, Ikeja, criminal proceedings in a charge brought by the Commissioner of Police, Lagos State, against Lambert Nmecha. Following police investigations in that criminal charge and at a stage in those proceedings, the Inspector–General of Police on a date not specified on his written application,
which was expressed to be brought in that charge, applied to the Magistrates’ Court Ikeja for an Order in the terms of the final order made by the Senior Magistrate. The application reads as follows:–

“In The Magistrates Court of IKEJA In the Magistrates Court of the Lagos Magisterial District. Commissioner of Police v. Lambert Nmecha.

I hereby apply for an Order of this Honourable Court that the Inspector–General of Police or any police officer be at liberty to inspect and take copies of ledger and of any record of Messrs: Bank of America, Apapa Branch, Lagos and

To stop further payment of cheque No. 7002255 worth ₦35,000 issued in favour of Trade Links International Nigeria Limited following police investigation. Showing particulars of account with the said bank of (BLANK)

Sgd Inspector–General of Police”

The Order made by the Senior Magistrate on 5th February, 1976 and which order was endorsed at the bottom of the said application reads:–

“I, the undersigned . . . Magistrate hereby make order on Bank of America Limited Apapa Branch as prayed above (empowering) the Inspector–General of Police or any other police officer.

Dated 5th February, 1976

Sgd

------------------------------
SENIOR MAGISTRATE”

It would seem that the order of the learned Senior Magistrate was as follows:–

(a) That the Inspector–General of Police or any police officer be at liberty to inspect and take copies of ledger and of any record or Messrs (Tradelinks International (Nigeria) Limited) with the Bank of America, Apapa Branch, Lagos.

(b) Stopping further payment of cheque No. 7002255 worth ₦35,000 (thirty-five thousand naira) drawn on an account at that branch and made payable to Tradelink International (Nigeria) Limited, the applicants.
Later the applicants applied for extension of time within which to apply for leave to make an application for an order of certiorari. The application was granted. Thereafter the application for leave to apply for an order of certiorari was also granted. The court later heard arguments on the application for an order of certiorari to bring up into court for purpose of being quashed, the order of the learned Senior Magistrate dated 5th February, 1976.

**Held –**

1. An order under section 7 of the Bankers’ Books Evidence Act, 1879 could be made in respect of a “Third Party” or without summoning the bank or any other party to the proceedings.

2. The Banker’s Book Evidence Act, 1879 is a law which is applicable in Lagos State by virtue of section 2(1) of the Law (Miscellaneous Provisions) Law, (Cap 65) of the Laws of Lagos State.

3. Section 7 of the Banker’s Book Evidence Act, 1879 gives power to the court or judge to order inspection of a bankers’ book before, or during trial whether the books relate to the account of a party to the litigation, or to that of a third party.

   However, inspection of a third party’s account can only be ordered when the account is in form and substance the account of a party to the litigation or is kept on his behalf.

4. The jurisdiction of the court to order inspection of entries in bankers’ books under section 7 of the Banker’s Book Evidence Act, 1879 must be exercised with utmost care.

   The application to inspect thereunder may be made *ex parte* but usually the party whose account is to be examined must have notice of the application (unless justice of the case otherwise requires) and the application should, unless the materiality of the inspection otherwise appears, be supported by affidavit.
5. Where an application for inspection of entries in banker’s books under section 7 of the Banker’s Book Evidence Act is made in the course of a criminal proceedings after sufficient evidence had been led to justify the making of the order, it would not be necessary for the Inspector-General of Police who applied for the order to file any affidavit in support thereof.

6. If an accused person in a criminal action had paid the very money he is accused of stealing into a specified bank account, whether his own or that of his wife or of any other third party, a court or judge could on proper application made to him ex parte at any stage of the proceeding make a stoppage order on the banker stopping the payment out of that money from the bank account of a party or a third party.

This power of stoppage is however not derivable from section 7 of the Bankers’ Book Evidence Act, 1879 or the Banking (Amendment) Decree, 1966.

Application granted.

Cases referred to in the judgment

Nigerian

Adeyemi v. Police Service Commissioner (1967) 1 A.N.L.R. 329


In Re Pool House Group Nigeria Ltd Suit No. M/183/67 delivered on 22nd January, 1968 (unreported)


R v. District Officer and others (1961) A.N.L.R. 51 at page 58

Foreign

Anisminic v. Foreign Compensation Commissioner (1969) 2 A.C. 147 at 171, 195
Arnott v. Hayes (1887) 36 Ch.D. 731
Howard v. Beal (1889) 23 Q.B.D. 1
Pollock v. Garle (1898) 1 Ch. 1
R v. Ashford (1955) 2 A.E.R. 327
R v. Agricultural Land Tribunal (1960) 2 A.E.R. 518 at page 520
R v. Barnes Ex parte Lord Vernon 102 L.T. 860
R v. Kensington Commissioner Ex parte Polignac 1917 1 K.B. 486
R v. Northumberland Tribunal Ex parte Shaw (1951) 1 A.E.R. 268 at pages 270-275
R v. Willesden Justice Ex parte Utley (1948) 1 K.B. 397
R v. Exeter Crown Court Ex parte Bealtie (1974) 1 W.L.R. 428 at 433

Statutes referred to in the judgment
Administration of Justice (Miscellaneous Provisions) Act, 1938, sections 7 and 20(5)
Bankers Book Act, 1879, section 7
Bankers Book Evidence Act, 1879, section 7
Law (Miscellaneous Provisions) Law, (Cap 65), Laws of Lagos State, section 2(1)
Summary Jurisdiction Act, 1884

Nigerian rule of court referred to in the judgment
High Court of Lagos (Civil Procedure) Rules 1972, Order 53, rule 1

Book referred to in the judgment
Halsbury’s Laws of England (4ed), Volume 11, paragraph 1559 at pages 818 and 819

Counsel
For the applicants: Mgbenwelu
For the respondents: Akinsanya
Chairman of application/company present: Nmecha
Judgment

BALOGUN J: In these proceedings, Mr PC Mgbewelu moves for an Order of Certiorari on behalf of Tradelinks International (Nigeria) Limited, and the application is that they should be brought up into this Court, with a view of its being quashed an order of Mr AA Awosanya given on the 5th day of February, 1976 in his capacity as Senior Magistrate Ikeja (as he then was) whereby, as it seems to me the learned Senior Magistrate made an order as follows:–

(a) that the Inspector–General of police or any police officer be at liberty to inspect and take copies of ledger and of any record of Messrs (Tradelinks International (Nigeria) Limited) with the Bank of America, Apapa Branch, Lagos;

(b) stopping further payment of cheque No. 7002255 worth ₦35,000 (thirty-five thousand naira) drawn at that branch and made payable to Tradelink International (Nigeria) Limited, the applicants.

The case raises a question of principle which I think, must be of considerable importance to bankers and customers in particular and the Nigerian public at large; and it was for that reason that after hearing the application and although learned Counsel for the respondents stated that she was unable to support the order in question, I adjourned my decision in order that I give a considered opinion thereon.

The facts and circumstances leading to the order complained of are to my mind very simple. There was pending in the Magistrates’ Court of Lagos State, Ikeja, criminal proceedings in a charge brought by the Commissioner of Police, Lagos State, against Lambert Nmecha. Following police investigations in that criminal charge, and at a stage in those proceedings, the Inspector–General of Police on a date not specified on his written application, which was expressed to be brought in that charge, applied to the Magistrates’ Court, Ikeja for an order in the terms of the final order made by the
Senior Magistrate. The application reads as follows:–

“In the Magistrates’ Court of Ikeja.

In the Magistrates’ Court of the Lagos.

Magisterial District.

Commissioner of Police v. Lambert Nmecha

I hereby apply for an order of this Honourable Court that the Inspector–General or any police officer be at liberty to inspect and take copies of ledger and any record of Messrs: Bank of America, Apapa Branch, Lagos and

To stop further payment of cheque No. 7002255 worth N35,000 issued in favour of Tradelinks International (Nigeria) Limited following police investigation. Showing particulars of account of the said bank of (BLANK).

Sgd Inspector–General of Police.”

The order made by the Senior Magistrate on 5th February, 1976 and which was endorsed at the bottom of the said application reads:–

“I, the undersigned Magistrate hereby make the order on Bank of America Limited Apapa Branch as prayed above (empowering) the Inspector–General of Police or any other police officer.

Dated 5th February, 1976

Sgd

SENIOR MAGISTRATE.”

On the 14th April, 1977 the applicants, by motion on notice to the Registrar Magistrate Court 2 Ikeja, applied to this Court for extension of time within which to apply for leave to make application for an order of certiorari in these proceedings. That the application was supported by an affidavit sworn to by one Lambert Nwagbo Nmecha explaining the reasons for the delay by the applicants in making application for leave in the matter. Following the case of R v. Ashford (1955) 2 A.E.R. 327 which decided that on such an application for an extension of time, I granted an oral application by the applicants for an adjournment to enable them to put the Inspector–General of Police on notice. On 2nd May, 1977 upon my being satisfied that both the Registrar of Magistrate
Court No. 2 Ikeja and the Inspector-General of Police had been put on notice, I heard the application for extension of time within which to bring an application for leave to apply for an order of *certiorari* in these matters, and I made an order in the following terms:–

“Leave is hereby granted to the applicants extending the time for them to bring an application for leave for an order of *certiorari* in the matter herein. The reasons for the delay in doing so within the time are in my view, cogent and satisfactory. The application shall be brought within four days from today.”

Thereafter, on the 3rd May, 1977 the applicants brought an *ex parte* application under Order 53, rule 1 of the High Court of Lagos State (Civil Procedure) Rules, 1972 (which relates to application for *mandamus*, prohibition and *certiorari*) for leave to apply for an order of *certiorari*, and that application was accompanied by a statement setting out the name and description of the applicants and the relief sought by them, as well as the grounds of the application. There was also an affidavit sworn in this Court by one Lambert Nwagbo Nmecha, verifying the facts relied on by the applicants. On 9th May, 1977 I granted leave on the *ex parte* application and ordered that the matter shall be returnable on 30th May, 1977. On 30th May, 1977, I heard arguments on the application by the applicants for an order of *certiorari* to bring up into this Court for purpose of being quashed the said order of the learned Senior Magistrate dated 5th day of February, 1976. It is that application which is now before me. The application is supported by the affidavit of Lambert Nwagbo Nmecha sworn to in this Court on 19th May, 1977 in paragraph 4 of which he deposed as follows:–

“4. That the certified true copy of the order complained of which has been verified by the affidavit has been lodged with the High Court Registry, Ikeja.”

There was annexed to the affidavit the following two documents namely, the statement and the affidavit used on the application for leave and these were marked as exhibits LNN2 and LNN1 respectively. In that statement (exhibit
LNN2) the grounds of the application are stated as follows:

“(a) That the learned Senior Magistrate acted without any legal powers or authority.

(b) The learned Senior Magistrate transgressed against all known rules of natural justice, equity and law by:

(i) Relying only on the sketchy information contained in the application of the Inspector-General of Police.

(ii) By not requesting for and getting any facts to support or justify his making the order.

(iii) By not giving the applicants any notice of the order or an opportunity to defend the application.

(iv) By not keeping any record of the order either in the courts record books or any books at all or any file.

(v) By making an order against the applicants when there were no facts or circumstances that could legally connect the applicants with the order or application.”

In the affidavit, (exhibit LNN1) the deponent deposed inter alia, to the following material matters to show that the Order complained of was without jurisdiction or in excess of jurisdiction, that is:

“7. That I know that the Learned Magistrate made the order in exhibit ‘A’ without inquiring into the facts (if any) supporting the application or its expediency neither was the applicant given any notice to challenge the application.

8. That I am informed by the manager, Bank of America Limited, Apapa Branch, that no investigation was made into the bank account of the applicants before or even after the order in exhibit ‘A’ was made.

9. That the cheque, the subject matter of the order in exhibit ‘A’ was issued by Bank of America, Apapa Branch, in favour of the applicants.”

At the hearing of the application Mr PC Mgbewelu, learned Counsel for the applicants, relied on those averments and submitted that the Senior Magistrate had no jurisdiction under any existing laws to make the orders complained of and that in any event that there had been want of jurisdiction in the sense that there had been a breach of the rules of natural justice. Mrs Akinsanya, learned senior state Counsel, who...
represented the two respondents, the Senior Magistrate and the Inspector–General of Police, admitted that the facts stated in the affidavit in support of the application were true and correct and that for that reason the respondents have filed no counter-affidavits. Learned Counsel for the respondents confessed that her researchers had not disclosed that the Senior Magistrate had the jurisdiction under any existing law (including Magistrate Court Law and the Criminal Procedure Act) and that accordingly, she was unable and was not in a position to support the order in question. Mrs Akinsanya was also constrained to admit that the Record Book used by the learned Senior Magistrate for the proceedings of 5th February, 1976 (and which learned Counsel helpfully produced before me) contained no record about the making of that order or about any application leading to the making thereof. Nonetheless, learned Counsel for the respondents urged this Court not to make the order sought by the applicants as in her view such an order would serve no useful purpose because the cheque, the subject matter of the order complained of, was issued over six months ago and must now be stale, as no bank will now honour that cheque. It seems to me that in making that final submission learned Counsel for the respondents had overlooked the terms, scope and unlimited duration of the order made by the learned Senior Magistrate. I will revert to this point later in this ruling.

I think it is necessary for me to cast a passing glance at the history and scope of the old prerogative writs of habeas corpus, certiorari, mandamus and prohibition, and the purposes for which they are used. The common law regards the sovereign as the source or fountain of justice and from ancient times the court of Queen’s Bench assumed the role of supervision over all inferior courts and tribunals vested with any jurisdiction by any Acts of Parliament, and to the end that the inferior courts and tribunals shall be kept within their jurisdiction, where there was no speedy remedy or no equally convenient and effective remedy of control by appeal or
otherwise; and thereby protecting the liberty of the subject by speedy and summary interposition. Certiorari, as has often been pointed out by the courts, is a remedy of a very special character. In most cases it is moved and granted, on the question whether or not an inferior court or tribunal has jurisdiction. It never goes to a superior court, but where it is shown that an inferior court either has no jurisdiction or has exceeded its jurisdiction, certiorari will be granted. Since 1st January, 1968, the writs of certiorari, prohibition and mandamus were by and under sections 7 and 20(5) of the Administration of Justice (Miscellaneous Provisions) Act, 1938 of the United Kingdom replaced by orders of those names, but no change was thereby made in the supervisory jurisdiction of the High Court over inferior courts and tribunals.

The object of the old writ of certiorari was to bring up into the Court of Queen’s Bench the proceedings and order which had been made by the inferior court or tribunal in order that it should be examined. It did not issue, or seldom issued to a court of record. In former days the procedure was by writ of error and the superior court examined the record and only decided for the plaintiff in error if there was an error on the face of the record. For that reason a writ of error, was an unsatisfactory remedy in criminal cases. With regard to the proceedings of courts not of record, as there was no record to be moved, the writ of certiorari brought up in the proceedings in and the order of the lower court. Until the Summary Jurisdiction Act, 1884 all such proceedings were at great length. Since then the simple forms now common were substituted. So the supervisory jurisdiction of the superior court then depended very much on the contents of the documents which were brought up under the writ and laid before the court. But the law had developed a long way since then and certiorari will now lie not only where there is a speaking order and there is an error on the face of the record, but also in respect of want of jurisdiction or “lack of jurisdiction” in the wider sense in which that expression is
now used in relation to *certiorari*. That expression now has a very wide meaning in relation to *certiorari* as matters akin thereto are covered such as a decision obtained by fraud or bias on the part of members of the inferior court or tribunal, or indeed, a breach of some principles of natural justice like receiving evidence from one party only in the absence of the other.


There is however, this vital distinction between the two main grounds and it is this; Where it is said that the inferior court or tribunal had gone wrong in law while acting within its jurisdiction, the Superior Court can only interfere if it can see that error on the face of the record; whereas, if *certiorari* is moved on the ground that there is want of jurisdiction in the inferior court or tribunal, (as is in the case now before me) the Superior Court is entitled to look at affidavit evidence to see whether or not there was jurisdiction.


Accordingly, in the case before me, as the grounds of the application is that the court lacked jurisdiction, I am entitled to look at the affidavit evidence before me.

From the very brief history which I have given of the old prerogative writs and the new prerogative orders and the scope and nature of *certiorari*, it seems to me clear that both common law and statute enjoins the High Court to watch very closely all inferior courts or tribunals having the duty to act judicially and to keep them within their bounds.
In speaking of the supervisory jurisdiction of the Superior Courts over inferior courts and tribunals and the meaning of lack of jurisdiction in the wider sense in which that expression is used in relation to the order of certiorari, Coker JSC in Okupe v. Federal Board of Inland Revenue (1974) 1 A.N.L.R. (Part 1) 314 observed at pages 329-330 as follows:–

“We have given anxious consideration to the question of the availability to the appellant of the prerogative orders for which he has now applied. The order of certiorari lies to remove proceedings from inferior tribunals to High Court for a variety of purposes, sometimes at common law, sometimes by statute, sometimes by virtue of both.”

An order of prohibition lies to restrain an inferior tribunal or any body of persons which has a legal authority to determine questions affecting the rights of subjects from exceeding its jurisdiction. We are of course not oblivious of the law that excess of jurisdiction is not shown merely because the tribunal concerned had decided contrary to the facts or without evidence to justify its findings or judgment. But it cannot be gainsaid that excess of jurisdiction is manifested where there has been a complete disregard of the fundamental conditions of the administration of justice and where there has been shown a real likelihood of bias or prejudice in the tribunal, the courts have always held that there has been excess of jurisdiction.


Apart from all these however an error of law appearing on the face of the records is a proper subject for an order of certiorari. In Anisminic Ltd v. Foreign Compensation Commission (1969) 2 W.L.R. 163, Lord Pearce at page 102 of the report observes concerning the occasions when the High Court would exercise its supervisory jurisdiction over inferior tribunal thus:

“Lack of jurisdiction may arise in various ways. There may be an absence of those formalities or things which are conditions precedent to the tribunals having any jurisdiction to embark on an
inquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening state, while engaged on a proper inquiry, the tribunal may depart from the rules of natural justice; or it may ask itself the wrong questions; or it may take into account matters which it was not directed to take into account. Thereby it would step outside its jurisdiction. It would turn its inquiry into something not directed by Parliament and fail to make inquiry which Parliament did direct. Any of these things would cause its purported decisions to be nullity.

If this was a case in court, we might think of remitting same back for trial or re-trial before another tribunal. In the present case there is no other functionary besides the respondents to whom this case can go back. The appellant is entitled to the justice of this Court and this country and so justice must not only be done but it must be manifest that it is done. The respondents may not proceed to asses the appellant for income tax in respect of the same period covered by this appeal and an order of Prohibition will also issue from this Court.

Those observations made clear that even a court or tribunal which has jurisdiction to enter upon an inquiry could be held to lack jurisdiction (in the wider sense) if it acts in bad faith, or gives a decision or grants a relief which it has no power to make or grant, or if it fails to comply with the principles of natural justice. It has been observed that it would give rise to a great practical difficulty if when supervising inferior courts and tribunals the court had to choose meticulously between matters which are matters of jurisdiction in the strict sense and matters which go to the denial of natural justice. The modern trend of the law is, I think, to hold a trial conducted in denial of natural justice, as a trial conducted without jurisdiction. See Anisminic Ltd v. Foreign Compensation Commission (1969) 2 A.C. 147 at 171; 195 R v. Exeter Crown Court Ex Parte Bealtie (1974) 1 W.L.R. 428 at 433. Adedeji v. Police Service Commissioner (1967) 1 A.N.L.R. 392.

And more recently, in the case of Hart v. Military Government of Rivers State and others (1976) 11 S.C. 211, Fatayi Williams JSC in delivering the judgment of the Supreme
Moreover, wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially or fairly acts in excess of their legal authority, an order of certiorari or prohibition would lie. (See R v. Electricity Commissioners (1924) 1 K.B. 171 at pages 204-205). It is the same with individual officers discharging public functions (see R v. Boycott and others Ex parte Keasly (1939) 2 K.B. 651), and to Ministers of the Crown such as in the case of R v. Minister of Health, Ex parte Yaffe (1930) 2 K.B. 98 where the Court of Appeal held that:–

‘An order made by the Minister under section 40, subsection 3, of the Housing Act, 1925, in respect of which the statutory conditions under which alone it can be made, have not been complied with, is not an order which when made, can, by reason of section 40 subsection 5 of the Act, having statutory effect; that as the order in question was made without the statutory conditions having been complied with, it was ultra vires; and therefore that a writ of the certiorari should issue for the purpose of quashing it.’

Be that as it may, in the case in hand, although the Military Governor was not sitting as a court stricto sensu, it is our view, nevertheless, that, in ascertaining the facts and directing finally that a much lighter punishment should be meted out to the appellant, he was under a duty to act judicially or fairly. Since, in the discharge of that duty, he has assumed the power of jurisdiction which he did not posses under the Constitution of the State, certiorari would lie to quash his order that the appellant be retired from the public service of the Rivers State.”

I must now turn to the case of In Re Pool House Group Nigeria Ltd, Suit No. M/183/67 (unreported) in which judgment was delivered by Taylor CJ on the 22nd January, 1968, the facts of which are similar to those of the present case, save that the order made therein was quite specific as to the customer’s account in respect of which information was sought from the National Bank Nigeria Limited, Broad Street, Lagos. The order therein made by Mr JA Somefun in
his capacity as Chief Magistrate and dated 5th October, 1967 and which appears at the bottom of the application was in the following terms:

“I the undersigned Magistrate hereby make an order on National Bank of Nigeria Limited Broad Street, Lagos, as prayed above (in favour of) the Inspector–General or any police officer.”

In that case, the application was expressed to be made under section 7 of the Banker Book Act, 1879 but I think what is intended to be therein referred to is section 7 of the Bankers’ Books Evidence Act, 1879 which empowers a court or judge to make an order for the inspection of a banker’s books for the purpose of a legal proceeding upon an application of any party to such proceedings. In that case the application made to the Chief Magistrate reads:–

“In the Magistrate Court of Nigeria. In the Magistrate Court of the Lagos Magisterial District. Application under section 7 of the Bankers’ Book Act, 1879 (42 Vic c.11) in conjunction with section 36A of the Interpretation Ordinance, (Cap 94).

I hereby apply for an order of this Honourable Court that the Inspector–General of Police or any police officer be at liberty to inspect and take copies of ledger and any records of Messrs Pool House Group Nigeria Limited.

2. Copies of relevant cheques.
3. Letter of recommenders.
4. Any other documents relating to the opening of accounts.
5. Copies of correspondence between the bank and the company.

Showing particulars of account with the said bank of:

National Bank of Nigeria Limited, Broad Street, Lagos.

Sgd S. Adeoye Fajana DSP
For Inspector–General of Police.”

Taylor CJ granted the order for certiorari on 15th January, 1968 and in the course of his reserved judgment delivered thereon on 22nd January, 1968 he observed as follows:–

“The applicant in the affidavit supporting the application had deposed to the following material matters inter alia:–

1. the said order is ultra vires and void because there was no proceeding whatsoever between the applicant and Inspector–
General of Police or any police officer on which the order could be made;

2. the said order is *ultra vires* and void as it was not made in the course of any proceeding whatsoever;

3. the said order is void because it was made by the Magistrate without any evidence whatsoever to support the application.

There may be other matters sworn to in the affidavit but for the purposes of the order I am about to make the above are sufficient. After leave was granted, the legal department were duly put on notice, and Mr JO Williams appeared for the Chief Magistrate on the 15th January, 1968. He made it quite clear that he was in no position to support the order. As a result I made the order absolute and said I would put my reasons into writing. The copy of the order sought to be quashed and said to be dated 5th October, 1967 has not been attached to the proceedings and in its place is attached proceedings in a criminal charge between the Inspector-General of Police and one Oluwole Obikoya No. M/11/67. Rulings in those proceedings having been delivered on the 20th September, 1967. Attempts to get a copy of the order sought to be quashed have proved fruitless. In the end and on my own Motion, enquiries from the learned Chief Magistrate who made the order showed that there was no record of such an order in the court record book or files. That the order sought to be quashed was made by the learned Chief Magistrate on the 5th October, 1967 was not disputed by the letter. The reason given by the learned Chief Magistrate for there being no record of the proceedings in the court record book or file is that the order was contained in a document brought to the learned Chief Magistrate by the police for the former’s signature. On it being signed it was withdrawn by the police and no record of same was kept in the court. It is difficult for me to imagine for one moment that the practice, such as was explained to me by the learned Chief Magistrate, and which he said was a practice taking place in all the Magistrate Courts, in truth and in fact takes place. I find it hard to believe that such a grave violation of private rights can be sanctioned by our Courts without the hearing of the person affected, without any proceedings civil or criminal being before the court and in such a way leave no record in our Courts that can be challenged or from which even a certified true copy can be made. Until I have the order before me, my order absolute cannot be really
effective and the only thing for me to do subject to anything Counsel may wish to say further is to order that this ruling be served on the Inspector–General of Police and that the signed order of the 5th October, 1967 be presented before the court on 29th January, 1968 for quashing effectively.”

I agree with the decision arrived at in that case and with those observations. Those observations stress the prime need to observe the principles of natural justice in all judicial proceedings, as well as the need to maintain the records of such proceedings in all courts. However, I think that the facts of that case are in some respects different from the present one before me, particularly as the application in that case was not made or expressed to be made in any pending legal proceedings whereas the application in the present case was made and expressed to be made in criminal proceedings to which I have referred. It also appears to me that an order under section 7 of the Bankers’ Book Evidence Act, 1879 could be made in respect of a “third party” or without summoning the bank or any other party to the proceedings. The said section reads:–

“7. On the application of any party of a legal proceeding a court may order that such party be at liberty to inspect and take copies of any entries in a banker’s book for any purpose of such proceedings. An order under this section may be made either with or without summoning the bank or any other party, and shall be served on the bank three clear days before the same is to be obeyed, unless the court or judge otherwise directs.”

The Bankers’ Book Evidence Act, 1879 is a law which is applicable in Lagos State by virtue of section 2(1) of the Law (Miscellaneous Provisions) Law, (Cap 65), of the Laws of Lagos State.

It seems to me that section 7 of Banker’s Book Evidence Act, 1879 gives power to the court or judge to order inspection of a banker’s book before or during trial whether the
books relates to the account of a party to the litigation or to that of a third party,


It seems to me however that an inspection of a third party’s account can only be ordered when the account is in form and substance the account of a party to the litigation or is kept on his behalf.

See: Howard v. Beal (1889) 23 Q.B.D. 1 and Pollock v. Carle (1898) 1 Ch.1.

The jurisdiction to order inspection of entries in bankers’ books under the section must, it has been stated, be exercised by the courts with utmost care. However, the application to inspect thereunder may be made ex parte, but usually the party whose account is to be examined must have notice of the application (unless justice of the case otherwise requires) and the application should, unless the materiality of the inspection otherwise appears, be supported by affidavit.


Having regard to the specific facts of this case, I think there is need for me to stress that where an application is made the provisions of section 17 aforesaid, the practice and procedure applicable thereunder should be strictly complied with so as to avoid any injustice.

There is no evidence before me as to the stage in the criminal proceedings when the application, leading to the making of the order complained of, was made and it appears to me that if the application was made in the course of that proceeding after sufficient evidence had been led to justify the making of the order by the Magistrate who was hearing the criminal proceedings, it would not have been necessary for the Inspector–General of Police who applied for that order to file any affidavit in support thereof. An application for leave to apply for an order of certiorari must show uberrima fides, and if leave is obtained on a false statement or on a suppression of material facts in the affidavit, the court may refuse an order on this ground alone.

In the present application, the applicant disclosed no information in respect of criminal proceedings of which he was quite aware; but I do not think that the omission is detrimental to the applicant’s application herein, as it appears to me that the learned Senior Magistrate had incorporated into his order the very application leading to the making of the order and he had thereby made a speaking order which discloses on its face that the order was made by him without any evidence in support thereof. In those circumstances, it appears to me that the order is on its face in law and this is so notwithstanding that in so far as the Order relates to the furnishing or giving of information in a banker’s book it is a matter within the jurisdiction of the Senior Magistrate under section 7 of the Banker’s Book Evidence Act, 1879 of the United Kingdom, as applicable in Lagos State.

I must now examine the said order in so far as it includes an order stopping the payment of banker’s cheques No. 7002255 worth N35,000 (thirty-five thousand naira) drawn on the account with the Bank of America Apapa Branch, Lagos; and made payable to the applicants. I think that in any legal proceeding, a court judge may at any stage of the proceeding and in application made by a party thereto (on notice to the other party or parties in the proceeding and any third party, if any, to be affected by the order sought) make an order for the preservation of the subject matter of the action; and it seems to me that such an order could be made in a civil or criminal proceeding. It seems to me therefore that if an accused person in a criminal action had paid the very money he is accused of stealing into a specified bank account, whether his own or that of his wife or any other third party, a court or judge could on proper application made to him ex parte at any stage of the proceedings made a stoppage order on the banker stopping that payment out of that money from the bank account of a party or a third party. It does appear therefore that in certain circumstances the law empowers a court or judge to make the type of stoppage order made by the learned Senior Magistrate in this case, and
that in making such an order the court or judge would derive his power to do so in Lagos State not under section 7 of the Banker’s Book Evidence Act, 1879 or the Banking (Amendment) Decree, 1968 which contains no such power.

Ordinarily a court or judge hearing a legal proceeding and on application made on notice to the parties in that proceeding and on a third party to be affected by the order sought, make an order for the preservation of the subject matter of the action and this is so whether the legal proceedings is civil or criminal. It seems to me therefore that if an accused person in a criminal action had paid the very money which he is accused of stealing into a specified account whether his own or that of a third party, a court or judge could on proper application made to him make a “stoppage order” in respect of payment of that money out of the bank account. It does appear to me therefore that in certain circumstances a court or judge could make the sort of stoppage order as that made by the learned Senior Magistrate in this case and that the power to do so is not derived from the section 7 of the Banker’s Book Evidence Act, 1879 or the Banking (Amendment) Decree, 1966 (which did not contain any such power). However the respondents have quite rightly in my view not sought to uphold the validity of that order at all or in so far as it relates to the stoppage of payment of the cheque. I think I must hold that in making the order of the stoppage of payment of the cheque the learned Senior Magistrate also acted in excess of jurisdiction. If an affidavit has been filed by the Inspector–General of Police in support of his application before the court setting out the basis for the application then the position could have been different; but here, as I have stated, there is a speaking order by the Senior Magistrate in which the terms of the application leading to the making of the order are as set out, and it shows that the order was made in the absence of any supporting evidence. I must therefore hold that the whole order made by the learned Senior Magistrate on 5th February, 1976 was made in excess of jurisdiction and is therefore null and void.
Indeed, on an application for certiorari, the court has no power to amend the order even if it were found valid as to one part and invalid as to the other part, see R v. Willesden Justice Ex parte Utley (1948)1 K.B. 397. In this case however it seems to me that the order is null and void in all respects.

It now remains for me to consider whether in this case I ought to exercise my discretion to quash that order which I have held to be null and void. It is trite law that an applicant for certiorari is not necessarily obliged to have exhausted any rights of appeal to a court of law. The applicants here, as an aggrieved party, although they are not party to the criminal proceedings have a constitutional right to appeal against that order but they did not do so. I do not think that their failure to do so is detrimental to their application for certiorari. It is true, I think that a court will not issue an order of certiorari where no benefit would be derived thereby and learned Counsel for the respondents has on that ground urged this Court not to exercise its discretion to issue the order of certiorari in this case. It appears to me that there is little merit in that submission. It seems to me that where a court or tribunal that is legally entitled to exercise a jurisdiction exceeds its jurisdiction as a result of a mistake of law or fact, certiorari should issue to quash the decision even though the decision is void and can properly be impugned on an appeal. It is true that the court has a discretion to refuse to issue certiorari to quash a decision which has been executed in such manner that quashing the order can have no direct effect in restoring the State of affairs obtaining before the impugned order was made, but that is not the position here. In the present case, the order has not been executed, and no information has been extracted from the banker’s books since the order was obtained, although the cheque which was stopped has now become stale, and no bank will now honour it.

In those circumstances, I think that it is proper for me to exercise my discretion in this case in favour of the
applicants. I think, I must bear in mind in all cases of this nature to prevent an injustice being done. As Ademola CJ (as he then was) observed in the *R v. District Officer and others* (1961) A.N.L.R. 51 at page 58:

“Now it is clear that it is of the utmost importance that the court should act to prevent an injustice being done when the remedy sought is within its powers to grant. This to mind is one of such matters in which the court should act. The High Court has an inherent power, unfettered by statute, to control inferior tribunals in a supervisory capacity. Such control is by means of *certiorari* to keep the inferior tribunal within the law, within bounds and within such jurisdiction as the legislature deemed fit to confer upon it.”

There is one final point which I think I must mention. Although in paragraph 4 of the affidavit sworn to in this Court on 19th day of March, 1977 in support of this application, it is averred *inter alia*, by the deponent Lambert Nwagbo Nwecha, that “a certified true copy of the Order complained of which has been verified by affidavit has been lodged with the High Court Registry Lagos” it is clear to me that while that statement is true (in that a certified true copy of the order was filed in another proceedings in this Court) no certified true copy of that order has been filed in these present proceedings, in that regard it is a photocopy of a certified true copy of that order. In effect therefore, I have not got before me in these proceedings the signed order of a certified true copy of the order made by the learned Senior Magistrate.

I think that in those circumstances it would be right that before I make a final order herein, I must order that the applicants shall file in these proceedings, within two days from today, a certified true copy of the order complained of and that on 15th day of June, 1977 the order be presented to the court for the purpose of being quashed forthwith effectively.

For the reasons which I have given, I hold that this is an proper case for me to exercise my discretion in favour of the
applicants and to make an order that the order of Mr AA Awosanya made on the 5th day of February, 1976 in his capacity as a Senior Magistrate sitting at Court No. 2, Magistrate’s Court of Lagos State, Holden at Ikeja, whereby he ordered that (a) the Inspector-General of Police and any police officer be at liberty to inspect and take copies of ledger and any records of Messrs Tradelinks International (Nigeria) Limited with the Bank of America Limited Apapa Branch, Lagos; and (b) stopping further payment of cheque No. 7002255 worth N35,000 (thirty-five thousand naira) drawn on an account at that branch by the Bank of America Limited (and the same being a banker’s cheque) be removed into this Court for the purpose of being quashed. As I am satisfied that the learned Senior Magistrate did not keep any record of the proceedings leading to the making of that order and that no copy of that order is kept in any book, file or record of the said Magistrate’s Court, and as no certified true copy of that order has been filed in these present proceedings, I think, the proper order for me to make now, and which I now make, is that the applicants shall within two days from today file in these proceedings a certified true copy of the said order and that on 15th day of June, 1977, the order shall be presented to this Court for the purpose of its being quashed forthwith and effectively.

That shall be the order of the court.

HIGH COURT OF LAGOS STATE

SAVAGE J

Date of Judgment: 24 JUNE 1977

Suit No.: L.D.881/74

Banking – Guarantee of a debt – Meaning of

Banking – Guarantee of a debt by a bank manager – Whether within the scope of his apparent authority

Facts

The plaintiff’s claims against the defendant was for the sum of ₦70,000 being amount owed to Eko Street Construction Co. The plaintiff averred that the defendant, through its Ikeja Branch Manager, guaranteed the sum of ₦75,422.62 for Eko Construction Co Limited and since Eko Construction was unable to pay the said sum, that the defendant bank gave out the said guarantee holding themselves out to pay the said sum.

The defendant, however, denied giving any guarantee. The defendant further averred that “no branch manager of the bank is authorised to guarantee any debt and that all guarantees are made by the head office of the bank.”

Held –

1. A guarantee is a promise to answer for the debt of another; it has to be in writing, or there must be a memorandum of it in writing, signed by the guarantor or his authorised agent, to satisfy section 4 of the Statute of Frauds.

2. A mere representation by the bank manager as to his authority cannot create apparent authority.

3. The giving of such a guarantee was not, in my view, within the apparent scope of the authority of a bank manager or a branch manager of the defendant company.


a To hold otherwise might lead to the most disastrous consequences.

Claim dismissed.

b Cases referred to in the judgment

Foreign

A.G. for Ceylon v. A.D. Silva (1953) A.C. 462
Re: Southport and West Lancashire Bank Co (1885) I.T.R. 204

c Nigerian statute referred to in the judgment

Evidence Act, sections 99 and 100
Statute of Fraud, section 4

d Counsel

For the plaintiff: Bentley

For the defendant: Akande

Judgment

SAVAGE J: The plaintiff’s claim as endorsed on the writ of summons reads:–

“The plaintiff’s claim against the defendant is for the sum of £70,000 owed by Eko Steel Construction Co Limited of the plaintiff’s payment of which has been guaranteed by the defendants and for the cost of this suit.”

Pleadings were completed. The plaintiff averred that it was a limited company carrying on business in Lagos and that the defendant was banker with its principal place of business at 96/102, Yakubu Gowon Street, (now known as Broad Street,) Lagos. The plaintiff further averred that a company called the Eko Steel Construction Co Limited, a customer of the defendant at its Ikeja Branch ordered Steel Materials from the plaintiff on payment against delivery, but that the Eko Steel Construction Co Limited, being unable to pay applied to the defendant to guarantee the payment of the sum of £75,422.62, the purchase price of the said steel materials, and that by a letter dated the 10th day of March, 1972, the defendant gave the said guarantee holding itself to pay the
said sum of N75,422.62. Finally, the plaintiff pleaded in paragraph 5 of the amended statement of claim as follows:–

“5. Eko Steel Construction Co Limited had been unable to pay the said sum of N75,422.62 and thereupon the plaintiff has called on the defendant to honour its guarantee but the defendant has refused and/or neglected to do so.”

The defendant, however, pleaded in paragraph 7 of its statement of defence as follows:–

“7. The defendant avers that no branch manager of the bank is authorised to guarantee any debt and that all guarantee are made by the head office of the bank.”

The burden of proof is on the plaintiff and it is the burden of establishing its case as disclosed on the pleadings.

The plaintiff called only one witness, the managing director of the plaintiff’s company. He produced a letter which he said was written by Eko Steel Construction Co Limited to the plaintiff. The letter admitted in evidence marked exhibit B. It reads:–

“The Managing Director,
Otto Wolff (Nigeria) Limited,
Apapa.
Dear Sir,
We enclose the original and one photostat copy of the letter from National Bank Nigeria Limited, guaranteed payment after 120 days from arrival, for the Mild Steel Plates recently ordered from your good selves.
We trust this will facilitate matters and look forward to your confirmation in due course.
Yours faithfully,
For: Eko Steel Construction Co Limited
Director.”

To this letter exhibit B, was attached, which reads:–

“The Managing Director,
Otto Wolff (Nigeria) Limited,
38 Warehouse Road,
P.M.B. 1153,
Apapa.

Dear Sir,

Eko Steel Construction Co Limited

Payment after 120 days

We hereby guarantee the payment of £35,000 (thirty-five thousand pounds only) for Mild Steel on behalf of our above-named customers after 120 days arrival of goods.

Yours faithfully,

For: National Bank of Nigeria Limited

(Sgd) A. Adenekan

Manager.”

This then is the guarantee on which the plaintiff’s action is founded.

The witness had told the court that after the 120 days had elapsed, Eko Steel Construction Co Limited was unable to pay, and he had to call at the Ikeja Branch to see the manager. He got there to find that the management had changed. He then went to the head office of the defendant who said it knew nothing about exhibit B, and refused to pay.

He acted on exhibit B, because he believed it was in order, and on the strength of it, he placed the order.

Exhibit B, the guarantee was forwarded to him by the Eko Steel Construction Co Limited who had written to say that they had obtained the guarantee from National Bank Ikeja. He did not, however, go to National Bank when he received exhibit B. He agreed under cross examination, that he did not check on exhibit B from National Bank when he received it. When asked if he knew that man, Adenekan, who signed exhibit B, as branch manager of the defendant’s bank at Ikeja, he said he did not know him. He was told, he admitted, by the head office of the defendant bank when he called there, that its branch manager had no authority and was not in a position to guarantee the debt.

That briefly is the plaintiff’s case.
Now, a guarantee is a promise to answer for the debt of another, it has to be in writing, or there must be a memorandum of it in writing, signed by the guarantor or his authorised agent, to satisfy section 4 of the Statute of Frauds. It is a special contract.

Who wrote exhibit B1? Who is Adenekan? Why was exhibit B1 itself not forwarded to National Bank? Eko Steel Construction Co Limited procured exhibit B1 and according to the plaintiff, from the Ikeja Branch of the defendant bank. What happened to them, why was no one from Eko Steel Construction Co Limited who ought to know about the guarantee not called? No one was called to prove the existence of Adenekan or what position he held at the time. I refer to section 99 of the Evidence Act. Section 100 of the Act allows the evidence that a person exists having the same name, address business or occupation as the marker of the document, in this case exhibit B1, to be admissible to show that such document was written or signed by that person. In exhibit A, another letter written by the Eko Steel Construction Co Limited supposedly to the Ikeja branch manager of the defendant bank, spoke of “... Your usual letter of guarantee for payment ...” This to my mind, quite clearly suggests system. In any event, the name of the addressee on exhibit A which was typewritten was the National Bank, Ikeja, but this was crossed off, and in its place exhibit A was addressed to Otto Wolff (Nig.) Limited, it could not have got to the National Bank, the defendant. If it had, the defendant should have the original and they should be the ones to produce it. It is all so strange. I think the evidence is most unsatisfactory.

Mr Bentley, learned Counsel for the plaintiffs in the course of his address submitted that in this case the guarantee was given by the manager, and that it would have been a different matter if it were given, say, by an accountant. The bank manager, he added was a person in authority. What Mr Bentley is saying therefore is, I take it, that when a person is held out as being employed in some particular capacity, persons dealing with him are entitled to assume that he has all
the authority which is within the apparent scope of his authority. Yes, this may be so.

But the question is, is guaranteeing the payment of a debt of another by a bank manager within the apparent scope of his authority? Quite clearly the answer is “No.” A mere representation by the bank manager as to his authority cannot create apparent authority. See A.G. for Ceylon v. A.D. Silva (1953) A.C. 462 where it was held:

“All ‘ostensible’ authority involved a representation by the principal as to the extent of the agents’ authority, and no representation by the agent as to the extent of the agent’s authority could amount to a ‘holding out’ by the principal . . .”

Finally, in Re Southport and West Lancashire Banking Co (1885) 1 T.L.R. 204 where a bank manager guaranteed the payment of a certain draft. It was held that it was not within the ordinary scope of a bank manager’s authority to give such a guarantee, and the bank therefore was not liable thereon unless he was expressly authorised to give it.

As I said earlier, the burden is on the plaintiff to establish its case as disclosed on the pleadings. It must adduce much evidence which ought reasonably to satisfy the court that the facts sought to be proved are established. Evidence of the identity of Adenekan as bank manager of the defendant’s Ikeja Branch, his special authority to guarantee the payment of another’s debt, the provisions of the Memorandum or Articles of Association of the defendant bank in my view would have been of considerable assistance and should have been adduced. This was not done.

The giving of such a guarantee was not, in my view, within the apparent scope of the authority of a bank manager or a branch management of the defendant company. To hold otherwise might lead to the most disastrous consequences.

I find the evidence adduced in support of the claim most unsatisfactory. The burden of proof has not been discharged by the plaintiff.

The claim fails and it is accordingly dismissed.
National Bank of Nigeria Limited v. Are Brothers (Nigeria) Limited

SUPREME COURT OF NIGERIA
FATAYI-WILLIAMS, IREKEFE, BELLO JJSC
Date of Judgment: 24 JUNE 1977  S.C.: 58/76

Banking matters – Overdraft facility – Failure of debtor to repay – Bank filing winding-up petition – Failure of debtor to file affidavit in opposition within time – Court extending time suo motu – Propriety of – Rule 36(1) Companies Winding-up Rules, 1949

Company Law – Winding-up petition – Failure of debtor to file affidavit in opposition within time – Court extending time suo motu – Propriety of – Rule 36(1) Companies Winding-up Rules, 1949

Facts

Consequent upon the failure of the respondent to repay the overdraft facility granted it, the appellant presented a winding-up petition and for all necessary steps ante-hearing of the petition. The respondent did not file its affidavit in opposition within the seven days stipulated in rule 36(1) Companies Winding-up Rules, 1949 but the trial Judge suo motu granted an extension of time and also made some other order.

The appellant, being dissatisfied appealed to the Supreme Court.

Held –

The court has an inherent jurisdiction to extend time in any given case, but such should not be done suo motu but upon application of the party in default.

In the instant case, the trial Judge was wrong in granting the respondents an extension on the argument that because the appellants had failed to lodge a counter affidavit to the
explanation for the delay given by the respondents, such de-
fault by the appellant rendered the respondent’s explanation
acceptable in the circumstance.

Appeal allowed.

Nigerian statutes referred to in the judgment
Companies Decree, 1968, sections 210, 212
Companies Winding-up Rules, 1949, rule 36(1)

Counsel
For the appellant: Williams
For the respondents: Aka-Bashorun

Judgment
IRIKEFE JSC: This appeal is, a sequel to an interlocutory
ruling delivered by the Federal Revenue Court on 9th July,
1974. There had been pending before that court, a winding-
up petition filed by the appellant, a limited liability company
engaged in banking business against the respondent, also a
limited liability company. The said petition was brought on
the ground that the respondents were unable to pay a debt
owed to the appellant. The relevant paragraphs in the peti-
tion allege as follows:

“(5) There is relationship of banker and customer between your
petitioner and the company.

(6) The company is indebted to your petitioner in the sum of
₦156,088.62 as at 30th September, 1973 in respect of over-
draft and banking facilities granted by the petitioner to the
company together with interest accruing on the amount
aforesaid.

(7) On the 11th day of December, 1973 petitioner served on the
company by leaving it at the registered office of the com-
pany aforesaid, a demand under his hand requiring the
company to pay the sum so due, and the company has for
three weeks thereafter neglected to pay the sum or to secure
or compound for it to the reasonable satisfaction of your pe-
titioner.

(8) The company is unable to pay its debts.
The petitioner therefore prays as follows:–

(a) That ARE BROTHERS (NIGERIA) LIMITED may be
wound up by the court under the provisions of the-
Companies Decree, 1968;
In opposition to the petition, the respondents filed an affidavit the relevant paragraphs of which assert the following:

“(6) There is relationship of banker and customer between the National Bank of Nigeria Limited (hereinafter called the ‘petitioner’) and the respondent.

(7) The respondent is indebted to the petitioner in the sum of N156,088.62 as at 30th September, 1973 but out of this debt the respondent, had since paid N15,000 direct to the petitioner and another sum of N8,000 through the solicitor to the petitioner.

(8) That the temporary inability of the respondent to pay this debt was caused partly by the petitioner which had unduly held up the sum of £62,068.19.6d (sixty-two thousand and sixty-eight pounds nineteen shillings and sixpence), now N124,137.95 (one hundred and twenty-four thousand, one hundred and thirty-seven naira, ninety-five kobo) belonging to the respondent.

(9) That the said amount was intended for a letter of credit to be opened by the petitioner at the instance of the respondent, in favour of Delta Financing Corporation of Panama City, R.D. Panama (hereinafter called the ‘Beneficiaries’) for the purchase of a quantity of cement.

(10) That despite the plan of the respondent the beneficiaries insisted that the letter of credit should be opened, only by the Bank of America. Copy of the beneficiaries’ letter of 21st February, 1970 paragraph (3) attached marked exhibit A refers.

(11) That the refusal to accept the petitioner to open the letter of credit was known to the petitioner.

(12) That despite this knowledge, the petitioner refused to refund the interest paid by the respondent in respect of the letter of credit. A copy of the respondent’s letter paragraph (2) of which was complaining of the loss of this interest is attached marked exhibits B and C.”

Paragraph 2 of page 2 of the letter refers:

“(13) That the petitioner also held on to the respondent’s £62,068.19.6d, now N124,137.95 for several months.
(14) That as a result of the long delay in refunding the money to the respondent, the purpose for which the letter of credit was to be opened had failed. Thus the business of the respondent was frustrated.

(15) That this frustration had disorganised the respondent’s business including its ability and mode of operating ‘the banking account with the petitioner.

(18) On 11th December, 1973, the petitioner served on the respondent a demand note requiring the respondent to pay the sum so due and the respondent through its managing director, hereafter signified its intention to liquidate the debt on reasonable terms to be negotiated by both parties.

(19) To this effect the respondent held 6 meetings with the solicitor of petitioner.

(20) That following the negotiation, the respondent was asked to make cash payment of ₦10,000 with an undertaking to liquidate the balance of the loan by a monthly instalment of ₦1,500.

(21) As a mark of genuine desire to pay this debt, the respondent, on 19th October, 1973, paid into the respondent’s account with the petitioner the sums of ₦5,000, a photostat copy of the teller is exhibited to this affidavit and marked ‘D’.

(22) The respondent has also paid the sum of ₦8,000, to the petitioner’s solicitor, Chief FRA Williams, as per receipt dated, 11th, April, 1977 a photostat copy of which is exhibited to this affidavit and marked ‘E’.

(23) The respondent has also lodged with his solicitors, ‘Lai Joseph and Co’ his cheque for another sum of ₦2,000.

(29) A photostat copy of a letter from the petitioner’s solicitors as evidence of the negotiation and the refusal of the petitioner to accept the respondent’s offer to liquidate the loan is attached marked exhibit F.”

The respondents do not, as could be seen from the foregoing, dispute the appellants’ claim; their complaint, it seems to us, is directed against the unreasonable attitude of the appellants in rejecting their proposals for liquidating the debt.
This rejection is contained, as already adverted to, in a letter dated 30th April, 1974 (exhibit F, being an annexure to the respondents’ affidavit at paragraph 29 thereof).

It reads:–

“The Secretary
Are Brothers Nigeria Limited
9, Nnamdi Azikiwe Street
P.O. Box 1954,
Lagos.
Dear Sir,
Suit No. FRC/L/M18/74
In the matter of Are Brothers (Nig.) Ltd and in the matter of the Companies Decree, 1968
I thank you for your letter Ref. No. ALB50/RWNB/74 dated 27th April, 1974 in respect of your overdraft account with the National Bank of Nigeria.

2. During the last visit of the Managing Director, Alhaji Chief K.O.S. Are, to these chambers, I informed him that the National Bank has rejected his offer to liquidate the loan in the manner proposed by him and that accordingly I had instructions to proceed to enforce payment of the loan by legal proceedings and that it may be necessary to proceed with the Winding-up Petition, which had already been filed in the Federal Revenue Court.

3. In pursuance to my instructions from the bank and with reference to the order made by the Federal Revenue Court when the matter came before the court on the 22nd March, 1973, I have had to publish notice for winding-up of the company. The said notice was published in the official Gazette of Thursday, 25th April, 1974, as well as in an issue of the Daily Sketch.

4. In this circumstance, I hope you will take appropriate steps to comply with the requirements of the said notice and such compliance is required to take effect on or before 6th May, 1974 (if you intend to defend the petition).

5. Please note that the matter comes up before the Federal Revenue Court on Tuesday, 7th May, 1974. It is therefore important for you to arrange to be represented at the proceedings.
6. Your Standard Bank Nigeria Limited cheque No. LA/3 123386 dated 9th April, 1974 for ₦9000.00 (nine thousand naira) is hereby returned to you. For security reasons I have cancelled the cheque.

Yours faithfully,

A. L. A. L. BALOGUN.”

At the hearing before the lower court on Friday, 21st June, 1974 learned Counsel appearing, on behalf of appellants moved for a winding-up order. He drew the attention of the court to the fact that the petition had been advertised seven clear days before the hearing, both in the Federal Gazette of Thursday, 25th April, 1974 and in the Daily Sketch of Monday, 13th May, 1974 as required by the rules of court (see rule 28 of the Companies (Winding-up) Rules, 1949 section 1, No. 330, 1949). Learned Counsel also referred to the affidavit filed by the appellants in verification of the petition and stressed the fact that the two affidavits filed by the respondents in opposition to the petition, were filed outside the stipulated, period of seven days in accordance with the rules of court and without the express leave of court so to do. The court was accordingly invited to discountenance the said affidavits.

Opposing, the order sought, Counsel appearing on behalf of the respondents argued that the delay in filing the two affidavits was due to the time taken up in negotiating with the appellants a satisfactory mode of repaying the debt due. This negotiation, Counsel argued, broke down on 30th April, 1974 from which date, the time prescribed by the rules should begin to run.

The respondents’ Counsel also argued that the petition was being opposed on grounds of law, fact, public interest and equity. He did not, however elaborate.

Finally, Counsel argued that on the available evidence, it had not been shown that the respondents had neglected to pay their debt. The matter was then adjourned for a ruling.
In its ruling, the court refused to make a winding-up order and purporting to act under section 212(1) of the Companies Decree, it ordered instead as follows:

“I order that parties to this petition should meet and examine the offer of the respondents to secure for the debt to the reasonable satisfaction of the petitioners and report back to the court on or before Monday, August 5th, 1974. The question of costs will be gone into later.”

This appeal is against the above ruling and the appellants relied on three grounds of appeal, namely:

“(a) The learned trial Judge erred in law in making the order complained of and in failing to make an order for the winding-up of the respondent/company.

(b) The learned trial Judge erred in law in relying on the affidavits deposed to by or on behalf of the respondents, when the said affidavits were not filed within the period prescribed under rule 36 of the Companies Winding-up Rules, 1949 and no leave of Court was sought or granted for an extension of the time so prescribed.

(c) The learned trial Judge erred in law when he held that he had power under section 212 of the Companies Decree, 1968 to make the order.”

In arguing the above grounds, learned Counsel representing the appellants submitted that the learned trial Judge erred, not only in taking cognisance of the two affidavits filed by the respondents in opposition to the petition, but in his interpretation of section 210 of the Companies Decree, 1968. The type of security envisaged under the provisions of section 210, it was argued, shall be such as is satisfactory to the creditor and not to the debtor. Finally, it was submitted by Counsel that, inasmuch as there was no dispute over the debt, it was not open to the learned trial Judge to have made an interim order as he had purported to do under section 212 Companies Decree, 1968.

For the respondents, it was argued that the order now being appealed against was the correct use of the learned trial Judge’s discretion under section 212 of the Decree; that he had construed section 210 of the Decree correctly and that in
any case, section 17 Federal Revenue Court Decree (Decree No. 13 of 1973) vested the court with jurisdiction to promote reconciliation among parties to suits and to encourage and facilitate amicable settlement thereof.

Is there any merit in these submissions?

Rule 36(1) of the Companies (Winding-up) Rules, 1949 (section 1, 1949 No. 330) relied upon by learned Counsel for the appellants in support of his plea for the exclusion of the affidavits reads:

“(1) Affidavits in opposition to a petition, shall be filed within seven days of the date on which the affidavit, verifying the petition is filed, and notice of the filing of every affidavit in opposition to such petition shall be given to the petitioner or his solicitor on the day on which the affidavit is filed.”

The facts here show that the appellants’ affidavit verifying the petition was filed on 20th February, 1974, while, the two affidavits in opposition were filed on 25th May, 1974, and 5th June, 1974, respectively, a matter of well over thirty days from the collapse of negotiations, as, deposed to by the respondents.

The learned trial Judge dealt with the non-compliance with the above-cited rule in these words:

“The petitioners also alleged that a demand for the payment of the amount was made to the company on December 11, 1973, requiring it to pay the said sum within three weeks, but they had failed to meet the demand. Hence the conclusion in paragraph 8 of the petition, that the respondents were unable to pay their debts. The respondents filed two affidavits in opposition to the petition. Counsel for petitioners attacked these affidavits in the course of his address and stated that they were not filed within the period of seven days from the date of the affidavit verifying the petition, which is 20th February, 1974, as provided by rule 36(1) of the Companies (Winding-up) Rules, 1949. To this, Counsel for the respondent replied and stated that this was due to the time taken up by negotiations to settle the matter out of court. This reply, I find, was borne out by reference in the first affidavit to meetings held with a view to settlement. This had not been denied in a counter-affidavit in reply by the petitioners. I am therefore satisfied that the
delay in filing the affidavit in opposition to the petition was genuinely due to the protracted negotiations for the purpose of settlement. I therefore, in the interest of justice, allow the affidavits even though filed out of time.”

The record in the case in hand shows clearly that before the ruling the subject of this appeal, no attempt was made by the respondents to move the court for extension of time for compliance with the provisions of rule 36(1) (supra).

Again, although no such extension was sought, the learned trial Judge nevertheless purported to act on the conflicting affidavits before him by granting the respondents an extension on the argument that because the appellants had failed to lodge a counter affidavit to the explanation for the delay given by the respondents, such default by the appellants rendered their (respondents’) explanation acceptable in the circumstance.

In as much as the reception of the respondents’ affidavits constituted the main basis for the ruling now the subject of this appeal, we think that the learned trial Judge was in error in dealing with this matter in the manner he had done.

Thus, although the court has an inherent jurisdiction to extend time in any given case with a view to the avoidance of injustice to the parties, it should not do so suo motu, but upon the application of the party in default.


See also Order 3, rule 5 of the Rules of the Supreme Court (Annual Practice, 1976) which states:–

“5(1) The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorised by these rules, or by any judgment, order or direction, to do any act in any proceedings.

5(2) The Court may extend any such period as is referred to in paragraph (1) although the application for extension is not made until after the expiration of that period” (emphasis ours.)
This Court has held in a number of cases that where, as in the case in hand, the court of first instance is called upon to act upon affidavit evidence, and such evidence is in conflict on a point material for the determination in the case, such conflict can only be resolved by the court calling for oral testimony on oath from the parties.

It would not be open to the court as it did here, to accept the last affidavit in point of time as the true position of matters, merely because the other side had failed to lodge a counter-affidavit.


In view of the order that we propose to make at the end of this appeal, we shall refrain from expressing an opinion on the other issues raised by Counsel for the parties, as these issues go to the merit of the action.

In the result, the appeal succeeds and it is allowed. The interim order made by Adediran, J. in this matter in the Federal Revenue Court of Nigeria, Lagos, on 9th July, 1974 is hereby set aside. We also order that this matter be heard de novo on the merit by the Federal Revenue Court, Lagos. The appellants are allowed costs in this Court assessed at ₦150.

Appeal allowed.
Arab Bank (Nigeria) Limited v. Dantata

SUPREME COURT OF NIGERIA

FATAYI-WILLIAMS, BELLO, OBASEKI JJSC

Date of Judgment: 7 JULY 1977
S.C.: 377/75

Banking – Guarantee – Liability of a surety thereunder – Principles governing

Facts

Before the Kano State High Court, the appellant claimed against the respondent the sum of £43,647 under a guarantee contract dated 30th September, 1972 whereby the respondent agreed in consideration of the appellant granting overdraft facilities to the Kano Dyeing and Printing Factory Limited, to guarantee the payment to the appellants of all sums due from the Kano Dyeing and Printing Factory Limited, to the appellants. The said Kano Dyeing and Printing Limited having gone into voluntary liquidation as at 27th August, 1973 and having owed due the sum of £174,589 to the appellants, it was the appellant’s case that under the aforesaid guarantee dated 30th September, 1972, one quarter of the sum outstanding was payable by the respondent being his proportion of the total debt due, the other three guarantors having already paid their proportion of one quarter each.

The respondent’s case was that he was not liable to the appellants. He averred that even if he was which was denied, he was liable jointly with other directors alleged to be parties to the loan contract for the total sum due and no apportionment of the debt was agreed by the parties to the contract, and in any case if he entered into any undertaking to be liable, which was denied, he did so in the belief which he gathered from the form of the undertaking that others therein named also would execute the document and as they did not all execute the document, he was not liable.

At the trial it turned out that although the four director agreed to sign the written guarantee jointly, only three
executed the Guarantee Agreement, exhibit A. The respondent maintained that since the actual agreement was not executed by all the four directors as guarantors, he was not liable to pay anything because there was a failure on the side of the appellants to legalise the document.

Upon conclusion of the hearing, the learned trial Judge found as a fact that exhibit A was intended to be signed by all the four directors of the company and that they were to be jointly and severally liable to the appellants after such signature. He also found that exhibit A was signed by only three directors including the respondent, and that there was no evidence to explain why the signature of the fourth guarantor was dispensed with.

The learned trial Judge then referred to the decisions in *Hansard v. Lethbridge* and *National Provincial Bank of England v. Brackenbury*, to the effect that where a surety had executed a document in the belief derived from the form of the document that it would be executed by all the sureties named as such in the document as persons who were to sign, he would be relieved from his obligation if all the others did not sign. He therefore dismissed the appellant’s claim.

Aggrieved, the appellant appealed to the Supreme Court. He argued *inter alia* that in order to avoid the agreement for non-execution, the respondent must show that there was a term in the agreement that all individual guarantors shall execute the agreement.

**Held** –

1. When a person signs a promissory note on a representation that others are to join and one afterwards refuses to sign, the payee cannot recover in an action on the note against the person who signed it, unless the jury or the judge is satisfied that such person, knowing the facts and being aware of his rights, had consented to waive his objection.
2. Where a surety executes a document in the belief, derived from its form, that it will be executed by all the sureties named therein as persons who are to sign, he (the surety) will be released from his obligation if all the others do not sign.

3. It is proper for any person who agrees, jointly and severally with others, to guarantee a loan granted by a bank or similar institution to a third party, to signify his agreement to stand as a joint guarantor in the belief that the joint guarantors could, and would repay the loan if the third party is in default, and the guarantors are called upon by the creditor to pay up.

4. As a general rule, where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectively be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect. What is the part of each must, of course, depend on the circumstances. In the instant case, the agreement (exhibit A) stated that it shall be signed by the parties, each of whom having a copy. There can be no doubt, therefore, that it was a condition precedent to the agreement that Mr Khatoun and the other guarantors who are jointly and severally liable with him, would execute the agreement as joint to which the overdraft facility was granted, not to join in the execution of the agreement, thereby discountenancing his joint obligation thereunder, and without notifying the respondent, the appellants had deliberately altered the fundamental basis of the contract of guarantee.

Appealed dismissed.

Cases referred to in the judgment

Foreign

Coyte v. Elphick (1874) 22 W.R. 541
In these proceedings commenced in the High Court of Kano State, the plaintiffs (now appellants) claimed from the defendant—

“The sum of ₦43,647 under a contract in writing dated 30th September, 1972, whereby the defendant agreed, in consideration of the plaintiffs granting overdraft facilities to the Kano Dyeing and Factory Limited, to guarantee the payment to the plaintiffs of all sums due by the Kano Dyeing and Printing Factory Limited to the plaintiffs, the said Kano Dyeing and Printing Factory Limited having gone into voluntary liquidation as at 27th August, 1973, and having been due the sum of ₦174,589 to the plaintiffs as at that date, which sum is still due and owing to the plaintiffs.”

Paragraphs 3 to 10 of the plaintiffs’ amended statement of claim read:

“(3) The defendant was a director of Kano Dyeing and Printing Factory Limited, a limited liability company incorporated in Nigeria and having its head office at 9, Independence Road, Bompai, Kano (hereinafter for brevity referred to as ‘the said company’).

(4) The said company had a banking account with the plaintiffs and the plaintiffs granted overdraft facilities to the said company upon consideration of the defendant inter alia guaranteeing same.
2. By written contract dated 30th September, 1972 between the plaintiffs, the said company and *inter alia* the defendant as guarantor the plaintiffs agreed to extend credit to the company up to ₦160,000 plus interest, commission and expenses until repayment.

(5) By the said written contract the defendant, in consideration of the plaintiffs granting the aforesaid credit and/or other banking facilities to the said company, guaranteed to pay the plaintiffs all sums due to the plaintiffs or that may become due to the plaintiffs by the said company.

(6) The plaintiffs duly extended credit to the said company under the aforesaid written contract and as at 27th August, 1973 the said company was indebted to the plaintiffs in the sum of ₦174,589 inclusive of interest commission and expenses.

(7) The members of the said company passed a resolution on 27th August, 1973, that the said company be wound up voluntarily and that a liquidator be appointed.

(8) The plaintiffs rank as unsecured creditors in the winding-up and the liquidator has informed the unsecured creditors of the said company that he anticipates the total dividends to be paid to unsecured creditors to be in the region of 35%.

(9) That on 25th September, 1974 the liquidator paid a dividend of 25% to the unsecured creditors of the company and the plaintiffs thus received from the liquidator on that date the sum of ₦43,647 towards the total indebtedness of ₦174,589 thus leaving a balance due by the company to the bank of ₦130,942.

(10) The plaintiffs now seek to recover from the defendant under the aforesaid written contract dated 30th September, 1972 one-quarter of the aforesaid sum of ₦130,942 that is ₦32,735.50 being his proportion of the total debt due, the other three guarantors having already paid their proportions of one quarter each.

The plaintiffs therefore seek judgment against the defendant in the sum of ₦32,735.50.”
In his own amended statement of defence, the defendant denied most of the averments in the statement of claim. The main plank of his defence is in paragraph (9) which reads:

“(9) Further to paragraph (8) hereof, the defendant would aver that if, which is denied, he is liable to the plaintiffs, he is liable jointly with other directors alleged to be parties to the loan contract for the total sums due and no apportionment of the debt was agreed by the parties to the contract, and in any case if, which is denied, he entered into any undertaking to be liable, he did so in the belief which he gathered from the form of the undertaking, that others therein named also would execute the document and as they did not all execute the document, he denies liability. The defendant would allege that the said other directors have not been sued as arrangements, the extent of which have not been disclosed to the defendant, have been reached with these other directors.”

It is common ground that the basis of the plaintiffs’ claim is the written agreement (exhibit A). It is described therein as a:

“contract relating to a bank loan between—

A. The Arab Bank (Nig.) Limited Kano Branch represented by Mr Taysir A. Sharaf and Mr Ali Obeidat hereinafter named the ‘bank’;

B. Kano Dyeing and Printing Factory Limited hereinafter named the ‘Borrower’; and

C. Personal Guarantees of—

1. Mr M.Z. Khatoun;

2. Mr J. Aboulafia;

3. Alhaji Aminu Dantata;

(Directors)

4. Abdul Latif Osseiran.”

Clauses 13, 18 and 23(d) of the agreement (exhibit A) provide as follows:

“13. The guarantor whose signature appears below declares that, in consideration of the granting by the bank of this credit and/or other banking facilities to the borrower, he guarantees that the Borrower shall fulfil all his undertakings and obligations arising from this contract, and also guarantees to pay to the bank all sums due to the bank or that may become due
to the bank in respect of this contract or any extension or renewal thereof, whether such extension or renewal shall take place once or several times.

. . .

18. If this contract is signed by more than one person in their capacity as debtors or guarantors, all the signatories shall be severally and jointly responsible to the bank for the total sum due to the bank according to this contract.

. . .

(d) If the bank has to sue the borrower and/or guarantor they undertake jointly and severally to pay all costs, fees, and expenses incurred by the bank plus lawyer’s fees valued at 10% of the total sum claimed.”

It is also shown in the agreement (exhibit A) that it is:

“written in two copies, signed by the parties, each of whom having a copy.”

The word “guarantor” is defined in the agreement to include the plural.

We pause here to observe that, notwithstanding the above statement that the agreement is “signed by the parties”, only three of the guarantors, in fact, executed the agreement. The first guarantor (Mr MG Khatoun), who, incidentally, is the founder of the company, did not execute the agreement. The significance of this omission will be discussed later.

The first witness called by the plaintiff admitted that the guarantors are four in number but that the bank did not sue all the four directors together because they have the right to claim either from all of them together or from one guarantor only. He further admitted that they did not sue Mr Osseiran and Mr Khatoun because they had reached an agreement with them by virtue of which those two person would pay the bank certain sums of money.

To further questions, the witness (plaintiff witness 1) replied as follows:–

“I agree that exhibit A was prepared in such a way that four people must sign as guarantors. I agree that only three people signed as guarantors of exhibit A.
a  
I agree that we expected all the names listed in exhibit A to sign.
I agree that the three directors who paid their share of the debt did
so in pursuance of their connection with exhibit A. I cannot say
whether the bank would pay if only three directors of the Kano
Dyeing and Printing Factory Limited have signed.”

b  
When he was questioned about the proportion of the debt
already paid by three of the guarantors (including Mr Kha-
toun who did not execute the agreement, exhibit A), the wit-
ness replied:–
“I agree that the three guarantors may expect the other to sign. I
agree that the three guarantors paid a total of three-quarters of the
balance shown in exhibit A. I do not know what each one of them
has paid . . .
I agree that the three guarantors paid the three quarters of the debt
shown in exhibit A as a result of their agreement with the bank.
The arrangement for the three guarantors to pay the three-quarters
is not in exhibit A. I agree that exhibit A does not contain any
method of apportionment of liability of the guarantors. I agree that
paragraph 18 in exhibit A contains a reference to ‘total sum due.’
I agree that the arrangement by bank and three guarantors to pay
three quarters of the debt is a gentleman agreement and is not
contained in exhibit A.” (Italics ours.)

c  
The defendant testified in his defence. He stated that al-
though the four directors agreed to sign the written guaran-
tee jointly, he discovered later that only three of them exe-
cuted exhibit A. He agreed that he was one of the three
guarantors who executed the agreement. He then observed
that since the actual agreement was not executed by the four
directors as guarantors, he was not liable to pay anything be-
cause “there is a failure on the side of the plaintiffs to legal-
ise the document.” Under cross-examination, the defendant
informed the court that he invested the sum of ₦180,000 in
the company by purchasing 90,000 shares at ₦2 per share.
When questioned about the apportionment of the amount
due to the plaintiffs from the company, the defendant re-
plied:–
“I say that we have never sat down and discussed with Aboulafia as
to the question of liability. I did not approach the other directors

about individual liability. I was phoned by the plaintiffs asking me to pay 25% of the loan. I did not pay and I did not discuss anything with them about this. I say that even if I heard that the other three directors guaranteeing the loan have paid 25% of the loan each, I am not prepared to pay 25%.”

In dismissing the plaintiffs’ claim, the learned trial Judge observed that the defendant agreed that all the four directors agreed to sign exhibit A guaranteeing the loan, but that he did not know why Mr Khatoun did not sign; that there was no suggestion that the defendant agreed to dispense with the signature of Mr Khatoun on exhibit A; that having regard to the wording of clauses 13 and 18 of exhibit A, there is no iota of doubt that the guarantors were to be jointly and severally liable to the plaintiffs for the total sum due to the plaintiffs. He then found as follows:–

“I find as a fact that exhibit A is intended to be signed by all the four directors of the company and that they were to be jointly and severally liable to the plaintiffs after such signature. I also find that exhibit A was in fact signed by only three directors including the defendant and that there was no evidence to explain why the signature of the fourth guarantor Mr MZ Khatoun was dispensed with. There are also no circumstances present before me to infer such evidence. It is therefore a question of law whether the defendant in this case would be liable to the plaintiffs under exhibit A.”

The learned trial Judge then referred to the decisions in *Hansard v. Lethbridge* (1892) 8 T.L.R. page 346 and *National Provincial Bank of England v. Brackenbury* (1906) 22 T.L.R. 797. The *ratio decidendi* of both cases is that where a surety had executed a document in the belief derived from the form of the document that is would be executed by all the sureties named as such in the document as persons who were to sign, he would be relieved from his obligation if all the others did not sign.

Being dissatisfied with the judgment, the bank has now appealed to this Court on the following grounds:–

“(1) The learned trial Judge erred in law in holding that the cases of *Hansard v. Lethbridge and others* (1892) 8 T.L.R. 346
and The National Provincial Bank of England v. Brackenbury (1906) 22 T.L.R. 797 applied to the present action that there was no condition precedent requiring the guarantee to be signed by particular persons.

(2) The learned trial Judge erred in law in not distinguishing the above quoted cases from the present action on the question of contribution."

In support of the first ground of appeal, learned Counsel for the appellants submitted that because the guarantors are described in exhibit A as “personal guarantors,” the agreement between the plaintiffs/appellants and the respondent is one between the creditor and an “individual personal guarantor.” Learned Counsel also submitted that, in order to seek to avoid the agreement for non-execution, the respondent must show that there is a term in the agreement that all the individual guarantors shall execute the agreement. Learned Counsel then pointed out that the ratio decidendi of the two cases relied upon by the learned trial Judge conflicts with the ratio decidendi of the two earlier cases, namely Coyte v. Elphick (1874) 22 W.R. 541 and Cumberledge v. Lawson (1857) 26 L.J.C. page 120.

Coyte v. Elphick referred to by learned Counsel for the appellants, is a case whereby a mortgage deed secured by a life insurance policy and by two sureties (one of whom is the defendant), the mortgagor mortgaged his landed property and the policy of insurance and all monies payable under it to the mortgagee. There was a power of sale in the deed by the mortgagee of the property and the insurance policy. The defendant mortgagor covenanted that if the mortgagee should be made to execute the power of sale, or if the proceeds should not be sufficient, he (the defendant mortgagor) would pay the deficiency to the amount of £300. To an action on this covenant, the defendant mortgagor pleaded that no policy was effected and also that one of the sureties had not executed the deed. The court held that it was a condition precedent that a policy should have been effected, and also that in the absence of express provision it was not a condition
precedent that the other surety had signed. This case, to our mind, is clearly distinguishable from the cases relied upon by the learned trial Judge and also from the case in hand. In the Coyte case, and unlike the case in hand, it is the mortgagor, not the joint surety who omitted to sign the deed, who was the defendant. In effect, the mortgagor tried to deny liability on the ground that one of the sureties whose liability is, in any case, separate and distinct from that of the mortgagor who is the principal debtor, did not execute the mortgage deed. We are therefore not surprised that the court held that this omission to execute the deed was not a condition precedent to the defendant mortgagor’s liability.

The second case, that is, Cumberledge v. Lawson is also one in which the principal debtor and not the surety is the defendant. In any case, it was decided mainly on the state of the pleadings. As was pointed out by Creswell J:–

“the defendant did not say that he never did seal or deliver nor that he delivered the deed as an escrow on condition that P should execute, nor that he was betrayed into sealing and delivering on the faith that he was not to be bound unless P executed; and I find nothing on the face of the plea to lead to the conclusion that there was any such stipulation. All defendant says is that he executed the deed on the faith that P should execute it. That clearly is not sufficient. If the defendant delivered the deed as an escrow on condition that he was not to be bound unless P executed, he should have so pleaded.” (Italics are ours.)

From the foregoing, it is also clear that Cumberledge’s case is distinguishable from the cases relied upon by the learned trial Judge.

The law as to the liability of a surety in circumstances similar to those of the case in hand is well settled.

Thus, in Leaf v. Gibbs (1830) 4 C. and P. 466, it was held that when a person signs a promissory note on a representation that others are to join and one afterwards refuses to sign, the payees cannot recover in an action on the note against the person who signed it, unless the jury are satisfied
that such person, knowing the facts and being aware of his rights, had consented to waive his objection.

Again, in *Evans v. Brembridge* (1855) 69 E.R. 741, one of two intended sureties executed a deed of covenant for the payment of monies advanced to the principal debtor, on the understanding that the moneys would not be advanced until the deed was executed by the other surety. The deed was never executed by the other surety, and no notice of his failure to execute it was given by the creditor to the executing surety until after the principal debtor had defaulted. It was held in an action, instituted by the creditor against the surety who executed the deed, that the executing trustee was entitled to be discharged in equity from every part of the debt and to have the deed delivered up to be cancelled. As Page-Wood VC, has rightly pointed out at pages 745-746 of the judgment:

“The only doubt I had was whether it might not be the proper course to order the deed to be delivered up upon some terms as that the plaintiff should be bound to the extent of half the sum secured by his covenant; but looking to the other authorities, *Leaf v. Gibbs* (4 C. and P. 466) and *Rice v. Gorden* (11 Beav. 265), which proceeded upon the equities of the parties, it seems to be decided that, when once it appears that the instrument is not such as it was intended to be, this Court holds that the legal effect of the instrument is to be got rid of as against the surety. This Court, then, will look at the original agreement between the parties to see if it appears that they all intended that the obligation should be joint and several between the co-sureties. In this case the deed was in that form, and was prepared and framed by the covenants, who sent it for execution to the plaintiff, thereby giving him the clearest intimation that his liability was intended to be joint and several. After that, it was the duty of the company to inform the plaintiff that the deed was not executed by his co-surety as originally proposed, and to ascertain his view with respect to his altered position. It is impossible to say that it was not materially altered by the plaintiff becoming severally bound, especially in this case, considering the relation of the principal debtor to the other surety. The plaintiff may have calculated on the influence that person might have exercised together with himself in inducing the debtor to discharge his obligation.”
Thirdly, in *In the goods of Cowardin* (1901) 18 T.L.R. 220, one surety to an administration bond executed the bond on being assured that the other person named in it as co-surety would execute it. The co-surety refused to do so. Consequently, the name of another surety was inserted in the bond and this person executed it. The first surety did not assent to the alteration. In an action brought to enforce the bond against the first surety, it was held that the bond was void and must be cancelled. The following observation, made by Barnes J, in his judgment in the case, is particularly apposite:–

“In *Underhill v. Horwood* (10 Ves., at page 225) the Lord Chancellor said:

‘Where a man executes a bond, meaning that it should be the joint bond of himself and another, and not his several bond, it would not be his several bond. But the cases go further. In such a case, however, unless there is something special the man, who had become so severally bound, has a right to have that bond delivered up; for his intention was not to become a mere several obligor, but to be a joint and several obligor, and the rights are different both in law and equity, for if he is only a several obligor he has no remedies over against any one, but if he is a joint and several obligor, or only a joint obligor, there is right of contribution against the other sureties in equity, from the earliest time, and of exoneration from the principal’.

Therefore it was clear how important it was to have a co-bondsman who was approved of in case it ultimately might become necessary to proceed against either.”

In *Hansard v. Lethbridge* (*supra*), relied upon by the learned trial Judge, it was held that where a surety executes a document in the belief, derived from its form, that it will be executed by all the sureties named therein as persons who are to sign, he (the surety) will be released from his obligation if all the others do not sign.

The facts of the last case to which we propose to refer – *National Provincial Bank v. Brackenbury* (1906) 29 T.L.R. 797 – are on all fours with the case in hand. There, a guarantee
a. To a bank for overdraft was, on the face of it, intended to be a joint and several guarantee by four guarantors. Three out of the four signed the guarantee, but the fourth did not sign, though willing to do so, and then died. The court held that those three who signed were not liable to the bank on the guarantee.

b. The rationale of all those decisions to which we have referred is not far to seek. It is, we think, reasonable for any person who agrees, jointly and severally with others, to guarantee a loan granted by a bank or similar institution to a third party, to signify his agreement to stand as a joint guarantor in the belief that the joint guarantors could, and would, repay the loan if the third party is in default, and the guarantors are called upon by the creditor to pay up. This, to our mind, is the main plank of the defence to the claim in this case. As a general rule, where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectively be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect. What is the part of each must, of course, depend on the circumstances. (See Mackay v. Dick (1881) 6 A.C. (H.L.) 251 as per Lord Blackburn at page 263).

c. The agreement (exhibit A) we recall, states that it shall be “signed by the parties, each of whom having a copy.” There can be no doubt, therefore, that it is a condition precedent to the agreement that Mr Khatoun and the other guarantors, who are jointly and severally liable with him, would execute the agreement as joint guarantors. By allowing Mr Khatoun who, as we have pointed out earlier, is the founder of the company to which the overdraft facility was granted, not to join in the execution of the agreement thereby discountenancing his joint obligation thereunder, and without notifying the defendant/respondent, the plaintiffs/appellants have deliberately altered the fundamental basis of the contract of
guarantee. The position here is precisely the same as that in
National Provincial Bank of England case (supra), and the
learned trial Judge was clearly justified in basing his deci-
sion on the ratio decidendi of that case. The first ground of
appeal therefore fails.

Learned Counsel for the appellant complained in the sec-
ond ground of appeal that the learned trial Judge was in error
in relying on the two cases which we have considered earlier
without distinguishing them from the present action on the
question of contribution. The short answer to this complaint
is this. The right and duty of contribution, as the learned
Counsel for the respondent has rightly pointed out, is based,
not on contract but on the doctrines of equity. Of course, the
issue of contribution only arises if the person asked to con-
tribute is a party to the original contract of guarantee. If he
has been released from liability under the contract, as is the
case in the matter now before us, the issue of contribution
does not arise. No person can be called upon to contribute to
a non-existent liability. The learned trial Judge was, there-
fore, right in not considering the issue. It is completely ir-
relevant.

For all the reasons which we have given above, the appeal
fails and it is dismissed. The judgment of the learned trial
Judge delivered on 4th March, 1974, in the High Court of
Kano State dismissing the plaintiffs/appellants’ claim in Suit
No. K/52/197A is affirmed.

Costs in favour of the defendant/respondent are assessed at
₦100.

Appeal dismissed.
Onyechi v. National Bank of Nigeria

HIGH COURT OF ANAMBRA STATE

UMEZINWA J

Date of Judgment: 12 JULY 1977

Banking – Banker/customer relationship – Duty of bank to honour customer’s cheque if sufficient funds available – What constitutes sufficient funds – Cheque drawn against uncleared cheque honoured only under agreement express or implied

Banking – Cheques – Cheque endorsed “Bank Cheque Issued” – Implication of – Duty of bank to honour – Difference from “bank draft”

Banking – Cheques – Wrongful dishonour – Customer who is not a trader must prove actual injury to credit to recover substantial damages – Employee of insurance company not a trader

Facts

The plaintiff brought an action against the defendant bank for damages for breach of contract.

The plaintiff, who was the Eastern Area Manager of an insurance company, had a current account with the defendant bank at its Enugu Branch. The insurance company also had an account with the defendant bank, and the plaintiff’s salary was paid by cheque under an arrangement between the company and the defendant’s head office in Lagos which drew cheques on its account and sent them to the company’s employees at Enugu.

On November 1st, 1971, when the balance remaining in the plaintiff’s bank account was 15s.5d, the plaintiff paid his salary cheque for £73 into his bank account. The cheque was endorsed “Account Payee Only” and “Bank Cheque Issued.”
The plaintiff’s paying-in slip contained a condition whereby the bank reserved the right not to honour cheques immediately on presentation.

On November 5th, 1971 the plaintiff issued a cheque for £8, the amount of a monthly instalment payment due for some furniture he had purchased. The cheque was dishonoured by the defendant bank and the furniture was repossessed. When the plaintiff complained to his bank manager he was told that the bank could refuse to honour even its own cheques.

The plaintiff brought the present proceedings for damages for breach of contract, alleging that the bank had previously honoured his salary cheques on presentation, and contending that (a) a cheque endorsed with the words “Bank Cheque Issued” had the same status as a bank draft and was equivalent to cash; (b) his bank account should properly have been credited with the amount of his salary cheque immediately when it was paid in and would then have held a balance of at least £73; when, therefore, the bank dishonoured his cheques for £8 it was in breach of contract; (c) the bank was not entitled to rely upon the condition printed on the paying-in slip since it had previously honoured the plaintiff’s salary cheques on presentation and there was an implied agreement that it would continue to do so, and (d) as a trader the plaintiff was entitled to recover substantial damages for the defendant’s breach of contract without proof of special damage.

The defendant denied that the plaintiff’s salary cheques had previously been honoured immediately on presentation and contended that (i) unlike a bank draft, cheques issued by a bank and endorsed “Bank Cheque Issued” was not equivalent to cash and, although it was banking practice to honour such a cheque immediately if it was presented at a bank in the same town or clearing area as that which issued it, when such a cheque was presented in a different area the bank would not normally honour it until it had been verified (ii)
the period between November, 1st and November, 5th was not sufficient to have enabled the bank to clear the plaintiff’s salary cheque and when, therefore, the cheque for £8 was presented there were inadequate funds in the plaintiff’s account. The bank had properly refused to honour the cheque and was not in breach of contract and the plaintiff’s claim should be dismissed.

Held –

1. A cheque endorsed “Bank Cheque Issued” when paid by a customer into his bank account which is outside the clearing area of the bank issuing the cheque is treated as an uncleared effect and does not acquire value until it has been cleared.

In the instant case, when Mr Izuigbe presented the cheque exhibit A for encashment the plaintiff had not enough funds in his account to cover the amount of £8 drawn against his account with the defendant.

2. The law is that a banker is bound to pay cheques drawn on him by a customer in legal form provided he has in his hands at the time sufficient and available funds for the purpose, or provided the cheques are within the limits of an agreed overdraft, and may so pay them within a reasonable margin after the bank’s advertised closing time. The funds must not only be sufficient, but must also be available.

3. In the case of cheques and other documents, the banker is entitled to a reasonable time for clearing or collection according to their respective nature. Mere crediting as cash is not sufficient to entitle the customer to draw against the cheque before clearing. There must be an agreement express or implied to permit the customer or draw.

4. Sufficiency of funds to compel the banker to honour the cheque if its customer refers to actual cash in the customer’s account and does not include cheques the fate of which has not been determined.
In the instant case, there were no records in the defendant bank’s office that the plaintiff had always been paid on the spot on presentation of a bank cheque issued. The period between November 1st, 1971, when the plaintiff paid into his account the sum of £73, and November 5th, 1971, when the cheque for £8 which he drew on his account was presented for payment, was not sufficient for the defendant to clear the cheque exhibit C.

5. A trader is entitled to recover substantial damages for the wrongful dishonour of his cheque without pleading and proving actual damage but it has never been held that exception to the general rule as to the measure of damages for breach of contract extends to any one who is not a trader.

In the instant case the plaintiff who is an employee of an insurance company is not a trader.

Plaintiff’s claim dismissed.

Cases referred to in the judgment

Nigerian


Foreign

Constantine v. Imperial Hotels Ltd [1944] 2 All E.R. 171
Gibbons v. West Minister Bank Ltd (1939) 2 K.B. 882
Hadley v. Baxendale (1854) 156 E.R. 145
Joachimson v. Swiss Bank Corp (1921) 3 K.B. 127

Books referred to in the judgment

Chorley and Smart: Leading Cases in the Law of Banking (3ed) at 69 (1973)
Halsbury’s Laws of England 1962, (3ed) at 190 and 194, paragraphs 359 and 362
Paget’s Law of Banking 1966, (7ed) at 287
Onyechi v. National Bank of Nigeria

**Counsel**

For the plaintiff: *Okunna*

For the defendant: *Okolo*

**Judgment**

UMEZINWA J: The plaintiff claims against the defendant the sum of ₦5,000 being special and general damages for breach of contract. The particulars of special damage were set out as follows:

```
“Loss of use of furniture from November 5th to December 6th, when
the plaintiff paid cash for
the furniture, at ₦7 per day 210.00
General damages 4,790.00
Total ₦5,000.00”
```

Pleadings were ordered, duly filed and delivered.

The plaintiff is the Eastern Area Manager of the Mercury Assurance Co Limited the defendant is a limited liability company carrying on banking business with its head office in Lagos and a branch office at 18 Ogui Road, Enugu. In 1971 the plaintiff had a current account with the defendant at its Enugu Branch. The defendant, in 1971, was also the bank for the plaintiff’s employer, the Mercury Assurance Co Limited. It would appear that the plaintiff’s employer had a standing arrangement with the defendant whereby the defendant’s head office branch at 40 Balogun Street, Lagos drew cheques on its account and sent the salaries of the members of the staff of the Mercury Assurance Co Ltd to them in Enugu. The plaintiff was included under this arrangement.

On November 1st, 1971 the plaintiff paid into his account with the defendant a cheque of £73 issued to him by the defendant from its head office in Lagos. The cheque was endorsed “Account Payee Only” and was also endorsed “Bank Cheque Issued.” The amount on the cheque represented the plaintiff’s salary for the month of October, 1971.
On November 5th, 1971 the plaintiff issued a cheque to one Emmanuel Izuigbe for the sum of £8 against his account with the defendant. The plaintiff had bought a set of furniture from Emmanuel Izuigbe for a total sum of £32, which he was to pay by four equal monthly instalments of £8 a month. The cheque was dishonoured by the defendant and was returned to him by Emmanuel Izuigbe. The returned cheque was admitted in evidence as exhibit A. It is the plaintiff’s evidence that Mr Emmanuel Izuigbe became annoyed with him for issuing him with a dishonoured cheque. Every effort made by the plaintiff to persuade him to believe that he had sufficient funds in his account with the defendant to honour the cheque failed and, notwithstanding the intervention of his landlord and wife, Mr Izuigbe came to his house and removed the set of furniture he had sold to him.

According to the plaintiff, on November 6th, 1971 he went to the defendant and reported the incident to its manager. The manager told him that he had the right to refuse to honour even their own cheques. According to the plaintiff a cheque endorsed with words “Bank Cheque Issued” is as good as a bank draft. On its presentation at the counter, it acquires value for which a customer is entitled to draw on his account. He stated that in the past he had received his salary from his employer in Lagos on cheques similarly drawn and endorsed by the defendant and that he had drawn on his account once he paid in the cheques into his account. According to the plaintiff, at the time he issued the cheque to Mr Izuigbe he had at least £73 in his account with the defendant. The plaintiff contends that by refusing to honour the cheque, exhibit A, the defendant was in breach of its contract with him; and he has brought this action claiming as per his writ of summons. The teller under which the plaintiff paid the sum of £73 into his account was admitted in evidence as exhibit B.

The defendant did not deny dishonouring the cheque for £8 which the plaintiff issued to Mr Emanuel Izuigbe. The defendant
was represented in this case by John Eyisi Agba, the manager of its Enugu Branch. This witness is a highly qualified bank official. He is an associate of the Institute of Bankers and Institute of Management. He holds a degree in economics from Durham University. He stated that on November 1st, 1971 a bank cheque issued for the sum of £73 was paid by the plaintiff into his account. A photostat copy of this cheque was admitted in evidence as exhibit C. It is evidence that the cheque was not equivalent to cash when it was paid in. It was not a bank draft but only a cheque endorsed “Bank Cheques Issued.” He then explained the difference between a bank draft and a bank cheque issued. According to him, a bank draft is an order of the bank to itself. It could be an order from one branch of the bank to another branch of the same bank. It is always coded by the bank manager and/or the accountant of the branch issuing the cheque. When presented at the other end, the branch manager or accountant decodes the code number and if it is found to be correct, the branch could pay cash at once to the person to whom the cheque was issued. A cheque endorsed “Bank Cheque Issued,” he stated, is used locally. It is used by banks within the same town or the same clearing area. Banks within the same clearing area or town can accept a cheque endorsed “Bank Cheque Issued” because they can easily check from the other local branch issuing the cheque whether the cheque is genuine or not. If a cheque endorsed “Bank Cheque Issued” is presented for payment in a branch of the bank in another town, the branch is not bound to pay until the genuineness of the signature and account have been confirmed. Where a bank cheque is issued to a customer and, as in this case, it is being lodged in the account of the person to whom the cheque was issued, it is treated as an uncleared effect. The witness stated that it is only after the cheque has been cleared that the payee can draw on his account. However, if a customer is in need of cash, he could ask the bank manager to purchase the cheque. In that case, the payee would fill in a
form indemnifying the bank if the cheque is returned unpaid. He would also pay commission for the amount depending on the value of the cheque. Payment in respect of a cheque endorsed “Bank Cheque Issued,” according to the witness, is not automatic but is subject to verification.

Continuing his evidence, the witness stated that when the plaintiff paid in exhibit A on November 5th, 1971 it was marked “effects unclear represent.” exhibit A was so marked because the defendant had not received the value of exhibit C. Exhibit C had not been cleared. Because the plaintiff had in his account on November 5th, 1971 a balance of only 15s.5d, the defendant acted properly in refusing to honour the cheque exhibit A when it was presented for payment. The witness stated that it is the customer who decides whether payment should be made to him by a banker draft or by a bank cheque issue. He pays a higher commission for a banker draft than he would pay for a bank cheque issue, for which the maximum commission is N2, irrespective of the amount.

Mr Agba admitted under cross-examination that he was not the branch manager in 1973 at the time material to this action. He was not even at the Enugu branch of the bank in 1971. He admitted that apart from what is recorded in the bank’s records, he does not know anything about the transaction between the plaintiff and Mr Olorininu who was the branch manager in 1971. It is his evidence that the difference between a bank draft and a bank cheque issue is both theoretical and practical. He admitted that on November 1st, 1971 they had in Enugu the specimen signatures of all the defendant’s branch managers who were authorised to sign cheques. He stated that if on November 1st, 1971 he had received a bank draft signed by the appropriate manager, he would have paid it if everything else was in order regardless of what was coming in transit. He also admitted that on November 1st, 1971, the defendant’s branch manager at Enugu had the signatures of all the accountants authorised to sign cheques. He...
admitted that on November 5th, 1971 the defendant had the authorised signature card of the plaintiff. He stated that he did not know whether before this incident the plaintiff had always been paid by the manager on the spot. He further stated that he did not know whether in the past the plaintiff had gone to the manager to purchase a cheque and paid commission. He finally stated that he did not know whether exhibit A was returned by the counter clerk to the plaintiff without referring it to the bank manager or the accountant. Re-examined by the learned defence Counsel, he stated that there were no records in his office which showed that the plaintiff had always been paid on the spot on presentation of cheques endorsed “Bank Cheque Issued.”

In his closing address, the learned defence Counsel submitted that the plaintiff had failed to establish his case and was not therefore entitled to judgment. The crux of the matter he submitted is whether the plaintiff had sufficient funds on November 5th, 1971 for the defendant to honour the cheque exhibit A. Learned Counsel submitted that exhibit B which is the teller under which the plaintiff paid in £73 on November 1st, 1971 represents the basis of the contractual relationship existing between the plaintiff and the defendant. He submitted that the obligation of a bank to pay for cheques issued by a customer is confined only to cases where there are sufficient funds in the customer’s account to meet the amount drawn on the cheque at the time of its presentation.

Sufficiency of funds he submitted, refers to actual cash in the customer’s account and does not include cheques the fate of which has not been determined. To support this submission, learned Counsel cited Joachimson v. Swiss Bank Corp. Reference was also made to Paget’s Law of Banking, (7ed) at 287 (1966). The principle, however, does not apply where the customer is given overdraft facilities under which he can overdraw the amount in his account.

Learned Counsel urged the court to accept the expert evidence of the bank manager that a cheque endorsed “Bank
Cheque Issued” is not equivalent to cash and the bank is not bound to meet the amount therein drawn on presentation. The court was further urged to accept the bank manager’s evidence that such a cheque can only be paid on the spot when a bank agrees to purchase the cheque and the customer guarantees to refund the amount if the cheque is dishonoured. He submitted that the burden is on the plaintiff to establish any special relationship between him and the defendant and that any such relationship has not been established by the plaintiff. Learned Counsel contended that even if there was a breach, the plaintiff could only recover nominal damages since he is not a trader. He cited in support of this submission Gibbons v. Westminster Bank Ltd. He referred also to Chorley and Smart, Leading Cases in the Law of Banking, (3ed) at 69 (1973). Also cited is the case Oyewole v. Standard Bank of West Africa Ltd. The plaintiff, he submitted, could only get substantial damages if he had pleaded and proved special damage. This, he contended, the plaintiff had failed to prove. There was no evidence that the plaintiff hired any furniture for which he claimed the sum of N7 per day for 30 days amounting to N210. It was finally submitted that the plaintiff’s item of claim for special damages was too remote and did not come within the rule in Hadley v. Baxendale.

In his reply, learned Counsel for the plaintiff urged the court to accept the evidence of the plaintiff that the defendant had in the past paid him on presentation of cheques endorsed “Bank Cheque Issued.” He submitted that the burden was not on the plaintiff to call the bank manager, who had previously paid him on the spot, as a witness in support of his case that he had always been paid on the spot in the past when he presented a bank cheque issued. He contended that the manager who represented the bank in this case was not at Enugu in 1971 and that everything he said in this case was collected from the records available to him. Learned Counsel further submitted that although the defendant in exhibit B, ie, the bank teller under which the plaintiff paid the sum of £73 into his account, reserved the right not to honour on
the spot a cheque issued by the plaintiff, it could not exercise that right when it had in the past paid the plaintiff cash on the spot. The plaintiff, he contended, had by that concession acquired a legal right which he could enforce against the defendant if it was breached. The court was urged not to accept the evidence of the bank manager that a manager who paid cash on the spot in respect of a bank cheque issued acted wrongly. The court was further urged to accept the proposition that the defendant’s manager in 1971 made representations to the plaintiff that a bank cheque issued could be paid on the spot. The court was also urged to hold that exhibit A was not referred to the branch manager but was simply returned as dishonoured by one of the bank’s counter clerks. On the quantum of damages, learned Counsel submitted that in addition to recovering the whole amount the plaintiff claims as special damages, he was also entitled to recover substantial damages under the head of general damages. The plaintiff is the area manager of an insurance company and learned Counsel submitted that he is a trader by virtue of that fact.

The issue that falls for determination in this case in view of the evidence led by the parties is whether on November 5th, 1971 when the plaintiff issued the cheque for £8 to Emmanuel Izuigbe, he had sufficient funds in his account with the defendant to honour the cheque when it was presented for payment. There is no dispute that the plaintiff paid into his account on November 1st, 1971 the sum of £73 as per exhibits B and C. Exhibit B is the pay slip or teller under which the amount was paid into the account and exhibit C is the cheque for £73 issued to the plaintiff by the defendant drawn against its account at 40, Balogun Street, Lagos. What has given rise to the controversy is that this cheque was endorsed by the drawer “Bank Cheque Issued” and there is disagreement about the implications of this endorsement. The plaintiff contends that a cheque endorsed “Bank Cheque Issued” is as good as a bank draft and acquires on it presentation value for which he is entitled to
draw on his account. The defendant holds a different view. Mr Agba, a highly qualified bank official who represented the defendant in this case, in his evidence stated that exhibit C is not a bank draft but merely a bank cheque issued. Where it is being paid into the account of a customer in a town different from the town from which the cheque was issued, it is treated as an uncleared effect and only acquires value after it has been cleared. Since the only amount standing on the plaintiff’s credit in his account when exhibit A was presented was 15s.5d the cheque for £8 was dishonoured (and in his view rightly) by the defendant.

Mr Agba left no doubt in mind that he is an expert in his own field and knows what he is talking about. I accept his evidence that a cheque endorsed “Bank Cheque Issued” when paid by a customer into his bank account which is outside the clearing area of the bank issuing the cheque is treated as an uncleared effect and does not acquire value until it has been cleared. I am satisfied and find as a fact that when Mr Izuigbe presented the cheque exhibit A for encashment the plaintiff had not enough funds in his account to cover the amount of £8 drawn against his account with the defendant.

The law is that a banker is bound to pay cheques drawn on him by a customer in legal form provided he has in his hands at the time sufficient and available funds for the purpose, or provided the cheques are within the limits of an agreed overdraft, and may so pay them within a reasonable margin after the bank’s advertised closing time. The funds must not only be sufficient, but must also be available. In the case of cheques and other documents, the banker is entitled to a reasonable time for clearing or collection according to their respective nature. Mere crediting as cash is not sufficient to entitle the customer to draw against the cheque before clearing. There must be an agreement express or implied to permit the customer to draw. (See Halsbury’s Laws of England, (3ed) at 190 and 194 paragraphs 359 and 362, and per
Atkin LJ in *Joachimson v. Swiss Bank Corporation* (1921) 3 K.B. at 127; [1921] All E.R. 100). Sufficiency of funds refers to actual cash in the customer’s account and does not include cheques the fate of which has not been determined. I accept the evidence of Mr Agba that there are no records in their office that the plaintiff had always been paid on the spot on presentation of a bank cheque issued. I am of the view that the period between November 1st, 1971, when the plaintiff paid into his account the sum of £73, and November 5th, 1971, when the cheque of £8 which he drew on his account was presented for payment, was not sufficient for the defendant to clear the cheque exhibit C. I am, therefore, unable to hold that by dishonouring the cheque exhibit A on November 5th, 1971 the defendant was in breach of the contract to pay a cheque drawn by the plaintiff on his account with the defendant. If I had held that the defendant was in breach of its obligation to pay cheques drawn on it by the plaintiff, I would only have awarded the plaintiff nominal damages. In *Gibbons v. Westminster Bank Ltd* [1939] 3 All E.R. 579, Lawrence J said:

“...It remains only to consider whether the plaintiff, who, it is admitted is not a trader, is entitled to recover more than nominal damages for the dishonour of her cheque without having pleaded or proved special damage.

The authorities which have been cited in argument all lay down that a trader is entitled to recover substantial damages for the wrongful dishonour of his cheque without pleading and proving actual damage, but it has never been held that exception to the general rule as to the measure of damages for breach of contract extends to any one who is not a trader.”

*Gibbons v. Westminster Bank Ltd* (supra) was followed by Taylor CJ in *Oyewole v. Standard Bank of West Africa Ltd*. I am unable to accept the submission of learned Counsel for the plaintiff that because the plaintiff is an Area Manager of an insurance company, that makes him a trader. The plaintiff is an employee of a business venture but that does not make him a trader.
Although the plaintiff pleaded special damage he failed to prove it. What the plaintiff gave in evidence as proof of special damage is the inconvenience and discomfort he endured by sitting on his bed when the furniture he purchased from Mr Izuigbe was removed by him because the cheque exhibit A was dishonoured by the defendant. Pain and discomfort do not come under items of special damages but come under general damages. In Constantine v. Imperial Hotels Ltd Birkett J awarded the sum of five guineas as nominal damages. Taylor CJ in Oyewole’s case (supra) awarded five guineas as nominal damages to the plaintiff, a legal practitioner. In this case I would have joined in the exercise by awarding the plaintiff ₦10.50 as nominal damages if I had found that the defendant wrongfully dishonoured his cheque.

In the result, the plaintiff’s action fails and is accordingly dismissed. I, however, make no order as to costs.

Suit dismissed.
National Bank of Nigeria Limited v. Fasoro

HIGH COURT OF OYO STATE
AYOOLA J

Date of Judgment: 18 July 1977

In a consolidated action the plaintiff claims the amount outstanding in the overdrawn account of the defendant with the plaintiff, while the defendant claims damages for wrongful termination of overdraft facilities already approved by the plaintiff.

The defendant had approached the bank’s headquarters for overdraft facilities, and it was approved verbally and communicated to the branch. The defendant therefore approached the branch and was given some forms to fill and also allowed to overdraw his account pursuant to the verbal agreement. A year later, the plaintiff instituted this action claiming the amount overdrawn in the defendant account, while the defendant alleges breach of contract and claims damages. He contends that he relies on the promise to grant overdraft facilities to him by expanding his business and facilities and has incurred loss. The damages claimed is the total loss incurred by a company which is a limited liability company.
Held –

1. The bank must not only prove satisfactorily the indebtedness of the customer, but must prove how the bank arrives at the figure being claimed.

2. An oral agreement for overdraft that was later reduced to writing is binding on the parties. An oral application for overdraft facilities had already been to the bank and granted, so that the subsequent rejection of the application a year after he had submitted it by the bank was nothing but a breach of contract.

3. Since the damages was sustained by a third party the defendant is only entitled to nominal damages. Plaintiffs non-suited. Judgment for the defendant in cross-action.

Cases referred to in the judgment

Nigerian

Olukade v. Alade (1976) 2 S.C. 183

Bonaco Lugi’s case S.C. 402/67 of 31st October, 1969 Unreported

Yesufu v. ACB Ltd (1976) 4 S.C. 1

Foreign


Jackson v. Horizon Holidays [1975] 3 All E.R. 92

Lloyd’s v. Harper (1880) 16 Ch.D. 290 at 321

Robinson v. Harman (1848) 1 Ex. 850, 855

Von Hatzfeldt Wildenburg v. Alexander (1912) 1 Ch. 284 at pages 288-289

Counsel

For the defendant: Adenipekun

For the plaintiff: No appearance stated

Judgment

AYOOLA J: In Suit No. I/367/74, National Bank Nigeria Limited, has sued its customer, Mr EAO Fasoro claiming the
sum of ₦10,901.34 being an amount allegedly due and owing to it by Mr Fasoro as overdraft with interest and charges thereon on the account of the defendant with the plaintiff. The bank also claimed interest on the said sum at the rate of 5% from the date of the judgment until the final liquidation thereof. In Suit No. I/10/75 Mr EAO Fasoro had taken out a writ of summons against the bank. Endorsed thereon, or more precisely at the back thereof, was his claim against the bank as follows:

(a) For ₦14,243.18 being the amount of loss suffered by the plaintiff (who trades under the name and style of LUFAŞ and Co) when the defendant bank which had previously agreed to grant the plaintiff overdraft facilities on faith of which the plaintiff entered into certain textile and building materials transactions to the knowledge of the defendant bank, unilaterally and without notice breached the agreement.

(b) The return of the plaintiff’s land certificate of title No. MO 4159 in respect of 3 Fashoro Street, Surulere, Lagos which the defendant is detaining against the plaintiff’s wish despite repeated demands.”

By an order made by Thompson J on 15th September, 1975 the two actions were consolidated. At the trial of the consolidated action, the bank was designated the plaintiff and Mr Fasoro was designated the defendant.

The case of the bank in Suit No. I/367/74 is simple and brief. Shorn of embellishments, it is that the defendant, a current account customer of the bank, was granted overdraft facilities by the bank at his own request and that the defendant is now indebted to the bank on his account in the sum of ₦10,901.34 by which his account has been overdrawn. It is said that the defendant by a letter dated 7th January, 1974 admitted that he has overdrawn his account which is the account over which he is now sued. Finally, it is alleged that the defendant has refused or neglected to pay the said sum. The defendant admits that he operated a current account at the Agodi Branch of the bank; and that as alleged in paragraph 9 of the statement of claim: “At a point, on demand of the said sum of money by the plaintiffs from the defendant,
the defendant wrote a letter dated 7th January, 1974 to the branch manager, Agodi Branch admitting he has overdrawn his account No. 1, which is the account over which he is sued and setting out terms of liquidation of the amount overdrawn.”

The defendant denied, significantly as will later be seen, that he obtained the overdraft facilities: “by virtue of his office as the former accountant general of Western State” and averred that he discussed the overdraft facilities with the plaintiffs as a General Merchant and dealer in textile and building materials. He averred that he retired from the service of the Western State Government on 13th April, 1971. The substance of the defence to the bank’s claim is also the basis of his case in Suit No. I/10/75 which I shall refer to as the cross-action. It is the defence that in November, 1971 the defendant approached the bank for overdraft facilities to enable him expand and improve his business, Lufas and Co, and discussed the details of the proposed re-organisation with the bank’s representative; and that he asked for an overdraft of ₦40,000 to be operated in two phases viz; (a) ₦14,000 for two years, with a moratorium of eighteen months before repayment; (b) ₦26,000 for two years, with a moratorium of eighteen months before repayment; it is alleged that the bank’s representatives agreed to grant the overdraft asked for on the said terms and gave instructions to the bank’s Agodi Branch manager to grant the overdraft on the said terms and required the defendant to complete the bank’s usual forms (Schedule I and III) and to deposit one only of two of the defendant’s document of title (which the defendant offered as security) with the Agodi Branch manager. The defendant averred that he immediately complied with these requirements and that on the faith of the bank’s agreement he proceeded to expand his business by considerably increasing the volume and quality of its stock in trade, renting additional storage space at a cost of ₦2,000; organised his business generally to cope with the expected financial expansion and tailored his affairs and business to...
fit into the second phase which included the building of offices and warehouse for the business. The planned reorganisation, it is said, was a composite programme which unless completed in full would not yield any results. After the defendant had withdrawn a total sum of N6,200 out of the sum of N14,000 allowed for the first phase of the reorganisation, the bank by a letter dated 9th October, 1972 in breach of its agreement “and by conduct inconsistent with its previous stand” informed the defendant that it no longer approved the said overdraft. The defendant’s business, it was alleged, was immediately disorganised and put in disarray and it became impossible to pursue the envisaged programme. And, finally, it was averred that “the loss suffered by the plaintiff as a result of the unlawful action is N4,243.18 made up of expenditure on storage, salaries, bank charges, rent, electricity, expense and gross loss.”

The bank’s reply to the defendant’s allegations was that it was on the 1st day of December, 1971 and not in November that the defendant approached the branch office at Agodi for overdraft facility of £7,000 (now N14,000) and completed the usual application form. The application which was made personally by the defendant and was not on behalf of any company or business organisation, was supported by a land certificate title No. MO 4159. After due careful and proper consideration of the defendant’s application by the management of the bank at its head office in Lagos, the application was rejected and the defendant was so informed by a letter dated 9th October, 1972. The bank denied that there was any oral agreement for a loan and averred that even if there was such an oral agreement with the former chairman and former Managing Director of the bank, the bank is not bound by such agreement as the bank was quite unaware of the transaction between the defendant and those mentioned by him who were no longer officials of the bank. The bank further contended that there was no consesus ad idem between the parties; that no agreement was reached between the parties and that the defendant did not suffer any loss and that if he
did such loss was occasioned by his lack of business administration.

One witness testified in support of the bank’s case, he is Mr Olufemi the Agodi Branch Manager of the bank. He tendered in evidence the statement of account of the defendant up to November, 1974. The statement of account was not objected to and it was admitted in evidence. It is exhibit A. The witness told me that as at November, 1974 the defendant was owing the bank ₦10,901.34. On February 13, 1975 the defendant paid a sum of ₦162 and the balance left unpaid for which the bank wants judgment is ₦10,739.34.

There is no doubt from the defendant’s evidence that he enjoyed overdraft facilities. From his evidence too, it is clear that the facilities were granted at his request. In exhibit B the defendant confirmed “the proposal that I made to settle my overdrawn account No. 1.” Under cross-examination of Mr Olufemi by Counsel for defendant a statement of account (exhibit E) was put in evidence by the defence through that witness. Mr Olufemi admitted that that statement of account shows that throughout December, 1971 the defendant was not owing any money. The defendant’s evidence on the issue of his indebtedness to the bank was simply that he had approached the chairman and the general manager of the bank who had agreed that he would be granted the overdraft facilities he sought from the bank; and, that accordingly withdrew ₦6,200. He told me that he was paying interest and charges on the overdraft. To understand his evidence better I refer to paragraph 7 of the statement of claim in Suit No. I/10/75 where the defendant averred that he drew “money from the bank within the facilities granted, to finance the re-organisation herein above stated and paid interest and bank charges thereon.”

In his address, Chief Chukura, for the defendant, has submitted that I should dismiss the bank’s claim because paragraphs 4, 5 and 6, have according to him not been proved by the
evidence before me. He submitted that the bank did not give evidence of overdraft at all, such as the time the overdraft was granted, or the terms on which such was granted. I am not in any doubt that from the pleadings the issue as to whether the defendant asked for and was granted overdraft facilities is not one which can be regarded as seriously disputed. In paragraph 3 of the defence, the defendant by necessary implication admitted that he applied for overdraft facilities, by paragraph 6 of the said defence he stated that the facilities were granted and in paragraph 7 of his statement of claim in the cross-action, he averred that he drew out money pursuant to the facilities granted. In fact, of all those averments, it will be unrealistic for me to hold that although the defendant applied for and obtained overdraft facilities, yet I could not find, as alleged by the bank, that it granted overdraft facilities to the defendant at his request, just because the bank has failed to state the circumstances in which the facilities were granted. To my mind, the fact of the grant of overdraft facilities is one issue, the effect of the circumstances in which such was granted on the rights and obligations of the parties is another. In this case although the defendant has urged and had brought the cross-action based on the fact, as he alleges, that the bank had committed a breach of contract in relation to an alleged contract to grant him overdraft facilities nothing has been urged on me to show that the bank is precluded from recovering from the defendant the amount by which the latter’s account is overdrawn, or that the money is not due for payment.

For the foregoing reasons, I am not entirely able to agree with the submission made by Counsel for the defendant as regards the bank’s claim. I find, but it does not matter to the defendant’s liability that there is no evidence in support of the averment contained in paragraph 4 of the statement of claim that overdraft facilities were granted to the defendant “by virtue of his office as the former accountant general of Western State.” I do find it sufficiently established on the pleadings and on the evidence that the defendant did request
for and was granted overdraft facilities by the bank and that
pursuant to the facilities so granted him he overdrew his ac-
count. The outstanding question as regards the bank's claim
is the amount of indebtedness incurred by the defendant to
the bank by reason of the overdraft facilities granted. The
bank says the sum is N10,901.34. The defendant denies, the
onus therefore is on the bank to prove the indebtedness in
the amount it claims; and it has sought to do this by putting
in evidence the statement of account exhibit A.

Now, exhibit A was not objected to when it was tendered.
It is secondary evidence of the contents of what must proba-

bly have been a banker's book as defined in section 96 Evi-
dence Act. To make it admissible in evidence the provision
of section 96(2)(c) of the Evidence Act ought to have been
complied with. At first, I thought I would disregard the
statement of account on that ground. However, I refer to Bo-

decision of the Supreme Court which was followed in
Alade's case (1976) 2 S.C. 183 and hold that exhibit A is le-
gal evidence on which I could act since it had been admitted
in evidence without objection. In Yesufú's case (1976) 4
S.C. 1. The statement of account was admitted in evidence
by the lower court despite objection. That is not the position
in the instant case.

However, the fact that I have accepted exhibit A as legal
evidence does not mean that I should ipso facto attribute
weight to it. exhibit A shows a debit balance brought for-
ward as its first entry. There is no evidence as to where this
huge debit balance was brought forward from. On the con-
trary, the evidence was that throughout 1971, and up to De-


ocember 31, 1971 the defendant’s account was in credit. There
is also the defendant’s evidence that he drew out only
N6,200. Where a bank relies on a statement of account duly
admitted in evidence in proof of the defendant’s indebtedness
it is incumbent on that bank, if any weight is to be attributed
to the statement, to show in the absence of an admission of
the amount of indebtedness by the defendant, that the state-
ment of account discloses a full record of the transaction be-
tween the parties from the time the debt was first incurred up
to the time the claim was brought. In this case exhibit A
cannot be a complete record. I am unable to place any reli-
ance on it. The position, therefore, is that while I am satis-
fied that the defendant is indebted to the bank, there is no
satisfactory evidence before me as to how the bank arrives at
the figure of ₦10,901.34 which it now claims as the amount
of such indebtedness. In the result, I am unable to enter
judgment for the bank in the sum claimed. Several para-
graphs in the defence and the contents of exhibit B are clear
indications that the defendant is liable to pay some sums of
money to the bank. In such circumstances I do not think it
will be just for me to dismiss the bank’s claim. The justice
of the case will be met if I non-suit the bank and that is the
order I shall make.

I now turn to the cross-action. The cardinal issue as re-
gards the cross-action is whether there was a contract be-
tween the bank and the defendant. The defendant alleges
there was a contract, the bank contends the contrary. The
evidence relied on in support of his case, by the defendant
was mainly his own oral testimony. The substance of his
evidence was that after he had discussed his need for a loan
and the reason why he needed a loan with the chairman and
the general manager of the bank, and after those two offi-
cials of the bank have gone through all the documents he
had produced in support of his request they agreed that the
bank would grant the facilities he asked for in two stages. As
to what these representatives of the bank did pursuant to the
agreement I shall read his evidence. He said:

“In my presence they communicated branch manager, Agodi by
telephone and gave direction that necessary forms should be
given to me to fill just to formalise the transaction after they have
given me verbal approval. They asked that I should provide
landed property as security at each stage, one for stage I and one
for stage II.”
Then, as to what he did, he told me:

“I then returned to Ibadan and went to the Agodi Branch manager on the following morning. He called the accountant, Mrs Balogun into his office and directed her to give me all the necessary forms and show me how the forms should be filled. Mrs Balogun complied with the manager’s directives. I filled exhibits D and D1. I forwarded the forms under cover of exhibit G and attached title deed for one landed property. The title deed is still with the bank.”

In further elaboration of the terms of the agreement he said that when he discussed with the chairman and the general manager of the bank, he was to repay the loan within two years and that he was granted a moratorium of 18 months. This, he said, meant that he was to repay the 1st phase loan within the last six months of the two years. He further told me that about a month after he had submitted exhibits D and D1 he approached Mr Egunjobi the branch manager of the bank who told him that he could draw on the overdraft facilities since there had been a verbal approval from Lagos. Soon after that, he increased the volume of his stock in trade, rented another shop, began to look forward to the increased volume of business. He withdrew N6,200 and was paying bank charges and interests over the overdraft.

Under cross-examination, the defendant told me that he incorporated Lufas and Co Limited in 1970. He was one of several share holders. He said that the application (exhibit D) was in his name because the securities were in his name and that was agreed in the discussion with the chairman and general manager of the bank. He confirmed much of what he said in evidence in chief during the cross-examination. He told me that when he was overdrawing his account he was aware of the fact that interest would be charged according to banking practices.

Mr Olufemi who testified for the bank was not the manager at the time material to this case, that is from December,
1971 to September, 1972. He told me that one Mr Egunjobi was the manager in 1971 and that one Mrs Balogun who was then the accountant was still there up to the time he was testifying. I read in full, his evidence on the application by the defendant for a loan. He said:

“On 1st December, 1971, the defendant in his name approached the bank for overdraft of £7,000 now ₦14,000. He approached the bank in the name of EAO Fasoro. After he applied, he completed some forms. These are some of the forms he filled . . . The forms were sent to our head office. After consideration, the application was rejected.”

The forms he referred to were exhibits D and D1. He further said that the bank did not reach an agreement that the defendant would be granted an overdraft of ₦14,000 and that it was not on the records.

Understandably, Mr Olufemi was not in a position to, and he did not say anything about most of the important facts relating to the formation of an agreement which the defendant testified on. A major part of the defendant’s evidence on that issue remains largely uncontroverted. The bank called neither Chief Akinyemi, nor Mr Sogunro, who were respectively chairman, and general manager of the bank at the material time to rebut the evidence; nor did it call Mr Egunjobi or even Mrs Balogun who at the time of trial was still in its employment to rebut any of the allegations made by the defendant. Besides, the absence of evidence of these persons, I have before me exhibit F which was written by the defendant to the bank on 12th October, 1972 and in which the facts on which the defendant now relies were clearly stated. There is no evidence that the bank ever refuted those facts when it received exhibit F. In my view, exhibit F shows that the evidence given by the defendant before me is not a mere after thought. I believe the evidence of the defendant and I find as a fact that in November, 1971 he discussed his project with Chief Akinyemi, then chairman of the bank and the general manager of the bank and that those
two persons agreed that the bank would grant the facilities he asked for in two stages. I find as a fact that they asked that he should provide landed property as security for the two stages and that he did in respect of stage I. I believe his evidence that in his presence the chairman and the general manager of the bank communicated with the branch manager, Agodi by telephone and gave direction that necessary forms should be given to him to formalise the transaction after they have given him verbal approval. I find as a fact that the defendant was allowed to draw on the facilities sometime more than a month after the agreement had been reached. I find as fact that the first phase of the overdraft to be given to the defendant was N14,000 and that the terms were as stated in his evidence.

The main point on which the bank rests its defence to the cross-action is as alleged in paragraph 17 of the defence that there had been no oral agreement with the former chairman and managing director of the bank. The bank also contends in paragraphs 18 and 19 of its defence that it is not bound by such agreement as was alleged by the defendant as it is quite unaware of the transaction between the plaintiff and its officials aforementioned and that there was no consensus ad idem between the bank and the defendant. I have held and found that there was an oral agreement as alleged by the defendant. I have not been addressed by Counsel for the bank on the other issues which the bank stated in its defence to the cross-action that it would contend. It has not been shown before me that the representatives of the bank with whom the defendant entered into the agreement on behalf of the bank had no authority to act. The facts, which I have found established, that pursuant to the agreement the defendant was allowed by the bank to enjoy the facilities which was the subject of the agreement and the bank did derive benefits there from by way of interest, show clearly that the persons with whom the defendant discussed and agreed the transaction were acting on behalf of the bank and were representatives of the bank.
The contract, in my view, is binding on the bank notwithstanding the fact that exhibits D and D1 were subsequently filled, after an agreement had been reached. The approach which I will adopt, in considering this aspect is that which had been stated in Von Hatzfeldt Wildenburg v. Alexander (1912) 1 Ch. 284 at pages 288-289 where Parker J, said:

“It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplates the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored.”

In the instant case, no question of construction of documents arises, but the approach is the same where the court has to evaluate the evidence and draw an inference from the circumstances of the case, what was in the contemplation of the parties. On the evidence before me I am satisfied that the transaction had already been agreed to by the parties when the defendant discussed it with the bank’s representatives and that the formality of submitting forms, to put it in the words used in Von Hatzfeldt Wildenburg’s case (supra), was a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. An oral application for overdraft facilities had already been made to the bank and granted. The form was just a matter of record. I am reinforced in this view by the fact that pursuant to the grant of the application the defendant was allowed to enjoy the facilities agreed to by the bank. The purported rejection of his application a year after he had submitted it, by the bank was nothing other than a breach of contract. Having considered all the circumstances of this case I
find a binding contract between the bank and the defendant. I also find that the bank committed a breach of that contract when in October, 1972 it stated that it no longer approved the overdraft contrary to prior agreement.

I now turn to the issue of damages. There is evidence before me given by the defendant that at the time he entered into the contract with the bank, he was a merchant. This has not been disputed and I accept it. There is also evidence given by the defendant, that he discussed his project with the chairman and general manager of the bank and that he told them that he wanted the loan in two phases viz: the first phase to increase the volume of his business and the second phase to build a proposed warehouse. This has also not been controverted and I accept the defendant’s evidence. The plaintiff further told me that he discussed his proposed re-organisation with the bank’s representatives. He said: “The proposed re-organisation which I discussed with Chief Akinwunmi and Mr Sogunro was that I would increase the volume of ordering from the textile mills and in order to prove our connection with the textile mills I showed them at their request letters of appointment as distributor.” Some letters which he said he showed them were admitted in evidence without objection. They were exhibits L and L1. He said that it was after going through all the documents that they agreed that the bank would grant the facilities. As to what he did, relying on the agreement he told me that he had made increased orders before he received notification of the non-approval of the facilities. He told me that as a result of the bank not keeping to the agreement he could not obtain money with which to clear the orders on his own, so he had to presell the goods at a loss in order to fulfill his obligations to his suppliers. He says I should award him a sum of N14,243.18 representing the total loss he suffered as a result of the stoppage of facilities. Cross-examined, he told me that he incorporated a company called Lufas and Co Limited, in 1970 and that its shareholders were himself and some others. He admitted that the application in exhibit D was in his personal name and explained
that that was so because the securities were in his name. His
only witness Mr Johnson, a Chartered Accountant, tendered
the audited accounts of Lufas and Co Limited, for the period
October to December, 1971 and January, 1972 to December,
1972. These were admitted in evidence as exhibits M and
M1 respectively. Exhibit M shows that for the period cov-
ered by exhibit M, Lufas and Co Limited, made a net profit
of N6,112.34 and exhibit M1 shows that for the period cov-
ered by that exhibit, Lufas and Co Limited, made a net loss
of N14,243.18. Mr Johnson explained to me that the volume
of business of the company declined substantially in 1972
while the fixed overhead remained. The company he said,
was having less trading activities. The liquid position in
which the company found itself was that it had no working
capital and one of the results is an obvious loss he con-
cluded.

In his address, Chief Chukura submitted that the evidence
on record was that the defendant discussed with the bank his
business which was Lufas and Co Limited, and that there
was knowledge that he was acting on behalf of Lufas and Co
Limited. He argued that this was a contract made for the
benefit of a third party to the knowledge of the plaintiff. If as
a result of the breach of that contract the beneficiary suffers
loss either the beneficiary or the person who made the con-
tract can claim in damages the loss suffered as damages.

Mr Fabunmi, Counsel for the bank submitted that for the
defendant to succeed he must show that he was authorised
by Lufas and Co Limited to enter into the transaction. This
he had not done. He also argued that unless the defendant
can show that he is the majority shareholder, in Lufas and
Co Limited, he cannot fight the battle of that company. He
further argued that the bank had no transaction with Lufas
and Co Limited, and that the loss of Lufas and Co Limited,
does not concern the bank.

The main question thus raised in the submissions of Coun-
sel are of considerable interest. The question simply put is
thus: Where A makes a contract with B for the benefit of C can A in the absence of evidence that he has himself suffered by reason of B’s breach recover more than nominal damages. The question raised in Chief Chukura’s submission, as to whether the person for whose benefit the contract was made can sue or not does not arise for discussion in this case. Suffice it to say that the law is settled, at least as at now, that it is the person who makes the contract that can sue on it. So, the real question is as I have stated earlier: What does he get if he sues on the contract?

Regrettably Counsel have not cited any cases in their argument in support of the proposition they made. The matter is not without authorities. In Lloyd’s v. Harper (1880) 16 Ch.D. 290 at page 321, Lush LJ considered it to be an established rule of law that where a contract is made with A for the benefit of B, A can sue on the contract for the benefit of B, and recover all that B could have recovered if the contract had been made with B himself. James LJ did not express the proposition as widely. He based his decision on that aspect of the case on trust concept. He said:

“The defendants say ‘You Lloyd’s have sustained no loss, and can only recover nominal damages because you can only recover for your own loss and not for the losses sustained by other person.’ That might be true if: Lloyd’s were not trustees, but I am of opinion that Mr Justice Fry was well warranted in the conclusion at which he arrived, that the engagement was made with the committee as trustees for and on behalf of the persons beneficially interested.”

In Jackson v. Harizon Holidays [1975] 3 All E.R. 92 Lord Denning cited with approval the principle stated by Lush LJ in Lloyd’s v. Harper as Lord Pearce did in Beswick v. Beswick [1967] 2 All E.R. 1197 at page 1212. Lord Denning did not think the principle was based on a trust concept, nor did he think the basis was in agency. The principle, according to him simply is one in contract and it is where a person had entered into a contract for the benefit of himself and others who were not parties to the contract, he could sue on the
contract for damages for the loss suffered not only by himself but also by the others in consequence of a breach of the contract even though he was not a trustee for the others.

A principle so widely stated is bound to create problems in its application if accepted out of context and without qualifications when considered along side other established principles in relation to the assessment of damages for breach of contract. The general rule, it was stated in McGregor on Damages (13ed), page 7 paragraph 10, which was clearly stated by Parke B in Robinson v. Harman (1848) 1 Ex 850, 855; is that the plaintiff is entitled to be placed, so far as money can do it in the same position as he would have been had the contract been performed. Where, for instance A enters into a contract with B for the payment of money to C to be used for A’s own benefit and C’s benefit, how can it be said that A would have lost more than the benefit which would have accrued to him had B performed the contract?

It is indeed difficult to explain or justify the principle in Jackson’s case (supra) without having a resort to the trust concept or to agency. In so far as it was stated to be independent of either, it must be seen as based not on any established principle of the common law but as a conscious widening of the basis of assessment of damages to accommodate such deserving cases where injustice would have been occasioned by adherence to the strict common law rule. Thus, as was noted in Beswick v. Beswick [1967] 2 All E.R. 1197 at page 1212 the words of Lush LJ in Lloyd’s v. Harper (which Lord Denning cited in support of his proposition) “cannot be accepted without qualification and regardless of context”, and Lord Upjohn in Beswick v. Beswick (ibid) doubted if Lush LJ was expressing a view on the purely common law remedy. He said:

“While in the circumstances it is not necessary to express any concluded opinion thereon, if the learned Lord Justice was expressing a view on the purely common law remedy of damages for breach of contract by reason of the failure to pay B he must prove his loss; that may be great or nominal according to circumstances.
I do not see how A can in conformity with clearly settled principle in assessing damages for breach of contract rely at common law on B’s loss."

If I have had to decide the issue I would have been very hesitant to follow Lord Denning’s judgment in Jackson’s case. In the instant case, on the pleadings, the case of the defendant was not that Lufas and Co Limited, has suffered the loss which he claims. Paragraph 1 of the statement of claim in the cross-action stated that the defendant trades under “the name and style of Lufas and Co.” In paragraph 15 of the same statement of claim the loss suffered was alleged to have been suffered by the defendant and not by Lufas and Co Limited. Perhaps, the fortunes of Lufas and Co Limited, and the defendant are to some extent intertwined that but for the separate corporate personality which the law imputes to the former the loss suffered by Lufas and Co Limited, could substantially have been said to be that of the defendant. Having regard to the pleadings however and the fact that Lufas and Co Limited, is at law a separate personality from the defendant, the defendant has not proved that it was he, rather than Lufas and Co Limited, who suffered the loss he averred he suffered. He has not pleaded that Lufas and Co Limited, suffered the loss which he claims and such circumstances as would bring the principle in Jackson’s case (supra) into operation should I decide to apply it. The evidence is clear that the defendant is one of several shareholders in Lufas and Co Limited. It will not be correct to say that he thereby trades, as alleged on the writ and in the statement of claim in the cross-action “under the name and style of Lufas and Co.”

In view of the view which I have taken on the pleadings (i) that the connection of the defendant and Lufas and Co Limited, has not been pleaded (ii) that the loss suffered has been said to be loss suffered by the defendant and not by a third party (Lufas and Co Limited,) it is not really necessary for me to consider if Lufas and Co Limited, had suffered the loss which defendants seeks to prove and whether the circumstances are such that the bank should be liable to the defendant for
such loss. In case I am wrong in that view however, I shall consider the evidence as related to the amount of loss Lufas and Co Limited, was said to have suffered and whether the loss of Lufas and Co Limited, could have been said to have been in the contemplation of the parties.

There is sufficient evidence which accept that the representatives of the bank knew that the overdraft facilities were required by the defendant for the purpose of improving and re-organising the business of Lufas and Co Limited. The documents exhibits L and L1 which he told me he showed to those representatives show clearly that the project for which overdraft facilities were sought were Lufas and Co Limited, projects. There is no doubt that Lufas and Co Limited, is an incorporated body and, as stated in evidence that it has several shareholders, it is a different personality from the plaintiff no doubt. In my view from the circumstances of the case, it must have been clear to the bank and the defendant if there is a breach of the agreement to grant the overdraft facilities, loss was likely to result to Lufas and Co Limited, by reason of the failure of the projects.

The defendant claims the net loss of Lufas and Co Limited, for the period January, 1972 to December, 1972. I am afraid, I am not able to award him such sum. On the evidence, the breach of agreement was not committed until October, 1972. Up to that time the defendant had enjoyed overdraft facilities of about N6,000. The defendant said that pursuant to the agreement to lend him N14,000 on overdraft he increased his order. There is no evidence as to when he actually increased his orders or when the goods ordered arrived or as to what quantity of goods he had to sell at a loss. Exhibit M1, the trading profit and loss account of Lufas and Co Limited for the year 1972, shows that the account covered period preceeding the breach of contract and the period subsequent to the breach ie from October to December, 1972. In my view, two separate profit and loss accounts should have been prepared showing the trading position for each of the periods.
On the whole, although I am satisfied that Lufas and Co Limited, suffered some loss I am not satisfied on the evidence, that it has been proved that the net loss shown in exhibit L1 is entirely referable to the breach of contract. So, if I were to award to the defendant as damages the loss suffered by Lufas and Co Limited, I would not have awarded the sum of ₦14,243.18 claimed in any event.

Be that as it may, I have found a contract proved and I have held, that a breach of that contract has been committed by the bank. There is sufficient evidence to show that the bank knew that the defendant required the money for some business activities. I am satisfied that the loss he had suffered was not merely nominal taking all the circumstances of the case into consideration, I think an award of ₦1,000 would adequately compensate the defendant. The defendant has not proved that he demanded at any time a return of his certificate of title. His cause of action on that head has not therefore accrued.

In the net result I enter a non-suit on the plaintiff’s claim and I non-suit the defendant on the second arm of his claim in the cross-action. I enter judgment for the defendant on the first arm of his claim in the cross-action in the sum of ₦1,000 being damages for breach of contract. The defendant is entitled to costs which I shall now assess.
Barclays Bank of Nigeria Limited
v. Abubakar

SUPREME COURT OF NIGERIA
ALEXANDER, FATAI-WILLIAMS, BELLO, OBASEKI JJSC
Date of Judgment: 17 October 1977 S.C.: 335/75

Banking – Overdraft – Implied overdraft – Customer drawing a cheque for a sum in excess of the amounts standing to his credit in his current account – Amounts to loan

Banking – Overdraft – Rate of interest chargeable on overdraft by bank in the absence of express agreement between customer and bank thereof

Facts

The defendant now respondent was a customer of the plaintiff now appellant bank who sought for and was granted overdraft facilities by the appellant. Consequent upon respondent default in liquidating the overdraft facilities obtained, the plaintiff initiated the present suit against the respondent at the Kano High Court claiming against the respondent as follows:

(1) The sum of ₦43,334.48 being money lent to, and money paid by the plaintiff as bankers to the defendant at his request as well as interest on same.

(2) Interest at the rate of 10% per annum from 11th July 1974 until judgment.

(3) Interest at the rate of 5% per annum from the date of judgment until judgment is fully satisfied.

The respondent in support of the overdraft facilities granted by the appellant whereby the respondent was allowed to overdraw his account through the issuance of some drafts in his favour by the appellant, executed an undertaking dated 3th November, 1972 in favour of the appellant confirming receiving the overdraft of ₦5,000 at 10% interest rate per annum.
Pleadings were ordered and duly exchanged between the respondent and the appellant. At the trial the respondent testified denying owing the amount claimed by the appellant on the ground that the appellant wrongly debited his account with value of some purchased drafts, and that he made some payment into his account after the granting of the overdraft facilities which should have liquidated the outstanding overdraft sum. The appellant on the other hand equally contended at the trial that the respondent was owing the amount claimed on the writs and that subsequent payment into the respondent account only succeeded in reducing the heavy overdraft granted to the respondent to the amount claimed on the writ filed.

At the conclusion of the hearing the learned trial Judge entered judgment for the appellant for a reduced sum of N24,122.48 as opposed to N43,334.48 claimed by the appellant with interest at 10% per annum from 11th June, 1974 till judgment and 5% per annum from date of judgment until judgment sum is fully satisfied.

The trial court also held that when the respondent was issued with drafts beyond the amount standing to his credit in his account, the balance of that amount was lent by the appellant to the respondent.

Both the plaintiff/appellant and the defendant/respondent were dissatisfied with the judgment of the trial court and each had appealed from the said judgment to this Court.

The plaintiff/appellant’s appeal was on two grounds firstly that the learned trial Judge erred in law and on facts by holding the respondent liable for a lesser sum of N24,122.48 as opposed to the sum of N43,334.48 claimed by the appellant and secondly that the judgment was against the weight of evidence.
The defendant/respondent equally filed several grounds of appeal but argued only two grounds before the court namely:

1. That the judgment was against the weight of evidence.
2. That there was no evidence that the respondent agreed to the rate of interest of 10% on the overdraft granted or knew that his account was being overdrawn.

Held –

1. If a customer draws a cheque for a sum in excess of the amount standing to the credit of his account, it is really a request for loan and if the cheque is honoured the customer has borrowed money.
2. Where there is no express agreement, it is settled law that the bank is entitled to charge compound interest on the basis that there is a custom to that effect or that the customer has impliedly consented where without protest he allows his account to be debited.
3. That the plaintiff/appellant can claim interest at the rate of 10% per annum on the overdraft sequel to agreement on record between the plaintiff/appellant and the defendant/respondent.

Appeal allowed.

Cases referred to in the judgment

Foreign

Eaton v. Bell 5 B. and Ald. 34
Eldon in Ex parte Bevan 9 Ves. 223, 224
Holder v. Inland Revenue Commissioners (1932) A.C. 624
Paton v. Inland Revenue Commissioners (1938) A.C. 341

Book referred to in the judgment

Paget’s Law of Banking (8ed), page 134

Counsel

For the plaintiff/appellant/respondent: Majiyagbe
For the defendant/respondent/appellant: Agbamuche
Judgment

OBASEKI JSC: In the High Court of the Kano State holden at Kano, the appellant as plaintiff initiated these proceedings claiming against the respondent as defendant:–

“(1) The sum of N43,334.48 being moneys lent to and moneys paid by the plaintiff as bankers to the defendant at his request and for interest on the moneys due from him and foreborne at his request and money found to be due from the defendant to the plaintiff;

(2) Interest at the rate of 10% per annum as from 11th July, 1974 until judgment; and

(3) Interest at the rate of 5% per annum from the date of judgment until the judgment is fully satisfied.”

Pleadings were ordered and duly delivered and from the statement of claim, it is clear that the claim was founded on account stated. In particular, paragraph 4 of the statement of claim reads:

“The plaintiff in keeping with the practice with customers’ accounts forwarded regular statements of account to the defendant and the defendant has never queried the said statement of account and has always admitted owing the plaintiff. The statement of account of the defendant is attached to this statement of claim and marked exhibit A and the plaintiff will rely on this statement of account at the trial.” (Italics ours.)

The defendant in paragraph 4 of his amended statement of defence, denied paragraph 4 of the statement of claim and went on to plead in paragraph 5 of the statement of defence as follows:

“The defendant will contend at the trial that the defendant did not authorise the plaintiff to credit or debit the defendant’s current account opened with the plaintiff on 31/8/72 with the statement of account of any of plaintiff’s customer or customers.”

Throughout the hearing, the main contention of the defendant was that the plaintiff wrongly debited his account with the value of some drafts purchased by Mecca and Medina Traveling Agency which he operated and of which he was a director, without his instructions. At the hearing, two witnesses testified at the instance of the plaintiff.
The defendant testified denying owing any amount or receipt of monthly statement of account from the bank. Alhaji Ibrahim Usman Wudil, who had testified at the instance of the plaintiff as PW1 was called by and also testified at the instance of the defendant.

At the conclusion of the hearing, the learned trial Judge entered judgment in favour of the plaintiff for a reduced amount in the last paragraph of his judgment as follows:

“The defendant is therefore liable to the plaintiff for the debit balance shown in exhibit E less the amount in exhibit F2B (£3285) and exhibit F14 (£6,321) which comes to £9,606 (₦43,334.48) less amount in exhibits F2B and F14 ₦19,212 = ₦24,122.48.

I accordingly enter judgment for the plaintiffs in the sum of ₦24,122.48 with interest at the rate of 10% per annum from 11th day of July, 1974 till today. The plaintiffs are also entitled to claim 5% court rate from today till judgment debt is satisfied.”

Neither the plaintiffs nor the defendant was satisfied with the judgment and being aggrieved, each has appealed from the said judgment to this Court.

The plaintiff’s appeal was on two grounds, which read as follows:

“(1) The learned trial Judge erred in law and on the facts when he held that the defendant was liable to the plaintiff in the sum of ₦43,334.48 less amounts in exhibits F2 and F14 which the defendant did not sign when in fact the defendant’s account (exhibits C and E) did not show that the defendant’s account was debited with the amount shown in the said exhibits F2 and F14 and when exhibit F2 was not properly before the court.

(2) Judgment is against the weight of evidence.”

The defendants filed several grounds of appeal, but the grounds of appeal argued before us are:

“(1) That the judgment is against the weight of evidence; and

(2) (added with leave of the court). That the learned trial Judge erred in law and on the facts by holding that the plaintiff can claim interest at the rate of 10% per annum on the
overdraft in respect of requisition in exhibits G2, G3 and G4, whereas there was no evidence that the defendant agreed to the rate of interest or knew that his account was being overdrawn.”

We shall now proceed to deal with the plaintiff’s appeal before considering the points raised in the defendant’s appeal.

We observed that the main complaint of the plaintiff is that although exhibits F2B and F14 were tendered along with the other exhibits, the amount £3285 shown in exhibit F2B and £6321 in exhibit F14, which were the requisitions for drafts were not debited against the account of the defendant and no debit notes in respect of these amounts were issued by the bank or were in evidence. This was, according to Counsel, because they were cash transactions and unlike the other exhibits F and G series, there was no instruction from the defendant to debit his account with those amounts. He further drew our attention to the fact that the statement of account for the relevant period exhibit C on which the action was based did not contain any entry of those two amounts. He observed that the learned trial Judge may have been misled (1) by the evidence of the plaintiff’s second witness (who tendered the documents) when he said, _inter alia_:

“I can identify the Pilgrims’ list and the requisitions signed by the defendant. I see these documents, they are the debit notes, I am referring to, together with the pilgrims’ list. There are 14 of them.

Majiyagbe: I seek to tender them in evidence.
Alabi: I have no objection
Court: The 14 documents each consisting of debit notes, draft requisitions, list of pilgrims tied together are hereby admitted and marked exhibits F1-14.)

I see exhibits F1-14, they cover the period dated December 1972, all of them bear the same month. I see amounts in exhibits F1-14 (read out and checked against exhibit C) the figures of the amounts on them all appear in exhibit C.”

And (2) by the defendant’s evidence which, _inter alia_, reads:

“I see exhibits F1-14. In exhibit F2B the signature for draft 30 for £3285 is not mine. In exhibit F14 the signature on the bill of draft
for £6,321.0.0 is not mine. In F11 the signature on the bill of draft No. 159 of 27/12/72 for £22069.0.0 is also not mine. The rest of the exhibits have my signature on all of them.”

This gave the impression that exhibit F2B and exhibit F14 had debit notes. The learned Counsel for the defendant in reply contended that if there was any error, it was as a result of the evidence of PW2.

The portion of the judgment where the learned trial Judge held that the amounts in exhibits F2B and F14 were erroneously debited to the account of the defendant and where he proceeded to deduct them in order to arrive at the “true” balance reads:

“Having accepted exhibits C and E as certified copies of the defendant’s statement of account compared and checked with the books, I find that prima facie the defendant is owing the plaintiffs the amount shown on exhibit E, which was the last statement to be prepared. I say that the defendant is owing the amount shown on exhibit E prima facie because he can bring rebutting evidence to show that he is not owing the amount shown on the statement. The last amount shown on exhibit E, which is a continuation of exhibit C is ₦43,334.48k, and this is what the plaintiffs are claiming from the defendant . . . In this case the plaintiffs alleged that the defendant signed all requisition forms on exhibits F1-14 and exhibits G1-4 and that his account was debited with the amount shown on the requisitions. The various amounts on the requisitions have been shown by evidence of PW2 to have appeared in exhibit C. This statement was found correct.

The defendant however admitted signing the requisition form on exhibits F1, 2A, 3-10, F12 and 13, but that he was deceived into doing so by the plaintiff’s employees. I have carefully compared the signature on exhibit F11 with those on the above and I disbelieve the defendant when he denied signing exhibit F11. I accept the evidence of PW1 and PW2 that he signed those requisitions on his own volition . . . I also accept the defendant’s evidence that he did not sign the requisition forms on exhibits F2B and F14, the total amount of which added up to £9606 (₦19,212).

The defendant is liable to the plaintiff for the debit balance shown on exhibit E less the amount in exhibit F2B (£3285) and exhibit F14 (£6321) which comes to £9606 (₦19,212).”
We have ourselves examined exhibits F2B and F14 as well as the oral evidence of PW2 and found that the documents did not include any debit notes.

Similarly, we have examined exhibit C to see if the amounts stated in exhibit F2B and exhibit F14 appear in the debit column and are satisfied that the aforesaid amounts did not appear at all in the statements of account exhibits C and E on which the claim was founded.

The learned trial Judge was therefore in error on the facts when he said:

“The various amounts on the requisitions have been shown by the evidence of PW2 to have appeared in exhibit C. This statement was found correct.”

And erred also in deducting the amounts in exhibits F2B and F14 from the sum claimed. It seems to us that exhibit F2B and exhibit 14 go to no issue and as it is the law that evidence which go to no issue should be rejected, the evidence constituted by these two exhibits should have been jettisoned.

The appeal by the plaintiffs succeeds.

With regard to the cross-appeal filed by the defendant, we observe that learned Counsel for the defendant argued his two grounds together. However, the only point of contention raised by the defendant’s Counsel was as to the rate of interest charged on the overdraft. Although a ground of illiteracy appeared in the grounds of appeal filed, on the objection of Counsel for the plaintiff, Counsel was not allowed to raise the ground of illiteracy of the appellant as it was not made an issue in the court below so as to engage the attention of all parties in their pleadings and evidence, and the consideration of the learned trial Judge. It appears this ground was the foundation of defendant’s appeal as learned Counsel for the defendant kept on returning to it and found it almost impossible to argue his appeal without referring to that ground. He contended that there was no express agreement between plaintiffs’ bank and the defendant on the rate of interest to
be charged on overdraft and that the overdraft he took from
the plaintiff’s bank earlier on had been liquidated.

On the first ground “that the judgment is against the weight
of evidence,” we can find no substance whatsoever. The
judgment is amply justified by the overwhelming evidence
in support of plaintiff’s claim.

The amounts contained in the requisitions tendered along
with the debit notes in exhibits F1, F2A, F3 to F13 and G1
to G4 were debited to the defendant’s account on the express
instructions of the defendant and it was these debits that ate
up the funds in the defendant’s account and caused his ac-
count to be overdrawn.

Having given written instructions to the plaintiff’s bank to
debit his account with these amounts in the aforesaid requis-
itions, it is not open to the defendant to contend the contrary.

Counsel for the defendant is also on slippery ground in his
contention in ground 2 above that there was no evidence that
the defendant agreed to the rate of interest or knew that his
account was being overdrawn.

The portion of the judgment being complained of reads:

“If a customer draws a cheque for a sum in excess of the amount
standing to the credit of his current account, it is really a request
for a loan and if the cheque is honoured, the customer has bor-
rrowed money. I agree with learned Counsel’s submission. If one
looks at exhibit C, the penultimate page, one would see that when
the defendant signed the requisition exhibits G2, 3 and 4, the
amount standing to his credit in his account was insufficient to
meet the value of the drafts so requested and so when the drafts
were issued by the plaintiffs the balance of that amount was lent
by the plaintiffs. I accordingly so find. The plaintiffs are therefore
entitled at common law to claim interest on such loan (overdrafts)
but could be supported on the ground of universal custom of
bankers . . . (Holder v. Inland Revenue Commissioners (1932)
A.C. 624) I hold that the plaintiffs can claim interest at the rate of
10% per annum on the overdraft.”
There is evidence (exhibit B an undertaking by the defendant in writing given on the 3rd day of November, 1972) which clearly shows that the defendant knew that the interest rate the plaintiffs’ bank was charging at that time was 10% and agreed that that interest should be chargeable on the overdraft granted to him. We refer to exhibit B. It reads:

“3.11.72

I confirm that I have been granted an overdraft of £5000.00 (five thousand pounds) which is repayable by 31.1.73.

I agree that the interest for the time being is chargeable at 10% per annum with monthly rests.

Alhaji Maiwada Abubakar.”

Looking at exhibit C, we find that the amounts in exhibits G1, G2, G3 and G4 were drawn from the defendant’s account on the 2nd day of January, 1973. These withdrawals went to reduce the account which was in credit for a debit of over ₦46,000 and despite several subsequent payments by the defendant, he only succeeded in reducing this heavy overdraft to the amount claimed in the writ at the time the writ was filed. Where there is no express agreement, it is settled law that the bank is entitled to charge compound interest on the basis that there is a custom to that effect or that the customer has impliedly consented where without protest he allows his account to be debited.


As banking is of comparatively recent origin in this country, the origin of the custom of bankers to charge interest on overdraft has to be traced to England from which our legal and judicial systems derived a lot of inspiration and guidance. In the case of *Paton v. Inland Revenue Commissioner* (1938) A.C. 341, which went up to the House of Lords, Lord Macmillan, delivering his judgment, observed at page 357 as follows:

“My Lords, the origin of this agreeable fiction whereby debits are to be deemed to be paid without payment may be traced historically to the ingenuity of lenders in devising a method of obtaining
compound interest without contravening the usury laws. It was il-
legal by an antecedent contract to stipulate for the payment of
compound interest, ‘but if you agree to settle account at the end of
six months, that not being part of the prior contract and then stipu-
late that you will forbear for six months upon those terms (ie, that
the interest shall carry interest for the subsequent six months), that
is legal’ per Lord Chancellor Eldon in Ex parte Bevan 9 Ves 223,
224. On this principle, it was held in Eaton v. Bell 5 B and Ald 34
that bankers who with the knowledge of and without objection by
their customers debited them with interest with half-yearly rests in
accordance with their general practice, did not offend against the
usury laws. This method of dealing with loan accounts which be-
came common form among bankers survived the abolition of the
usury laws and is well established as the ordinary usage prevailing
between bankers and customers who borrow from them and do not
pay the interest as it occurs.”

And Lord Maughan said at page 364:

“In the first place, I would observe that the legislature must be
taken in 1915 to have been fully conversant with the usual prac-
tice of banks in the United Kingdom in relation to short loans and
overdrafts. Unless the practice were departed from, there would
always be a payment of interest by the customer, that is either an
actual payment or an apparent payment.”

As already stated above, the evidence on record of express
agreement to the rate of interest the bank (plaintiff’s bank)
charged is fatal to the defendant’s main contention in his ap-
peal. The grounds of appeal therefore fail and defendant’s
appeal is hereby dismissed.

The plaintiff’s appeal succeeds as already stated and it is
thereby allowed. The amount for which the defendant was ad-
judged liable by Kalgo Ag J in his judgment, is hereby set aside
and in its stead we substitute the sum of N43,334.48k (forty-
three thousand, three hundred and thirty-four naira, forty-eight
kobo) with interest at the rate of 10% per annum from 11th July,
1974 to 22nd July, 1975, and thereafter at the rate of 5% per an-
umn till date of payment of the judgment debt. For the avoid-
ance of doubt, we make the following orders:

“There will be judgment for the plaintiffs for the sum of
N43,334.48k (forty-three thousand, three hundred and thirty-four
naira, forty-eight kobo) with interest at the rate of 10% per annum from 11th July, 1974 (the date of filing the writ) till 22nd July, 1975 (the date of judgment in the High Court). This judgment debt shall bear interest at the rate of 5% till payment.”

And this shall be the judgment of the court.

The defendant shall pay the plaintiff costs of this appeal assessed at ₦1,000.
African Continental Bank Limited
v. Ehiemua and another

SUPREME COURT OF NIGERIA
SOWEMIMO, IDIGBE, ESO JSC
Date of Judgment: 9 FEBRUARY 1978  S.C.: 123/76

Banking – Order of instalmental payment of judgment debt – What court should consider as sufficient reason for granting order – Principles applicable

Facts
Before the Mid-Western State High Court the defendant/respondent pleaded liable to a claim of £3,079.19.10 (₦6,160) by the plaintiff/appellant being overdraft granted to the defendant/respondent. The court accordingly gave judgment for the amount. Thereafter, the defendant/respondent filed an application to pay the judgment debt instalmentally.

The court granted order of instalmental payment of $10 (₦20) per month. The appellants appealed and contended that it will take 26 years to complete the payment of the judgment debt, and that there was no sufficient reason for granting such order. The Order was made under Order 29, rule 8 of the High Court (Civil Procedure) Rules, 1958 made under the High Court Law, (Cap 44), Law of Western Region of Nigeria, 1959. It provides:

“When any judgment or order directs the payment of money, the court may, for any sufficient reason, order that the amount shall be paid by instalments with or without interest. Such order may be made at the time of giving judgment, or at any time afterwards and may be rescinded upon sufficient cause at any time.”

Held –

1. In a proper exercise of discretion under the rules, the order of instalmental payment must be made for “sufficient reason.”
2. The order of instalmental payment must not be such as would frustrate the judgment of the court, and order that will allow judgment debt to be paid in a span of 26 years is tantamount to frustrating the judgment of the court.

3. Trial courts to take every care not to frustrate their own judgment by making order of such instalmental payments of judgment debts as would amount to taking away from the judgment creditor the very judgment that the courts have awarded him.

Appeal allowed.

Nigerian statute referred to in the judgment
High Court Law, (Cap 44), Laws of Western Region of Nigeria, 1959

Nigerian rules of court referred to in the judgment
High Court (Civil Procedure) Rules, 1958, Order 29, rule 8

Appeal
This was an appeal against the decision of Mid-Western State (Now Bendel) High Court granting order of instalmental payment. The Supreme Court in a unanimous decision allowed the appeal and set aside the order.

Counsel
For the appellant: Sadoh
For the respondent: Unrepresented

Judgment
ESO JSC: The defendants, who are the respondents in this Court, had, in the Mid-Western State (now Bendel) High Court, before Obaseki J (as he then was), sitting at Benin City, pleaded liable to a claim of £3,079.19.10 (₦6,160) by the plaintiff (appellant in this Court), being overdraft granted to them by the plaintiff/appellant.

Originally, there were three defendants. Mrs Okpaise, who was one of the defendants, died and the action against her was struck out, after it had been withdrawn by the plaintiff.
The court then gave judgment against the present two defendants/respondents for the amount claimed. Thereafter, the defendants/respondents filed an application to pay the judgment debt by instalments of £10 (₦20) per month, that is, each of them was to pay £10 per month. The learned trial Judge having considered the affidavits filed by the defendants/respondents, the counter affidavit filed on behalf of the plaintiff/appellant and the evidence of the defendants/respondents, Mrs Bernice Kerry stayed the execution of the judgment, “so long as the defendants pay the judgment debt and costs by instalments at the rate of £10 (₦20) per month.”

The plaintiff, who is dissatisfied with this decision, has now appealed to this Court on the following grounds:

1. The learned Judge erred in law by granting an order of instalmental payment when the applicants who were bound by the Partnership Law, (Cap 26) failed to show sufficient reason for the order sought.
2. The learned Judge misdirected himself by not considering—
   (a) all the assets available to the judgment debtors for the payment of the judgment debt and/or
   (b) the convenience of the judgment creditor before making the order.”

Before us, the respondents were neither present nor represented by Counsel. However, Mr Sadoh, learned Counsel for the appellant, urged on us to allow the appeal and leave the plaintiff/appellant to its remedy. Under the order made by the learned Judge, learned Counsel submitted, it would take about 26 years to liquidate the debt.

Now the rule under which the order for instalmental payment was made is Order 29, rule 8 of the High Court (Civil Procedure) Rules, 1958, made under the High Court Law, (Cap 44), Laws of Western Region of Nigeria, 1959 and applicable in the Mid western State (now Bendel State). It provides—

“When any judgment or order directs the payment of money, the court may, for any sufficient reason, order that the amount shall
be paid by instalments, with or without interest. Such order may be made at the time of giving judgment, or at any time afterwards, and may be rescinded upon sufficient cause at any time.”

What are the reasons for the order for instalmental payment in this case? The first defendant/respondent deposed to an affidavit that—

“(i) the construction firm in respect of which the overdraft was incurred had become defunct since 1967;
(ii) she was a petty contractor and after the civil war her income was not more than N60 a month on the average;
(iii) she had moral responsibility to help her husband, a retired civil servant, in the education of their children, one in Hull University and the other in Ahmadu Bello University Zaria;
(iv) she had responsibility for two other relations who were orphans, one in a secondary school and the other in a primary school;
(v) she had responsibility for an aged mother;
(vi) she had other debts to liquidate.”

The second defendant/respondent’s case was that—

“(i) she had an income of N70 a month as a customary court President; and
(ii) she had other debts to liquidate.”

Though she admitted owning some trinkets and clothes, the second defendant/respondent said in her oral evidence before the learned Judge that these trinkets and clothes would not value up to N3,000 (N6,000).

The question is whether the learned Judge, on the facts before him, and in the circumstances of the case, could be said to have exercised his discretion properly in granting the stay of execution of the judgment and ordering instalmental payment of the judgment debt to span over a period of twenty-six years? In a proper exercise of his discretion under the rules, the order must have been made for a “sufficient reason.” The defendants/respondents incurred an overdraft of N6,160 from the appellant for the purpose of their business. Now, under the orders made by the learned Judge, they
will take about twenty-six years to repay the loan, because according to them, they have other financial responsibilities, including responsibility by one of them to assist in the education of her children in universities and other relations in secondary schools.

We would like to impress on trial courts to take every care not to frustrate their own judgment by orders of such instalmental payments of judgment debts as would amount to taking away from the judgment creditor the very judgment that the court has awarded him. We think that any situation where a judgment debtor is allowed to take twenty-six years to repay a judgment debt of ₦6,000, which debt was incurred for the purpose of a business transaction, would definitely amount to frustrating the judgment the learned trial Judge has awarded the plaintiff. We cannot conceive as sufficient any reason that would grant an order permitting a judgment debtor, in the circumstances of this case, to take over a whole generation to repay a judgment debt of only ₦6,000. To our mind the only reasonable course the learned Judge should have taken in this case, was to have left the judgment creditor to its remedy.

This appeal therefore succeeds and it is allowed. The orders of stay of execution and instalmental payments made by Obaseki J, in suit No. 11/41/72, on 9th August, 1972, are hereby set aside. In their place we make an order dismissing the application of the defendants/respondents. The applicants are awarded the costs of this appeal assessed at ₦142 and costs in the High Court assessed at ₦25.
African Continental Bank Limited v. Yesufu

SUPREME COURT OF NIGERIA
ALEXANDER, CJN, SOWEMIMO, BELLO JJSC
Date of Judgment: 10 FEBRUARY 1978 S.C.: 288/76

Admission – Customer’s letter requesting to reconcile outstandings expected to be credited – What amounts to

Banker – Bills for collection – Breach of duty to collect face value – Liability to customer

Banking – Bills of exchange – Meaning of – Distinguished from letters of credit

Banking – Presumption of revocable letters of credit – When made

Letters of credit – Requirement to give notice of dishonour not required – No legal obligation to give notice of revocation

Facts

The appellant, a commercial bank had a banking relationship with the respondent, their customers. The respondent was in business of selling and exporting rubber to his foreign customers, while the appellant acted as his negotiating and collecting bankers.

Whenever the respondent shipped any rubber, he presented his letters of credit and shipping documents to the appellant who negotiated the same on his behalf and collected the payment from foreign banks for the goods shipped. The appellant maintained a second account designated as suspense account No. 8081 in favour of the respondent. This was in addition to the consolidated main current account of the respondent.

The two accounts were operated thus: Upon presentation of bills by the respondent to the bank for negotiation or collection,
the appellants advanced to the respondents money by way of an overdraft to the value of the bills and credited his consolidated main current account with the amount and at the same time debited the suspense account with the same amount. Whenever the bills were negotiated or collected and paid, the suspense account would be credited with the proceeds.

On 3rd August, 1970, the appellant transferred the balance of the suspense account which then stood at a debit of £77,118.145.9d to the consolidated current account and thereafter all the financial transactions between the parties were entered into in the consolidated current account.

The appellant subsequently commenced proceedings before the High Court of Benin City claiming the sum of £161,185.4.0d being money lent by the appellant to the respondents and for money paid by the appellant for the respondent as his bankers and foreborne at interest at the respondents’ request. The appellant also claimed interest at the rate of 9% per annum from date of the writ till date of judgment. At the trial the appellant called witnesses, but the respondent apart from filing his statement of defence did not give evidence, and did not call any witness, but rested his case on the evidence adduced by the appellants.

At the end of the trial, although the learned trial Judge found that the respondent became heavily indebted to the appellant bank, it nevertheless dismissed the appellants claim in its entirety on the ground that the indebtedness was incurred through the negligence of the appellants by their failure to give notice of non-payment or short-payment of the bills to the respondent.

Aggrieved, the appellant appealed to the Supreme Court. The appellant contended that there was irrebutted evidence amounting to admission of the debt by the respondent and that the learned trial Judge ought to have found the respondent liable on the basis of the admission vide exhibit 10A. It was the appellants’ contention that there was ample evidence
unrebutted, showing that the appellants had been sending statements of accounts to the respondent.

In reply, Counsel for the respondent submitted that exhibit 10A relied upon to found admission by the respondent of the indebtedness ought to be excluded from the records of appeal on the ground that it was not pleaded and consequently went to no issue. He submitted in the alternative that if the letter, exhibit 10A was rightly admitted in evidence, then the interpretation put on it by the learned trial Judge, that it could not amount to admission of indebtedness was correct.

**Held** –

1. It is trite law that if a banker undertakes the collection of bills for a customer, he is bound to present them for acceptance and payment in accordance with the provisions of the Bills of Exchange Act, 1882, and must give notice of dishonour to his customers if they are dishonoured.

2. A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person or to bearer.

3. The duty of a banker to give notice of dishonour of a bill to his customer relates to a bill which is a bill of exchange within the definitions of sections 2 and 3 of the Bills of Exchange Act.

4. A banker has no legal duty to give notice of dishonour of a revocable credit to his customer. In the instant case, the fact that the letters of credit were presented by the appellants to the bank of New York and were not paid raises a presumption that they were revocable unless it is otherwise stated on the face of it.

5. In the absence of any agreement to the contrary, a collecting banker has a duty to collect the face value of a bill, and if he collects any amount less than the value of
the bill he may be liable to his customer for a breach of contract. This common law rule is founded on the liability of an agent exceeding his authority.

Appeal allowed.

Cases referred to in the judgment

Nigerian

Seismograph Services (Nig) Ltd v. Eyuaf (1976) 9-10 S.C. 135 at 155

Foreign

Bank of Scotland v. Dominion Bank (Toronto) (1891) A.C. 592
Cape Asbestos Co v. Lloyds Bank Ltd (1921) W.N. 274
Sassoon and Sons Ltd v. International Banking Corporation (1927) A.C. 711 at 731

Nigerian statute referred to in the judgment

Bills of Exchange Act, 1882, sections 2, 3, 47, 48 and 49

History of the case

This was an appeal against the decision of the High Court of Justice, Benin City, which dismissed the appellant’s claim in its entirety. The Supreme Court allowed the appeal and entered judgment for the appellant.

Counsel

For the appellants: Agbamuche

For the respondent: Odje

Judgment

BELLO JSC: The facts of the case in this appeal are as follows: The appellants are commercial bankers and the respondent is their customer. In 1968, the respondent opened a current account in his personal name of Festus Omorogie Eke in the Warri Branch of the appellants’ bank. In January, 1969, he opened another current account No. 8080 in the
business name of “Sarah Yesufu Trading Company” and that account was also known as account No. 1. By a letter dated 29th January, 1969, the respondent requested the appellants to consolidate the two accounts and consequently the appellants transferred the balance of the first account to the account No. 8080 (account No. 1).

In connection with the business of the respondent as a seller and exporter of rubber to his foreign customers, the appellants acted as his negotiating and collecting bankers. Whenever the respondent shipped any rubber, he presented his letters of credit and shipping documents to the appellants, who negotiated the same on his behalf and collected the payments from foreign banks for the goods shipped. In respect of that export business the appellants maintained another account designated as suspense account No. 8081 (account No. 2) in favour of the respondent.

In so far as the export business was concerned, the two accounts, according to the evidence of PW1, the then manager of the Warri Bank, were operated in this manner. Upon the presentation of bills by the respondent to the bank for negotiation or collection, the appellants advanced to the respondent money by way of an overdraft to the value of the bills and credited his consolidated current account with the amount and at the same time debited the suspense account with the same amount. When the bills were negotiated or collected and paid, the suspense account would be credited with the proceeds.

It may also be pointed out that on 3rd August, 1970, the appellants transferred the balance of the suspense account, which then stood at a debit of £77,118.14s.9d, to the consolidated current account and thereafter all the financial transactions between the parties were entered into in the consolidated current account No. 8080 (account No. 1).

It was in respect of the aforementioned accounts that in proceedings commenced by the appellants in the High Court of Benin City, they claimed from the respondent the sum of
£161,185.4s.0d being money payable by the respondent to the appellants for money lent by the appellants to the respondent and for money paid by the appellants for the respondent as his bankers and forborne at interest at the respondent’s request and outstanding on the respondent’s account as debit balance. They also claimed interest at the rate of 9% from the date of the writ until judgment or payment.

At the trial of the action the appellants called seven witnesses who testified on their behalf. The respondents’ statement of the composite account, which shows a debit balance of £161,185.4s.0d was admitted in evidence as exhibit 5. Although the respondent had filed and delivered a voluminous statement of defence, he did not give evidence and did not call any witness. He rested his case on the evidence adduced by the appellants.

After a review of the evidence adduced by the appellants, the learned trial Judge made the following findings:

1. that the bulk of the amount claimed was in respect of bills which the appellants collected and undertook to negotiate for the respondent. That when some of those bills were dishonoured and some were under paid, the appellants did not give notice to the respondent of their dishonour and underpayment. Relying on the Bank of Scotland v. Dominion Bank (Toronto) (1891) A.C. 592, the learned trial Judge stated that the appellants had a duty to give such notice to the respondent and he found the appellants in breach of that duty;

2. that the appellants had not been sending periodic statements of account to the respondent and, consequently, the respondent could not be held to have implied notice that those bills were not collected and were not paid;

3. that the letter dated 21st July, 1971, exhibit 10A, from the respondent to the appellants and the evidence relating to the discussion the respondent had with the solicitor of the appellants (PW4) did not amount to an admission of the respondent’s indebtedness to the appellants.”

The learned trial Judge then arrived at the following conclusion:

“As pointed out by Mr Okeaya Inneh, the claim put forward by the
bank embraces a lot of items which were neither specified in the statement of claim nor in the evidence of the principal witnesses who testified for the bank. But prominent in the claim were the uncollected or short-paid bills for which the bank has been unable to account to the defendant. On the basis of non or short collection without notice to the defendant, the latter became heavily indebted to the bank, and thereby incurred substantial amount of compound interests on the alleged overdrafts as could be seen particularly on pages 1, 15, 16 and 17 of exhibit 5. I am of the view, that in failing to notify the defendant of the state or fate of his bills which he presented to the bank to collect for him, the bank was certainly negligent and it cannot turn round to ask the defendant to pay the difference between the face values of the bills and the amounts actually received by them from their overseas agents. It would be wrong to allow the bank to take advantage of its own negligence for which it has offered no explanation to make a claim on the defendant for the difference received or non-payments by the bank from overseas, and which in its books are now considered as overdrafts against the defendants.”

Notwithstanding his finding that the respondent “became heavily indebted to the bank”, nevertheless the learned trial Judge dismissed the appellants claim in its entirety on the ground that the indebtedness was incurred through the negligence of the appellants by their failure to give notice of non-payment or short-payment of the bills to the respondent. It is against that decision that the appellants have appealed to this Court upon the only ground that the decision is against the weight of evidence.

Learned Counsel for the appellants, relying on exhibits 9 and 10A and the evidence of the undertaking given by the respondent to the solicitor of the appellants (PW4) to pay the debt, contended that there is irrebutted evidence amounting to admission of the debt by the respondent and that the learned judge ought to have found the respondent liable on the basis of that admission. He further submitted that there is ample evidence showing that the appellants had been sending statements of account, and in particular had sent exhibits 5 and 7, to the respondent and that evidence has not been
rebutted. He urged us to allow the appeal and enter judgment for the appellants in the amount claimed.

In reply learned Counsel for the respondent emphasised the point that although the respondent did not give evidence, the onus was still on the appellants to prove their claim and that they failed to discharge the burden of proof. He submitted that exhibit 10A, which was written by the respondent in answer to exhibit 9, ought to be excluded from the records of appeal on the ground that it was not pleaded and consequently it went to no issue. In the alternative, he argued that if the letter, exhibit 10A, was rightly admitted in evidence, then the interpretation put on it by the learned trial Judge “that it could not amount to admission of his (respondent’s) indebtedness” was correct. He conceded that the statement of account, exhibit 7, was sent to the respondent but contended that the weight attached to it should be very minimal since it was not signed by the bank official who prepared it and the official who checked and examined it did not testify at the trial.

Upon a proper consideration of the case, concluded the learned Counsel for the respondent, and having regard to that fact that there is no evidence of the whereabouts of the bills in question and that their position is still uncertain, the appellants failed to prove the precise amount due to them from the respondent and the appeal ought to be dismissed.

The matter under consideration in this appeal may be put in a nutshell: two witnesses (PW1 and PW6) who were the managers of the bank at the material time, testified that the respondent was indebted to the appellants in the sum of £161,185.4s.0d and they produced the respondent’s statement of account (exhibit 5) which showed a debit balance in that sum. The solicitor of the appellants also testified that in the reply (exhibit 10A) to his letter demanding that the respondent should settle his debt, then in the sum of £179,310.7s.7d, the respondent stated that he intended to liquidate his total indebtedness and at a meeting thereafter with
the solicitor he further agreed to settle the debt and made a part payment of £40,000. The learned trial Judge, as we have earlier on indicated, found that the respondent became heavily indebted to the appellants and nevertheless dismissed the appellants claim in its entirety on the only ground that the appellants did not give notice of dishonour or underpayment of the respondent’s bills, which formed the bulk of the amount claimed. There are two issues for determination in this appeal. Firstly, whether the appellants have a right of recourse against the respondent in respect of the bills which were dishonoured by non-payment. Secondly, whether they have the same right in respect of the bills which were underpaid on collection.

Subject to the qualification which we will in due course point out, we think the learned trial Judge correctly stated the law relating to the duty of a banker to give notice of dishonour of his customer’s bills. It is trite law in England that if a banker undertakes the collection of bills for a customer, he is bound to present them for acceptance and payment in accordance with the provisions of the Bills of Exchange Act, 1882, and must give notice of dishonour to his customer if they are dishonoured: See Halsbury’s Laws of England 4ed, page 81 paragraph 106 and Bank of Scotland v. Dominion Bank (Toronto) (1891) A.C. 592, which was cited by the learned judge. The duty to give such notice is a statutory duty and it is founded under the provisions of the Bills of Exchange Act, 1882. sections 47 and 48 of the Act provide:

“47. Dishonour by non-payment

(1) A bill is dishonoured by non-payment

(a) when it is duly presented for payment and payment is refused or cannot be obtained, or

(b) when presentment is excused and the bill is overdue and unpaid.

(2) Subject to the provisions of this Act when a bill is dishonoured by non-payment, an immediate right of recourse against the drawer and indorsers accrues to the holder.
48. Notice of dishonour and effect of non-notice

Subject to the provisions of this Act, when a bill has been dishonoured by non-acceptance or by non-payment, notice of dishonour must be given to the drawer and each indorser, and any drawer or indorser to whom such notice is not given is discharged: provided that—

(1) Where a bill is dishonoured by non-acceptance, and notice of dishonour not given, the rights of a holder in due course, subsequent to the omission, shall not be prejudiced by the omission.

(2) Where a bill is dishonoured by non-acceptance and due notice of dishonour is given, it shall not be necessary to give notice of a subsequent dishonour by non-payment, unless the bill shall in the meantime have been accepted.”

Section 49 of the Act then proceeded to make provisions for the rules in accordance with which valid and effectual notice of dishonour may be given.

We think it is essential to identify the types of bills that are covered by the provisions of sections 47, 48 and 49 of the Act.

“Bills of Exchange” as defined by section 2 of the Act means:

“3. Bills of Exchange defined:

(1) A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person, or to bearer.

(2) An instrument which does not comply with these conditions, or which orders any act to be done in addition to the payment of money, is not a bill of exchange.”

It is clear from the foregoing that the duty of a banker to give notice of dishonour of a bill to his customer relates to a bill which is a bill of exchange within the definitions of sections 2 and 3 of the Act. In parenthesis, it may be pointed out that in ordinary parlance the word “bill” has a wide and
varied meaning. “The word bill is one of the most general that can be used wherever it is not confined by other terms eg a Bill of Parliament, a Bill of Chancery. In every kind of business the word bill occurs as representing any writing, a bill of lading, a bill of parcels, a play bill, a bill of fare, a bill of divorcement, and so on” (per Maule, arg. Bank of England v. Anderson 3 Bing N.C. 601) quoted in Stroud’s Judicial Dictionary.

It is significant to observe that sections 2, 3, 47, 48 and 49 of the Bills of Exchange Act, Cap 21, 1958 Laws of the Federation of Nigeria and Lagos are carbon copies of their respective English counterparts.

The question for consideration therefore is: were the bills in the case on appeal bills of exchange within the meaning of the provisions of the Bills of Exchange Act of Nigeria? If they were such bills, then the appellants were obliged to give notice of the dishonour to the respondent but not otherwise.

The pleadings and the evidence in the case make it crystal clear that the “bills” in question were in fact “letters of credit.” Paragraph 10 of the statement of claim describe them as such.

PW1 testified as follows:

“On the 29th of January, 1972 the debit was £161,185.45.0d which is the amount claimed in this action. The debit was the debt owed by the defendant to the bank as at that date. That amount is made up of overdrafts, bank charges for services rendered to him, compound interest on overdrafts made, drafts sold to him, commissions on turn-over, exchange and commission on his letter negotiated.”

That evidence was reinforced by PW4 who stated:

“From time to time he entered into contracts with overseas importers, and on the basis of those contracts letters of credit were opened for him through Warri Branch of the bank. Whenever he shipped any rubber he would submit the letters of credit to us and we negotiated on his behalf and the accounts were cleared. That practice was constant until I left there. We advanced him money by means of overdrafts. The accounts were usually cleared at the
end of the month. He got the money from the bank by issuing cheques.”

It has been held in *Cape Asbestos Co Ltd v. Lloyds’ Bank Ltd* (1921) W.N. 274 cited in Digest (Replacement) page 285, paragraph 855 that a revocable letter of credit might be revoked at any time and that there was no legal obligation on a banker to give notice of the revocation to his customer and that the giving of notice was an act of courtesy which it was very desirable should be performed but it was not founded upon any legal obligation. It seems to us that *Cape Asbestos’* case is the only reported judicial decision in the common law countries on the matter, for it is the only case cited by the learned authors of Halsbury’s *Laws of England*, (4ed) at page 100, note 4, Chitty on *Contracts* Volume 2 (23ed), paragraph 433 note 6 and Paget’s *Law of Banking*, (8ed), page 636 note 16 to support the proposition that a banker has no legal duty to give notice of dishonour of a revocable credit to his customer. We think the support given to the proposition is weighty. We take it as being the correct statement of the law.

The fact that the letters of credit in the case in hand were presented by the appellant to the Bank of New York and were not paid raises the presumption that they were revocable credits for the presumption is that a credit is revocable unless it is otherwise stated on the face of it: See Halsbury’s *Laws of England*, (4ed) at page 104, note 7. The onus is on the respondent to show that they were irrevocable which he failed to do. Consequently, the learned trial Judge erred in law in holding that the appellants had a legal duty to give notice to the respondent of the dishonour of the said letters of credit.

We are also in complete disagreement with the interpretation put by the trial Judge on the letter (exhibit 10A) that it does not amount to an admission of liability by the respondent. It is pertinent to set out in full the contents of the letter (exhibit 9) written by the appellants’ solicitor and the respondent’s reply
(exhibit 10A) to it. The letter (exhibit 9) dated 5th July 1971, reads:

"L.D. W/2/12

(LEGAL DEPARTMENT)
5th July, 1971
The Managing Director
Sarah and Yesufu Trading Company
P.O. Box 151
Benin City.
FINAL NOTICE
(For the attention of FS Yesufu Esq.)
Dear Sir,
We are the Solicitors of the African Continental Bank Limited, and we have instructions to demand from you the immediate payment of your outstanding debt with the bank amounting at the close of business on 31st May, 1971, to £179,310.7.7d (one hundred and seventy-nine thousand, three hundred and ten pounds; seven shillings and seven pence) which debt originated from your transactions with the bank at its Warri Branch in December, 1968.
It is our instruction that several demand letters have been sent to you by the bank to settle this outstanding debt but to no avail. Accordingly, we hereby give you 14 (fourteen) days notice to settle this debt failing which we shall carry out our further instruction to take out a writ of summons in the court against you for the recovery of the said amount and this we shall do without any further notice to you.
Yours faithfully,
(signed)
C IGBOAMALU OKOYE
SOLICITOR"

The respondent’s reply (exhibit 10A) dated 21st July, 1971, reads:

"21st July, 1971
The Senior Solicitor
African Continental Bank Limited
Head Office
Dear Sir,

Re: My Overall Indebtedness

I intend to liquidate my total indebtedness with the bank on or before the end of September, 1971, or substantially reduce the amount. The two months should be regarded as months of grace to enable me double my efforts towards the clearing of this adverse balance.

Considering my past relationship with the bank, I hope you will use your good offices to make this consideration. I will also like the Senior Solicitor to give me some time to reconcile some of the outstandings which are expected to be credited to my account to reduce my indebtedness and have not been done.

Litigation as you know is protracted and might not be in the interest of the cordial relationship that has always existed between the bank and myself. Kindly give this my unflinching proposal your consideration. If I fail, you can go on with your court action for recovery. I give my honour on this transaction and I promise, that I won’t fail.

I have outstanding bills and as soon as they mature or the proceeds are received, I will pay same to reduce the balance and I am also expecting some money from Finance House for the expansion of my business.

Be rest assured that I will not fail.

Yours faithfully,

SARAH and YESUFU TRADING COMPANY

(signed) F.S. Yesufu

Managing Director.”

It is also relevant to refer to the evidence of the solicitor (PW4) who testified as follows:–

“At the expiration of the time set out in exhibit 9, the defendant did nothing to settle his liability to the bank. On the 20th of July, 1971, I came to Benin to file a writ of summons against the defendant. On the 21st July, 1971, I was at the Ring Road Branch of the bank preparing the writ of summons when the defendant came there to see me. He told me that he was going to pay the debt by a monthly instalment of £20,000 (₦40,000).”
“The defendant by this letter dated 21st July, 1971, and addressed to me reduced his proposals into writing. This is the letter tendered in evidence admitted by consent and marked exhibit 10. This is a certified copy of the letter admitted in evidence and marked exhibit 10A. As a result of the letter, I telephoned the Head Office and finally told the defendant that the bank would not allow me to discontinue until he paid down something. He gave me two cheques of £10,000 (₦20,000) each. Pursuant to this, I stopped the issue of the summons.”

In his assessment of exhibit 10A, the learned trial Judge states as follows:

“It is to my mind that exhibit 10 could not amount to an admission of his indebtedness to the bank because whatever effect the first paragraph had was offset by the second paragraph in which he expressed his doubt about the state of his account.”

To our mind the second paragraph of the respondent’s letter exhibit 10A, does not raise any doubt about his admission of indebtedness to the appellants.

We may summarily dispose of the point half heartedly taken by the learned Counsel for the respondent that the letter exhibit 10A was improperly admitted in evidence in that it was not pleaded and ought therefore to be expunged from the records. It is sufficient to state that the letter was not objected to when it was tendered in evidence. As a matter of fact, it was admitted by consent. As the point was not taken in the trial court, we would not allow the respondent to raise it for the first time on appeal particularly when he has not cross appealed: See *Seismograph Service (Nig) Ltd v. Eyuaye* (1976) 9 and 10 S.C. 135 at 155.

*Sassoon and Sons Ltd v. International Banking Corporation* (1927) A.C. 711 was a case in which the respondent as discounting bankers sought to claim recourse and succeeded against the appellants as their customers after the dishonour of drafts by non-payment. In the Privy Council’s advice to dismiss the appeal, Viscount Sumner stated at page 731 of the report:

“The appellants are not in a position to show that when they discounted
these drafts, they bargained that the transaction should be without recourse, and in order to qualify their direction, giving by the letters D/A and to limit the respondents’ *prima facie* right recourse against themselves, they must show some contract with them to that effect or some breach of contract or duty on their part, which would have that effect in law.”

The respondent in the case in hand did not discharge that burden either.

We are accordingly of the opinion that the appellants in the case in hand are entitled to exercise their right of recourse against the respondent in respect of all the bills that were dishonoured by non-payment and that they are entitled to recover from him the value of those bills.

It remains to deal with the bills that were under collected by the appellants. The evidence of PW1 on those bills reads:

“In exhibits 5 and 7, against 29th October, 1969 there is an entry marked ‘OVER PMT. OF NEW YORK BILLS’ accepted for collection. Debit £17,612.8s.10d. By this it is meant the amount was short paid to the bank by overseas bankers (our overseas agents) to whom we sent the bills for collection. The practice is that we send our bills to our overseas agents for collection and if they collect less amount, we debit the customer with the difference. It is necessary to get the authority of the customer before accepting a smaller sum. On this occasion the defendant did not give us authority to collect £17,612.8.10d less than the bills would fetch.”

In the absence of any agreement to the contrary, a collecting banker has a duty to collect the face value of a bill and if he collects any amount less than the value of the bill he may be liable to his customer for a breach of contract. This common law rule is founded on the liability of an agent exceeding his authority.

The evidence of PW1 establishes that by their breach of contract with the respondent, the appellants caused a loss of £17,612.8s.10d to the respondent and that being the case, they were not entitled to claim that sum. They must bear the loss. We will deduct that sum from the amount claimed.

We accordingly allow the appeal and set aside the decision
of the court below including the order as to costs. We order that judgment shall be entered for the appellants against the respondent in the sum of ₦287,145.52 with interest at the rate of 9 per centum from the 5th day of February, 1972, until the 17th day of December, 1974. We arrive at the sum of ₦287,145.52 as follows –

- **Amount claimed:** £161,185.4s.0d
- **Less under payment:** £17,612.8s.10d
  
  £143,572.15s.2d

The balance is converted into naira. This shall be the judgment of the court.

*The respondent shall pay the appellants costs in the court below assessed at ₦500 and costs of this appeal assessed at ₦161.*
Balogun v. National Bank of Nigeria Limited

SUPREME COURT OF NIGERIA
ALEXANDER CJN, BELLO, IDIGBE JJSC
Date of Judgment: 9 MARCH 1978

Action – Claims for breach of contract and defamation – Whether can be combined in one action

Banking – Banker/customer – Relationship existing between them – Nature of – Wrongful dishonour of cheque – Principle in Hadley v. Baxendale (1854) 9 Exch. 341 – Applicability to cases of wrongful dishonour – Extent of

Defamation – Libel – Wrongful dishonour of cheque – Banker making libellous endorsement thereon – Effect

Legal practitioners – Wrongful dishonour of cheque – Whether persons in business – Whether entitled to substantial damages for wrongful dishonour of cheque

Facts

The appellant, a solicitor, issued a cheque on her client’s account for N40 to one of her clients which cheque was returned unpaid with the inscription “Refer to Drawer.” At the time the cheque was presented to the respondent for payment, the appellant had enough money in her client’s account.

The appellant filed an action in the lower court claiming the sum of N50,000 damages suffered by her as a result of defendant’s breach of contract and pleaded that she suffered damages in the way of her profession.

The learned trial Judge awarded nominal damages since she pleaded no special damages.

The appellant appealed to the Supreme Court. It was contended on behalf of the respondent that only a trader could
obtain substantial damages in like circumstances without pleading and proving same and that since the appellant was not a trader, nominal damages will suffice.

**Held** –

1. The receipt of money on an account by a banker makes the banker a debtor of the customer.

2. The relationship between a banker and his customer 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.

3. The refusal by a banker to pay a customer’s cheque when 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.

4. A customer whose cheque is wrongfully dishonoured can always bring claims for defamation and breach of contract together in one single action.

5. A solicitor in practice is “in business” and for that matter in commercial business but is not a trader; thus where his cheque is wrongly dishonoured he is entitled to substantial damages without pleading and proving same.

6. The endorsement R/D or “Refer to Drawer” upon a dishonoured cheque is defamatory of a customer.

7. The wrongful dishonour of a cheque, in itself entitles the customer to damages for breach of contract. Where the customer is a person in business or a professional man, it is assumed that the dishonour causes damages to his reputation and he may be awarded substantial damages without proof of actual damage to his reputation. Where the customer is not a person in business or professional man, he is in the absence of proof of actual damage entitled to nominal damages only.
In the instant case, the appellant is a solicitor and so a person in business she is therefore entitled to substantial damages for wrongful dishonour of her cheque without pleading and proving same.

Appeal allowed.

Cases referred to in the judgment

**Nigerian**


**Foreign**

Addis v. Gramophone Co Ltd (1909) A.C. 488 at 495


Bank of New South Wales v. Milvain (1884) 10 Victorian L.R. 3

Cox v. Cox (1814) 3 M. and S. 114


Foley v. Hill (1848) 2 H.L. Case 28

Gibbons v. Westminster Bank Ltd (1939) 2 K.B. 882

Hadley v. Baxendale (1854) A Exch. 341

Joachimson v. Swiss Bank Corporation (1921) 3 K.B. 110 at 127

Marzatti v. Williams (1830) 1 B. and Ad. 415

Milward v. Lloyds Bank (Unreported) 1924

Pyke v. Hibernian Bank Ltd (1905) I.R. 195

Rolin v. Steward (1854) 14 C.B. 595 or 139 E.R. 245

Szek v. Lloyds Bank Ltd (unreported) but referred to in Journal Institute of Bankers page 123
Books referred to in the judgment

Chalmer *Bills of Exchange* (13ed), page 259
Chitty on *Contracts* (23ed) Volume on specific contracts page 390, paragraph 390
Gatley on *Libel and Slander* (7ed), page 83, article 85
Paget’s *Law of Banking* (8ed), page 312

Counsel

For the appellant: *Osipitan*
For the respondent: *Oriade* (with him *Jimilehim* and *Taylor*)

Judgment

IDIGBE JSC: The question in this appeal is whether the appellant is entitled to substantial damages for dishonour of her cheque by the respondents without any allegation, in her pleadings, of special or actual damages flowing from such dishonour of the cheque and proof of the same? The appellant, who is a barrister and also enrolled as a solicitor of the Supreme Court of Nigeria, was, at all times material to the proceedings in the case in hand, actively engaged in practice as a solicitor in the metropolis of Lagos.

The facts which appear, from the record, to be not in dispute are as follows: the appellant operates two banking accounts with the respondents; one in her private and personal capacity at the Marina, Lagos Branch of the respondent company and the other her practice and clients’ account, at the 40 Balogun Street, Lagos Branch of the said company. On the 6th January, 1972 appellant drew a cheque on the 40 Balogun Street Branch of the respondents for N40 in favour of one of her clients, a Mrs Sidney of Ikeja in Lagos State. A few days later, Mrs Sidney returned to the appellant and produced to her the said cheque which had been marked “Refer to Drawer” by the respondents who had refused to make payment of the sum of N40 (forty naira) (ie the
equivalent of £20, ie twenty Nigerian pounds) to the payee, Mrs Sidney. At the time the cheque was presented to the respondents for payment, the appellant had enough money in fact, more than enough with the respondents in the clients’ account to meet the cheque for N40 (ie forty naira).

The facts given in evidence by the appellant, and her witness and which have not, in any way, been challenged are:

“(1) On the 31st day of December, 1971 the appellant whose business account was in credit lodged with the bank for payment into the same account the sum of £93.2.6 (ie N186.25k; one hundred and eighty-six naira and twenty-five kobo, the equivalent of ninety-three pounds to shillings and six pence).

(2) The appellant has not a personal, private or other account with the respondents ie at the 40 Balogun Street Branch of the company (hereafter referred to as ‘the respondents’ branch’ or ‘the branch’).

(3) When, a few days after issue of the cheque exhibit A which was dishonoured (hereafter also referred to as ‘the dishonoured cheque’) the appellant immediately telephoned and spoke to the manager of the branch, a Mr Adeleke, and complained to him about the unmerited treatment she had received from the branch. Mr Adeleke was not only impatient with the appellant but treated the complaint with levity. It is just as well to mention here that on returning the dishonoured cheque to the appellant, Mrs Sidney had to say to the appellant that she was surprised that ‘a cheque of only £20 from a lady of her type could bounce’; whereupon, annoyed and embarrassed the appellant immediately paid the sum of £20 to Mrs Sidney from her resources in the office.

(4) The appellant thereafter went to the bank and on arrival there was, at her request, shown in the accounts department of the bank, her ledger card from which she was satisfied that she had more than enough money to meet the dishonoured cheque. Thereafter she went back to her office and later sent a written complaint, exhibit B, to the respondents which drew a reply exhibit C; further to exhibit C, the appellant sent another letter, exhibit D, to the respondents.
(5) The appellant was not allowed to operate her client’s account until after ‘the matter was sorted out’ as per exhibit F, a letter dated 15th March, 1972 from the respondents.

(6) When Mrs Sidney gave evidence she also confirmed to the court that (a) she read the endorsement ‘Refer to Drawer’ on the cheque and (b) she not only was surprised that a cheque for a mere £20 from a lady of the appellant’s type could bounce but told her so.

(7) At all times material to the issue of the dishonoured cheque the appellant who practiced under the name of ‘Balogun and Alatishe’ kept her clients’ account at the respondents branch, (ie 40 Balogun Street, Lagos) under the name of ‘Balogun and Alatishe’ and Co: Solicitors.”

Now, in exhibit B, the appellant wrote on 21st January, 1972 to the respondents as follows:

“A/C 0376 Balogun and Alatishe and Co Barristers and Solicitors
I issued cheque No. H 014214 for the sum of £20 dated 6th January, 1972. I have just been informed by the recipient that it was returned unpaid when she presented it on the 17th January to the cashier.

Kindly investigate and let me know your findings.

Yours faithfully,

Mrs A Balogun.”

By their reply of the same date, the 21st January, 1972 (exhibit C), the respondents wrote to the appellant as follows:

“M/S Balogun, Alatishe and Co
27/29 Martins Street, Lagos
Dear Sirs,

Dishonoured Cheques

We refer to your letter dated 21st January, 1972 on above and (sic) will inform you that the balance in your current account as at 17th January, 1972 was £10.5.10, hence we were unable to honour your cheque of £20.

Please be informed that the current balance in your account is now £0.6. debit.

(Sgd) R. Adeleke
Manager: for National Bank of Nigeria Limited.”
On the 25th January, 1972 the appellant wrote again in exhibit D to the respondents as follows:

“Mr R.A. Adeleke
Manager
National Bank Nigeria Limited
40 Balogun Street
Lagos

Dear Sir,
Account No. 0376
I have received your letter dated 21st January, 1972. It appears that this letter was written without your going through the items of my statement of account.

I paid in a total of £243.2.6 on 31st December, 1971 and 3rd January, 1972. I have only issued cheques up to the value of £165.19.9 against the account.

One of your clerks went through the statement with me and discovered the error.

Unless one of the two cheques was returned to your bank unpaid (I have no notice of this), I insist that my account is in credit coupled with the fact that I was in credit at the end of December, 1971.

Yours faithfully,
Mrs A Balogun.”

By exhibit F dated 15th March, 1972 (nearly two months later) the respondents replied to exhibit D thus:

“Mrs A Balogun,
Alatishe and Co
27/29 Martins Street,
Lagos.

Dear Madam,
Current A/C 0376
We refer to your letter dated 25th January, 1972 on our above account, and will state that we have discovered the error committed, and your account has been rectified accordingly.

We hereby tender our unreserved apology and we promise that proper care of the account will be taken in future.
Yours faithfully,
R. Adeleke
Manager: for National Bank of Nigeria Limited.”
On 10th January, 1972 the appellant, as plaintiff, commenced these proceedings claiming from the respondents as defendant the sum of “₦50,000 damages suffered by the plaintiff as a result of the defendants’ breach of contract . . .”

It is pertinent, we think, to note that in paragraph (12) of her statement of claim, the appellant pleaded: “As a result of the defendants’ wrongful refusal to pay the sum of £20 the plaintiff suffered damages in the way of her profession.” In a reserved judgment by which the learned trial Judge in the court below award the sum of ₦10 (£5) as nominal damages he made the following observations in some of the passages of the said judgment:

“. . .I think it is fair to say that by his address Mr Falodun, learned Counsel for the defendants, conceded that the plaintiff was entitled to succeed. He contended, however, that the plaintiff was entitled only to nominal damages especially as she pleaded no special damages. It was submitted that only a trader could obtain substantial damages in like circumstances. In support of Mr Falodun’s submission . . . reference was made to Gibbons v. Westminster Bank Ltd (1939) 2 K.B. 882 where Lawrence J at page 888 concluded:

‘. . .In my opinion this matter should be treated as covered by these authorities, and I hold accordingly that the corollary of the proposition laid down by them, in the law namely, that a person who is not a trader is not entitled to recover the substantial damages for wrongful dishonour of his cheque, unless the damage which he suffered is alleged and proved special damage . . .’

That statement of the law is better understood when it is remembered that in an action for breach of contract, as this is, damages are not at large and plaintiff must always plead and prove his actual loss otherwise he is entitled to nominal damages only. Two exceptions to this general rule are known: One is an action for breach of promise to marry and the other where a trader who is in funds at his bank has cheque dishonoured wrongfully. Lord Atkinson in Addis v. Gramophone Co Ltd (1909) A.C. 488 at 495 has said that these exceptions ought not to be extended. Taylor CJ in Oyewole v. Standard Bank of West Africa Ltd (1968) 2 All
This appeal is from the said judgment of which the passages set out above in quotation form part. A number of grounds of appeal were filed but before us, the appellant had leave of this Court to argue that it is erroneous in law to ascribe such a very narrow interpretation to the meaning of the word “trader” used in the case of *Rolin v. Steward* (1854) 14 C.B 595: 139 E.R. 245. On the other hand the sum of the argument of learned Counsel for the respondent is that the interpretation given by the learned trial Judge in the court below in the case at hand is justified. A solicitor, learned Counsel for the respondent argued, is not a “trader” and, in accordance with the decision of Lawrence J in *Gibbons v. Westminster Bank Ltd* (*supra*), he is not entitled to an award of substantial damages in an action, based on breach of contract against his bankers for wrongful dishonour of a cheque issued by him on his client’s account unless he alleges and proves actual damage.

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 or predominating business of banker is the 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 in by, a customer: See also Atkin LJ in *Joachimson v. Swiss Bank Corporation* (1921) 3 K.B. 110 at 127. Therefore, the receipt of money from or an account of his customer by a banker constitutes the latter the debtor of the former (*Foley v. Hill* (1848) 2 H.L. Case 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 Corporation* (*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 when 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 dam-
ages. The only question which arose, in these circumstances,
has always been that relating to the quantum or amount of
damages. The general rule for measuring or quantifying
damages for breach of contract was that established by the
leading case of Hadley v. Baxendale (1854) 9 Exch. 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 damage could reasonably have been within the con-
templation of the parties at the time when the contract was
made. But it rarely happens that a banker knows the circum-
stances under which a customer has had to issue a cheque
which he refused to honour and this makes it very difficult
to apply the rule in Baxendale (supra) in measuring damages
in those circumstances. It is on this account that damages
awarded for wrongful dishonour of cheques by a banker are
generally nominal, save in the instances which the law has
come to regard as exceptional; and these constitute the ex-
ceptions with which we will deal anon.

Direct and/or natural damage arising from a breach of con-
tract by a banker to honour the cheque of his customer apart,
there is, however, also the serious likelihood of considerable
danger to the reputation of a customer and generally to his
business; (if he the customer is engaged in business). People
generally, whether or not in business, do not deal with a person
whose cheques are not paid, although it is conceded that in-
stances of disinclination to deal with such a person more read-
ibly abound in the field of business. As it is always extremely
difficult to have accurate estimates of the extent of damage under this “head,” it has, therefore, been laid down by a long line of cases beginning with that of Marzetti v. Williams (1830) 1 B. and Ad. 415 that damages in such cases are “at large,” which is to say that in such cases a jury may within reason make an award of any such sum as they consider the circumstances of the breach of contract or dishonour of cheque warrant although there has been no proof of any actual loss (ie special damage) to the customer. In the case of Marzetti (supra) in which a trader sued his bankers for wrongful dishonour of cheque although there was no evidence to show that the plaintiff had sustained any injury from the banker’s mistake, Lord Tenterden CJ remarked:

“I cannot forbear to observe that it is a discredit to a person and therefore injurious in fact, to have a draft refused payment for such small a sum, for it shows that the bankers had very little confidence in the customer. It is an act particularly calculated to be injurious to a person in trade.” (See 109 E.R. 842 and (1830) 1 B. Ad. 415 at 424).

Marzetti’s case (supra) was followed in the case of Rolin v. Steward (1854) 14 C.B. 595, which was a case by the plaintiffs who were in business (they were in fact merchants and shipowners) against the defendant a public officer of a company carrying on the trade and business of bankers in England under the name and style of East of England Bank. The action was for dishonour of three cheques and a domicile bill due to the inadvertence of a clerk in the office of the bankers. The plaintiffs gave no evidence that they actually suffered injury. A jury awarded them £500. It was held that the jury were entitled to give substantial damages, though £500 was, in the circumstances, excessive; £200 was eventually agreed upon.

The case of Marzetti (supra), therefore, put it beyond doubt that where a banker without justification dishonours his customer’s cheque, he is liable to the customer in damages for injury to his credit and the case of Rolin v. Steward makes it clear that if the customer is also “in trade” – we
prefer to use the actual words of Lord Tenterden, “in trade” for reasons we will show later – at the time of such dishonour then damages for such injury to the customer’s credit will be at large and a jury may within reason award substantial damages although there is no evidence from such customer of any actual damage suffered by him. It was not until 1939, that there was a decision by a court that the converse is the law ie that in an action by a “non-trader” for wrongful dishonour of his cheque by his bankers, only nominal damages should be awarded unless the non-trader pleaded and proved actual damage in which case substantial damages may be awarded in his favour; the decision was given by Lawrence J in the case of Gibbons v. Westminster Bank Ltd (supra). That decision which undoubtedly is good law – subject to the reservation which we make in this judgment – has been followed in a number of court decisions and approved by a number of text writers. The judgments in which Gibbons case (supra) has been followed include such weighty decisions as the New Zealand case of Baker v. Australian and New Zealand Bank Ltd (1958) N.Z.L.R. 907 (decided by Shorland J); (2) the Australian case of the Bank of New South Wales v. Milvain (1884) 10 Victorian L.R. (cases-at-law) at page 21 decided by Stawell CJ and Holrovd J (3) Oyewole v. Standard Bank of West Africa Ltd [1968] 2 All N.L.R. at page 32 decided by Taylor CJ (4) Fatel v. National and Grindlays Bank Ltd (1968) 3 African Law Reports Commercial at page 249; also in Modern African Banking Cases (1973) Edition at 170 decided in the High Court of Uganda. (In Patel, Rolin’s case was properly applied to the facts before the court but the statement of Lawrence J regarding “non-traders” was approved in passing) and (5) Alabi v. Standard Bank of Nigeria Ltd (1974) 4 E.C.S.L.R 574 decided in the High Court of Kaduna by Wheeler Ag. SPJ. The above decisions are, indeed, weighty and this court has considerable respect for them. However, we are of the respectful opinion that the foregoing cases, like the case in hand (ie, the decision on appeal before us), give a far too
narrow interpretation to the expression “trade” and/or “trader.” Earlier on, we drew attention to the expression “person in trade” (and not “trader”) used by Lord Tenterden in Marzetti’s case (supra). While it is true that a trader is in business, all persons in business are not necessarily traders; for instance, the ordinary citizen who, daily, exhibits his various articles or stock-in-trade in the market for the purpose of selling for gain is engaged in business and is a trader but the citizen who runs a private school although engaged in business can hardly be referred to as a trader. Although a “person in trade” is a “person engaged in business” he is not necessarily a trader; but a trader is necessarily engaged in business. Therefore, we prefer the expression “person in trade” for it refers to persons engaged in some occupation, usually skilled but not necessarily learned, as a way of livelihood. That being the view we take of the expression “persons in trade” a class of people against whom in the words of Lord Tenterden a banker’s act of wrongful dishonour of cheque is “particularly calculated to be injurious,” we find it difficult to exclude all “non-traders” that is, all persons who are not traders (and this may include “persons in business” or “persons in trade”) from the ambit of the “exception” enunciated in Rolin v. Steward (supra) (ie that damages in cases of dishonour of a “trader’s” cheque are, in the absence of proof of actual loss, “at large”). We respectfully prefer the view that:

“The corollary of the proposition laid down by the cases of Marzetti (supra) and Rolin (supra) is the law; and it is that a person who is not engaged in business or who is not in business) is not entitled to recover substantial damages for wrongful dishonour of his cheque, unless the damage which he suffered is alleged and proved as special damage.”

This, indeed, is only a re-statement of the proposition of Lawrence J in the case of Gibbons (supra) subject to the qualification that we prefer the expression “person who is not engaged in business” to “person who is not a trader” therein stated. It
is our view that the expression “not in business” in the re-

[179x480] b stated proposition takes care of the principles of law in-

volved, which is that “only people engaged in business need” recover substantial damage without proof of actual loss because of the damage deemed to be necessarily done to their credit, and/or reputation in business, by the unjustified action of the bankers; per se the act could imply, unjustifiably, insolvency or dishonesty on the part of the person engaged in business. We will elaborate anon in the next paragraph.

Such, however, is the view we take of the state of the law on the subject that we see no reason why, properly applied, the principles enshrined in the exception (ie to the ordinary rule in Baxendale (supra) for measure of damages in contract, as explained in the foregoing paragraph) should not extend to estate agents, auctioneers, solicitors in practice, stockbrokers and possibly all classes of commercial agents. In our respectful opinion, any other view of the proposition could lead to the absurd if not ridiculous situation where a “petty trader” becomes entitled to substantial damages for the dishonour of his cheque per se merely because he is a “trader” whereas a reputable auctioneer or estate agent, or solicitor in practice can obtain only nominal damages unless he can show that actual damage resulted from such act of dishonour of his cheque. However, in this judgment we would confine ourselves to the reasons why we think it is not right to exclude a solicitor in practice from the ambit of the said exception. In Rolin v. Steward (supra) it was the direction to the jury by Lord Campbell which was being attacked. There was no evidence in that case that the plaintiffs had sustained any special damage but His Lordship, in leaving the case to the jury told them that they ought not to limit their verdict to nominal damages, but should give the plaintiffs “such temperate damages as they should judge to be reasonable compensation for the injury they must have sustained for the dishonour of their cheques”; and Williams, J
in concurring with the views of Crosswell and Crowder JJ, had these pertinent observations to make:

“...As to the alleged misdirection, I think it cannot be denied, that if one who is not a trader were to bring an action against a banker for dishonouring a cheque at a time when he had funds of the customer’s in his hands sufficient to meet it, and special damage was alleged and proved, the plaintiff would be entitled to recover substantial damages. And when it is alleged and proved that the plaintiff is a trader, I think it is equally clear that the jury in estimating the damages, may take into their consideration the natural and necessary consequences which must result to the plaintiff from the defendant’s breach of contract; just as in the case of an action for slander of a person in the way of his trade, or in the case of imputation of insolvency on a trader, the action lies without proof of special damage...” See Williams J in 139 E.R. at page 250.

The italicised portions of the passage in quotation above underscores the reason why the courts have not insisted that a person whose business credit damaged by the act of wrongful dishonour of his cheque should either bring separate action for defamation, or prove actual loss before a jury should award him substantial damage. The sting of damage to the person in business lies, we think, in the slanderous nature and effect of the act of dishonour of the cheque per se. After all, it is well known that slander exists as much in spoken word as gestures or actions. “Sometimes a mere act may convey a defamatory imputation if it would be so understood by reason of a convention meaning... or by reason of the inferences to be drawn from it, whether by the ordinary man, or by some person with special knowledge to whom it was published.” (See Gatley on Libel and Slander (7ed), page 83 article 85). Thus it was held in Jefferies v. Duncombe (1809) 2 Camp 3, that it was defamatory to place a burning lantern in front of a person’s private dwelling-house during the hours of day (ie daytime) thereby intending to make out the house as a bawdy-house, that is, a brothel; and in Cox v. Cox (1814) 3 M. and S. at 114 Lord Ellenborough CJ was of the opinion obiter, that the act of holding up an empty purse before a crowd and gesticulating in the plaintiffs direction could be considered defamatory, although there were no
slanderous words accompanying the action. It is well known
that a customer whose cheque is wrongfully dishonoured
can always bring claims for defamation and breach of con-
tract together in one single action. That the courts have not
in this class of cases insisted, on the plaintiff bringing a
separate action for slander or, on proof of actual loss justi-
fies our view that the raison d'être for award of substantial
damages in such cases is to be found in the view which the
law takes of the peculiar nature of the damage which the act
of dishonour of cheques per se is deemed to have on the
credit of a trader and/or business man, or, on the general
reputation of man in business, just as in the case of slander
of a person in the way of his trade or business. And when, of
course, in addition to an act of dishonour of a cheque the
banker, as in the case in hand, makes a libelous endorsement
thereon, the customer may in addition to a claim for dam-
ages for breach of contract bring also in the same action a
claim for damages for libel. Sometimes in such cases the
two claims have been dealt with without any marked differ-
entiation; one of such instances occurred in *Allen v. London

We are firmly of the opinion that, in view of the explana-
tions we have made in the preceding paragraphs, the excep-
tion (established in the case of *Rolin v. Steward*) should not
be limited to “traders” but should extend to persons who are
“in business” in the sense that they are engaged in a pursuit
upon lines sufficiently commercial to bring them within the
expression “business.” We think that some weighty author-
ity also exists for this view of the state of law; and we refer
to the view of Lord Chorley as expressed in his *Law of
Banking* (1974) (6ed) at page 111 where it is stated as fol-
lows:

“Damage to reputation follows as a matter of course when the cus-
tomer is in business, unless of course, it can be shown that owing
to bankruptcy or some other reason the customer’s credit is of no
value. In the case of other persons, however, the loss to reputation
may be problematical . . . It is that, except in the case of a customer

Idigbe JSC


in business, actual damage must be proved before it can be recovered and this view was followed in Gibbons v. Westminster Bank Ltd. There are, however, other classes in the community such as military and naval officers, and professional men, to whom the consequences of a dishonoured cheque may be no less disastrous than to a trader and it seems unjust to limit the right to recover such damages to traders . . ."

Here, Lord Chorley – a renowned authority on banking and Commercial Law – is even suggesting that the exception (ie Rolin’s case (supra)) be not limited to “persons in business,” but that it be extended to such classes of persons whose reputation in their various honourable callings and professions are just as likely to be damaged by the wrongful act of dishonour of their cheques per se as by slander in their respective way of trade, calling or profession. And dealing with the same topic the learned author of the (13ed) of Chalmers on Bills of Exchange observes:

“. . .The damages for a breach of such duty to honour a customer’s cheque will be merely nominal unless the customer alleges and proves special damage (a quite unlikely eventuality) or unless the customer is a trader; it may however be that a solicitor, an auctioneer, a stockbroker, an estate agent and possibly any kind of commercial agent would be in the same way as a trader . . .” (See (13ed), Chalmers Bills of Exchange, page 259).

On the same subject the learned authors of Chitty on Contracts (23ed), the volume on specific contracts writes:

“Apart from the rights that may arise in tort from the nature of the written answer, the wrongful dishonour of a cheque, in itself entitles the customer to damages for breach of contract. Where the customer is a tradesman, or probably, a professional man, it is assumed that the dishonour causes damage to his reputation and, he may be awarded substantial damages without proof of actual damage to his reputation. Where the customer is not a tradesman, or professional man he is, in the absence of proof of actual damage entitled to nominal damages only.”

(See Chitty on Contracts: Volume: Special Contracts, (23ed), page 390, paragraph 390). Again, it is to be noted, from the learned authors of Chitty on Contracts that the
modern trend is to extend the exception (Rolin’s case) to professional men of persons in business and not to limit the exception (as the case of Gibbon v. Westminster (supra) seems to advocate), “to traders.” Indeed, the trend as it appears from modern text books on the subject is towards a preference of the words “persons in business” to “traders” as the class of people to whom the exception (as per Rolin v. Steward (supra) applies. Paget on Banking, for instance in dealing with the subject states:

“It is contended that the presumption of serious injury only applied where the customer is a business man, and that at least in all other cases, actual damage must be approved.”

See Paget’s Laws of Banking (8ed) page 312, the word “trader” is not used. In a reference, however, to the case of Gibbons v. Westminster (supra) the learned author of Paget on the Law of Banking states:

“In a recent case in contract, Gibbons v. Westminster Bank, Lawrence J felt himself bound by the authorities, and, further, held that the corollary of the proposition laid by them is the law, that a person who is not a trader is not entitled to recover substantial damages for the wrongful dishonour of his cheque, unless the damage which he has suffered is alleged and proved as special damage.”

We respectfully state that we do not feel bound, on our understanding of the earlier decisions, to the view that the principle of law confirmed in the case of Rolin v. Steward is intended to be limited to “traders.”

Earlier on in this judgment, we referred to a number of decisions which followed in the wake of Gibbons v. Westminster (supra) and these include Bank of New South Wales v. Milvain (supra), Oyewole v. Standard Bank of West Africa Ltd (supra); Alabi v. Standard Bank Nigeria Ltd (supra) and Patel v. National Grindlays Bank Ltd (supra) (in which case Sheridan J approved, in passing, the general statement of Lawrence J in Gibbons that all “non-traders” are in an action for wrongful dishonour of their cheques entitled to nominal damages only, and unless they pleaded and proved actual...
damage substantial damages could not be recovered by them). These, indeed, are weighty decisions but we feel bound to say that, in so far as these decisions seek to exclude the application of the exception in Rolin’s case from “business man” (i.e. “persons in business”) who are NOT “traders”, we certainly, are unable to associate ourselves with such a view of the law. (Emphasis added.)

This appeal concerns a solicitor in practice, and we will now deal with this specific aspect of the appeal. In the instant case, the plaintiff a solicitor in practice issued a cheque on her business account for her clients with the defendants’ bank. The Legal Practitioners Decree No. 15 of 1975 recognises that a solicitor in practice may keep such a business account (section 19 of the Decree refers). The learned trial Judge in the court below rightly, in our view, declined the invitation of learned Counsel for the appellant that he should regard a solicitor as being in the same category as “a trader”; we, however, take the view that a solicitor in practice is “in business” and for that matter “in commercial business” but that is not to say that he is “a trader.”

“Business is a wider term, and not synonymous with, trade; and means practically anything which is an occupation as distinguished from pleasure. Profit or the intention to make profit is not an essential part of the legal definition of a trade or business; and payment of a profit does not constitute a trade or business that which would otherwise not be such.” (See Halsbury’s Laws of England, Lord Simonds Edition or (3ed), pages 10-11).

And in the case of Re Wilkinson (1922) K.B. 548 although the court in that case was dealing with the term “business” under the Unemployment Insurance Act of 1920, we consider the observations of Roche J pertinent to our consideration. In that case the learned Judge observed:

“My present view is . . .that a solicitor’s practice, at any rate in London, is a pursuit upon lines sufficiently commercial to bring it within the term business as distinguished from an occupation such as that of a school-master which is not organised and conducted upon commercial lines.” (See (1922) 1 K.B. 587 per Roche J.)
Here then is a case of a solicitor in practice who issues a cheque on the business account of her clients and the same was without justification dishonoured by the respondents. The cheque was for a mere £20 (₦40) which she had previously collected on the instructions of her client from a debtor; the cheque had been returned – and endorsed thereon by the bankers “Refer to Drawer”– to the client to whom it was issued. The client had returned the dishonoured cheque to the appellant telling her how surprised she was at a solicitor of her type. Although, apparently, a moot point, there is, however authority for the view that the endorsement “R/D” or “Refer to Drawer” upon a dishonoured cheque is defamatory of a customer; that view was certainly taken by Grantham J in the case of Szek v. Lloyds Bank Ltd (unreported) but referred to (1) in 1098 Journal of Institute of Bankers page 123 and (2) at pages 113 and 123 of Lord Chorley: Law of Banking, op. cit. and (3) at page 5 note 65 of Gatley on Libel and Slander, op. cit. That also was the view of the trial Judge in Pyke v. Hiberian Bank Ltd (1905) IR 195; and in Milward v. Lloyds Bank – unreported 1924 – Wright J expressed the opinion, albeit, obiter that the endorsement “R/A,” which means “Return to the Acceptor,” on a bill of exchange could be defamatory.

The imputation in these circumstances from either the very act of wrongful dishonour of the cheque where the customer has enough funds to meet the amount on the cheque, or, the endorsement “R/D” thereon is, indeed, clear and it is that the customer is dishonest and untrustworthy. Can anything affect her credit or reputation, as a “person in business,” and/or a solicitor in practice, more seriously? The unequivocal implication, in the circumstances, is that having collected a debt of ₦20 for her client the appellant was unable to make it available to her when she required it. Is it seriously to be contended that the circumstances the exception which for convenience, we refer to as the rule in Rolin v. Steward is not to apply; but it would have if the solicitor in practice had been “a trader” (Gibbons v. Westminster)? Can it be...
seriously contended that in such cases damage should not be presumed to follow as natural and necessary consequence of the act of wrongful dishonour per se, but that the solicitor must go into the trouble of alleging and establishing actual damage? We feel completely unable to subscribe to the view that that is what Rolin v. Steward decided and, we certainly think the answer to both questions must be in the negative.

In the words of Williams J in Rolin’s case “the jury in estimating the damage may take into consideration the actual and necessary consequences which must result to the plaintiff from the defendant’s breach of contract: just as in the case of an action for slander of a person by way of his trade” (See 139 E.R. at 250). It is, of course, well known that slander of a person by way of his trade or business (profession or calling) is actionable without proof of special damage and, substantial damage may be awarded although actual damage was not proved.

On the view which we take of the decision in Rolins v. Steward (supra) as indicated in this judgment and, applying the diction of Williams J in Rolin v. Steward, we are satisfied that there is no need for the appellant to plead and prove actual damage in order to be entitled to substantial damage. We would, however, like to observe that although the respondents in the end apologised for their negligence in dishonouring the appellant’s cheque by their letter dated 15th March, 1972, exhibit F some three months after the event, their attitude to the complaints of the appellant had been extremely cavalier. This observation is only made as a passing remark and has no bearing on the damages that ought to be awarded to the plaintiff/appellant.

The appeal succeeds on the question of damages. Accordingly the judgment of the High Court of Lagos State in Suit L.D. 23/73 dated 26th May, 1975, in so far only as it makes an award of ₦10 to the appellant is hereby set aside and in substitution therefore it is ordered that judgment be entered in favour of the plaintiff (appellant herein) against the
defendants (respondents herein) in the sum of ₦1,000. The appellant shall have costs in the High Court already fixed at ₦200 and, in this Court assessed and fixed at ₦175.

Appeal allowed.
Adeleke v. National Bank of Nigeria Limited

HIGH COURT OF OYO STATE

IBIDAPPO-OBE J

Date of Judgment: 17 APRIL 1978

Banking – Libel – Cheque wrongfully dishonoured – Notice of dishonour published to third parties – Whether notice of dishonour libellous

Facts

The plaintiff, an army officer, issued a cheque which the defendant bank, on receipt erroneously presented for payment to one of its own branches.

In consequence the cheque was returned unpaid, although the plaintiff had ample funds in his own bank account. A senior officer was given notice of its dishonour.

The plaintiff brought this action against the defendant claiming (i) that he had been libelled by the defendant in a letter dated 20th August, 1975 and (ii) damages for libel.

Held –

1. Any imputation which tend to injure a man’s reputation in a business, employment, trade, profession, calling in office, carried on or held by him is defamatory.

In the instant case, the plaintiff is a professional soldier, a Major in the Nigeria Army and the uncontradicted evidence before the court is that the cheque in controversy was paid to the Military Public Relations Officer (MPRO).

2. The answer of the defendant bank on exhibit B in connection with the cheque of the plaintiff is libellous of the plaintiff, there being sufficient funds in the plaintiff’s account to meet the cheque if the defendant bank had presented the cheque for payment.
3. The plaintiff was right in bringing an action in tort of defamation because of the way the cheque was carelessly handled and the nature of exhibit B which tells a lie against the cheque and thus becomes libellous of the plaintiff.

*Judgment for plaintiff.*

**Cases referred to in the judgment**

**Nigerian**

- Ashubiojo *v.* ACB (1966) L.L.R. 156
- Okolo *v.* Midwest Newspaper Corporation (1977) 1 S.C. 33
- Okoroji *v.* Ezumah (1961) 1 All N.L.R. 183

**Foreign**

- Frost *v.* London Joint Stock Bank Ltd (1906) 22 T.L.R. 760

**Counsel**

- For the plaintiff: Onalaja
- For the defendant: Craig

**Judgment**

**IBIDAPO-OBE J:** The plaintiff in this case instituted an action against the defendant bank for libel in that a cheque for N28 which he drew in favour of the 2nd Infantry Division Military Public Relations Officer’s account on his bankers, Barclays Bank Limited, Benin City, was returned unpaid by the defendant bank without presentation to his bankers. In fact, the defendant bank had in error sent the cheque of the plaintiff which was paid into the account of the Military Public Relations Officer (“MPRO”) with the defendant bank to another branch of the defendant bank at Ado-Ekiti. The stamps on the cheque, show that it was lodged with the defendant bank at its Agodi Branch on 22nd July, 1975 and ex facie, there was the stamp of the National Bank, Ado-Ekiti, dated 28th July, 1975. There is nothing whatsoever on the cheque indicating that it ever reached the plaintiff’s bank.
By 20th August, 1975, the defendant bank had prepared exhibit B to their customer, 2nd Infantry Division MPRO Quarter 2 Agodi, Ibadan, with the following particulars:

“Please note that your account has been DEBITED under the usual reserve as follows: R/E 22nd July, 1975 Benin IBC 88 for 2nd Infantry Division MPRO to Benin BBN Cheque 635957 paid in 22nd July, 1975 returned unpaid amount ₦28.

(Sgd) MANAGER

Checked and found correct by (Sgd)

(Sgd) MANAGER, 20th August, 1975.”

The plaintiff in his statement of claim pleaded thus:

1. In 1975 the plaintiff was a Captain in the Nigerian Army based in Ibadan. The plaintiff was promoted to the rank of Major in 1976.

2. The defendant is a company incorporated under the Banking Decree and incorporated also under the Companies Decrees and has branches throughout the Federal Republic of Nigeria with a branch in Agodi, Ibadan. The defendant carries on the business of banking throughout Nigeria and in its branch in Agodi, Ibadan.

3. The plaintiff operates a banking account with Barclays Bank of Nigeria Limited in its branch in Benin City Bendel State.

4. On 22nd July, 1975 the plaintiff issued a cheque No. 361197/035957A drawn on the Barclays Bank of Nigeria Limited in favour of the 2nd Infantry Division MPRO Account of the Nigerian Army Ibadan for the sum of ₦28 and crossed the cheque.

5. The cheque was lodged in the account of the 2nd Infantry Division MPRO Account of the Nigerian Army with the defendant at its Agodi Branch, Ibadan on 22nd July, 1975. The defendant acknowledged the lodgment by putting its date stamp on the cheque.

6. Through the carelessness, negligence and recklessness of the defendant the cheque was sent to the Ado-Ekiti Branch of the National Bank which acknowledged receipt on 28th July, 1975.

7. The defendant without justification returned the cheque unpaid and debited the account of 2nd Infantry Division MPRO Agodi, Ibadan, as the cheque was unpaid.

8. The notice of the dishonour of the cheque as unpaid was published by the defendant to the Officer in Charge, MPRO, 2nd Infantry Division Headquarters, Agodi, Ibadan, in the defendant form 138 Number 100519 of 20th August, 1975.

9. By the publication of the said 20th August, 1975 what was published to the plaintiff falsely and maliciously was that the plaintiff was insolvent and issued a dud cheque or bounced cheque.
10. By this false publication it was understood to mean that the plaintiff was a man of straw and insolvent though a Senior Army Officer of the Nigerian Army and liable to punishment in a criminal matter under the issue of Dud Cheque Decree.

11. By this publication of the insolvency of the plaintiff as a Senior Army officer the plaintiff is liable to a court-martial for the issue of a false cheque contrary to the ethics of his profession as a Senior Army Officer.

12. By this publication reasonable people have understood it to mean that the plaintiff is insolvent and in financial embarrassment, and liable to dismissal from the Nigerian Army.

13. The plaintiff by reason of the returned cheque and false publication has been greatly injured in his credit and reputation and in his profession as a Senior Army officer.

14. The plaintiff avers that at the material date of the issue of the cheque he had sufficient funds in his bank account to meet the sum of N28.

15. The plaintiff avers that the defendant negligently returned the cheque unpaid and recklessly in that the defendant did not present the cheque No. 361197/035957A to Barclay’s Bank of Nigeria Limited, Benin City Branch, for encashment at all.

16. The plaintiff avers that he obtained the permission of the 2nd Infantry Division Headquarters of the Nigerian Army, Ibadan, in instituting this action.”

The defendant bank in its statement of defence pleaded as follows:

“The defendant is not in a position to deny or admit paragraphs 1, 3, 5, 11, 14 and 16 of the statement of claim and puts the plaintiff to the strictest proof thereof. 2. The defendant denies paragraphs 6, 7, 8, 9, 10, 11, 12, 13 and 15 of the statement of claim and puts the plaintiff to the strictest proof thereof. 3. The defendant admits paragraphs 2 and 4 of the statement of claim. 4. At the trial, the defendant will aver that on 22nd July, 1975 the plaintiff issued a Barclays’ Bank, Benin, Branch, cheque for N28 in favour of the 2nd Infantry Division MPRO and that the cheque was lodged in the account of the Division maintained at the defendant’s Agodi Branch. 5. With further reference to paragraph 6 of the statement of claim the defendant avers that by reason of a postal error committed by the post office the cheque was sent to the defendant’s branch at Ado-Ekiti. 6. With further reference to paragraphs 7 and 8 of the statement of claim the defendant admits that the cheque was sent to the 2nd Infantry Division, MPRO Ibadan.”
in the ordinary course of business. 7. The defendant will rely on the defence of qualified privilege at the trial of this suit.”

The plaintiff gave evidence and called two witnesses; the defendant bank called no witness but rested its case on that of the plaintiff. The question before the court for determination is whether or not the action of the plaintiff is maintainable against the defendant bank. The plaintiff in his evidence *viva voce* testified that he was indebted to the 2nd Infantry Division MPRO in the sum of ₦28. He was a captain in the Nigerian Army at that time. He was therefore obliged to issue his cheque to the drawee in the sum of ₦28 which was paid into the account of the drawee with the defendant bank.

When the cheque was returned unpaid, he took pains to find out from the defendant bank and his bankers and the replies to his enquiries were received simultaneously. He tendered exhibits C and D in this regard. In exhibit C, his bankers explained in these words:

“We refer to your letter dated 13th September, 1975 and advise that there is no evidence to show that the above-mentioned cheque has ever been presented for payment at this branch.

If it is alleged to have been returned unpaid, could you please ascertain the reason for non-payment as it ought to have been stated on the face of cheque.

You will no doubt observe that there has never been any Barclays Bank stamp on the cheque to signify that the cheque has ever been presented at any of our branches.”

On the other hand, the defendant bank explained in exhibit D as follows:

“While the returned cheque should already be in your possession, kindly look at the top of the face of the cheque where the reason/s for it’s return should have been written.”

It is significant to observe that the signatory of exhibit C is, or appears to be, the manager of the defendant bank while that of the letter, exhibit D is obviously the manager of the bank, Mr JA Olufemi. At the time the cheque was issued, the plaintiff had over ₦2,000 to his credit with the bank so far so that, other things being equal, there could have been
no valid reason for dishonouring the cheque, if it had been presented to drawer’s bankers in Benin City.

The plaintiff called two witnesses. Captain Samuel Ade-toye, who was in charge of the accounts of the drawee’s accounts and who was accountable for all moneys received on behalf of the 2nd Infantry Division, emphasised that all receipts by him must be paid on the same day and he was subject to audit checks so that when the cheque was returned unpaid, he was very much disturbed as it was his discretion to refuse or accept cheques from senior officers. His opinion of the plaintiff was that he had no funds and was certainly irresponsible to have issued a dud cheque. He therefore lodged a report to the army authorities and he notified the plaintiff. In the same vein, another witness, Major Gregory Sanda testified that it was an irresponsible act and a violation of the Army Act for a soldier to issue a dud cheque. He said further that the General Officer Commanding instructed that the plaintiff ought to be disciplined; he would have been court-martialed if investigation had revealed that he had no funds to cover the cheque.

Counsel for the defendant bank cross-examined all the witnesses at length. She *inter alia* objected to the writ of summons and submitted that the statement of claim was defective having violated the provisions of Order 2, rule 5 of the High Court (Civil Procedure) Rules, which provides as follows:

“In an action for libel, the indorsements on the writ shall state sufficient particulars to identify the publication in respect of which the action is brought.”

The indorsements on the writ and in particular the words “On 20th August, 1975 the defendant falsely and maliciously returned the cheque unpaid as per the defendant advice No. 100519 of the said date” show clearly that by the said words, the defendant meant and was understood to mean that the plaintiff, a senior officer in the Nigerian Army issued a cheque when he was not solvent enough to meet the...
cheque. It appears to me that these words contain sufficient particulars in pursuance of Order 2, rule 5. The words which appear on the defendant’s advice No. 610059 and which were tendered as exhibit B can hardly be made clearer than this and I held that the objection was totally misconceived.

Counsel also urged me to ignore exhibit E, the statement of account of the plaintiff on the grounds that it was inadmissible in law. Exhibit E was addressed to the plaintiff on request and was authenticated by the bankers of the plaintiff. It seems to me trite law to regard this as inadmissible because the plaintiff failed to call the manager of the bank to tender it.

The facts having been reviewed let me now turn to the law. It is settled law that any imputation which may tend to inquire a man’s reputation in a business, employment, trade, profession, calling or office carried on or held by him is defamatory. The plaintiff in this case is a professional soldier, a Major in the Nigerian Army and the evidence before me which is uncontradicted is that the cheque in controversy was paid to the MPRO. There are no indorsements on the cheque itself, such as “Refer to Drawer”, but the slip (exhibit B) attached to the cheque had indorsements by the defendant bank.

Counsel for both the plaintiff and the defendant bank referred me to Paget’s Law of Banking (8ed) particularly pages 309-313 which I have considered carefully.

The facts of this case however seem to me unusual because the controversial cheque circulated between the defendant bank vis-a-vis its branch in Ado-Ekiti and of course was returned to the MPRO which keeps an account with the defendant bank. There is thus no contractual relationship between the plaintiff and the defendant bank, the former not being the customer of the latter. The absence of an answer on the cheque, is quite obvious especially when it never reached the bankers of the plaintiff who would have paid the cheque or refused payment.
I am inclined to hold therefore that the plaintiff in bringing an action in tort of defamation because of the way the cheque was carelessly handled and the nature of exhibit B which tells a lie against the cheque and thus become libellous of the plaintiff. In my judgment, I hold that the answer of the defendant bank on exhibit B in connection with the cheque of the plaintiff is libellous of the plaintiff there being sufficient funds in the plaintiff’s account to meet the cheque if the defendant bank had presented the cheque for payment. I am thus unable to follow the decision of the court of Appeal in England in *Frost v. London Joint Stock Bank Ltd* (1906) 22 T.L.R. 760 cited before me by Counsel for the defendant rather, I am inclined to come nearer home and follow the decision of the Supreme Court in *Okolo v. Midwest Newspaper* (1977) 1 S.C. 33 which was cited by Counsel for the plaintiff.

I am further strengthened in this view by the decision of Taylor CJ in *JA Ashubiojo v. ACB* (1966) L.L.R. 156 where it was held that the defendant bank were liable to the plaintiff damages for refusing to pay two cheques of the plaintiff for small sums of £24 and £6.5s though the plaintiff had enough funds in his account.

On the quantum of damages, I am inclined to consider the opportunity available for the defendant bank to make amends when the letter, exhibit D, was written, but instead, the plaintiff was asked to “look at the top of the face of the cheque where the reason/s for its return should have been written.” If a little care had been taken by the manager of the defendant bank, he would have discovered the folly of their original action in connection with the cheque and exhibit B.

The plaintiff, on the other hand, was obliged to defend his good name in the Army and avoid disciplinary action which could have been serious having regard to the fact that the present administration had warned the citizens of this country that it would not tolerate any acts of indiscipline.
Thus, in Okoroji v. Ezumah (1961) 1 All N.L.R. 183, Taylor FJ delivering the judgment of the Supreme Court (Ademola CJF and Bairamian FJ concurring) held:

"The appellate courts are very reluctant to exercise this power and to attempt to re-assess the amount of damages which the trial Judge has given, and that they will never do so unless it can be established that at the trial, the judge proceeds upon a wrong principle of law or that his award was clearly an erroneous estimate since the amount was manifestly too large or too small."

The plaintiff, in his writ of summons and in his evidence *viva voce* is claiming ₦39,000. This is rather in the nature of a gold-digging action. In the circumstances of this and having regard to previous decisions and the value of money these days, the defendant bank shall pay to the plaintiff ₦1,000 damages for the libellous publication contained in National Bank of Nigeria Limited, Agodi branch, Ibadan, Advice No. 100519 of 20th August, 1975 in respect of a cheque issued by the plaintiff on 22nd July, 1975 in favour of 2nd Infantry Division MPRO Account.

*Action allowed with costs.*

*Damages of ₦1,000 to plaintiff.*
Bank of America Nigeria Limited v. Kujore and others

HIGH COURT OF LAGOS STATE

JOHNSON J

Date of Judgment: 21 April 1978

Suit No.: L.D. 157/73

Banking – Banker/customer relationship – Effect of death of customer thereon – Relevant considerations

Banking – Credit facilities – Letters of trust and trust receipts – Nature of

Facts

The plaintiff’s claim against the defendants as the administrators and administratrix of the estate of Chief IA Kujore trading under the business name of A Kujore and Sons is for the total sum of £36,974.11.9d (₦73,949.18k) (seventy-three thousand, nine hundred and forty-nine naira, eighteen kobo) being advance facility granted by the plaintiff to the late Chief IA Kujore trading under the business name of A Kujore and Sons at his request at the plaintiffs Yakubu Gowon Street Branch in the normal course of their business as bankers and for the money paid by the plaintiff to the late Chief IA Kujore at the late Chief IA Kujore’s request and for bank charge incidental expenses and interest upon money due from Chief IA Kujore trading under the business name of A Kujore and Sons to the plaintiff as at 31st day of December, 1972.

The plaintiff’s case was that the deceased Chief Kujore was a valued customer of the bank with reasonable credit facilities. Where the deceased ordered goods and the consignor sent the documents relating to the shipment of the goods to the plaintiff, the documents were released to the deceased chief by the plaintiff on the execution of a trust receipt by the deceased to cover the value shown on the documents. Such trust receipts were eventually debited to the account of the
deceased chief with the bank. This apparently from the exhibits presented to the court, had been the standing practice between the deceased and the bank; and the exhibit D series is evidence of such transactions.

The deceased chief died on the 12th of August, 1971 and the plaintiff claimed that at that time, there were two outstanding trust receipts already signed by the deceased chief but not yet debited to his account. They were later debited to his account. The said trust receipts are those attached to exhibits D and D4 dated the 9th of August, 1971 and the 24th of April, 1971 respectively. Evidence was given by the plaintiff that the two trust receipts had been completed by the late chief before his death and were debited after his death his signatures were identified on the said trust receipts.

Held –

1. A trust receipt operates as an equitable assignment but it can be overridden by a charge in favour of or a sale to a bona fide transferee for value without notice of the trust. In the instant case there is no evidence that any other person beside the deceased chief or his representative has acquired a bona fide title notice of the trust. The administrators of the estate of the deceased are therefore bound by the indebtedness of the deceased arising out of the trust.

2. The relationship of banker and customer is terminated by death; however any indebtedness in favour of a deceased or against him enures either for the benefit of or against the estate of such deceased.

Appearances not stated.

Judgment

JOHNSON J: In the original writ of summons taken out by the plaintiff against the defendants the plaintiff claimed as follows:–

“The plaintiff’s claim against the defendants as the administrators and administratrix of the estate of Chief IA Kujore trading under
the business name of A Kujore and Sons is for the total of sum of £36,974.11.9d (₦73,949.18k) (seventy-three thousand, nine hundred and forty-nine naira, eighteen kobo) being advance facility granted by the plaintiff to the late Chief IA Kujore trading under the business name of A Kujore and Sons at his request at the plaintiff’s Yakubu Gowon Street Branch, in the normal course of their business as bankers and for the money paid by the plaintiff to the late Chief IA Kujore at the late Chief IA Kujore request for bank charges incidental expenses and the interest upon money due from Chief IA Kujore trading under the business name of A Kujore and Sons to the plaintiff as at 31st day of December, 1972; and

The plaintiff also claims interest at the rate of 9% on the sum of £36,947.11.9d (₦73,949.18k) from the 1st day of January, 1973 until judgment and thereafter at the rate of 5% per annum on the said amount until final liquidation of the whole debt.”

Pleadings were duly filed and delivered by the parties. At the commencement of hearing it became apparent to the court that the matter involved issues of complicated accounting in respect of the operation of the account of the late Chief IA Kujore, a valued customer of the plaintiff bank. The court therefore referred the matter to a referee for necessary action.

After series of meetings by the parties with the referee, a report was submitted by the referee. All the defendants, who are administrators and administratrix of the estate of the late Chief IA Kujore originally objected to the acceptance of the report. However after further discussions and clearance of some issues, the first and second defendants accepted indebtedness of the estate to the plaintiff as recorded by the referee in his findings; leaving only the third defendant who maintained her objection to any claim against the estate of her deceased husband by the plaintiff. To this end further evidence was given by witnesses for the plaintiff and the case for the plaintiff was eventually closed.

The third defendant by her Counsel informed the court that she was calling no evidence and thereupon the case for that defendant was closed. Both Counsel thereafter addressed the
Johnson J

Bank of America Nigeria Ltd v. Kujore and others 405

court. Adeleke the learned Counsel for the plaintiff informed the court that the first and second defendants had submitted to judgment and urged the court to give judgment for the plaintiff in view of the fact that the third defendant called no evidence. Mr Sofola (Jnr) the learned Counsel for the third defendant also addressed the court and submitted that the trust receipts claimed to have been signed by the deceased Chief Kujore were debited to his account after his death.

The issue involved in this case appear to me a simple one, it is admitted by the plaintiff that the deceased Chief Kujore was a valued customer of the bank with reasonable credit facilities. Where the deceased ordered goods and the consignor sent the documents relating to the shipment of the goods to the plaintiff, the documents were released to the deceased chief by the plaintiff, on the execution of a trust receipt by the deceased to cover the value shown on the documents. Such trust receipts were eventually debited to the account of the deceased chief with the bank. This apparently from the exhibits presented to the court, had been the standing practice between the deceased and the bank; and the exhibit D series is evidence of such transactions.

The deceased chief died on the 12th of August, 1971 and the plaintiff claimed that at that time, there were two outstanding trust receipts already signed by the deceased chief but not yet debited to his account. They were later debited to his account. The said trust receipts are those attached to exhibits D and D4 dated the 9th of August, 1971 and the 24th of April, 1971 respectively. Evidence was given by the plaintiff that the two trust receipts had been completed by the late chief before his death and were debited after his death his signatures were identified on the said trust receipts.

The statement of account in respect of the banking operations of the said chief were tendered and admitted as exhibits E and G to G4. Exhibit F was put in to show the agreement between the deceased chief and the plaintiff on the rate of interest chargeable on advances made to him at 9% per
annum. None of these exhibits was challenged by the third defendant as to the correctness of their contents. It is perhaps fair to say that as she did not herself personally operate the account, she was in no position to admit or deny their correctness.

The plaintiff however, presented its case for the debt due to it by the deceased with sufficient evidence. It is perhaps useful at this stage to consider the effect or the nature of a trust receipt. Already evidence has been given by the plaintiff bank as to the operation of a trust receipt which has not been challenged. However, Mr Sofola (Jnr) in his submission referred the court to Paget’s *Law of Banking* (7ed) at page 553 on letters of trust which in my considered view is akin to a trust receipt. It reads:—

“The effect of a letter of trust being to constitute the pledgor the bailee from the banker as bailor, and his trustee of the proceeds of sale, in effect it operates as an equitable assignment; but it can be over-ridden by a charge in favour of, or a sale to, a *bona fide* transferee for value without notice of the trust.”

There is no complaint here that any other person besides the deceased chief or his representative had acquired a *bona fide* title notice of the trust. As a matter of fact there is evidence to the effect that after the death of the deceased chief, payments were made into his account to reduce his indebtedness to the bank. There is no evidence of any withdrawal from the said account by anyone. It was also submitted that the plaintiff has not established its case since evidence of the delivery of the goods covered by the trust receipts was tendered. I am of the view that this submission is erroneous. The documents of the goods were all in the possession of the deceased chief and there is no evidence that they passed into wrong or unauthorised hands. The fact of the collection or non-collection of the goods is therefore a matter within the peculiar knowledge of the chief and/or his representatives after his death. In such a situation, the statement of the law is that the onus of proof is in the person with such knowledge. If therefore anyone is to blame for the absence of such
evidence, it is the third defendant who was contesting the regularity of the plaintiff’s action.

Mr Sofola had further suggested in his submission that the relationship of customer and banker is terminated by death; I have no quarrel with this submission as a correct statement of the law as it relates to the encashment of cheques, but it must be clearly stated and admitted as correct statement of law that any indebtedness in favour of a deceased or against him, enures for the benefit of, or against the estate of such deceased. That in my considered view, first the slight difference in the relationship of a customer and the banker as it relates to the effect of death on such relationship.

I am satisfied that the plaintiff has established by preponderance of evidence, the indebtedness of the defendants in their capacity as administrators and administratrix of the estate of the late Chief IA Kujore to the tune of ₦72,949.18k (seventy-two thousand nine hundred and forty-nine naira, eighteen kobo). There will therefore be judgment for the plaintiff for the said sum with interest at the rate of 9% per annum from the 18th day of May, 1971 until the date of judgment which is today. This is in keeping with the claim of the plaintiff as contained in the amended statement of claim dated the 29th day of June, 1977 pursuant to an order of this Honourable Court made on the 27th day of June, 1977.

“Costs: Adeleke: Matter started in 1973. Referee’s fee has to be borne by the plaintiff.

I ask for ₦5,000 costs. Referees fee is ₦2,500.

Sofola on costs urges the court not to overburden the estate.”

I award ₦4,000 costs to the plaintiff to be borne by the estate of the deceased.
Barclays Bank of Nigeria Limited v. Ashiru and others

SUPREME COURT OF NIGERIA

SOWEMIMO, IDIGBE, ANIAGOLU JJSC

Date of Judgment: 15 JUNE 1978 S.C.: 92/76

Banking – Mortgages – Execution of legal mortgage in favour of bank by the court in place of recalcitrant – Bank customer – Order X, rule 11, Sheriffs and Civil Process Law, (Cap 116), Laws of Western Nigeria; section 22 Western Nigeria High Court Law, (Cap 44), Volume 2 of 1959

Declaratory judgment – Principles governing award of same

Lis pendens – Application thereof to property under mortgage with bank

Facts

The plaintiff/respondent herein between 1951 and 1959 obtained overdraft facilities from the first defendant/appellant who were his bankers upon the deposit of his title deeds for his two properties lying and situate at 46, Akpata street, Shomolu and 30, Ishoku Street Ijebu-Ode (now in Ogun State) as collateral for the overdraft facilities granted by the bank. The plaintiff/respondent subsequently signed a “Memoranda of Deposit of Title Deeds” on the 22nd day of January, 1957, and 26th January, 1959 respectively in favour of the first defendant/appellant. Sequel to the refusal of the plaintiff/respondent to execute a legal mortgage drawn up by the defendant in clause 2 of the Memorandum of Deposit of 22nd January, 1957 and 26th January, 1959 respectively in favour of the first defendant/appellant as declared by Supreme Court in Suit No. SC/362/66, the defendant/appellant as plaintiff filed Suit No. J/18/63 against the plaintiff/respondent as defendant for declaration that the memoranda of deposit dated 22/1/59 made between the plaintiff and defendant in the present suit constituted a binding contract upon the defendant
The High Court holden at Ijebu-Ode (Oyemade J) on 14/2/65 gave judgment in favour of the plaintiff by granting all the reliefs sought before the court. On the strength of the judgment in Suit No. J/18/63 coupled with continuous refusal of the plaintiff/respondent to execute the deed of legal mortgage drawn by the appellant bank, the defendant/appellant caused the Registrar of High Court of Ijebu-Ode to execute the legal mortgage deed prepared by them on behalf of the plaintiff/respondent in respect of the properties at 46, Akpata Street Shomolu Lagos and 30, Ishoku Street, Ijebu-Ode and to sign also the appropriate land transfer form (usually referred to as Land Form 1A) in respect of the properties involved herein, and the Registrar of High Court acceded to the defendant/appellant request as confirmed by court judgment.

The defendant/appellant armed with the executed legal mortgage by the court Registrar which was duly registered and in view of the inability of the plaintiff/respondent to liquidate the overdraft facilities, they exercised their power of sale by selling the property at 46, Akpata Street, Lagos to the defendant/respondent for the sum of £7,050 as well as the second property at 30, Ishoko Street, Ijebu-Ode to the third defendant/respondent herein for the sum £700.

The plaintiff/respondent who was not satisfied with the steps taken by the appellant bank in disposing of his mortgage property to the first and second defendant sequel to the deed of legal mortgage executed by the court Registrar filed a fresh suit against the defendant/appellant at High Court of Ijebu-Ode (now Ogun State) which led to the present appeal before the Supreme Court, the plaintiff/appellant claimed declaratory reliefs against the defendant/respondent before the High Court namely:

(1) A declaration that the deed of mortgage with registration particulars No. 3/3/111 in the land Registry at
Ibadan in respect of 30, Ishoku Street, Ijebu-Ode as well as the Deed of Mortgage with registration particulars No. 12/12/1321 in the land Registry at Lagos in respect of property at 46, Akpata Street, Shomolu, Lagos purported to be executed by the plaintiff or on behalf of the plaintiff in favour of the defendant sometime in 1970 or there about is void, irregular, null and of no effect on the grounds of (a) non est factum (b) that conditions precedent were not complied with in law and in fact.

(2) A declaration that any purported sale or disposition or alienation of the aforementioned properties covered by the aforesaid Deed of legal mortgage is irregular null, and void and of no legal effect on the same ground.

The above claims represented the substratum of the plaintiff/respondent case which was followed up to Supreme Court. On 19/6/72 the High Court seized of the matter dismissed all the plaintiff/appellant claims before the court but the plaintiff/respondent appealed against the High Court judgment to the Western State Court of Appeal, which by majority judgment allowed the appeal of the plaintiff/respondent. The present appeal of the defendant/appellant was against the Western State Court of Appeal majority judgment.

However before the determination of appeal before the Supreme Court the plaintiff/respondent purportedly sold property at 46, Akpata Street, Shomolu, Lagos to another person notwithstanding the pending appeal as well as the fact that the property had already been sold by the appellant bank in order to recover the overdraft facilities owed by the plaintiff/respondent.

Held –

1. By combined provisions of Order X, rule 11 of the judgments (Enforcement) Rules (Cap 116) and section 22 of the High Court Law of the Western State of Nigeria (Cap 44) which is devoid of inconsistency, the Registrar of the High Court is one of the persons empowered un
der the law to execute any conveyance contract of negoti-able instrument where any person neglects or refuses to comply with a judgment or order directing him to execute the conveyance, contract or other documents stipulated by the judgment.

2. Where a bank customer pursuant to court judgment refuses or neglects to personally execute a deed of legal mortgage in favour of the bank pursuant to memorandum of deposit already executed in bank’s favour, the bank shall be entitled to call upon the High Court Registrar to execute the deed in favour of the bank pursuant to Order X, rule 11 of Cap 116 and section 22 of the High Court Law, (Cap 44) and such deed shall have the same effect as if the bank customer personally execute the deed in favour of the bank pursuant to Order X, rule II of Cap 116 and section 22 of the High Court Law, Cap 44.

3. The sale of property at 46, Akpara Street, Shomolu, Lagos under mortgage to the bank by the plaintiff/respondent before the determination of the appeal and cross-appeal between the plaintiff/respondent and defendant/appellant is caught by the doctrine of *lis pendens* which does not allow the litigant parties and give to them pending the litigation, rights in the property in dispute, so as to prejudice the opposite party.

4. The court in granting a declaratory judgment has a discretionary power which is wide enough to allow the court to take into account virtually all objections and/or defences available in all equitable proceedings in favour of a party resisting a claim for the remedy.

5. The court will not grant declaratory judgment in favour of a party involved in inequitable behaviour.

Appeal allowed.

Cases referred to in the judgment

Foreign

*Bellamy v. Sabine* (1857) 26 L.J. (N.S.) Equity Reports 797
IDIGBE JSC: In the High Court of the Western (now Ogun) State, holden at Ijebu-Ode the plaintiff/respondent brought an action against the defendants/appellants (Barclays Bank of (Nigeria) Limited) and the second and third defendants/respondents for the following claims:

“(1) A declaratory judgment that the deed of mortgage, registered as No. 3 at page 3 in Volume III in the Lands Registry,
Ibadan, in respect of the property situate at No. 30, Ishoku Street, Ijebu-Ode, purported to be executed by the plaintiff or on behalf of the plaintiff in favour of the first defendants sometime in 1970 or thereabout, is irregular, null and void and of no effect, on the grounds of (a) non est factum and or (b) that conditions precedent to the purported execution thereof were not complied with in law and in fact.

A declaratory judgment that any sale or disposition alienation of the property described in the said deed or mortgage referred to in claim (1) above made by the first defendants to the second defendants on or about the 30th day of January, 1971, is null and void and of no effect.

A declaratory judgment that the deed of mortgage registered as No. 12 at page 12 in volume 1321 in the Lands Registry, Lagos, in respect of the property situate at No. 46 Akpata Street, Shomolu, purported to be executed by the plaintiff or on behalf of the plaintiff in favour of the first defendants sometime in 1970 or thereafter is irregular null and void and of no effect, on the grounds of (a) non est factum and or (b) that conditions precedent to the purported execution thereof were not complied with in law and in fact.

A declaratory judgment that any sale or disposition of the property described in the said deed of mortgage referred to in claim (3) defendant on or about 6th March, 1971, is null and void and of no effect.

A declaration that the judgment of the Supreme Court of Nigeria in Appeal No. SC.362/66 dated the 19th day of December, 1968, in effect determined the relationship of the customer and bankers as between the plaintiff and the first defendants respectively, whereby the first defendants were not entitled to charge or claim any further interests on the account of the plaintiff as it stood on the date of the said judgment.”

On the 19th day of June, 1972, the High Court holden at Ijebu-Ode dismissed the above claims; but an appeal from the decision of the High Court to the Western State Court of Appeal (hereafter referred as “the Court of Appeal”) was by a majority judgment of that court allowed. (Court of Appeal Judgment of 21st May, 1975, in Suit No. CAW/50/74 refers). This appeal is from the said judgment of the Court of Appeal. This appeal concerns the first four claims.
The facts which form the background to these proceedings may be summarised thus: between 1951 and 1959 the plaintiff, then actively engaged in trade obtained overdraft facilities from the defendants/appellants who were his bankers upon deposit of his title deeds for the properties described in claims (1) and (3) above [ie the land and buildings at 30 Ishoku Street, at Ijebu-Ode and at 46 Akpata Street, Shomolu (now in Lagos State)] with the defendants/appellants, and in respect of this transaction he later signed “Memoranda of Deposit of Title Deeds” of the 22nd day of January, 1957, and 26th January, 1959, in favour of the defendants/appellants. In Suit J/18/63 the defendants/appellants (as plaintiffs) claimed from the plaintiff/respondent (as defendant):—

“(a) a declaration that Clause 2 of the Memorandum of Deposit of Deeds dated the 22nd January, 1957 . . .made between the plaintiff of the one part and the defendant on the other is a binding contract upon the defendant.

(b) An order for specific performance by the defendant of the said contract.

(c) For damage amount to the sum of £3,670.3.9d; and

(d) . . .”

The High Court, holden at Ijebu-Ode (Oyemade J as he then was) on the 4th day of February, 1965 delivered its judgment in favour of the defendants/appellants; parts of the said judgment read:

“At the time this action was commenced in May, 1963, exhibit B shows that the defendant was owing the plaintiffs the sum of £2,115.5.1d, which has risen to the sum of £2,474.5.10d as at 30th December, 1964. Having come to the conclusion that paragraph (1) of the Memoranda of Deposit of Deeds exhibits E and F – covers any monetary liability incurred by the defendant to the plaintiffs . . . I hold that the plaintiffs are entitled to a declaration that Clause 2 of the Memoranda of Deposit of Deeds dated 22nd January, 1957, and 26th January, 1959, respectively is binding as between the plaintiffs and the defendant and I give judgment accordingly.
As regards the claim for specific performance and damages . . . I give judgment for the sum of £2,474.5.10d in lieu of ordering specific performance at this stage.”

Upon an appeal and cross-appeal to the Supreme Court (S.C. 362/66) by the plaintiff/respondent herein and the defendants/appellants herein respectively that court on the 19th day of December, 1968, dismissed the appeal of the plaintiff/respondent but in allowing the appeal of the defendants/appellants ordered as follows:–

“(i) The award to the plaintiff/respondent of £2,474.5.10d by the Ijebu-Ode High Court in Suit No. J/18/63 on the 4th February, 1965, is hereby set aside.

(ii) The plaintiff/respondent is hereby granted a decree for specific performance as sought in the second head of claim . . .”

Upon refusal of the plaintiff/respondent to execute a legal mortgage drawn up by the defendants/appellants or otherwise specifically perform the contract constituted in Clause 2 of the Memoranda of Deposit of Deeds of the 22nd January, 1957, and 26th January, 1959 (as decreed by the Supreme Court in S.C. 362/66), the defendants/appellants caused the Registrar of the High Court Ijebu-Ode to (i) execute the legal mortgage deeds prepared by them, on behalf of the plaintiff/respondent in respect of the said properties at Ishoku Street, Ijebu-Ode and at 46, Akpata Street, Shomolu, and to sign also the appropriate Land Statutory Transfer Forms (usually referred to as Lands Form 1A) in respect of the same properties. Armed, as it were, with the legal mortgages the defendants/appellants caused the property at 46, Akpata Street, Shomolu, to be sold to the first defendant/respondent herein for the sum of £7,050, and that which is located at 30, Ishoku Street, Ijebu-Ode to be sold to the second defendant/respondent herein for the sum of £700. After the judgment of Oyemade J in Suit No. 3/16/63 but after the plaintiff/respondent had entered his appeal and the defendants/appellants’ cross-appeal had also been entered in the Supreme Court) the plaintiff/respondent without waiting for the outcome of the said appeal, on the 26th day of January,
1966, as evidenced by a conveyance of the 23rd day of January, 1967, later registered as instrument No. 36 at page 36 in Volume 983 of the Lands Registry of Ibadan, sold the land and property at 46, Akpata Street, Shomolu to one Adaran Ogundiani of Odolameso in Ijebu-Mushin for the sum of £200. Following the sale of the property (ie the premises at 46, Akpata Street, Shomolu) and also the premises at 30, Ishoku Street, Ijebu-Ode (the possession of which was retained by the plaintiff) by the defendants/appellants to the first defendant/respondent and second defendant/respondent herein respectively, the plaintiff/respondent commenced these proceedings.

At this stage, we think it is desirable to set out certain relevant paragraphs in the pleadings delivered on either side. Paragraphs 15, 16, 17, 21 and 21(b) of the statement of claim read:

“15. The first defendant in favour of whom specific performance was decreed did not comply with the terms of the contract alleged to be existing between the first defendant and the plaintiff.

16. The plaintiff further states that the conditions precedent to the execution of a specific performance by the plaintiff were not fulfilled or set in motion by the first defendant.

17. The first defendant, without notice to the plaintiff procured the Registrar of the High Court, Ijebu-Ode to execute a legal mortgage of the said buildings in its favour.

21. The plaintiff will contend at the trial of this action that the purported legal mortgage executed by the Registrar of the High Court, Ijebu-Ode, in respect of the properties (sic) were illegal, irregular, null and void and of no effect, on the following grounds:–

(a) illegality: in that the registrar had no locus standi to execute the particular legal mortgages;

(b) that conditions precedent to the purported execution thereof were not complied with in law and in fact;

(c) that the Supreme Court decreed for a specific performance of the contract and not the execution of a legal mortgage;
a  
(d) that it was not shown that a specific sum of money 
was owing by the mortgagor to the mortgagee at the 
time of the execution;

b  
(e) that the execution was done without or in excess of 
jurisdiction;

(f) *non est factum*.

c  
21(b) That conditions precedent to the purported execution 
thereof were not complied with in law in that:–

(i) the letter of first defendant’s Counsel inviting the 
Registrar of the High Court to execute the legal 
mortgage by proxy does not fulfil the requirement 
of the provisions of Order X, rule 11 of the Sheriff 
and Civil Process Law, (Cap 116) of the Laws of 
Western State of Nigeria;

(ii) the despatch of the mortgage deed and Lands Form 
1A to the Registrar of the High Court does not con-
stitute a tender to the court as required by law;

(iii) that the terms of the judgment of the Supreme Court 
did not include direction to execute any legal mort-
gage;

(iv) that no formal application was made to the court 
alleging failure, neglect or refusal by the plaintiff to 
execute the said deeds and other papers.”

g  
The relevant paragraph in the pleadings of the defen-
dants/appellants (apart from the general traverse in the lead-
ing paragraphs and some of the paragraphs confirmed to 
specific denial of certain material specific allegations in the 
statement of claim) are 7, 8, 11 and 12, and these read:–

h  
“7. Following the decision of the Supreme Court in Appeal No. 
F.S.C. 362/66 . . . the bank by letters and personal visits by 
its Ijebu-Ode Manager called upon the plaintiff and pre-
sented him a deed of mortgage in respect of the two (props-
ties) for execution in specific performance as ordered by 
the Supreme Court, as well as Lands Form 1A for approval 
of the transaction. The plaintiff refused to execute and sign 
the deed and the forms and confirmed his refusal by writing 
under his hand dated 20th January, 1970.

i  
8. Upon the plaintiff’s refusal to put into effect the judgment of 
the Supreme Court, the bank in compliance with law applied
to the Higher Registrar of the High Court of Justice, Ijebu-Ode who executed the deed of mortgage and signed the Lands Form 1A in accordance with the terms of the judgment.

11. Following the mortgage herein before referred to, the bank by notice dated 15th July, 1970, made formal demand on the plaintiff requiring (him) to pay the sum of £6,401.1.8d then due and sent the same by registered post to the plaintiff’s address at 50, Ishoku Street, Ijebu-Ode but the plaintiff refused to claim the notice which was returned.

12. The bank again forwarded another and identical bank notice to the plaintiff at his said address by registered post which he also refused to claim. The plaintiff also refused to accept a notice of the same date from the bank manager who made several attempts to deliver it to the plaintiff during the first two weeks of September, 1970.”

(We think we should point out at this stage that the property referred to in these proceedings, sometimes as “30, Ishoku Street”, is the same as 30, Iboku Street, which, indeed, is the correct designation).

In the course of his evidence the plaintiff admitted that the bank manager came to his house subsequent to the judgment of the Supreme Court in S.C. 362/66 and requested that he should sign a legal mortgage but be refused to do so as he had already sold the property to a third party.

At the close of the case the learned trial Judge reviewed the evidence before him against the issues joined by parties on the pleadings and by his judgment of the 19th day of June, 1972, dismissed the claims of the plaintiff/respondent herein.

However, in dealing with the submissions of learned Counsel for the plaintiff/respondent that the legal mortgages in the case in hand were invalid because the conditions precedent to a valid execution of the same had neither been fulfilled nor set in motion by the defendants/appellants the learned trial Judge examined in detail the provisions of Order X, rule 11 of the Judgments (Enforcement) Rules, (Cap 116), hereinafter referred to as “the Sheriffs and Civil Process Rules, (Cap
“1. the learned trial Judge erred in law in assuming that Order X, rule 11 of the Sheriffs and Civil Process Rules is capable of being read in the light of section 22 of the High Court Law aforesaid because:

(a) the two provisions are clearly inconsistent in the sense that they purport to lay down somewhat different rules for the same object;

(b) Order X, rule 11 aforesaid is accordingly null and void; and

2. the learned Judge erred in law and on the facts in failing to observe that the decree for specific performance ordered by the Supreme Court in S.C. 362/66 any deed, conveyance or other document to be executed; and

3. the learned Judge erred in law and on the facts in failing to observe that there being no judgment directing the plaintiff to execute any deed, conveyance or other document neither section 22 of the High Court Law nor (if it is valid) Order X, rule 11 of the Sheriffs and Civil Process Rules aforesaid are applicable to the facts of this case.”
inconsistent with those of the substantive legislation (or principal law) on the same subject then the former must be considered nugatory. Learned Counsel then referred to the cases of Strickland v. Hayes (1896) 1 B.D. 290; Thomas v. Sutter (1900) 1 Ch. 10; and Powell v. May (1946) K.B. 330 in further support of his submission. The effect of the submission of Counsel in this: The defendants/appellants in acting, under Order X, rule 11 of Cap 116 which is nugatory being inconsistent with section 22 of the High Court Law, (Cap 44) aforesaid, when they procured the High Court Registrar to execute the legal mortgages in question in the case in hand could only have obtained invalid documents and; therefore, a sale made under the invalid documents must be null and void; and the learned trial Judge in the High Court erred in law in upholding the sale and dismissing the claims of the plaintiff/respondent.

Further, learned Counsel for the plaintiff/respondent submitted to us, as he did in the Court of Appeal, that the effect of rule 11 of Order X, (Cap 116) aforesaid is to limit the field of choice of persons whom the court may order to execute a document in the circumstances set down in the Rule, by specifically “tying down the hands of the court” (as it were) which it requires to select only the registrar whereas the field of selection as provided in the substantive law (section 22 of the High Court Law, (Cap 44) aforesaid) is definitely wider.

The Court of Appeal in a majority judgment, Akinkugbe JCA (as he then was) dissenting, found favour with the submissions of learned Counsel for the plaintiff/respondent and allowing the appeal set aside the judgment and order of the High Court of Ijebu-Ode of the 19th day of June, 1972, and in substitution therefor ordered that judgment be entered for the plaintiff/respondent in terms of the first four claims on his writ. The first defendants (Barclays Bank of Nigeria Limited) have now appealed to this Court (and throughout this judgment they have been, and will hereafter be, referred to as the defendants/appellants).
We will now examine the submissions put before us. It is, we think, necessary to set out in detail the provisions of section 22 of the High Court Law, (Cap 44) aforesaid and Order X, rule 11, (Cap 116) aforesaid; the former reads:–

“Where any person neglects or refuses to comply with a judgment or order directing him to execute any conveyance, contract or other document or to endorse any negotiable instrument the court may on such terms and conditions, if any, as may be just, order that the conveyance, contract or other document shall be executed or that the negotiable instrument shall be endorsed by such person as the court may nominate for that purpose, and a conveyance, contract, document or other instrument so executed or endorsed shall operate and be for all purposes as valid as if it had been executed or endorsed by the person originally directed to execute or endorse it”

And the latter reads:–

“Where a judgment directs any deed to be executed or any negotiable instrument to be endorsed, and the party ordered to execute or endorse such deed or such deed or negotiable instrument shall neglect or refuse so to do, any party interested in having the same executed or endorsed may prepare a deed or endorsement of the instrument in accordance with the terms of the judgment and tender the same to the court for execution, upon the proper stamp (if any is required by law), and the execution thereof by the Registrar in the form prescribed by rule 13 of Order VI shall have the same effect as the execution or endorsement thereof by the party ordered to execute.”

In this Court, learned Counsel for the plaintiff/respondent has pressed the submission that (1) the provisions of Order X, rule 11 (Cap 116) aforesaid, being inconsistent with the provisions of section 22 of the High Court Law (Cap 44) aforesaid, are nugatory and cannot be validly acted upon; and (2) that appropriate action can be taken, in the circumstances of the case in hand, only under the provisions of section 22 of Cap 44 aforesaid which according to the submission of learned Counsel for the plaintiff/respondent contemplates that there must be already in existence a conveyance, instrument
or document, to be executed or endorsed when the order being flouted or disobeyed was made; and such, however, is not the position in the appeal in hand.

Now, the first part of the submission in the immediately preceding paragraph relates to the issue of subordinate legislation and the cases cited by learned Counsel for the plaintiff/respondent in support of his contention relate in the main to bylaws. “Subordinate legislation is legislation made by a person or body other than the sovereign in Parliament by virtue of powers conferred either by statute or by legislation which is itself made under statutory powers” (see Halsbury’s Laws of England (3ed), Volume 36, page 476, paragraph 723).

Subordinated legislation is invalid if it is repugnant to the general law of the country or if it is repugnant to the provisions of a statute which delegates to the body or person making it, the powers so to do.

“It is, however, not bad merely because it deals with something which the general law does not deal with or because it makes unlawful something which the general law does not make unlawful, but it must not, expressly or by necessary implication, profess to alter the general law by making something unlawful which the general law makes lawful, or vice versa, or by adding something inconsistent with the provisions of a statute creating the same offence” (see on the subject of by-laws).

Accordingly, subordinate legislation “is prima facie ultra vires if it is inconsistent with the substantive provisions of the statute by which the enabling power is conferred” (which is not the case here) “or of any other statute” (which is alleged or submitted to be the case here; “and equally, of course, if it purports to affect existing statutes expressly (see Halsbury’s Laws of England (3ed), Volume 36, pages 491-492, paragraph 743).

Now, it appears to us that section 22 of the High Court Law, (Cap 44) aforesaid gives a court power “on such terms and conditions, if any, as may be just” in the circumstances.
envisaged by the section to order a conveyance, instrument or document or contract, to be executed or endorsed “by such person as the court may nominate for that purpose” (and this really means: any person whosoever including the Registrar of the court as the court may select or nominate). Order X, rule 11 of Cap 116 aforesaid merely ordains that in circumstances which come within the purview of the rule then upon proper stamping if necessary of a document, instrument, or deed tendered to the court for execution, “the execution of the same by the Registrar in the form prescribed by rule 13 of Order VI (ie of Cap 116 aforesaid) shall have the same effect as the execution or endorsement thereof by the party ordered to execute.” There is in our view no inconsistency between the two provisions. Section 22 of Cap 44 aforesaid undoubtedly provides a wider field of selection for people who may execute the instrument (and this includes the person mentioned in Order X, rule 11 of Cap 116) while rule 11 aforesaid (ie rule 11 of Order X, (Cap 116)) provides that execution or endorsement of the documents therein enumerated, in the circumstances provided for in that rule, by a particular person (ie the Registrar of the High Court although one of the persons who may, in the circumstances provided in section 22 of Cap 44 aforesaid, also be selected to carry out the duties envisaged in that section) in the particular form prescribed within the rule shall per se have effect as if execution or endorsement had been carried out by the party ordered to execute the same. We see nothing in section 22 of Cap 44 aforesaid which by necessary implication excludes, or makes inconsistent with it, a provision in a rule (such as Order X, rule 11 aforesaid) made specifically for enforcement of judgments and, ordaining that the execution of deeds or endorsement of instruments by a particular person (not being a person who is excluded by the statute, that is, section 22 of Cap 44 aforesaid) in a particular manner shall have effect as if it had been executed by a person who was expected to do so under a decree of the court. One good reason for the rule is that getting the
Registrar to execute or endorse the documents in circumstances within the rule may and could be time-saving. Before we leave this aspect of the matter we wish to draw attention to the statements of Channell J and Hannon J in two cases which apart from the general principles of law already stated earlier on, in our opinion, also lend support to the view we take of this matter:

“On the question of repugnancy, I repeat what I have said before. A by-law is not repugnant to the general law merely because it creates a new offence, and says that something shall be unlawful which the law does not say is unlawful. It is repugnant if it expressly or by necessary implication professes to alter the general law of the land.” (See Gentel v. Rapps (1902) 1 K.B. 160 at 165/166 per Channel J (italics supplied)

And in Irving v. Askew (1870) 5 L.R.Q.B. 208 at 211, Hannon J observed:

“It was further urged on behalf of the County Court Judge, that the 192nd Rule was repugnant to section 15 of 13 and 14 Chapter 61, and therefore invalid. If the rule were really repugnant to the provisions of the Act of Parliament, I should think that the rule, though made under the provisions of the Act, would not override its enactment; but I do not see that such repugnance exists. Section 15 enacts that the appeal shall be in the form of a case agreed on by both parties or their attorneys, and if they cannot agree, the judge of the county court shall settle the case and sign it? This does not provide any mode of authenticating a case agreed by both the parties. But it does not exclude the making of any rule or regulation on that subject if it should be found necessary to do so, and I think that good reasons may be given for requiring that the judge should sign the case even though the parties have agreed upon it.”

We are, therefore, satisfied that there is no inconsistency between the provisions of section 22 of the High Court Law, (Cap 44) aforesaid and Order X, rule 11 of Cap 116 aforesaid and that the provisions of the latter are far from nugatory. In our view, the majority judgment of the Court of Appeal on this particular issue is very much in error.

We will now deal with the submissions of learned Counsel for the plaintiff/respondent that, in any event, the provisions...
of rule 11 of Order X, (Cap 116) are inapplicable to the facts of the case in hand because, as he contends, (i) the decree for specific performance ordered by the Supreme Court in S.C. 362/66 is not in terms of a judgment directing any deed or conveyance to be executed and; (ii) the provisions of the rule contemplates that there must be in existence, at the time of the Judgment of the court, a conveyance or deed to be executed and to which the order for specific performance must have been directed, or can be attached. In support of his contention learned Counsel for the plaintiff/respondent drew our attention to section 47 of the Judicature Act, 1925 the provisions of which are, in pari materia with section 22 of Cap 44 aforesaid. Learned Counsel then referred to precedents Nos. 45 and 47 in Volume 33 of the (2ed) of Atkins Court Forms, which he contends indicate the procedure to be followed in these matters. There is no doubt that under the provisions of section 22 of the High Court Law, (Cap 44) aforesaid it is necessary to follow a procedure analogous to that which is set out in the precedents referred to in Volume 35 of Atkins Court Forms (ie Precedent Nos. 45 and 47). The provisions of the said section make it clear that the court may on such terms and conditions as may seem just order that the conveyance be executed by another person; thus, the section contemplates that the application to substitute the party originally ordered to execute the conveyance, should generally be on notice to that party or at least that the court may impose terms and conditions to its order for substitution of the party to whom the order for execution was originally directed. The language of Order X, rule 11, (Cap 116) is, however, different. It ordains that if the party ordered to execute a deed (or to endorse a negotiable instrument) should refuse to do so then “any party interested in having the same executed or endorsed, may prepare a deed (or endorsement of the instrument) in accordance with the terms of the Judgment and tender the same to the court for execution” and provided it has been properly stamped (in the
case of a document required to be stamped) then the execu-
tion of the same by the Registrar of the court in the form pre-
scribed by rule 13 of Order VI of Cap 116 shall have the
same effect as the execution or endorsement thereof by the
party originally ordered to execute the same. It is to be noted
that under the provisions of rule 11 of Order X aforesaid, no
question arises as to substitution of the party affected by the
original order being made “upon such terms and conditions as
may seem just to the court.” What seems to be necessary for
this Rule (Order X, rule 11) to operate, is (1) an invitation to
the party required under the order of court to execute the rele-
vant document, (2) a refusal or neglect by the said party to
carry out the said order of court; and thereupon the party in-
terested may prepare a deed in terms of the order of the court
tender the same to court for the signature of the Registrar.
There must be clear evidence (as here) of (1) an invitation of
the party ordered by court to execute the document; and (2)
there must also be clear evidence (as here) of the party’s re-
fulsion or neglect to carry out the court’s order. Thereafter the
party interested may prepare the document in terms of the
judgment of the court and tender the same to the court for
execution. There is no particular procedure laid down for ten-
dering the same to court; and as we observed earlier on, a no-
tice of motion is not a *sine qua non*, that is, it is not contem-
plicated as necessary within this rule, at this stage. Therefore,
when, as here, it is shown that the document or instrument
after it has been prepared (following a refusal or neglect of
the party originally ordered to execute the same) was lodged
with the High Court Registrar for execution the registrar un-
doubtedly has a duty to bring the same to the notice of the
judge who on being satisfied with the documents will
authorise its execution by the registrar; this undoubtedly is a
matter for the internal administration of the registry. When,
as here, the document is shown to have complied with the
terms of the judgment or order of court (as required by Or-
der X, rule II) and it is further shown (as here) to have been
executed by the Registrar in the form prescribed by rule 13
of Order VI the onus, in our view, (if the specific issue was so raised on the pleadings which is not the case here) is on the party asserting that the execution had not been author-
ised by the court, to establish the same. There is no evidence of lack of authority of the court on the part of the Registrar in executing the two legal mortgages under rule II of Order X, (Cap 116) aforesaid.

In view of the foregoing observations we are unable to up-
hold the contentions and submissions of learned Counsel for the plaintiff/respondent and are satisfied that the Court of Appeal erred in law in the view contained in the majority judgment that the provisions of Order X, rule II of Cap 116 aforesaid are nugatory. The matter, however, does not rest there since this Court has still to determine the resultant positions of the second and third respondents vis-a-vis Ashiru (the plaintiff/respondent) and Ogundiani (the purchaser from Ashiru qua vendor of the premises at 46, Akpata Street, Shomolu, Lagos) in order to arrive at the proper order on the claims in these proceedings. There is, however, no problem with the property situate at 30, Ishoku Street, Ijebu-Ode. At the time of the execution of the legal mortgage by the Regis-
trar of the High Court in favour of the bank (defen-
dants/appellants herein) the owner Ashiru (plain-
tiff/respondent herein) had not divested (or attempted to di-
vest) himself of his legal estate in that property.

Therefore, the Registrar of the High Court, Ijebu-Ode (here-
after referred to simply as “the Registrar at Ijebu-Ode”) by the legal mortgage he signed on behalf of Ashiru duly trans-
ferred the legal estate therein to the bank who pursuant to its exercise of its power of sale thereunder duly transferred the legal estate to Chief Oresanya (the second defend-
ant/respondent). There is need, however, to consider in de-
tail the nature and effect of the purported sale of the property at 46, Akpata Street, Shomolu, Lagos to Ogundiani. There is evidence that Ogundiani bought this property with actual no-
tice and full knowledge of the fact and nature of the security
which the said property constituted in favour of the defendants/appellants (in this judgment also referred to simply as “the bank”). He, therefore, took the legal estate (if, at law and in equity, he did) subject to the bank’s equitable mortgage (and, as we have already explained in the judgment delivered this morning in the Appeal No. 470/75, that in the circumstances, the purported transfer of the legal estate aforesaid, if effective, ought not to be allowed, in equity, to supersede the equitable rights of the bank until he (Ogundiani) or Ashiru (the plaintiff/respondent) gets “rid of” the bank’s equitable mortgage (see Jared v. Clements (1903) 1 Ch. 428); and if not “got rid of,” the purported sale of the legal estate cannot avail the plaintiff/respondent and/or Ogundiani against the bank. We have taken the precaution of querying the effectiveness of the purported transfer of the legal estate in 46, Akpata Street, Shomolu to Ogundiani by Ashiru because of the effect of the doctrine of *lis pendens* on this particular transaction. We dwelt at length already with the equitable doctrine of “Notice” in our Judgment in S.C. 470/75, delivered this morning and no useful purpose will be served in going over the grounds again or repeating our reasons for the above view. Again, it should be pointed out that where, as here, there is a prior covenant by which a person (in this case, the vendor) binds himself to convey the legal estate in a particular property, if called upon so to do, to another (in this case, a mortgagee), a subsequent conveyance by the vendor of the legal estate in the same property to a third party (as purchaser) must be void – not voidable – not on the ground of the transaction being in fraud of creditors (ie offending the relevant section of the statute which provides against conveyances in fraud of creditors) but on the ground that, in equity, he (the vendor) cannot while the covenant under which he is bound to convey the legal estate to the earlier obligee is still in force, convey the same to another. But the transaction in respect of this property (ie 46, Akpata Street, Shomolu, Lagos) is clearly caught by another doctrine of law, the doctrine of *lis pendens* which hardly has
any bearing on the equitable doctrine of notice. It has been said that the doctrine affecting a purchaser is not founded upon any doctrine of actual or constructive notice, but upon the fact that the law does not allow to litigant parties, and give to them pending the litigation, rights in the property in dispute so as to prejudice the opposite party. Usually taken as the clearest exposition of this doctrine is the statement of Turner LJ in *Bellamy v. Sabine* (1857) 26 L.J. (N.S.) Equity Reports 797 at 803, and we will quote extensively from the said judgment:

“The doctrine of *lis pendens* is not, as I conceive founded upon any of the peculiar tenets of a court of equity as to implied or constructive notice. It is, as I think, a doctrine common to the courts both of law and equity, and rests, as I apprehend, upon this foundation that it would plainly be impossible that any action or suit could be brought to a successful termination if alienations *pendente lite* were permitted to prevail. The plaintiff would be liable in every case to be defeated by the defendant alienating before the judgment or decree, and would be driven to commence his proceedings *de novo*, subject again to be defeated by the same course of proceeding. That this doctrine belongs to a court of law no less than courts of equity appears from a passage in 2 Inst. 375, where Lord Coke, referring to an alienation by a mesne lord pending a write, says that the alienee could not take advantage of a particular provision in the Statute of Westminster 2nd ‘because he came to the mesnalty *pendente brevi*, and in judgment of law the mesne (as to the plaintiff) remains seised of the mesnalty; for *pendants lite nihil innovetur*’; and though *Lord Bacon’s Orders*, which give the rule in equity, are very generally expressed the language of the order upon this subject being ‘no decree bindeth any that cometh in *bona fide* by conveyance from the defendant before the bill exhibited, and is made no party, neither by bill nor order; but where he comes in *pendante lite* and while the suit is in full prosecution (and this includes while the suit is under appeal), and without any colour of allowance or privity of the court, there regularly the decree bindeth’, this Order must, I think, be understood to mean that the decree binds so far as the title of the plaintiff is concerned . . .” (Italics and square brackets supplied by the court.)
In the same suit, the Lord Chancellor made these pertinent observations:—

“It is scarcely accurate to speak of *lis pendens* as affecting a purchaser upon the doctrine of notice, although undoubtedly the language of the court often so describes its operation. It affects him not because it amounts to notice but because the law does not allow to litigants parties and give to them pending the litigation, rights in the property in dispute, so as to prejudice the opposite party. Where a litigation is pending between a plaintiff and a defendant, as to the right to a particular estate, the necessities of mankind require that the decision of the court in the suit shall be binding, not only on the litigant parties, but also upon those who derive title under them by alienation made pending the suit; whether such alienees had, or had not, notice of the pending proceedings. If this were so there could be no certainty that litigation would ever come to an end. A mortgage or sale made before a final decree to a person who had no notice of pending proceedings, would always render a new suit necessary; and so interminable litigation might be the consequence . . .” (1857) 26 L.J. (N.S.) Equity Reports at 801.

Later in his judgment the Lord Chancellor in support of the above principle of law stated clearly the additional burden and effect which the equitable doctrine of notice can place on a purchaser. Said the learned Lord Chancellor:—

“Notice of the equitable claim insisted on by the plaintiff would prevent their setting up a legal title against that claim; and whether the notice came to them by means of their being made aware that a suit was pending, in which the right claimed appeared to be claimed, or in any other manner would be immaterial. But in such a case the legal title would be affected not by reason of their being *lis pendens*, but by reason of the mortgagees [and/or purchaser] having notice of the claim . . . That this is the true doctrine as to *lis pendens*, appears to me not only founded on principle, but also consistent with the authorities. In *Culpepper v. Aston* 2 Ch. Case 115, land had been devised to a trustee to sell for payment of debts. The heir filed his bill against the trustee, alleging that the real estate was not wanted for the debts, and therefore, praying a conveyance. It was held that a *sale* by the trustee *pendente lite* did not bind the heir. So in *Sorrell v. Carpenter* 2. P.Wms.487, the plaintiff instituted a suit against one Ligo upon a claim, which by the decree he established to certain leasehold estates. Pending the suit,
Ligo sold to the defendant. The question was, whether the defendant Carpenter could sustain his purchase. Lord King was clear that he could not, although upon some formal ground the bill in that case was doctrine really was that pending a litigation, a defendant cannot by alienation affect the right of the plaintiff to the property in dispute . . .” (Square brackets and underlining supplied by this Court). (See (1857) 26 L.J. (N.S.) Equity Report at page 801).

The case of Bellamy v. Sabine is a decision of a Full Court of Appeal and we have quoted at length from portions of the Judgments of their Lordships of the Court of Appeal which we consider germane to the rather complex legal situation which has arisen as a result of the fraudulent transaction between Ashiru (the plaintiff/respondent herein; and his accomplice, Ogundiani (the purchaser from Ashiru).

Now applying the doctrine of lis pendens as confirmed in the case of Bellamy (supra) to the facts in these proceedings what do we find?

1. Ashiru selling to Ogundiani the property (46 Akpata Street, Shomolu, Lagos) which was the subject of a pending claim for specific performance at the instance of the bank (as the plaintiff) in Suit No. J/18/63 in circumstances which are, undoubtedly, fraudulent. And, here, we must point out that notwithstanding the determination by Oyemade J the claim was still pending as it was still – to borrow the language of Turner LJ in Bellamy (supra) – in full prosecution, that is, under appeal, as the case of Kinsman v. Kinsman has shown (see (1831) 1 Russ X.M. 617; also 39 E.R. 236; for as the Lord Chancellor (Lyndhurst) pointed out in that case, “in order to constitute a litis pendentia, there must be a continuance of the litis contestatio” (see 39 E.R. at 238).

2. Pending the appeal, and without waiting for determination on the cross-appeal by the bank or on his own appeal Ashiru sold to Ogundiani who knew full well that (a) the property he was buying was security for money due and owing to the bank who kept the title deeds under a memorandum of deposit of title deeds in which his vendor had covenanted to execute, in favour of the bank, a legal mortgage in respect of the same property; and (b) that the pending claim was one in
which the bank was already calling for the legal estate he was buying for the claim in the suit, to the knowledge of Ogundiani was for specific performance of the vital clause in the memorandum of deposit of title deeds.”

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 person’s property (see also *Wigram v. Buckley* (1894) 3 Ch. 483 at 486 and 592-593). That the doctrine exists at common law is confirmed in *Sorrell v. Carpenter* (supra) and a *lis pendens* only became compulsorily registrable for the first time in England by the State 2 and 3 Victoria Chapter II (Judgments Act, 1839); until then the common law principles of the doctrine applied with full effect. As was stated in *Sorrell v. Carpenter*:

“Where there is a conveyance made *pendente lite* . . . even though the alienation be for ever so good a consideration, yet if made *pendente lite*, the purchase is to be set aside; and this is in imitation of the proceedings in a real action at common law, where, if the defendant aliens after the pendency of the writ, the judgment in the real action will over-reach such alienation. But where there is a real and fair purchaser without any notice, it is a very hard case, especially in a Court of Equity, to set such purchase aside . . .” (per the Lord Chancellor in *Sorrell* (supra) at 2 P. Wms. 482 at 483).

It only remains for us to mention that none of the statutes which before 1900 made the registration of *lis pendens* compulsory in the United Kingdom qualify, here, as one of “general application” and in any event, at all material times to the trial of this case in the High Court of Lagos, the Law of England Application Law (Cap 60) of the Laws of Western Nigeria, in Volume 3 of the 1959 Edition of the Laws of Western Nigeria, was applicable to these proceedings and any statute which in England required the registration of a *lis pendens* would be inapplicable to these proceedings; and, therefore, there is no local statutory requirement for registration.
of *lis pendens* applicable to these proceedings. It follows, therefore, that the claims of the plaintiff/respondent in items (3) and (4) in these proceedings cannot succeed.

Two other aspects of the submissions made in this appeal relate (1) to conditions for the award of declaratory judgments and, (2) the issue of fraudulent conveyance, that is, conveyances in fraud of creditors and we think we should now deal with the two subjects; we prefer to begin with the former. The question quite often raised, is whether or not the declaratory judgment is an equitable remedy and whether the court should be guided by equitable principles in making the award? In other words should a plaintiff who seeks the remedy fail, if it is shown that he has not come to the court with clean hands or, as the expression goes, that he should himself “do equity”? The case of *Chapman v. Michaelson* (1900) 2 Ch. 612; affirmed in (1909) 1 Ch. 238, is generally regarded as one of the decisions in which this question was directly discussed and dealt with, and it was there decided that the declaratory judgment is not an equitable remedy (see Eve J (1908) 2 Ch. at 620-622; and Cozens-Hardy MR (1909) 1 Ch. at 242). However, in a more recent case of *Hordern-Richmond Ltd v. Duncan* (1947) K.B. 545 at 552, the power to award declarations was ascribed to the equitable jurisdiction of the court. The description of the remedy as an equitable relief seems justifiable on historical grounds and legal history shows that its equitable origin has left its marks (ie equitable marks) on the remedy. Therefore, it has remained a remedy of a discretionary nature and the discretion of the courts in this regard is wide enough to allow it to take into account virtually all objections and/or defences available in all equitable proceedings in favour of a party resisting a claim for the remedy; and accordingly, in one of the many cases in which the courts have entertained equitable defences to the claim, it was indicated that inequitable behaviour on the part of the plaintiff might be raised as a defence in declaratory proceedings. (See *City of London v. Horner* (1914) 111 L.T. 512).
We have accordingly examined the general conduct of the plaintiff/respondent, as borne out by the findings of fact in the court of trial, and are satisfied that far from satisfactory it savoured of a calculated attempt to despoil the defendants/appellants of the fruits of judgment (on their claim for specific performance of clause (2) of the memoranda of Deposit of Deeds aforesaid) in the event of the defendants/respondents’ cross-appeal from the judgment of Oyemade J in J/18/63 aforesaid being allowed. His action, in those circumstances, in effecting a sale of the very property involved in the claim for specific performance in Suit No. J/18/63 was indeed dishonest and fraudulent. His action in not only keeping to himself the purchase price of this property but also, not informing the bank (defendants/appellants) of the sale which took place in January, 1966 until January, 1970, underscores not only the plaintiff/respondent’s dishonest disposition but his fraudulent intention in making the conveyance to Ogundiani; he certainly, in these proceedings, has not come to the court with clean hands. In the circumstances, therefore, the plaintiff/respondent, in our view, is not entitled to the declarations he seeks and they were rightly dismissed by the court of trial.

Again, the question of the conveyance by the plaintiff/respondent in favour of Ogundiani having been made in fraud of creditors, in this case, the bank, received full consideration in our judgment in S.C. 420/75 delivered earlier on this morning and there is, in our view, no point in repeating here everything that was said in that judgment. It is, however, sufficient to say that we are satisfied that the said conveyance was made by Ashiru not only with the undoubted intent of defrauding the bank but that the third party, Ogundiani, actively took part in the fraudulent scheme. However, the relevant law on the subject is that such a conveyance is voidable at the instance of any person prejudiced (section 161 of the Property and Conveyancing Law (Cap 190) of the 1959 Edition of the Laws of Western State, applicable to these proceedings; Volume 5 of the
Laws of Western Region of Nigeria) and NOT, ipso facto, void. There is no cross-claim, cross-action or cross-prayer, by the bank in these proceedings for the conveyance by Ashiru (plaintiff/respondent) to Ogundiani (the third party) to be set aside; accordingly the bank cannot, in these proceedings, avail itself of the provisions of section 161 of Cap 190 aforesaid.

This appeal, therefore, succeeds for the reasons already stated in regard to our observations on (1) Order X, rule 11 of Cap 116 aforesaid, (2) the doctrine of lis pendens and (3) the principles for the award of declaratory judgments. The majority judgment of the Western State Court of Appeal in CAW/50/74 dated the 21st day of May, 1975, together with the order for costs are hereby set aside. This court hereby affirms the judgment and orders of the High Court of Western State holden at Ijebu-Ode (Olu Ayoola J) in Suit No. ECJ/16/71 dated the 14th day of June, 1972. The defendants/appellants shall have costs against the plaintiff/respondent, in the Court of Appeal assessed and fixed at ₦160 and in this court assessed and fixed at ₦340.

HIGH COURT OF LAGOS STATE

SAVAGE J

Date of Judgment: 8 JULY 1978

Suit No.: L.D. 1274/74

Banking – Banking and customer – Customer’s cheque returned unpaid when account in credit – Bank marking cheque “Account frozen under Banking Decree” whereas freezing order had expired – Whether action of bank constitutes negligence – Quantum of damages recoverable

Facts

The plaintiff was a printer and trader carrying on a printing business in Lagos. He maintained a current account and a deposit account with the defendant, the National Bank of Nigeria Limited his account with the defendant bank was blocked by the Central Bank from the month of August, 1972 to August, 1973, a period of one year. On the 11th of September, 1973, the plaintiff drew a cheque, exhibit A on his account with the defendant bank for the sum of ₦400 which he needed in buying materials for his printing business.

The plaintiff had sufficient funds in his account at the material time to meet exhibit A.

Exhibits A was returned unpaid and marked by the defendant “Account frozen under Banking Decree.”

On 31st of October, 1973, the defendant wrote the plaintiff admitting that the cheques was inadvertently returned unpaid as the freezing order had expired 16 days previously and apologised for it.

The plaintiff took action against the defendant claiming the sum of ₦40,000 as damages for libel and negligence of the defendant whereby the plaintiff’s cheque was returned unpaid.
when the had sufficient credit at the materials time.

The claim for libel was subsequently withdrawn and struck out.

Held –

1. The primary function and duty of any bank is to honour the cheques of its customers provided that the state of the account of the customer concerned is such as to warrant the bank doing so, and there is no legal reason or excuse to the contrary. The obligation of the bank to pay, therefore, is only subject to the condition that there are funds of customer sufficient and available for the purpose.

2. A banker who had a sum of money belonging to his customer, became the customer’s debtor and was therefore bound to pay a cheque drawn by such customer after the lapse of a reasonable time affording an opportunity to the different persons in the defendant’s establishment of knowing the fact that the money was available. Refusal to pay, in such circumstances was a breach of duty for which an action would lie.

3. Although the moment the bank became aware of the lifting of the embargo on the customer’s account, it could not be expected that the branch office should be immediately acquainted with the fact, but in case the defendant had in 10 days for more than ample time having regard to the circumstances with which to communicate the fact to the branch office.

4. As it is undisputed that the customer was a trader, it is not necessary for him to prove that any damage in fact had been suffered by him.

5. In an action of tort which are in substance founded upon contract and might have been brought in contract the same principle applies that nominal damages are recoverable although no actual damage can be proved.

Judgment for the plaintiff.
Cases referred to in the judgment

**Foreign**

Marzetti v. Williams and others [1824] All E.R. 150

**Book referred to in the judgment**


**Counsel**

For the plaintiff: *Akande*

For the defendant: *Mogaji*

**Judgment**

SAVAGE J: The plaintiff’s claim against the defendant is for ₦40,000 damages for libel and for the negligence of the defendant whereby the plaintiff’s cheque No. LBH 125898 dated 11th September, 1973 was returned unpaid when in fact the plaintiff’s account with the defendants was in sufficient credit at the material time.

Learned Counsel for the plaintiff said he was not pressing the issue of libel and was therefore abandoning the claim under that head; consequently no evidence was led in that regard.

The plaintiff alone gave evidence.

Paragraphs 1, 4, 7 and 9 of the statement of claim read as follows:

“1. The plaintiff is a printer and trader carrying on his business within the municipality of Lagos, but his activities covers the whole Federation of Nigeria.

4. The blocking of the plaintiff’s account lapsed at the end of August, 1973 and on 11th of September, 1973 the plaintiff drew a cheque No. LB H125898 on his said current account for the sum of ₦400 which he intended to spend in buying materials for his printing business, but it was returned unpaid by the bank’s servant (the cashier to whom it was presented) who remarked on it ‘Accounts frozen under Banking Decree’ whereas that was not true.
7. The failure to honour the said cheque was a negligent act on the part of the defendant acting through its servant (the cashier at the material time) in that the plaintiff’s account with the bank was not frozen at the time of its presentation. It also frustrated the plaintiff’s efforts to transact his normal business to make profit by denying him the opportunity of drawing out money to do so.

9. The defendant admitted its negligence in question by its letter dated 31st October, 1973 and knew that the said negligence was likely to cause the plaintiff inconvenience and also in his trade and business because it is well aware that the accounts were in connection with his business.”

The defendants pleaded in paragraph 3 and 5 of the statement of defence as follows:

“3. The plaintiff had with the defendant a current account and a deposit account to the tune of N1,425.32 and N22,433.52 respectively as at the end of September, 1973.

5. The Marina Branch of the defendant where the plaintiff had his account was not aware of the expiry of the Central Bank’s order to block the plaintiff’s accounts hence the plaintiff’s cheque No. 125898 for N400 was not met.”

The following facts were established by evidence. The plaintiff was a printer and trader carrying on a printing business in Lagos. He maintained a current account and a deposit account with the defendants; the National Bank of Nigeria Limited his account with the defendant bank was blocked by the Central Bank from the month of August, 1972 to August, 1973, a period of one year. On the 11th of September, 1973 the plaintiff drew a cheque, exhibit A on his account with the defendant bank for the sum of N400 which he needed in buying materials for his printing business.

The plaintiff had sufficient funds in his account at the material time to meet exhibit A.

Exhibit A was returned unpaid and marked “Account frozen under Banking Decree.”
On the 31st of October, 1973, the defendant wrote exhibit C to the plaintiff. Exhibit C reads:

“Dear Sir,

Your current account No. 100025 cheque No. 125898 for ₦400

We refer to the above-mentioned cheque which was inadvertently returned unpaid on the 7th September, 1973, marked “Accounts frozen under Banking Decree.”

We regret to advise that the relative order has since expired on the 31st August, 1973, and you are therefore free to operate the account. We regret any inconvenience caused and ask you to accept our apologies accordingly.

Yours faithfully,


(Sgd)

Milton Job.”

Exhibit C speaks for itself. The defendant bank made a mistake and apologised for it.

It is well known that the primary function and duty of any bank is to honour the cheques of its customers provided that the state of the account of the customer concerned is such that warrant the bank doing so and there is no legal reason or excuse to the contrary. The obligation of the bank to pay, therefore, is only subject to the condition that there are funds of the customer sufficient and available for the purpose.

The plaintiff, at the material time, had sufficient funds with the defendants to meet exhibit A, the cheque for ₦400 and the funds were available. It is however, not disputed that there has been embargo on the plaintiff’s account with the defendant bank.

The embargo was subsequently lifted and was not in force at the time of the issue of exhibit A. The order enforcing the embargo according to exhibit C expired on 31 August, 1973. The plaintiff presented his cheque on 11 September, 1973, that is, some 10 days after the funds standing to the credit of the plaintiff became available for paying.
It was held in *Marzetti v. Williams and others* (1824 – 1834) All E.R. 150:

(i) a banker who received a sufficient sum of money belonging to his customer was bound to pay a cheque drawn by the customer after a lapse of such a reasonable time as would afford an opportunity to the persons in his establishment to know the fact of the receipt of the money;

(ii) a breach of that duty was a breach of contract;

(iii) the jury having found in an action by the customer that such a reasonable time had elapsed, the customer was entitled to nominal damages.”

It seems to me, therefore, that a banker who had a sum of money belonging to his customer, became the customer’s debtor and was therefore bound to pay a cheque drawn by such a customer after the lapse of a reasonable time affording opportunity to the different persons in the defendants establishment of knowing the fact that the money was available. Refusal to pay, in such circumstances was a breach of duty for which an action would lie.

The defendants wrote the plaintiff to say that the said embargo expired some ten days before exhibit A was presented for encashment at the defendants’ branch office at Marina, Lagos. I will concede that at the moment the defendants became aware of the lifting of the embargo, perhaps it could be expected that their Marina Branch should be immediately acquainted with the fact that the embargo had been lifted, a reasonable time must be allowed for that purpose. It is my view that in this case such a reasonable time had elapsed; the defendants had 10 days far more than ample time, having regard to the circumstances, within which to communicate the fact to their Marina Branch.

It was held in the *Marzetti*’s case that the customer was entitled to nominal damages. But substantial damages can be awarded in similar cases.

It is not disputed that the plaintiff, Mr Aderibigbe is a trader and for this reason, it is not necessary for him to prove that any damage has in fact been suffered by him.
In Halsbury’s, Volume 11 (3ed), paragraph 388 the following passage occurs: “. . . In actions of tort which are in substance founded upon contract and might have been brought in contract the same principle applies . . .” That is, nominal damages are recoverable although no actual damage can be proved.

The plaintiff said under cross-examination that at the time he presented exhibit A for payment, he knew that the order that his accounts with the defendant be frozen had been lifted, but he did not communicate the fact to the cashier at the Marina Branch of the defendant bank.

However, the defendant wrote exhibit C dated 31 October, 1973 to the plaintiff apologising to him for inadvertently returning exhibit A unpaid and informed the plaintiff that he was now free to operate his account. The plaintiff thereafter started operating his account. He agreed under cross-examination that by June, 1974, his account had dwindled to N1.74 and that in September of the same year he filed this action against the defendants. He however, had a substantial amount in a fixed deposit account with the defendants.

I have no doubt in my mind that the plaintiff has established the breach of duty on the part of the defendant to honour his cheque. There has been an infringement of legal rights by the breach of contract, and in the assertion of his right, the plaintiff ought to succeed; it is my view, however, that the court has to look into all the circumstances and at the conduct of both parties, and see where the blame is, and what ought to be the compensation according to the way the parties conducted themselves. I have held that the defendants were blameworthy. In fact, they admitted that much in exhibit C. The plaintiff himself who knew that the embargo on his account had been lifted did not mention the fact to the clerk at the Marina Branch of the defendants. This was in September, 1973. On receipt of exhibit C, he started to operate his account and did nothing about the infringement of his legal right until a year later. No explanation was given for
this delay. There is no evidence that the plaintiff had con-
tinuously been in his printing business at the material time
since he was himself under detention for a period. It would
appear that the only assignment he had, was the request for
student exercise books from the Erin-Ile Secondary School
in Kwara State in a letter dated 29 December, 1973, a time
when there was no restriction on his account with the defen-
dants to which reference was made.

As said, there is no doubt that there had been a breach of
duty on the part of the defendants for which an action would
lie. The claim for damages for libel was withdrawn and it is
accordingly struck out; but the plaintiff has established the
infringement of his legal right.

To this extent the plaintiff succeeds and for the reason
given above, I would award him *nominal* damages.

There will be judgment for the plaintiff in the sum of ₦100
damages.

The plaintiff will have the costs of this action assessed at
₦50.
Ochuuwa v. Barclays Bank of Nigeria Limited

HIGH COURT OF LAGOS STATE

BAMGBOYE J

Date of Judgment: 21 AUGUST 1978

Suit No.: L.D.108/77

Banking – Cheques – Wrongful dishonour of – Liability of bank – Damages

Facts

The plaintiff by his writ of summons claim against the defendants, the sum of N50,000 (fifty thousand naira) being damages for wrongful dishonour of the plaintiff’s cheques issued to various persons and companies at the Apapa Branch of the defendants between July, 1976 and August, 1976.

The defendant have refused or neglected to pay the said sum despite repeated demands.

The basic facts which seem to form the cause of this action are that the plaintiff, who was at the material time a branch manager with the firm of Messrs John Holt Shipping Services Limited, at the Muritala Mohammed Airport, Ikeja has been a customer of the defendant bank, since 1971, and for about seven years prior to the incident leading to this action has been maintaining a healthy current account with the Apapa Branch of the said bank. During the course of ordinary transactions and at a time when the plaintiff’s account was on a credit side with the defendant bank, he issued certain cheques in favour of his own company (ie Messrs John Holt Shipping Services Limited,) but were “referred to the drawer” by the employees or servants to the said defendant bank.

As soon as the facts of the incident were brought to the plaintiff’s knowledge, he felt aggrieved and he there and then contacted the defendant bank who seemed to have realised...
their mistakes, sent a letter to the plaintiff in which an apology was tendered to him. The letter was dated 24 November, 1976. However by a letter dated the same date, the plaintiff appeared to have rejected the apology as tendered in the defendant’s letter referred to above. He subsequently proceeded to take a legal action in which he is now claiming a sum of ₦50,000 as damages for the wrongful dishonour of his cheques.

**Held –**

1. If a banker without justification dishonours his customer’s cheque, he is liable to the customer in damages for injury to credit, but that save in the case of a business customer, proof of actual damage to credit is necessary to secure substantial damages.

2. Per Curiam

In the present case, the plaintiff has proved as pleaded by him serious injury to his credit and reputation occasioned by the inexcusable course of conduct on the part of the defendant bank in dishonouring one after the other at a most unprivileged occasion, the two cheques issued by him in favour of his employers, Messrs John Holt Shipping Services Limited whose branch manager he was and still is. This is more so having regard to the undisputed fact that the plaintiff’s monthly salary has always been regularly paid into his account with the defendant bank and that at the material time there was standing to his credit in his account with the said bank, a sum of ₦5,844.05 as evidenced by the statement of account tendered and marked exhibit C.

In my view therefore, and having regard to all the facts, as well as the circumstances of the case, I think the plaintiff should reasonably be entitled to an award of a fair and reasonable damage.

Judgment for the Plaintiff.
Cases referred to in the judgment

**Foreign**

*Cox v. Cox and Company* (1921) The Times 18

*Davidson v. Barclays Bank Ltd* [1940] 1 All E.R. 316 at 322, 324

*Evans v. London Provincial Bank* (1917) The Times March

*Flach v. London and South Western Bank Ltd* (1915) 31 T.L.R. 344

*Gibbons v. Westminster Bank* [1939] 3 All E.R. 577

*Holland v. Manchester and Liverpool District Banking Corp.* (1909) 14 Com Ces 241

*Joachimson v. Swiss Bank Corporation* (1921) 3 K.B. 110 at 127

*Kinlan v. Ulster Bank Ltd* (1928) I.R. 171

*Lawson v. Siffre and another* (1932) 11 N.L.R. 100

*Marzetti v. Williams* (1830) 1 B and A.D. 415

*Plunkett v. Barclays Bank Ltd* (1936) 2 K.B. 107

*Sterling v. Barclays Bank Ltd* (1930) The Times July 18

*Story v. Challan* (1887) 8 C. and B. 324

*Szera v. Lloyds Bank* (1908) 2 Legal Decisions Affecting Bankers 159: (1908) The Times, January 15

*Wilson v. United Counties Bank Ltd* (1920) A.C. 127

**Books referred to in the judgment**

Gatley on *Libel and Slander* (7ed), page 86, paragraph 86

Halsbury *Laws of England* (2ed), Volume 1, page 827, paragraph 1348

Mayne and Macgregor on *Damages* pages 202-205, (12ed)

Paget’s *Law of Banking* (8ed), page 311

Phipson on the *Law of Evidence* (13ed), page 544, paragraph 544

Robert Lowe on *Commercial Law* (5ed), pages 347-348

Winfield on *Tort* (8ed), page 258, paragraph 3, page 321-322, 581
Words and Phrases Legally Defined J.B. Sanderson PA, Volume 3, (2ed)

Appearances not stated.

Judgment

BAMGBOYE J: The plaintiff by his writ of summons claim against the defendants, the sum of N50,000 (fifty thousand naira) being damages for wrongful dishonour of the plaintiff’s cheques issued to various persons and companies at the Apapa Branch of the defendants between July and August, 1976.

The defendants have refused or neglected to pay the said sum despite repeated demands.

The basic facts which seem to form the cause of this action are that the plaintiff, who was at the material time a branch manager with the firm of Messrs John Holt, Ikeja has been a customer of the defendant bank, since 1971, and for about seven years prior to the incident leading to this action has been maintaining a healthy current account with the Apapa Branch of the said bank. During the course of an ordinary transaction and at a time when the plaintiffs’ account was on a credit side with the defendant bank, he issued certain cheques in favour of his own company (ie Messrs John Holt Shipping Services Limited), but were “referred to the drawer” by the employees or servants of the said defendant bank.

As soon as the facts of the incident were brought to the plaintiff’s knowledge, he felt aggrieved and he there and then contacted the defendant bank who seemed to have realised their mistakes, sent a letter to the plaintiff in which an apology was tendered to him. The letter was dated 24 November, 1976. However by a letter dated the same date, the plaintiff appeared to have rejected the apology as tendered in the defendant’s letter referred to above. He subsequently proceeded to take a legal action in which he is now claiming a sum of N50,000 as damages for the wrongful dishonour of his cheques.
Pleadings were ordered, filed and delivered.

At paragraphs 3, 4, 5, 6, 7, 8, 9, 12 and 13 of his statement of claim, the plaintiff averred inter alia as follows:

3. The plaintiff has been a customer of the defendants and for the past seven years had maintained a healthy and respected current account with the Apapa Branch of the bank.

4. The plaintiff while on official assignment at Kano issued a Barclays Bank cheque No. 360700/862928 dated 2nd July, 1976 for the sum of N100 (one hundred naira) to his employers, Messrs John Holt Shipping Services Limited, and the said cheque was returned to the plaintiff, marked “Refer to Drawer” after the plaintiffs employers had presented the cheque to the bank.

5. The plaintiff however, presented the same cheque to the bank on his return from Kano and it was honoured.

6. That on 14th July, 1976 the plaintiff drew a Barclays Bank cheque No. 862930 for the sum of N40 (forty naira) in favour of John Holt Shipping Services Limited, Ikeja, but that the bank allegedly dishonoured it.

7. This attitude of the bank has jeopardised the chances of the plaintiff getting credit facilities from his employers as nobody could rely on his cheques which have recently been constantly rejected by the defendant bank.

8. When the plaintiff contacted the defendants for explanation, the defendants treated the matter with levity and total disregard.

9. At the same time these cheques were dishonoured, the plaintiff had more than N6,000 (six thousand naira) to his credit as contained in his statement of account. The statement of account together with the dishonoured cheque would be founded upon at the trial.

12. That the reputation of the plaintiff as a branch manager based at the country’s International Airport as well as his employer’s business reputation was adversely affected.

13. That by the defendants’ action the plaintiff had suffered considerable loss of integrity as he was exposed to ridicule, hatred and odium before his Chief Accountant, Colleagues, Customers and Junior Staff.”
On the other hand, the defendant at paragraphs 2-10 of their statement of defence averred *inter alia* as follows:

2. The defendant admit paragraphs 1, 2 and 3 but deny any negligence and recklessness and thereby join issue with the plaintiffs.

3. The defendants aver that the contents of paragraphs 4, 5 and 6 of the statement of claim are true, but go on to say that it was an honest and mistaken omission. In fact there are two accounts of identical names and during cross-reference, one was taken for the other.

4. The defendants by a letter dated 24th November, 1976 wrote the plaintiff and apologise for the omission as stated in paragraph 3 herein and will rely at the trial on this note of apology.

5. That the defendants wrote the employer of the plaintiffs expressing their apology for the omission as contained in paragraph 3 herein, again the defendant will rely on this letter at the trial.

6. By a letter dated 24th November, 1976 the plaintiff rejected letters of apology as contained herein in paragraphs 4 and 5 of the statement of defence.

7. The defendants are not in a position to admit paragraphs 7 and 8 of the statement of claim and will put the plaintiff on its strictest proof.

8. The defendants admit paragraphs 9, and 10 but aver that apologies have been tendered to the plaintiff as stated in paragraph 4 herein.

9. That the defendants admit contents of paragraphs 10 and 11 of the statement of claim but aver that unreserved apology was tendered to plaintiff and his employer and surely the employer could not hold anything against the plaintiff, knowing that his intention was not fraudulent.

10. The defendants aver that they are not in a position to admit paragraphs 12 to 14 and will request a strictest proof of the assertions therein in view of the contents of paragraphs 4, 5 and 6 therein of the statement of defence.”

Because of the material significance of certain averments as contain in the above statement of claim as well as the statement of defence as filed by either party, relevant reference
will later be made to them at the appropriate stage of this judgment. It is therefore at this stage, pertinent to look into and consider the facts as adduced in evidence in support and proof of the plaintiff’s claim for damages as filed by him.

In support of the said claim, the plaintiff gave evidence and called three other witnesses who testified in support and justification of the plaintiffs’ claim.

In his own evidence the plaintiff testified substantially *inter alia* as follows:

That the defendant company are his bankers and that he has been their customer since 1971 from which time his monthly salary has been regularly paid into his account with them. He maintained current account with the defendant company. Sometime in June, 1976 he (the plaintiff) had an assignment to go to Kano to re-organise a division of his company’s shipping business and he went there for this purpose. He completed the said assignment on or about 7th July, 1976. While at Kano he wanted to buy some souvenir for the children and so on 2nd July, 1976 he issued a cheque No. 360700/862928 for the sum of ₦100 in favour of his company Messrs John Holt Shipping Services Limited, Kano Branch and he was there and then given a sum of ₦100 cash in exchange. The said cheque was paid to the account of the company, but about two weeks after the issue of the said cheque he received an information from the branch manager, Kano concerning the cheque. By this time he had already returned to Lagos. He became annoyed and there and then spoke to the branch manager on the telephone saying that he was not sure that his cheque would bounce. He therefore requested the branch manager of his company at Kano to present the said cheque at the bank again.

On 14th July, 1976, he again issued a cheque No. 862930 for the sum of ₦40 in favour of his company Messrs John Holt Shipping Services Limited, Ikeja, but on 27th August, 1976, the said cheque was returned unpaid by the defendant bank. The cheque was returned to the plaintiff and the manager
of his company insisted that he should pay in cash. On looking at the cheque he found the following words on it, “Referred to drawer.” The said cheque was produced tendered and marked exhibit A. As a result of this, he had to pay to his company the said sum of N40 in cash and he was issued with a receipt. He produced the said receipt, and it was tendered and marked exhibit E. The plaintiff subsequently took up the matter with the defendant bank and on 30th August, 1976, he went to the business premises of the bank along Wharf Road, Apapa and demanded to see the statement of his account with the bank: and it was handed over to him. He produced the same; it was tendered and marked exhibit C. On seeing the said exhibit C the plaintiff demanded to know why his cheque was returned unpaid. He was there and then referred to the accountant of the bank; but instead of being allowed to see the accountant, it was someone else who came to see him. As a result of what he was told by his interviewer, he demanded to see the manager; but he was not allowed to see him. After waiting for a long time and seeing that it was getting to the closing time, the plaintiff there and then drew a cheque No. 862936 for a sum N250 and he was paid in cash and he went back home. He later wrote a letter to his solicitor. He produced the said letter. It was tendered and marked exhibit D. He averred that at the time he issued the said two cheques, which were returned unpaid, he had sufficient money in his account with the defendant bank. He later gave an instruction to his solicitor. The latter subsequently wrote to the bank.

On 24 November, 1974, the plaintiff received a letter of apology from the defendant bank, but he refused to accept the apology. He produced the said letter. It was tendered and marked exhibit E.

The plaintiff further averred and stated that since this incident, his employers had curtailed the facility of drawing any cheque on them for payment in cash, and that certain members of his subordinate staff knew of the incident and started
to laugh at him with ridicule. One of them is Mr Awe an accounts Supervisor with his company. As a branch manager of his company his duties include the co-ordination of his company’s activities in air freight, to negotiate the carriage of cargo by air from overseas to Nigeria and vice versa; and to act as clearing agent for some other major companies such as the UAC group of companies. At present, his gross income is about ₦11,000pa. He stated that if he had not been credit worthy at the bank at the time his two cheques were dishonoured, his employers would have thought that he was trying to defraud them and so would have terminated his employment. In his own evidence, one Stephen Oleleye Awe, a clerk in the employment of the firm of Messrs John Holt Shipping Services Limited, who was at the material time attached to the company’s branch office at Ikeja of which the plaintiff was the branch manager stated that during the course of his duty, the plaintiff handed to him a cheque for a sum of ₦40 with a request for exchange in cash. He took the cheque and paid over to the plaintiff a sum of ₦40 in cash. He subsequently lodged the said cheque with the company’s bankers Messrs Barclays Bank Ikeja for clearance. After a few days, the said cheque was returned by the bank unpaid. It was endorsed “Referred to Drawer.” He identified exhibit “A” as the cheque. On receiving the said cheque as referred by the bank, he showed the same to the plaintiff who on seeing it appeared shocked and embarrassed in the presence of other members of the staff who were then about eight in number at the scene. Some of the junior members of the staff were actually laughing at the plaintiff, whilst others were casting hard jokes against him saying that he had no money in the bank. Some mocked at him with ridicule.

Mr Awe averred before me saying:

“I was personally surprised and embarrassed. Before the date of this incident, I have had very high impression of the plaintiff’s integrity and I have had no occasion to have any doubt about him as a man of substance. As a result of this incident I have had a
change in my mind about the plaintiff. I later recovered the sum of N40 from the plaintiff. He paid it in cash and I gave him a receipt for it.”

The witness identified “exhibit” as the receipt. Another witness called in support of the plaintiff’s case is one Newaekpe Onwuka Oji (m) an administrative assistant in the employment of the firm of Messrs John Holt Shipping Services Limited, who was at the material time attached to the company’s branch at the Muritala Mohammed Airport, Ikeja where the plaintiff was then a branch manager. He stated that he was on duty on 27th August, 1976 at the offices of the company at Ikeja when he heard the Senior Accounts Supervisor who was then sitting by his side shouting from his desk, saying “Oga Ke.” He saw the said Senior Account Supervisor Mr Awe (ie PW3) holding up a cheque leaf which attracted his attention as well as the attention of other members of the staff, who with himself started to laugh. He also saw the said senior accounts supervisor going away with the said cheque leaf in his hand to the plaintiff. He saw him handing it over to the plaintiff. He observed that the plaintiff appeared surprised, humiliated, shocked and confounded. He himself (ie the witness) was personally worried about the incident, because until that day he had very high regard and esteem for the plaintiff. He had always thought that he was much worth what he had always appeared to be. He was disappointed to know that he was not worth as much as N40 in his account in the bank. After and as result of this incident, his respect and esteem for the plaintiff became diminished. He had always thought, because of his position, he was a man of substance but having seen what happened to the cheque for N40 issued by him, he had a poor impression about him and regarded him as a man of straw. The witness, Mr Oji identified exhibit A as the cheque he saw the Senior Account Supervisor holding up that day.

This witness was cross-examined at some length by the learned Counsel for the defendant company but he did not appear to have been shaken. He was firm and straightforward
throughout. I have no doubt as to the credibility of the facts stated by him.

In support of the defence, a witness, one Charles Ayodele Bajomo a branch accountant of the defendant coy was called. In his own evidence Mr Bajomo stated that he is attached to the Apapa Branch of the defendant company and that he does not know the plaintiff but was in the course of his duty familiar with his name. He averred that he was on duty both on the 16th July, 1976, and on 9th August, 1976 respectively and that in the course of his duty on the latter date he saw a cheque relodged by the payee (ie Messrs John Holt Shipping Services Limited,). He identified the said cheque and it was tendered and marked exhibit G. When the said cheque was re-presented on 9th August, 1976, he gave instruction that it should be paid because the plaintiff had sufficient funds in his account with the bank. He could not say why the cheque was dishonoured when it was first presented. As far as he know there was no subsequent communication between the bank and the plaintiff after the amount of £100 on the cheque was paid to the payee.

Under cross-examination by the learned Counsel for the plaintiff the witness averred inter alia as follows:–

“As far as I know the word ‘Refer to Drawer’ connotes that the drawer at the particular time had no sufficient fund in his account with the bank. From the manner the plaintiff has been operating his account with the bank, he appears to be one of our best customers. As an individual, I was not happy when I saw the plaintiff’s cheque dishonoured when he had enough funds in his account with the bank; I cannot fully remember if I had seen the plaintiff’s signature before the 9th of August, 1976. It is from the records in our office that I saw that the plaintiff’s signature resembled that of another customer of the bank. I cannot say if the resemblance of signature is still existing.”

At the close of the defence, the learned Counsel on the other side of the scale addressed the court.

In his own submission, Mr Bakare the learned Counsel for the defence first observed inter alia that the action as filed
by the plaintiff and by his writ of summons claiming a sum of ₦50,000 as damages for wrongful dishonour of his cheques alleged to have been issued to various persons and companies between July and August, 1976 were in fact issued to only one company. These are exhibits A and H. That the writ itself fails to indicate whether it is a claim in tort or a breach of contract and that assuming it is based on a claim in tort, the totality of the evidence adduced for the plaintiff’s case has failed to establish any tortious liability against the defendant company. He submitted that the words “Refer to drawer” complained of has been shown by the authorities not to have constituted any libel at all. In aid of his arguments he drew attention to the (2nd) Paget’s *Law of Banking* page 311, and the case of *Gibbons v. Westminster Bank* [1939] 3 All E.R. 577.

In his further address, Mr Bakare referred to paragraph 5 of the statement of defence showing that the defendant coy has tendered a letter of apology which was refused by the plaintiff and that the defendant company also wrote to the employers of the plaintiff a similar letter of apology as pleaded at paragraph 9 of the said statement of defence as against the assertion made by the plaintiff at paragraph 14 of the statement of claim. He therefore submitted that where apologies were tendered in cases of libel, it is a clear manifestation of the intention of the defendant willing to withdraw the statement even if it is libellous and further to say “I do not intend to libel you.” The learned Counsel referred to exhibits A, A1, C and G and stated that since they were not pleaded, they cannot be used in a trial of this nature, because the adversary is not to be taken by surprise, and that as this is a court of record, the parties are bound by their pleadings and unless the leave of the court is granted, unpleaded, matters cannot be introduced at the trial.

In support of this proposition Mr Bakare cited the following authorities:

(a) *Words and Phrases Legally Defined* Volume 3, (2ed) by J.B. Sanderson PA;
(b) Gatley on *Libel and Slander* (7ed), page 86, paragraph 86 saying that the words used must be shown to be defamatory;

(c) Phipson on the *Law of Evidence* (13ed) at page 544, paragraph 544;

(d) As to the question of damages Mr Bakare invited attention to the (12ed) of Mayne and Macgregor on *Damages* pages 202-205;

(e) (5ed) of Robert Laws on *Commercial Law* pages 347-348 saying that the onus is on the plaintiff to prove the special damages to him.

In reply Mr Offor, the learned Counsel appearing for the plaintiff submitted that the court should hold the view that the plaintiff has made a strong case against the defendant/company. The plaintiff’s statement of account, exhibit C shows that he had at the material time to his credit a sum of ₦5,844.45k when the cheque for the sum of ₦100 was “Referred to drawer” so also was exhibit A for ₦40. He stated that the action as filed is based on tortious liability for the negligence of the defendant coy and invited attention to paragraphs 7, 8, 10-14 of the statement of claim. He submitted that the words “Refer to drawer” constitute libel. He further drew attention to the following authorities:–

(a) (2ed) Halsbury *Laws of England*, volume 1, page 827, paragraph 1348;

(b) Bullen and Leake on *Precedents and Pleadings* (12ed), pages 246-247 (last paragraph);

(c) *Joachimson v. Swiss Bank Corporation* (1921) 3 K.B. page 110 at page 127;

(d) (8ed) of Winfield on *Tort* page 258 paragraph 3;

(e) *Davidson v. Barclays Bank Ltd* [1940] 1 All E.R. 316 at pages 322-324;

As to the letter of apology as tendered by the defendant coy to the plaintiff as well as to his employers Mr Offor submitted and in aid of his submission invited attention to the (8ed) Winfield on *Tort* pages 321-322. He stated that it is the duty of the defendant to have paid into court some amount for consideration by the plaintiff.

In his further argument Mr Offor pointed out that as to the negligence on the part of the defendant company, it is to be stated for the plaintiffs’ case whether or not a loss of reputation has been allowed to occur. There is evidence to show that at the material time the plaintiff was credit worthy.

As to the issue of damages, Mr Offor stated that at common law a plaintiff may be required to establish a special damage. He contended that in this particular case, the plaintiff has established sufficient grounds for claim for damages. He referred to paragraph 9 of the statement of claim as well as to exhibit C plaintiffs statement of account with the defendant coy showing a credit balance of ₦5,844.5k. In aid of his contention on this issue, the learned Counsel invited attention to the following authorities:–

(a) *Wilson v. United Counties Bank Ltd* (1920) A.C. 127;

(b) (8ed) Winfield on *Tort* page 581, saying that it is for the court to say whether or not, from the facts before it, the plaintiff has established any cause of action.

Again, as to the measure of damages, Mr Offor referred to the case of *Lawson v. Siffre and another* (1032)11 N.L.R.P. 100 and stating that the plaintiff is entitled to pecuniary loss suffered by him at the time of this incident. In the case of special damage, the damage must be material or temporal advantage (eg. a loss of dealing, even though it may turn out to be unprofitable). In support of this principle, the learned Counsel also referred to the following authorities:–

(a) *Story v. Challan* (1887) 8 C. and B.P. 324;

(b) Gatley on *Slander* (5ed) pages 72-78;

(c) Sections 2 and 3 of the Defamation Act, 1952
Finally, Mr Offor submitted that the true test of liability is whether or not the act is legal or illegal with natural or probable result of the defendant’s words.

With the leave of the court, Mr Bakare the learned defence Counsel made the following reply to certain new points of law and procedure raised by the learned Counsel for the plaintiff. He submitted as follows:

(a) That general and special damages have not been pleaded. No leave of the court has been sought and granted. Furthermore, this was based on the issues of remoteness of damage; these have not been pleaded and should be ignored sections 2 and 3 of the Defamation Act, 1952 refers to slander and not to libel, and the publication in issue is founded in libel and not slander. The matter, therefore must be proved and not be left to the court to infer;

(b) There is no distinction as between the issue of special and general damages. This should be ignored since they were not pleaded vide Bullen, Leak and Jacobs on Precedents and Pleadings at pages 6, 7, 8 and 9.

Now having heard the facts on both sides as well as the submissions of the learned Counsel on either side of the scale, it will therefore be pertinent at this stage to examine and consider the issues which now seem to be issue. If I may briefly reiterate for a while, it is the plaintiff’s claim by his writ of summons that he is entitled to a claim for damages in the sum of ₦50,000 for wrongful dishonour of his cheques issued to various persons and companies at Apapa Branch of the defendants between July, and August, 1976. Here, I may state that even though the keen observation of the learned defence Counsel regarding the alleged issue of the plaintiff’s cheques to “various persons and companies” as shown on the writ of summons is obviously correct, it must however be pointed out that the underlined allegations were neither pleaded nor adduced or controverted in evidence by either side on the line. It is then my view that it will not be part of
the duty of the court to strive officiously to look into matters or allegations which have not been pleaded, or in support of which no evidence has been offered nor denial made before it. Such matters in my further view, should not form part of the issues to be considered for a decision.

The learned defence Counsel has also complained that the writ has failed to indicate whether it is a claim in tort or a breach of contract and that the totality of the evidence adduced for the plaintiff’s case has failed to established any tortious liability against the defendant and therefore submitted that the words “Refer to Drawer” complained of has been shown not to have constituted any libel at all; and in aid of his arguments drew attention to the (8ed) of Paget’s Law of Banking page 311 and the case of Gibbons v. Westminster Bank (1939) 3 All E.R. 577. In answer to the point as raised by the learned defence Counsel, Mr Offor the learned Counsel for the plaintiff stated that the action as filed is based on tortious liability for the negligence of the defendant/company and invited attention to paragraphs 7, 8, 9, 10-14 of the statement of claim and submitted that the word “refers to drawer” constitute libel.

In considering the point as argued by the Counsel on either side of the matter, it would be pertinent to take a cursory look at the (8ed) of Paget’s Law of Banking, page 310 which seem to have provided an answer. It reads inter alia as follows:–

“Refer to Drawer’ would seem by itself not to be libellous, though as above stated, Gratham J left it to the jury in Szera v. Lloyds Bank (1908) 2 Legal Decisions Affecting Bankers 159: (1908) The Times, January, 15 (where the claim for dishonouring of cheques and also for libel in writing ‘Refer to drawer’ on such cheques. He told the jury that if they thought it a case for damages they would probably be disposed to award one sum which would cover the two claims for breach of contract and libel. The jury did not however do so, but awarded £250 damages for breach of contract and nothing on the claim for libel; Scrutton J (as he then was in Flach v. London and South Western Bank Ltd
[1915] 31 T.L.R. 334 said that in his opinion, the expression amounted to a statement of the bank, “We are not paying; go back to the drawer and ask him to pay.” In the view he took of the case, the bank were justified in not paying under the moratorium then in force, and he did not think that it was possible to extract a libellous meaning from what had been said by the bank. This statement was adopted by Duparq J (as he then was) in *Plunkett v. Barclays Bank Ltd* (1936) 2 K.B. 107. But in *Sterling v. Barclays Bank Ltd* (1930) The Times July 18, Horridge J with a special jury awarded substantial damages. The words ‘Refer to drawer’ were referred to the jury in *Javson v. Midland Bank Ltd* (1967) 2 Lloyds Report 563 who answered that their effect was to lower the reputation of the plaintiff in the minds of right-thinking people.”

In the (2ed), *Halsbury’s Laws of England*, Volume 1, page 827, paragraph 1348 the principle is also stated *inter alia* as follows:–

“If a banker without justification dishonour his customer’s cheque, he is liable to the customer in damages for injury to credit (See *Marzetti v. Williams* (1830) 1 B and A.D. 415). But later cases tend to show that save in the case of a business customer, proof of actual damage to credit is necessary to secure substantial damages.”

As to the issue of tender of apology the learned defence Counsel referred to paragraph 5 of the statement of defence and stated that where apologies were tendered in cases of libel, it is a clear manifestation of the intention of the defendant, willing to withdraw the statement even if it is libellous and further to say “I do not intend to libel you.”

How the letter of apology as written and signed by the manager of the defendant bank which was produced in evidence and tendered and marked exhibit E read as follows:–

“Barclays Bank of Nigeria Limited
P.O. Box 310
P.M.B. 1166 Apapa
Lagos

24th November, 1976
Private and Confidential
Mr A.C. Ochiuwa
John Holt Shipping Services Limited,
Ikeja.

Dear Mr Ochiuwa

RETURNED CHEQUES IN FAVOUR OF JOHN HOLT NO. 862928 FOR ₦100 FOR ₦40

We were depressed when we realised (through your solicitors) that the above cheques, returned unpaid, were drawn by you. The two cheques presented (coincidentally) on the same day – 16th July, 1976 – were erroneously referred on another account whose name resemble your own and signature, but lacked sufficient funds to meet all the cheques. Had the cheques been referred on your own current account, they would have been paid automatically as you maintain a well conducted account with us.

Please accept our unreserved apology for the inadvertent error in returning your cheques: We assure you that we hold you in high esteem and it was not our intention to do anything calculated to bring your character into any form of disrepute.

The error is deeply regretted. We enclose a copy of our letter to your employers so that they may be advised of the true position.

Yours sincerely

(Sgd) AM SCOTT
Manager.”

As to the above quoted letter Mr Offor stated and I have no doubt as to this, that there has been no evidence that the said tender of apology has been accepted by the plaintiff. On the contrary he resorted to a legal action. It is however to be noted here that the excuse as advanced on the face of the above letter that the plaintiff’s cheques “were erroneously referred on another account whose signature resemble your signature, but lacked sufficient funds to meet the cheques” does not seem to be either convincing or by any means impressive. It seems to me a typical concoction on which it would not be judicially safe to rely. For example, during the course of cross-examination by Mr Offor, the learned Counsel appearing for the plaintiff the only witness called on behalf of the defendant bank one Charles Ayodele Bajomo, a
branch accountant of the defendant and who appears to me a very responsible official of the said bank averred *inter alia*:

“I cannot fully remember if I had seen the plaintiff’s signature before the 9th August, 1976. It is from the records in the office that I saw that the plaintiff’s signature resembled that of another customer of the bank. I cannot say if the resemblance of signature is still existing.”

In order to advance a credible and reliable defence, that the mistake which in fact influenced the non-payment of the plaintiff’s cheques when they were presented at the bank was genuinely due to the resemblance stated by the defence witness, one would have thought it advisable that in a case of this nature, the record showing the said resemblance between the plaintiff’s signature and the signature of the other customer of the bank should have been produced and tendered. Or how else can we really be assured that such an allegation is not a mere fabrication, calculated and intended to pull the wool over the plaintiff’s eyes? Again assuming without concluding that by a strange coincidence two people unknown to each other may possibly have resembling signatures in the records of the bank it is still part of the duty of the bank, in cases of doubt to go a little bit further and enquire meticulously into their respective addresses as well as to their respective full names in the record kept by the bank. It is also my further view that the attention of these customers should have been drawn to these facts. As omission or neglect of these essential duties can possibly constitute negligence on the part of any commercial bank such as the defendant company. It may also result into loss of public confidence. I must however state here again, that I am unable to accept this fact which seem to have no more weight than a fiction, as representing the true picture of the record of signature kept by the defendant company; nor am I impressed by the manner in which the facts were alleged, It all seems to me an after thought which cannot serve any useful purpose in a judicial proceeding.
Again, Mr Bakare, the learned defence Counsel has stated that exhibits A, A1, C and G were not pleaded and therefore could not be used at the trial of this action. As to this, it is only necessary to draw the attention of the learned Counsel to paragraphs 4, 6 and 9 of the plaintiff’s statement of claim for an answer. It may also be necessary to invite attention to the provisions of Order 16, rule 4 of the High Court of Lagos State (Civil Procedure) Rules, 1972. It reads inter alia:

“Every pleading shall contain and contain bail only, a statement in a summary form of the said material facts on which the party pleading necessarily relies for his claim of defence, as the case may be, but not the evidence by which they are to be proved, shall, necessary be divided in paragraphs numbered consecutively.”

Now in considering the facts as well as the circumstances in which the plaintiff’s two cheques exhibits A for N40 and “H” for N100 respectively were “referred to drawer” and returned unpaid. I am satisfied that such a course of conduct on the part of the defendant bank was most unjustified, unwarranted having regard to the financial position of his account with the said bank at the material time as evidenced by his statement of account which was produced and tendered as exhibit C. There is no doubt too that as a result of this course of conduct as adopted by the defendant/company in their business transaction, substantial injury has been allowed to be done to the plaintiff’s credit more especially as these cheques were issued in favour of his own company, Messrs John Holt Shipping Company Limited, the branch manager of which he was and still is. His reputation has hereby suffered considerable loss in the minds of his colleagues and officers as well as his employers whom I have no doubt, are reasonable and right thinking people. When the fact of the return of the unpaid cheques became known and published in the general office the plaintiff himself was shocked, but some of his officers who were present and heard the story held him in ridicule and laughed at him, some saying “Oga Ke” meaning “and the boss too.” As a result of this incident, the plaintiff’s cheques
were no longer accepted by his employers in exchange for cash.

How the plaintiff has sued the defendant/company for damages suffered by him as resulting from their action in dishonouring his cheques at a time when he had substantial amount of money in his account with them. He therefore by his writ of summons claims the sum of N50,000. It is then pertinent at this stage to look into and consider the measure of damages. The law as it now seems to have been well established is that presumption of necessary serious injury only applies where the customer is a businessman and that at least in other cases, actual damages must be pleaded and proved. It is on this principle that the tendency of recent authorities seems to have given greater weight. For example, in Evans v. London Provincial Bank (1917) The Times, March where the plaintiff a wife of a naval officer sued the defendant for the dishonour of a cheque, Lord Heading LCJ directed the jury that the only question was what amount of damages was due to the lady for the mistake the bank had undoubtedly made though she had not suffered any special damage. If necessary the question of law which might arise would be discussed thereafter. The jury returned a verdict of one shilling, the foreman saying that they did not consider that Mrs Vans had suffered anything more than annoyance.

In Cox v. Cox and Company (1921) The Times 18 where a cheque had been returned marked “N.S.” present in a few days; the plaintiff sued for dishonour of the cheque and for libel. The bank paid £50 into court in respect of the breach of contract in dishonouring the cheque, which plaintiff accepted and continued the action for the alleged libel. The jury found for the defendant; Darling, J, intimated that he did not think the £50 would have been recoverable if not paid in.

Also in Kinlan v. Ulster Bank Ltd (1928) I.R. 171 where a customer presented a cheque drawn and payable to himself and payment was refused, though there were funds to meet
it; the Supreme Court of Eire held there was no defamation; the defendants had paid £40 into court presumably to cover breach of contract.

And in Gibbons v. Westminster Bank Ltd (1939) 2 K.B. 882 Lawrence J felt himself bound by the authorities, and further held that the corollary of the proposition laid down by them is the law.

“That a person who is not a trader is not entitled to recover substantial damage for the wrongful dishonour of his cheque, unless the damages which he has suffered is alleged proved as a special damage.”

On the other side of the scale is the case of Davidson v. Barclays Bank Ltd [1940] 1 All E.R. 316 where the plaintiff, a credit bookmaker, issued a cheque for £2.15s.8d, which when presented to the defendant bank was dishonoured by them; being marked with the words “not sufficient” Bilbery J held:

“The bank could not by making the mistake of thinking that there were insufficient funds to meet the cheques created on their part a duty to make a communication the necessity for which had never arisen. Similarly they were not making a communication on a matter of common interest, both to them and to the payee of the cheque, because, except for their mistake there was no matter of common interest connected with the cheque which called for a communication. The defence of qualified privilege therefore failed. In that case judgment was entered for the plaintiff against the defendant for £250.”

In the present case the plaintiff has proved as pleaded by him serious injury to his credit and reputation occasioned by the inexcusable course of conduct on the part of the defendant bank in dishonouring one after the other at a most unprivileged occasion, the two cheques issued by him in favour of his employers, Messrs John Holt Shipping Services Limited, whose branch manager he was and still is. This is more so having regard to the undisputed fact that the plaintiff’s monthly salary has always been regularly paid into his account with the defendant bank and that at the material time
there was standing to his credit in his account with the said bank, a sum of ₦5,844.05 as evidenced by the statement of account tendered and marked exhibit C.

In my view therefore, and having regard to all the facts, as well as the circumstances of the case, I think the plaintiff should reasonably be entitled to an award of a fair and reasonable damage.

Judgment is therefore hereby entered for the plaintiff against the defendant bank in the sum of ₦2,500.

Appearances not stated.
Angus Builders Company Limited
v. Bank of America (Nigeria) Limited

HIGH COURT OF LAGOS STATE

BADA J

Date of Judgment: 5 October 1978

Banking – Cheques – Dishonoured – Refer to drawer – Whether libelious

Facts

The plaintiffs were customers of the bank, who applied for and were granted credit facility with certain conditions.

The plaintiffs, as averred by the defendants, did not meet the conditions, hence the defendants dishonoured the cheques issued by the plaintiffs, by writing on them “Refer to drawer.”

The plaintiff here brought an action claiming the sum of four million naira as damages suffered resulting from the defendant’s breach of contract.

Held –

The word “R/D” meaning “Refer to Drawer” written on a cheque of a customer by his bank may be libellous of the customer but in the instant case where the defendant bank was not obliged to honour the plaintiffs’ cheques in the prevailing circumstances, the dishonour was not wrongful and therefore not malicious.

Plaintiff’s claim dismissed.

Cases referred to in the judgment

Foreign

Abbas v. Matheson and Co 104, L.T.J. 268
Beckett v. Nurse, (1948) 1 K.B.D. 525
Flack v. London and South Western Bank Ltd (1915) 31 T.L.R. 334
Gates v. WA and RA Jacobs (1920) 1 Ch.D. 567
Jayson v. Midland Bank Ltd (1968) 1 Lloyds Reports 409
Whiting v. E London Waterworks (1884) W.N. 10

Counsel
For the plaintiff: Adesanya
For the defendant: Abudu

Judgment

BADA J: The endorsement in the plaintiff’s amended writ of summons reads as follows:–

“The plaintiff’s claim is for four million naira (₦4,000,000) being damages suffered by the plaintiff as a result of defendant’s breach of contract contained in a letter dated 21st October, 1974.

ALTERNATIVELY:
Plaintiff claims the said sum for libel committed on the plaintiff by defendant dis-honouring plaintiff’s cheques drawn in favour of its customers.

PARTICULARS OF DAMAGES
General damages .................................................... N4,000,000.”

Both parties filed and exchanged pleadings.
In his further amended statement of claim, the plaintiff averred as follows:–

“1. The plaintiffs are a limited liability company carrying on business as Building and Civil Engineering Contractors and registered by the Federal Ministry of Works as said contractors in category D. The defendants are bankers carrying on business at their branch at 138/146, Broad Street, Lagos and elsewhere. At all material times the plaintiffs were customers of the defendants and had an account at the said branch.

2. The plaintiff were at all material times engaged on the crash programme of constructing 309 housing units for the Federal Government of Nigeria in the FESTAC Village and were executing several other important contract works for the Federal Ministry of Works and the defence all over the country. The plaintiffs therefore required bridge financing
3. By an agreement contained in a letter from the defendants to the plaintiffs dated 21st October, 1974, the defendants agreed to increase the plaintiff’s credit accommodation with the said bank from N250,000 to N650,000 upon the plaintiffs providing the securities required by the defendants. The said credit facility was a revolving nature. The limit of the said credit facilities was increased to N850,000 on the 27th November, 1974.

4. In compliance with terms of the agreement of the 21st October, 1974 aforesaid the plaintiff provided the following securities to the defendants, viz:–

   (i) 1st debenture over the assets of the plaintiffs stamped for N600,000.

   (ii) 1st debenture over the entire assets of Angus Plant Hire Company Limited a subsidiary of the Angus Group of Companies Limited estimated at more than N800,000.

   (iii) 1st legal mortgage over two pieces of land at Enugu valued in July, 1971 at N340,000 (stamped by defendant for N600,000).

   (iv) Legal mortgage over a plot of land at Ikeja then being developed with an estimated value on completion of N200,000.

   (v) Angus Plant Hire Limited guarantee for N660,000.

   (vi) Plaintiff company’s managing director’s personal guarantee for N660,000.

   (vii) Domiciliation payments agreement whereby moneys accruing from contract works completed by plaintiff were paid over direct to defendants.

5. In furtherance of the said agreement, the plaintiff also gave irrevocable standing orders to the Federal Military Government of Nigeria and the Federal Ministry of Works, the Federal Housing Authority of the Cabinet Office, Federal Ministry of Defence, who were the plaintiff’s employers to pay moneys receivable on certificates for completed works direct to the defendants and cancelled similar instructions given in favour of the International Bank of West Africa Limited.
6. The plaintiff also submitted to the defendants, on a monthly basis billings certified by their client’s representatives and quarterly summaries showing certificates received and completed work to be done as at the end of January, 1975 was sent to the defendants. At the request of the defendants, by the letter dated 19th March, 1974 schedule of completed works, existing plant and equipment of the plaintiffs, works in hand and list of plaintiff’s tenders were submitted to the defendants.

7. In the premises it was the duty of the defendants to honour any cheque drawn on the defendants by the plaintiffs and duly presented for payment provided the said revolving credit facility had not been exceeded.

8. The defendants in breach of the said credit accommodation agreement dishonoured on various dates the following cheques drawn by the plaintiffs on the defendants’ bank, viz:


   (iii) Cheque dated 21st January, 1975 issued by plaintiffs in favour of Mr Anthony Esendu for ₦3,440.


The defendants would not make available any funds for the plaintiffs to continue their contract works and commitments despite repeated demands, even though payments from plaintiffs’ employers were received by the defendants following the domiciliation of funds aforesaid.

9. The plaintiffs never exceeded the limit of the said credit facilities at all times material to this action. In fact the defendants did confirm by letter dated 27th March, 1975 that the plaintiffs’ overdraft in their books was only ₦241,083.05k.

10. By reason of the premises the plaintiffs were compelled to close down their operations and stopped work for a period of three months from January, 1975 to March, 1975 until they could make alternative arrangements for working capital.
PARTICULARS OF DAMAGES

1. To loss of use/hire charges on plant and machinery standing idle for 3 months ........................................ N535,563.77k

2. To wages paid to workers for the period ............................................................... 321,571.42k

3. To salary paid to expatriate “SYSTEM” expert for said period ................ 2,000

4. To travelling expenses to recruit expert and his replacement ..................... 6,909.23k

5. To replacement consultants’ fees less expert’s salaries from March 1975 to date ......................................................... 104,678.81k

6. To rent paid on premises for 3 months ................................................................. 8,100

7. To loss of profit on contract works for 3 months at 25% ............................... 354,666.67k

8. To bank charges and interest as per defendants’ statement ......................... 15,262.53k

9. To loss of commercial credibility and goodwill as a result of inability to complete projects on schedule ........... 2,651,247.57k

TOTAL N4,000,000.00k

11. Further or in the alternative the defendants falsely and maliciously wrote on the said cheque which they dishonoured, of and concerning the plaintiff the words ‘R/D’ and published the said words to the payees of the said cheques and their collecting bankers.

12. By the said words (which are abbreviations for ‘REFER TO DRAWER’) the defendants meant and were understood to mean:

(a) That the plaintiffs had no money to meet the said cheque.

(b) That the plaintiffs were insolvent and had been dishonest and issued the said cheques in bad faith.

(c) That the plaintiffs were a person whose financial standing was unsound, to whom credit should not be given and with whom no one should have business dealings.
PARTICULARS OF INUENDO

13. (i) It is a notorious fact that the usual reason for writing “R/D” on a cheque was want of funds to meet it.

(ii) In the light of present day knowledge of worldly affairs pertaining to cheque and banking, the courts will take judicial notice of the fact that the words ‘R/D’ on a cheque mean that the drawer had no funds to meet the cheque.

(iii) There are rampant cases of fraudulent issues of bouncing cheques in Nigeria that a Decree, the Criminal Justice (Miscellaneous Provisions) Decree had to be issued to check this abuse.

14. By reason of the premises the plaintiffs have been injured in their credit and reputation and in their said business and have suffered damage.

15. The plaintiff will rely at the trial of this action on all correspondences between plaintiff and the defendant and other matters in relation to banking activities of the defendant.

AND THE PLAINTIFF’S CLAIM AS PER THE AMENDED WRIT”

In their forty-second paragraph amended statement of defence filed on 16th July, 1976 the defendants in paragraph 1 thereof traversed generally and the second amended statement of claim and admitted in their paragraph 2, the averment is paragraph 1 of the amended statement of claim, qualifying the admission that the plaintiffs are registered contractors in category D by the Federal Ministry of Works. The averments in the remaining paragraphs of the amended statement of defence, in the main, are denials of the plaintiffs’ averments in the amended statement of claim and contending, in part, that the matters on which the plaintiffs relied were fraught with vitiating elements which create no legal or contractual obligations.

Twelve witnesses testified for the plaintiffs. The first was Chief Angus Chike Ilonse a building and civil engineering contractor for over thirty years who claimed to be owner of the plaintiff/company registered as disclosed in exhibit P1, which company could take contract up to the value of N100 million. In this connection, this witness said that the company
had many building construction projects all over the Federation. For these projects, the company needed finance which initially was being borne by the International Bank for West Africa through whose recommendation the plaintiff/company became customers of the defendants’ bank.

The plaintiffs were initially granted N250,000 even though N800,000 was the amount the plaintiffs needed. Following a discussion between the plaintiffs and an assistant manager of the defendant’s bank, exhibit P4, was written to the plaintiffs.

The plaintiffs said they complied with the conditions set out in the said letter and executed the Borrowers General Agreement, exhibit P5, and also signed debentures and mortgages (six in all) which were with the defendant’s bank. exhibits P6 and P7 were copies of agreements between the plaintiffs and the Federal Housing Authority and the Ministry of Defence respectively.

There were no other conditions to the plaintiffs’ knowledge other than those stipulated in exhibit P4 and the plaintiffs expected the defendants to honour the agreement by honouring cheques issued by the plaintiffs company which, initially, the defendants did, but about the months of December, 1974 and January, 1975 to March, 1975 the defendants dishonoured the following cheques:

3. Cheque dated 17th January, 1975 for N1,040.89k in favour of J. Allen Co exhibit P8C.

Following the dishonouring of the above mentioned cheques, the plaintiffs said the business came to a standstill as a result of which the plaintiffs sustained financial losses as follows:

1. On machines standing idle — N535,563.77
2. House rents for staff — N8,600,000.00
3. Loss of credit–worthiness about — ₦2,500,000.00
4. Salary to expatriate who took over “FESTAC” Job — ₦104,000.00
5. Loss of profit from closed down sites 25%, about — ₦321,000.00

The first plaintiff’s witness concluded his evidence-in-chief as follows:

“There are writings on all the cheques showing ‘R/D.’ ‘R/D’, means the withdrawer had no money, he is broke, he is a defrauder. I lost all credit facilities from my customers.

When we could not find money I had to negotiate with another bank, UBA.

At the time my cheques were dishonoured my securities were with the Bank of America. The bank (defendant) did not give me any notice either in word or in writing, that they were not going to honour the agreement in exhibit P4.

By the loss of face on the dishonoured cheques, I am claiming ₦4,000.”

When cross-examined the first plaintiff’s witness admitted forwarding exhibit D1 to the defendants and that at the instance of the defendants, exhibit D2, the final account of the plaintiff’s company was forwarded to the defendants. The witness said he also forwarded documents in respect of two properties under exhibit D3 to the defendants.

The witness denied that the plaintiffs’ overdraft was reduced to ₦200,000 because of failure to present certificate under the agreement, and that at no time was there any complaint from the defendants about failure to present certificates. He confirmed writing exhibit D4 to the defendants showing what amounts were due for payment to his company in December, 1974 and the amount to be paid out by the company in that month. According to this witness the amounts due to the plaintiffs in December, 1974 were paid to the defendant bank. He remembered issuing a cheque dated 20th December, 1974 for ₦24,757.20k in favour of Ezekiel Wrought Iron Works Limited, but he had to stop the cheque because the drawee of the cheque did not perform
and another cheque for ₦3,440 in favour of Anthony Esendu which the defendants paid. He denied that he had no certificates of billings by an architect to cover the amount on the two cheques exhibits P8 and P8A, but admitted exhibit D5 (sixteen copies of statement of account) to be those sent to him by the defendants as representing the plaintiffs company’s statement of accounts with the defendants.

On 19th December, 1974 the witness said he received ₦509,850 as mobilisation fee from the Federal Housing Authority and that at his instruction the amount was paid into the defendants bank in a new account exhibit D7 from which he paid salaries etc., on the projects going on in various parts of the Federation. The balance of the account was later transferred to the UBA. He admitted writing to the defendants giving an undertaking that the plaintiffs would employ the mobilisation payment received from the Federal Housing Authority purely on contract awarded for the construction of 304 buildings type F1-42 for the said authority in pursuance of the agreement between the plaintiff and the said authority as disclosed in exhibit D6. He disagreed with the suggestion that some of the expatriates left because of the financial mismanagement of the plaintiff’s company.

Concluding his answer to question under cross-examination, the witness said as follows:–

“I am claiming ₦2,000 for goodwill. There is no provision for goodwill in the statement of account, exhibit D2, because I was not selling it. I cannot give the net worth of my company as at 31st March, 1974 on exhibit D2. The net profit for the year ended 31st March, 1974 as on exhibit D2 was ₦40,000. The total value of equipment purchased as shown on exhibit D2 is detailed on Schedule I attached to exhibit D2.”

Sydney Arthur Parker was the second plaintiffs’ witness who testified to the effect that he supplied the architect certificates in respect of buildings under construction with the plaintiff company to a Mr B Cairns of the defendants bank. Such certificates were exhibits P9, P10, P11, P12, P12A, P13, P14, P15, P16, P17, P17A-P17G, P18, P19 and P19A.
He said further that by mid-November, 1974 the plaintiff’s company started to experience difficulties because of lack of funds, by May, 1975 however, the position improved as the plaintiffs had transferred its accounts to the U.B.A.

When cross-examined, he said that the arrangement with the defendants bank was that upon presentation of the certificates, 80% of the amount on the certificates would be released and that all the amounts on the certificates were paid into the bank and reflected as credits in the bank’s statements of accounts of the plaintiffs company.

The third PW was a Roger Wood who said he was a manager of Systems Building Managing Consultancy; a company which was the managing consultant for the plaintiffs in respect of Black Arts Festival Village. This witness said his company charged 4% of the contract sum of the Black Arts Festival Village of which 1.5% was for the expenses for providing the company’s staff etc. Between February, and March, 1975 the charge was 4% of the mobilisation fee which was paid by the plaintiffs, the first being 1.5% paid at the initial stage and the other payment made in May or June.

Udo Ekpeyong Nnamse was the 4th plaintiff’s witness who was working with the Federal Ministry of Works and in charge of contracts accounts. He received exhibit P20 from the plaintiffs instructing the Ministry to pay certain money on certain contracts to the defendant bank.

The 5th plaintiffs witness, Nicholas Amadi Nwamana, a trade unionist, gave an account of what occurred with the members of the Amalgamated Union of Building and Wood Workers Nigeria who were working at different construction sites of the plaintiffs company in certain towns between December, 1974 and March, 1975 as a result of non-payment of their salaries, incessant termination of appointment of some workers, lack of materials to work and failure to pay “Udoji.”
Peter Okonta of J Allen, Lagos was the 6th plaintiff’s witness who identified exhibit P8C as the cheque issued by the plaintiffs company which cheque was twice dishonoured. The cheque was for the monthly instalmental payment of vehicles leased to the plaintiff s. The witness, however, said that the plaintiff had before issued cheques which were not paid when the International Bank for West Africa were the plaintiffs’ bankers and as such if he held any view about the plaintiffs it would not be in the dishonouring of exhibit P8C above but on all transactions with the plaintiffs.

The 7th plaintiffs witness was Edward Olusegun Mobee a chartered accountant who said he was seconded to the plaintiffs company as its manager/chief accountant by his employers, Coopers Lymanbrant, on 12th December, 1975. By virtue of his appointment he became familiar with the accounting records of plaintiff and the various site accounts clerk forwarding their accounting records to him in Lagos which was the head office that provided funds for the sites. Each of the sites had its imprest account from which site managers operated except Lagos sites.

He continued his evidence and said as follows:

“I was not in the company in December, 1974 to March, 1975 but from the record of the company which I saw I observed that there were no movement in the company. Another thing I noticed was that the company was operating its bank account with the Bank of America.

From the records I observed that there were no funds coming to the sites. Wages were paid during the time, returns were sent to the head office in Lagos. Each site has separate files for wages, cash returns, stock of materials returns, and plant and machineries returns. The files are in the head office. I handed them over to our solicitors.”

Thereafter exhibits P21-P44, which are files containing records of various payments made by the plaintiffs at their different sites in the Federation, receipts, a deed of sub-lease and invoices were tendered through this witness.

When cross-examined he said he did not check nor audit nor pay the various sums shown on exhibits P21-P39 which
had been prepared before he assumed duty with the plaintiffs. Between January and March 1975, he said that exhibit D5, that is, the account of the plaintiffs with the defendants was being actively operated.

In respect of invoice No. 1588 in exhibit P43 he could not explain why the stamp 6th February, 1975 appeared on it when the invoice was meant for January, 1975. He was not in a position to say whether the machines were used or in fact there. He agreed to the suggestion that his secondment to the plaintiffs company was justified as there was no management there before he took over on 12th December, 1975. The plaintiff’s company was being managed by Fitzpatrick Jersey (Overseas) Limited, from April, 1975 to December, 1975 and he knew that at the time of his assumption of office the plaintiffs company was heavily indebted to the United Bank for Africa.

The representative of Oba-Nle-Aro Trading Company Limited, a Francis Elabor was the 8th plaintiff’s witness, he identified exhibit P8 as the cheque issued by the plaintiffs and which was not paid on presentation. When the cheque was returned by the bankers of the witness’s company, exhibit P45, a debit note was forwarded along. The plaintiffs however, subsequently paid the amount shown on the dishonoured cheques in bits.

According to this witness his company thought the plaintiffs company was out to dupe other well organised companies when the cheque was dishonoured and they thereafter decided not to grant credit facilities to the plaintiffs, even though the plaintiffs were good customers before the issue concerning exhibit P8.

Another Esendu, a timber dealer and supplier was the 9th plaintiff’s witness. He identified exhibit P8 as the cheque issued in his favour by the plaintiffs but on presentation of the said cheque it was dishonoured. He then proposed to hand over the matter to the police because as he thought it was an offence to issue a cheque which subsequently bounced.
He however, complained the matter to the first PW, Chief Ilonse who then issued an open cheque which he cashed immediately from the Bank of America.

A Joshua Chidoke Arubalese, the site co-ordinator under the plaintiffs in Sokoto, was the 10th PW.

By the end of 1974 and January to March, 1975, he observed that operations were not being carried on smoothly on the sites at Sokoto because of slow remittance of wages and money for running the sites: materials did not arrive and workers became hostile for non-payment of their salaries and Udoji and for being idle. He communicated the situation to the head office.

The purchasing officer of the plaintiffs’ company at Kano, a Kenneth Anika was the 11th PW. He gave an account of the situation of the site at Kano between January and April, 1975 when the workers had to chase away the site Engineer because workers had no materials to work with and he wrote to the head office at Lagos.

The 12th PW was Herman Doteel an engineer under the plaintiffs. He said he heard of a Mr Scott who worked for the plaintiffs and from the records in the office, the said Mr Scott left on 17th February, 1975. The salaries and other expenses incurred on the said Mr Scott were contained in his personal file, exhibit P46. The witness said he worked out what was payable to Mr Scott between 1st January, 1975 and 17th February, 1975 to be N2,157 which he paid to him.

By virtue of his work he advised the managing director concerning recruitment of officers and the managing director often travelled by air for such recruitment drive. The records of such recruitment were contained in exhibit P47.

The records showed that the amount incurred by the managing director in recruiting Mr Scott was N6,909.

When he assumed duty under the plaintiffs he observed during his familiarisation tour that the construction sites were not as active as expected. He assumed the potential
loss of profit to the plaintiffs between January, 1975 and March, 1975 to be ₦354,666 and also found out that the amount on plant hire for that period was ₦535,000. The plaintiffs, from the record, paid as interest a total of ₦9,000 to the defendants bank between that same period.

The purport of the evidence of Brian Cairns, the only defence witness is this:

He was an assistant manager of the defendant bank with whom the plaintiffs’ company operated an account, exhibit D5, but later opened another one, exhibit D7. The plaintiffs’ account with the defendants started in August and was closed finally in June, 1975.

In July, 1974 the plaintiffs approached the defendants for bridging financing and the plaintiffs were initially granted ₦250,000 on certain conditions, the principal one being the submission of certificate for the work done which was the essential basis of the finance.

It was agreed that 80% of the work certified was to be advanced to the plaintiffs.

Before the facility was granted, the defendants asked for the audited account of the plaintiffs, that is, the balance sheet, but the plaintiffs could only submit a draft, exhibit D9, as the plaintiffs claimed the original was not ready. It was on the draft that the plaintiffs company’s strength was analysed. The final account, exhibit D2, was later submitted by the plaintiffs.

The plaintiffs submitted a number of documents to the defendants and when exhibit D9, the draft balance sheet, was submitted certain issues were raised on the face of account and the defendants came to the conclusion that the plaintiffs’ company’s networth was ₦489,000 whereas the final account, exhibit D2 was ₦117,500. The profit of the plaintiffs as per exhibit D9 was ₦117,500. A similar analysis was made in respect of Angus Plant Hire Limited, and the networth of the company was ₦53,283 deficit which showed...
that the capital had been completely eroded and was therefore bankrupt. A meeting was subsequently held with the plaintiff to explain the discrepancies and the explanation given was bad accounting. Later a letter, exhibit D11, was forwarded by the plaintiffs’ chartered accountant to explain the discrepancies. The defendants later agreed to increase the bridging finance from N250,000 to N650,000 as contained in exhibit P4, subject to provision of certificates of billings as under the facility of N250,000.

The plaintiffs, in pursuance of exhibit P4 submitted the security items in (i)- (iv) under paragraph 4 thereof; item (viii) was not submitted. The purpose of security was to assist the bank in case anything went amiss in respect of the billings which were outside direct control of the defendant bank.

The Ministry of Works and Housing and Ministry of Defence were to lodge assignments of the domiciliation of payments with the bank. Such assignment should bear the clients’ signature, the contractors’ signature and the bank’s signature. The assignment lodged by the Ministry of Works bore all the three signatures but that of the Ministry of Defence did not; the effect of which was that there was no assignment in respect of the contracts for the Ministry of Defence and as such in granting credit facility the certificates issued by the Ministry of Defence were disregarded. Representations were made to the plaintiffs through Mr Parker, the plaintiffs’ quantity surveyor to regularise the purported assignment from the Ministry of Defence but it was not carried out. The basis of bridging finance was that 80% of the certificates of work done would be financed up to N650,000.

On 27th November, 1974 a meeting was held at the head office and it was attended by the first plaintiff's witness, Major Parker, Marshall Lewis the managing director of the defendants bank and the witness (Mr Cairns) concerning the inadequacy of the certificates held in relation to the outstanding. Although the first plaintiff’s witness promised to provide certificates to cover the outstandings, a decision was
reached between the parties that the credit facility should be reduced to N\$200,000 to which the plaintiffs did not object. A letter, exhibit D12, was later written by the plaintiffs to the defendants.

Another meeting was held on 27th December, 1974 to discuss the list, exhibit D4, submitted by the plaintiffs and also to know the immediate cash requirements. The plaintiffs undertook to provide the defendants with certificates to the tune of N\$426,427 but the undertaking was not fulfilled. It was then that the defendants intimated to the plaintiffs the defendants’ inability to accommodate the plaintiffs any further in view of the level of outstanding, then at N\$562,688, unless certificates to the tune of N\$426,427 were received.

As at 31st December, 1974 only about N\$230,000 was paid in by certificates.

Another meeting was held between the parties on 14th January, 1975 and it was agreed that cheques drawn pending receipt of outstanding certificates would be subject to special clearance by him (Mr Cairns) as the accounting officer and Major Parker of the plaintiffs company. There was no objection from the plaintiffs.

As at 21st January, 1975 an amount of N\$198,377 was outstanding against the plaintiffs for which the defendants held no certificate. That was the date the cheques exhibits P8, P8A and P8B were referred to drawer because there were no certificates to cover them. So was exhibit P8C. The cheques, with the exception of exhibit P8, were later represented and paid as certificates were submitted and amounts on them subsequently paid in.

It was because the plaintiff did not comply with the conditions laid down that certain cheques which were presented were not paid. The plaintiff was expected to submit quarterly, list of contracts outstanding but on 31st March, 1975 no such return was received.

On 14th May, 1975 the plaintiff closed its account after it had been transferred to the United Bank for Africa.
In respect of the plaintiffs’ second account, exhibit D7, it was opened on the insistence of the defendants to receive mobilisation payments from the Federal Housing Authority. On 30th December, 1974 an amount of ₦509,000 was paid into the account and was specifically earmarked for the Black Arts and Festival Projects but withdrawals were made by the plaintiff for purposes other than the Black Arts Festival.

The defendants later found out that the final account later submitted to the bank by the plaintiffs, was different and showed an inferior position to the draft account on which the decision to increase the credit was based. The existence of a debenture with the International Bank for West Africa was a surprise to the defendants; this was discharged with the assistance of the defendants.

The expression “R/D” was written on the cheques exhibits P8, P8A-P8C because when they were presented for payment there were insufficient funds to meet the cheques and the line of credit for bridging finance was not in accordance with the terms offered to the plaintiffs. It was not written out of malice or to show that the plaintiffs were dishonest or insolvent.

Under cross-examination the witness said that the total value of the plaintiff’s securities with the defendant bank was ₦3,600,000 according to the stamp to support the bridging loan ₦650,000. He admitted writing exhibit P48 to the plaintiffs and that he knew the plaintiffs had a lot of commitment all over the country.

The amount on each of exhibits P12A and P13, according to this witness was by cheque deposited with the bank and not by assignment.

At the close of the defence, both learned Counsel addressed. I shall deal with the points raised in the addresses in due course, particularly those I consider pertinent to the facts of this case.
The agreement on which the plaintiff is relying for this claim, according to the amended writ of summons and the averment in paragraph 3 of the amended statement of claim, is the letter, exhibit P4. The body of the said letter written by the defendants to the plaintiffs on 21st October, 1974, reads as follows:—

“Confirming our discussion today we will need the following documentary requirements:—

1. A new personal guarantee by chief Angus Ilonseh in the amount of N700,000.

2. A new corporate guarantee issued by Angus Plant Hire Company Limited in favour of Angus Builders Co Limited for N700,000 with an accompanying resolution authorising this guarantee.

3. Evidence to be submitted to our bank showing the release of any claims against your company’s assets by International Bank of West Africa Limited, under the previous registered debentures.

4. Your submission on a monthly basis all relative certificate of billings evidencing work completed during the month on contracts outstanding reflecting billings to date and approved by contracts architect. This will take the form of individual certificate contract billings for relative contracts outstanding with a cover sheet showing totals.

5. You are required also to submit on quarterly basis contracts outstanding noting the billings to date retention held and uncompleted work to be done.

Since we have increased our credit recommendation to your company from the N250,000 approved in July, 1974 to N650,000 we are enclosing for your completion a new Board Resolution and Borrowers General Agreement. It is extremely important that the above documentary requirements are fulfilled as quickly as possible.

An early meeting between yourself, Mr Baxter and our bank will be advisable.

Your earliest attention will be appreciated.”
From the context of this letter I have to ask myself whether or not the agreement between the plaintiffs and the defendants can be ascertained from it without reference to any matter outside this letter particularly the discussion that preceded the writing of the said letter and the discussion at the subsequent meeting (if any) which the defendants advised should be held with the plaintiffs, Mr Baxter and the bank. The answer to this question becomes necessary since it can be gathered from the second paragraph of the said letter that the documentary requirements under the said letter became necessary because the N250,000 credit accommodation to the plaintiffs approved in July, 1974 had been increased to N650,000 which suggests that the terms contained in the said letter is in addition to the terms under an existing agreement between the plaintiffs and the defendants. The terms of the agreement that led to the granting of the prior N250,000 credit accommodation have both been disclosed and the plaintiffs, it would appear had operated his account, exhibit D5, for over two months before exhibit P4 was written.

Learned Counsel for the plaintiffs during his address submitted that 80% of the billings was not a term of the contract; this submission I must state, overlooked the context of the letter, exhibit D1, written to the defendants on 19th July, 1974 by the plaintiffs:

“We also confirm that we are prepared to enter into any domiciliation arrangement on the contract for the Federal Government college at Port-Harcourt whereby all receipts from this contract will be paid to the bank as a first step towards the furtherance of good relationship with the bank. By virtue of the fact that there is normally a delay in receiving payment after architects survey certificate has issued, we hope, as agreed with you, that the bank will allow us to draw up 80% of the value of the certificate pending the receipt of the payment from the Federal Ministry of Works and Housing. We hope we will be able to enter into similar arrangement in respect of new contracts.”

The above quoted paragraph not only dealt with the issue of 80% of the certificate but also of domiciliation arrangement
on the particular contract, Federal Government College, Port-Harcourt which arrangement was also extended to other contracts as supported by the statement of claim and the evidence of the first plaintiff’s witness. It would be observed that none of these arrangements were reflected in the letter, exhibit P4, nevertheless they featured prominently in the acts of the parties to the arrangement.

Although the plaintiff averred in paragraph 3 of the amended statement of claim that the credit facilities were increased to ₦850,000 on 27th November, 1974, not only was there no document to support this averment, there was no oral testimony on it other than the first plaintiffs’ witness’s evidence that the defendants initially granted the plaintiffs ₦250,000 credit facility, the amount needed by the plaintiffs was ₦800,000.

In view of the previous dealing between the plaintiffs and the defendants in respect of the ₦250,000 credit facility earlier granted to the plaintiffs and the subsequent conduct of the parties after the writing of exhibit P4, I cannot but hold that the agreement between the plaintiffs and the defendants cannot be ascertained on exhibit P4 alone without reference to matters outside it. In other words the letter, exhibit P4, is an internal memorandum previously concluded by the plaintiffs and defendants for which oral evidence becomes admissible to the terms of the previous agreement: see Beckett v. Nurse (1948) 1 K.B. 525; [1948] 1 All E.R. 81. In view of this, it therefore becomes necessary to ascertain what the terms of the former agreement and the conditions in which they operated.

The plaintiffs proffered evidence to support its compliance with the terms contained in exhibit P4 and as averred in paragraph 4 of its further Amended statement of claim. The defence can be gleaned from paragraphs 14, 15, 16, 17, 19, 20 and 23 of the second amended statement of defence which read as follows:–

“14. The defendants will contend at the trial that the credit accommodation given to the plaintiffs was conditional that the plaintiffs should comply with certain conditions.”
15. The defendants will aver at the trial that notwithstanding that the plaintiffs failed to comply with the conditions given to the plaintiffs the defendants at their discretion still gave the plaintiffs credit accommodation.

16. The defendants will rely at the trial on all the correspondences between the plaintiffs and the defendants in relation to banking activities of the plaintiffs with the defendants to show that the plaintiffs did not comply with the agreed terms under which credit accommodation was to be given to the plaintiffs.

17. With reference to paragraph 4 of the second amended statement of claim, the defendants will contend at the trial that the plaintiffs averments in their said paragraphs 4 are not the only conditions the plaintiffs were to comply with before the plaintiffs could enjoy the credit facilities to be made available by the defendants to the plaintiffs.

19. The defendants will aver at the trial with reference to paragraph 5 of the second amended statement of claim that the plaintiffs flouted the purported irrevocable standing orders claimed to have been given to the various ministries referred to in their paragraph 5 of the second amended statement of claim.

20. With reference to paragraph 6 of the second amended statement of claim the defendants will aver at the trial that the plaintiffs failed to submit on monthly basis all relative certificate of billings evidencing work completed during the month and also failed to provide on a regular quarterly basis contract outstanding noting billings to date, retention held, and uncompleted work to be done.

23. With further reference to paragraph 7 of the second amended statement of claim, the defendants will aver at the trial that as a result of the plaintiffs non-compliance with the terms in the defendants letter dated 21st October, 1974 to the plaintiffs it became necessary to deal orally with the plaintiffs on a day to day transactional basis. This involved oral agreement either in the bank or over the telephone as to which cheques could be paid at any particular time.”
It would be observed that apart from paragraph 19 and 20 which specifically set out certain conditions, namely, flouting of the purported standing order given to the ministries and failure to submit relative certificates of billings on monthly basis, as certain conditions not complied with by the plaintiffs, all the averments in the above quoted paragraphs as well as others not quoted but referring to non-compliance of the conditions of the agreement did not spell out which conditions or terms in exhibit P4 which were not complied with by the plaintiffs. In other words, the non-compliance by the plaintiffs of certain terms of the agreement were mainly repeated in many of the forty paragraph second amended statement of defence. Indeed if there is any document that can be described as prolix it is the second amended statement of defence.

Order 16, rule 10 of the High Court of Lagos State (Civil Procedure) Rules, provides as follows:–

“10. 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 defendant (as the case may be); and, subject thereto, an averment of the performance or occurrence of all conditions precedent necessary for the case of the plaintiff or defendant shall be implied in his pleading.”

The learned editors of the 1952 Edition of the Annual Practice, writing under the caption “Condition Precedent” under rule 14 of Order 19 of the said edition, which rule is in pari materia with the above quoted rule state at pages 354 and 355, inter alia, as follows:–

“Cases constantly occur in which, although everything has happened which would at common law prima facie entitle a man to a certain sum of money, or vest in him a certain right of action, there is yet something more which must happen, in the particular case, before he is entitled to sue, either by reason of the provisions of some statute, or because the parties have expressly so agreed; this something more is called a condition precedent. It is not an essence of such a cause of action, but it has been made essential. It is additional formality superimposed on the common law.”
A general averment of the due performance of all conditions precedent is implied in every pleading and therefore it need not be alleged (Gates v. WA and R Jacobs (1920) 1 Ch. 567). It is for the defendant if he contends that there was a condition precedent and that it has not been duly performed, to state specifically what that condition was, and to appeal its non-compliance; otherwise its due performance will be presumed. And it is not sufficient for him to allege generally that “an express condition” has been agreed to; he must state its terms and between whom it was made, and whether verbally or in writing (Abbas v. Matheson and Co, L.T.J. 268); and see Whiting v. E London Waterworks (1884) W.N. 10. Nevertheless, when a condition precedent is properly pleaded, the burden of proving its due performance or the waiver of its due performance still rests on the plaintiff.”

Exhibits P9, P10, P11, P12, P12A, P13-P16, P17, P17A-P17C, P18, P19 and P19A were payment certificate tendered on behalf of the plaintiffs. Three of the certificates, exhibits P12, P12A and P13 appear to have originated from the Ministry of Defence while the others were from the Federal Ministry of Works and Housing. According to Mr Parker, the second PW, all the amounts appearing on the payment certificates were paid into the defendants bank and reflected on the bank’s statement of account, exhibit 5.

It was the contention of the defendants that the Ministry of Defence did not make assignment of the domiciliation referred to in paragraph (vii) of the amended statement of claim even though representations about it were made to Major Parker who promised to contact the ministry yet the assignment was not made; the result was that the defendants were obliged to disregard the certificates submitted by the Ministry of Defence under the conditions of allowing credit to the plaintiffs.

Although evidence was offered on behalf of the defendants on some other issues in defence of this action, such issues, namely, bad accounting by the plaintiffs, existence of a debenture created by the plaintiffs in favour of the International Bank for West Africa, difference in the final statement of accounts of the plaintiff’s company showing an inferior
position to the draft accounts on which the defendants had earlier based its decision to extend the credit facilities, cannot be said to be grounds on which the defendants are seriously relying for their defence as some of these facts from the evidence of the defence witness seems to have come to the knowledge of the defendants before the credit facility was increased to ₦650,000 and were not seriously pursued at the trial. What appears to be the crux of the defence to this action is contained in the averments in paragraphs 19, 20 and 23 of the second amended statement of defence which is the failure of the plaintiffs:

“To assign the domiciliation payment, particularly in respect of the Ministry of Defence to submit on a monthly basis all relative certificate of billings evidencing work completed during the month and also to provide on a regular quarterly basis contract outstanding noting billings to date, retention held and uncompleted work to be done and subsequent oral day to day dealing with the plaintiffs.”

The plaintiffs, through the second PW Mr Parker, linked the amounts on the certificates, exhibits P9-P19A, consisting of 36 certificates, with certain amounts credited in exhibit D5, the statement of account of the plaintiffs with the defendants bank. This evidence was not in any way challenged nor controverted by any other positive evidence from the defendant. These certificates include those from the Ministry of Defence, exhibits P12, P12A and P13. Indeed, Mr Cairns, the only defence witness had this to say about these certificates in answer to certain questions under cross-examination:

“...I had earlier said there should be 3 signatories to every certificate before any certificate can be cashed. The Ministry of Defence did not refuse to sign the certificates.

I see exhibits P12 and P13. They were paid and credited to the account on 8th November 1974 and 2nd January 1975 respectively. exhibit P12A is for ₦118,348.83k dated 19th December 1974 – I cannot trace the date it was paid and credited to the account.”
From the facts so far disclosed and established, the question then arises: Which certificates from the Ministry of Defence did the defendants disregard in respect of the credit facility granted to the plaintiffs? Which assignment were the defendants expecting before the payments from the Ministry of Defence certificates could be credited into the defendants bank’s account? The defendants could not supply these answers to any of these questions and as such I cannot but hold that the plaintiff’s domiciliation payment in respect of the payment certificates from the Ministry of Defence were duly paid into the plaintiff’s account with the defendants. Furthermore in the absence of any evidence from the defendants to show how an assignment in the manner he described was made, particularly that of the Federal Ministry of Works and Housing, I further hold that the assignment in respect of the payment certificates of the ministry of defence was made in so far as payments on the certificates exhibited were made: equity looks on that as done which ought to be done.

As to the submission on monthly basis all relative certificate of billings evidencing work completed, the form which these should take is contained in exhibit P4 thus:–

“This will take the form of individual certificate contract billings for relative contracts outstanding with a cover sheet showing totals.”

A glance at each certificate appears to reflect the details required above. Although the plaintiffs did not lead evidence as to provision “on a regular quarterly basis contracts outstanding noting billings to day”, the defendants on other hand also failed to substantiate the failure of the plaintiffs to comply with this term of the agreement.

As to the subsequent day to day dealings of the defendants with the plaintiffs, the plaintiffs had this to say:–

“On 27th November, 1974, myself and Major Parker had a meeting at the defendant’s bank together with Mr Cairns of the bank. Mr Marshall Lewis, the managing director of the bank was also present. The defendants did not complain about my failure to present any certificate under the agreement. I was not informed at that meeting that because of my failure, my overdraft would be
reduced to N200,000. I did not write a letter in December, 1974 in connection with the meeting of 27th November, 1974. I see the photocopy of the letter now shown to me. It bears my signature. It is not true that my overdraft with the bank was reduced to N200,000.

I do not remember holding a meeting with Mr Cairns or with Major Parker at the bank’s premises on 27th December, 1974. The documents now shown to me are those I submitted to the defendants in December.”

Immediately the witness concluded this evidence exhibit D4 was tendered through him. This exhibit which consists of two documents would appear to have been made on 20th December, 1974 as the date appearing on it under the signature of the first PW. The first document disclosed the payment due to the plaintiffs by 31st December, 1974 while the second document set out the plaintiff’s financial requirements for the same month.

The defence witness, Mr Cairns had this to say on this issue:–

“We had contact with the plaintiff’s company on a daily basis with Major Parker of Angus Builders and on 27th November, 1974 a meeting was held at our head office. Present were: myself, Chief Ilonse, Major Parker, Mr Marshall Lewis, the managing director of the Bank of America Limited.

We called the meeting because we were concerned with inadequacy of the certificates held in relation to the customer’s outstandings.

At the meeting Major Parker and Chief Ilonse undertook to provide us with certificates to cover adequately our outstandings. A decision was taken that the facility to the company should be reduced to N200,000. The plaintiffs did not object to this.

I later received a letter from the plaintiff’s company concerning the meeting we held.”

The photocopy of a letter, exhibit D12, was tendered through this witness. The body of the letter written by the first PW. on 2nd December reads as follows:–

“We beg to refer to the meeting held in your office on 27th November, when it was agreed that within the next two weeks we would
be granted facilities up to ₦200,000 for the purchase of materials to keep our sites moving. It would now appear that as at today you have rescinded this decision by only allowing ₦105,000.

This has put us in a complete dilemma as we anticipated we would operate up to ₦200,000 in view of the fact that it is most essential we continue to purchase materials in Lagos for our up-country sites. We have no alternative but to return to you the Bankers’ Draft for ₦20,000 issued in favour of our Sokoto Branch.

We can only express our strongest disapproval of your action which has now adversely affected our progress in Sokoto.”

The above quoted letter negatived the evidence of the plaintiffs concerning what took place at the meeting of 27th November, 1974.

The documents, exhibit D4, were written by the plaintiffs and submitted to the defendants: the circumstances leading to their being written were not disclosed by the plaintiffs’ first witness. The plaintiffs did not state that it was part of the transaction with the defendants to set out which payments were due for each month and the financial requirements of the plaintiffs for the month. If in fact the plaintiffs were entitled as of right according to his construction of the terms of the agreement, the plaintiffs did not need to disclose which payments were forthcoming before drawing on the plaintiffs’ account with the bank. As at 20th December, 1974 when the letter was written the account of the plaintiffs with the defendants, according to exhibit D5 stood at ₦67,703.49.

The defence witness gave evidence which led to exhibit D4 and he said, inter alia, as follows:

“I remember on 27th December, 1974, a meeting was held between me, Chief Ilonse, Mr Baxter, Major Parker and Mr Scott at the head office of the bank in Lagos. The purpose was twofold. First, the company submitted a list of certificates due but not yet in the bank’s possession but which they expected to receive by the end of December, 1974. Secondly, it was to submit to the bank a list of the company’s immediate cash requirements. I see exhibit D4; it was the list of payments due to Angus Builders Limited, from their clients which they expected to receive by the
end of December, 1974. The company undertook to provide to the bank, certificates to the tune of ₦426,427. The promise was not fulfilled. We informed the company that in view of the level of understandings on the bridging which was at that point ₦562,688; we would be unable to make further accommodation to the company unless certificates to the tune of ₦426,427 were received. The amount ₦426,427 promised to be paid by the end of December, 1974 by the company was not paid. We reminded them at the meeting of 27th December, 1974.”

When the plaintiffs did not provide the payment certificates by 31st December, 1974 another meeting according to the witness was held on 14th January, 1975 even though by that time some of the certificates to the tune of ₦230,000 had been paid in. The witness went on and had this to say about the meeting:

“On the date of the meeting there were some certificates still outstanding and not received. The principal agreement at the meeting was that any cheques drawn pending the receipt of outstanding certificate would be subject of a special agreement between myself as the account officer and Major Parker. There was no objection to this at the meeting. On that day two cheques were later presented and paid, they were to the value of ₦2,500 and ₦5,400. They were paid on 23rd January, 1975.”

In the absence of any evidence from the plaintiff explaining the circumstances leading to the writing of exhibit D4, I cannot but accept the evidence of the defence witness which seems most probable in the circumstances. Furthermore, in view of the evidence disclosed in exhibit D12, I prefer the evidence of the defence witness to the reduction to ₦200,000 of the credit facility granted to the plaintiffs by the defendants.

In the circumstances, I make the following findings of fact:

“(i) Following the inadequate submission of payment certificates of billings by the plaintiffs the defendants reduced the credit facility of the plaintiffs with the defendants to ₦200,000.

(ii) The plaintiffs agreed to the said reduction.
(iii) As a result of the failure of the plaintiffs still to submit payment certificates to meet the outstandings as expected it was agreed between the plaintiffs and the defendants that any cheque to be drawn pending the receipt of certificate would be subject to special agreement between the defendants and the plaintiffs.”

From the above facts it cannot be in doubt that the terms set out in exhibit P4 had been superseded by the subsequent term contained in exhibit D12 which was subsequently carried by oral agreement and conduct of the parties. That being the position, the plaintiffs cannot rely on exhibit P4 as the agreement on which he can maintain this action for a breach of contract for the defendants’ act in dishonouring the plaintiffs’ cheque which were then subject of special agreement between the parties as to honouring or otherwise.

I must observe that exhibits P8, P8A and P8B which were cheques issued on 25th November, 1974, 21st January, 1975 and the 17th January, 1975 respectively for a total sum of N43,330 were presented for payment on 22nd January, 1975 when the account of the plaintiffs with the defendants stood at N175,902 according to exhibit D5. It must be remembered that two cheques to the value of N7,900, according to the defence witness had been approved on 14th January, 1975 for payment but were not presented until 23rd January, 1975. Therefore as at 22nd January, 1975, the defendants would have known that at any time from that date the account of the plaintiff would rise to N183,602 and as the limit of accommodation was N200,000 and as any cheque which would be presented pending submission of certificates should be agreed upon between the parties, the plaintiffs’ account would have risen to N237,132 by 23rd January, 1975 thus exceeding the limit of accommodation. By virtue of the agreement between the parties, the defendant would therefore not be liable in dishonouring these cheques. The same applies to exhibit P8C.

The plaintiff’s claim for damages for a breach of contract contained in the letter of 21st October, 1974 therefore fails.
On the second leg of the plaintiffs’ claim, namely, for libel committed on the plaintiffs by the defendants for dishonouring the plaintiffs’ cheques, this, I must state cannot be treated in isolation without reference to the agreement between the parties, and in this connection, the agreement that any cheques drawn pending the receipt of outstanding certificate would be subject of a special agreement between the parties.

As the authorities stand, the word “R/D” meaning “refer to drawer” written on a cheque of a customer by his bank may be libellous of the customer but in the instant case where the defendants bank was not obliged to honour the plaintiffs’ cheques in the prevailing circumstances, I cannot but hold that the dishonour was not wrongful and therefore not malicious: see Jayson v. Midland Bank Ltd (1968) 1 Lloyds reports 409.

In Flack v. London and South Western Bank Ltd (1951) 31 T.L.R. 334, the opinion of Scruttes J on the words “Refer to Drawer” on a cheque in circumstances similar to these appears at pages 336 as follows:–

“With regard to the question of libel, the words ‘refer to drawer’ in his opinion, in their ordinary meaning amounted to a statement by the bank, ‘We are not paying; go back to the drawer and ask why,’ or else, ‘go back to the drawer and ask him to pay’. In the view he took of the case the bank were justified in not paying under the moratorium and he did not think that it was possible to extract a libelous meaning from what had been said by the bank.”

If there were occasions when these statements contained in the above quoted opinion were most appropriate, they were the occasions when exhibits P8, P8A-P8C were presented to the defendants for payment which was in violation of agreement existing between the defendants and the plaintiffs.

Having held the view that the word “R/D” on the cheques could not be libellous, the plaintiffs’ claim under this head fails.

In the result the two legs of the plaintiffs’ claim are dismissed.
Adekoya v. National Bank of Nigeria Limited

HIGH COURT OF OYO STATE

Date of Judgment: 13 DECEMBER 1978

Banking – Dishonoured cheques – Credit balance in account of drawer – Liability of a banker for a wrongful dishonour of a customer’s cheque

Contract – Wrongful dishonour of a customer’s cheque by a bank – Whether amounts to breach of contract – Effect thereof

Damages – Wrongful dishonour of a customer’s cheque by a bank – Effect thereof – Whether customer entitled to substantial damages or/and special damages

Tort – Wrongful dishonour of a customer’s cheque by a bank – Cheque marked “R/D” – Whether libellous

Facts

The plaintiff claimed against the defendant the sum of ₦10,000 (ten thousand naira) as general damages for defendant’s wrongful refusal to pay the plaintiff’s cheque and for libel contained in the answer on the said cheque which read “Refer to Drawer” (R/D) drawn by the plaintiff in favour of one of his customers. The plaintiff was at the material time a customer of the bank and had enough credit balance in his account to pay the cheque. At the trial, the court found that the said cheque had no irregularity of any kind in its form and that the defendant bank dishonoured the cheque by its endorsement “Refer to Drawer” (R/D) without any substantial reason.

Held –

1. That a bank will be liable in damages for breach of contract if it dishonours its customer’s cheque where the
customer has sufficient funds to meet the amount of the cheque and the cheque is regular in every form.

2. A person whose cheque is wrongfully dishonoured can sue for breach of contract and libel together and will be entitled to substantial damages if he is “in trade” or “nominal” damages if he is not “in trade” but in either case he can also get special damages if special damage is proved.

3. That although the plaintiff could not be said to have suffered by special damage by the defendant’s wrongful dishonour of his cheque, the plaintiff as a “business man” is however entitled to substantial damages. What is substantial damage is a question to be determined with regard to the circumstances of each case.

4. That it is the duty of the judge to decide as a point of law whether the words complained of by the plaintiff are capable of any defamatory meaning. If the answer to this question is in the affirmative then, the judge must leave to the jury the question whether the words complained of by the plaintiff actually defamed or libelled the plaintiff.

5. That in certain circumstances, the words “Refer to Drawer” are capable of an adverse reflection on the reputation; solvency or honour of the drawer of the cheque as the words may mean that the drawer’s account is nil or insufficient to pay the cheque. The smaller the amount of the cheque the greater the adverse reflection of the drawer’s good faith and solvency, when his cheque is marked “Refer to Drawer” for no good reason.

6. A libel action based on such words as “Refer to Drawer”, although capable of defamatory meaning may fail if the defendant bank can establish that the remark “Refer to Drawer” was as a result of a serious irregularity in the forms of the cheque such as absence of drawer’s signature or difference in words and figure about the amount to be paid.
Obiter
“The relation between banker and customer is that of a debtor and creditor, with super added obligation on the part of the banker to honour the customer’s cheque if the account is in credit. A cheque drawn by a customer is in point of law a mandate to the banker to pay the amount according to the tenor of the cheque. It is beyond dispute that the customer is bound to exercise reasonable care in drawing the cheque to prevent the banker being misled. If he draws the cheque in a manner, which facilitates fraud, he is guilty of a breach of duty as between himself and the banker, and he will be responsible to the banker for any loss sustained by the banker, as a natural and direct consequence of this breach of duty. See per Lord Finlay LC; in London Joint Stock Bank Ltd v. Macmillan and Authur (1918) A.C. 777.”

Judgment for the Plaintiff.

Cases referred to in the judgment

Nigerian

Foreign
Hadley v. Baxendale (1854) 9 Exch 341
London Joint Stock Bank Ltd v. Macmillan and Authur (1918) A.C. 777
Tolly v. Barclays Bank Ltd [1936] 1 All E.R. 653

Counsel
For the plaintiff: Akande
For the defendant: Aribisala

Judgment
FAKAYODE CJ: The plaintiff’s claims is for
“₦10,000 (ten thousand naira) general damages for wrongfully refusing to pay the plaintiff’s cheque no. BH-P229300 dated 13th day of March, 1978 for ₦500 (five hundred naira) at Ibadan and
for libel contained in the answer on the said cheque drawn by the plaintiff in favour of one Prince Sola Adesanya and dishonoured by the defendants.”

The plaintiff is a businessman who manufactures polythene for making bags. He trades in the name of “Sholly Associated Industrial Centre” and keeps a current account No. 10245 in the defendant bank at the Cocoa House Branch at Ibadan.

On the 13th March, 1970, the plaintiff drew a cheque No. BH-P229300 on the defendant bank in favour of one Prince Adesanya, for the sum of ₦500 (five hundred naira). Prince Adesanya presented the cheque exhibit A, at the bank for payment in cash but the defendant’s cashier, after a verification of the plaintiff’s signature and account returned, the cheque, exhibit A, to Prince Adesanya with the endorsement R/D (meaning “Refer to Drawer”). In other words, the cheque was dishonoured ie it was not paid.

Prince Adesanya returned to the plaintiff factory in angry manner but as he did not meet the plaintiff at work he left the dishonoured cheque with one Mr Fatai Ayinde Bello, an employee of the plaintiff, with instructions that the plaintiff should pay him cash.

When Mr Bello deliver the dishonoured cheque, exhibit A, to the plaintiff, the plaintiff went to the defendant bank for explanation why Prince Adesanya was not paid. The plaintiff also demanded a statement of his bank account, exhibit B, which showed that as at 13th March, 1973 (the day in question) the plaintiff had a credit balance of ₦5,056.19. It was stated in exhibit A, the dishonoured cheque, the plaintiff’s signature was verified by an official of the defendant bank. The plaintiff tendered a Local Purchase Order for 200 plastic sieves ordered by the Cocoa Research Institute of Nigeria. The Local Purchase Order was admitted as exhibit B, the value of which was ₦100. The plaintiff said he could not meet this order because of the accident of the dishonoured cheque, exhibit A. The plaintiff also said that he was unable
to meet orders from other customers apart from Prince Al-
Ahaji Bashorun and the Cocoa Research Institute of Nigeria
because of the dishonoured cheque, exhibit A, and that, in
addition, some 75% of his staff had to leave his factory at
the end of that month.

Continuing his evidence, plaintiff said as he could no
longer procure raw material for the manufacture of poly-
thene materials from Prince Adesanya, his main supplier, he
had to go to Lagos to buy the raw materials from other peo-
ple at the rate of ₦1.30 kobo instead of ₦1 per kilogramme
which was Prince Adesanya’s price. He said between 13th
March, 1978 and 31st May, 1978 he lost ₦6,000 in his busi-
ness turnover due to the incident of the dishonoured cheque.

Under his cross-examination, the plaintiff said before he
opened his said bank account he had to sign a Specimen
Signature Card for the defendant. The Specimen Signature
Card was tendered as exhibit E which contained the plain-
tiff’s business name a “Sholly Associated Industrial Centre
of SW8/1142 Ring Road, PO Box 1642, Ibadan.” The plain-
tiff admitted that after the dishonoured cheque, exhibit A, he
had issued other cheques which were honoured by the de-
fendant.

PW1 (Prince Olusola Adesanya) and PW2 (Fatai Ayinde
Bello) materially corroborated the evidence of the plaintiff.
PW1 said that after about an hour when he presented the
cheque at the bank for payment the defendant’s cashier
threw the cheque, exhibit A, at him with the endorsement
R/D. PW1 said he was of the opinion that the reason why the
cheque was marked R/D was that the plaintiff had no money
or no sufficient money in his bank account to cover the
amount of the cheque. He said he went to the plaintiff’s
place to demand the goods he supplied to the plaintiff or
their price in cash. PW1 said the plaintiff subsequently paid
him the ₦500 in cash. PW1 said he himself maintains a bank
account at the United Bank for Africa at Amunigun in
Ibadan and that he had seen remarks like “R/D or “R/P” on
bank cheques before. He said a remark like S/I means “Signature is Irregular.”

The DW1 was Mr Napoleon Edesiri Okoro, the defendant’s accountant who said that his bank would suspend the payment of a cheque on the ground of some vital irregularity in the form of the cheque until the customer clears the irregularity. He said the remark “R/D” means “Refer to Drawer” and that exhibit A was marked “R/D” because it bears the rubber stamp impression of the plaintiff’s business name whereas, the Specimen Signature Card, exhibit E, does not bear any such rubber stamp impression. DW1 said the plaintiff did not produce exhibit A when plaintiff was asked to do so. Mr Okoro said if the plaintiff had no sufficient funds to cover exhibit A, the endorsement would have been “N/S” means “no sufficient fund.” DW1 denied that the endorsement R/D on exhibit A was false or malicious, DW1 tendered 8 previous cheques issued by the plaintiff and honoured by the defendant as exhibits J-J7. He admitted that exhibit A and exhibits J-J7 were basically the same in form.

In his address at the close of the defence, Mr Aribisala, learned Counsel for the defendant bank, submitted that the words “Refer to Drawer” (R/D) were not libellous. He cited such cases as *Flack v. London SW Bank Ltd* (1915) T.L.R. Volume 31 page 334 and *Tolly v. Barclays Bank Ltd* [1936] 1 All E.R. 653. He maintained that a bank owes a duty of care to its customer not to pay out the customer’s money in a negligent manner.

In his own reply, Mr Akande, learned Counsel for the plaintiff, submitted that a bank owes a duty to honour its customer’s cheque. He said the plaintiff is a businessman and is entitled to damages if his cheque was dishonoured. He submitted further that the words “Refer to Drawer” (R/D) were not libellous of the plaintiff. He cited *Pyke’s case* reported in (1950) IR 195. He said plaintiff was entitled to judgment.

From the totality of the evidence in this case, I find as fact
Fakayode CJ

Adekoya v. National Bank of Nigeria Limited

503

at 13th March, 1978 when the plaintiff issued a cheque for N500 in favour of his creditor, one Prince Adesanya (P W 1), the plaintiff had a credit balance N5,056.19 in his account and that the said cheque, exhibit A, had no irregularity of any kind in its form. I also find as a fact that the defendant bank dishonoured the cheque by its endorsement “Refer to Drawer” (R/D) without any substantial reason. I say this because the previous cheques of the plaintiff, exhibit J-J7, which were substantially in the same form as exhibit A, were honoured by defendant. Exhibit J-J7 as well as exhibit A bore the rubber stamp impression of the plaintiff’s business name which appears on the Specimen Signature Card, exhibit E, in the possession of the defendant bank.

I must now discuss the relevant point of law namely:

(a) the issue of breach of contract and

(b) the issue of libel. Breach of Contract. In London Joint Stock Bank Ltd v. Macmillan and Authur (1981) A.C. 777, the House of Lords, per Lord Finlay LC, lay down the following principle of law:

“The relation between banker and customer is that of a debtor and creditor, with super-added obligation on the part of the banker to honour the customer’s cheques if the account is in credit. A cheque drawn by a customer is in point of law a mandate to the banker to pay the amount according to the tenor of the cheque. It is beyond dispute that the customer is bound to exercise reasonable care in drawing the cheque to prevent the banker being misled. If he draws the cheque in a manner which facilitates fraud, he is guilty of a breach of duty as between himself and the banker, and he will be responsible to the banker for any loss sustained by the banker, as a natural and direct consequence of this breach of duty.”

The above principle of law may be paraphrased thus:

(a) The relation between a banker and his customer is that of a debtor and creditor;

(b) A bank is duty bound to honour his customer’s cheque if the account is in credit;
A customer whose account is in credit, and who wants his cheque to be honoured, must take care in drawing up his cheque because the banker may not, honour a cheque which is materially irregular e.g. irregularity about signature, date, amount in words and figure and such like;

The banker and the customer owe each other a duty of care not to cause financial loss one to the other.

A bank will be liable in damages for breach of contract if it dishonours its customer’s cheque where the customer has sufficient funds to meet the amount of the cheque and the cheque is regular in every form.

The locus classicus on this aspect of our law is the case of *Balogun v. National Bank of Nigeria Ltd* (1978) 3 S.C. 155. In that case, the appellant, a practising lawyer, issued a cheque for N40 on her clients account at the defendant bank but the cheque was dishonoured. The appellant’s client’s account was sufficiently in credit at the material time and in spite of her entreaties to get the bank officials to honour the N40 cheque she was treated with insults and levity. The Supreme Court, on appeal, held that a person whose cheque is wrongfully dishonoured can sue for breach of contract and libel together and will be entitled to substantial damages if he is “in trade” or “nominal” damages if he is not “in trade” but in either case he can also get special damages if special damage is proved.

The well-known case for damages for breach of contract is *Hadley v. Baxendale* (1854) 9 Exch. 341. A party committing a breach of contract will be liable in damages which flow directly and naturally from his failure to keep his own side of the agreement or bargain provided that such damage was reasonably within the contemplation of the parties at the time the contract was made. In the case in hand, I do not see any special damage which the plaintiff suffered apart from the embarrassment he sustain when his cheque, exhibit A, was dishonoured.
Subsequent cheques issued by him were honoured by the defendant bank. His bank statement, exhibit A, does not show any sizeable turnover in his credit. He got Prince Adesanya paid by cash and so I could not see any reason why Prince Adesanya would not continue to supply him raw materials for his polythene bags trade. But the law says a “businessman” like the plaintiff entitled to substantial damages if cheque is dishonoured wrongfully. What is substantial damages is a question to be determined, with regard to the circumstances of each case. In the present case, dishonoured cheque, exhibit A, was for ₦500. The plaintiff’s account had a credit balance of ₦5,056.19 at the material time. The order the plaintiff got from the Cocoa Research Institute of Nigeria at the material time was for ₦100, I therefore think, having regard to all the circumstances, that general damages of ₦300,00 is substantial for the defendant’s breach of contract in dishonouring the plaintiff’s ₦500 cheque, exhibit A.

Libel:

The leading case on this aspect of the law is Pyke v. Hibernian Nigerian Bank Ltd (1950) I.R. 195. In that case, the plaintiff sued for breach of contract and libel in respect of three dishonoured cheque which were marked “Refer to drawer” by the defendant bank. The trial court awarded the plaintiff £400 damages for libel and £1 for the breach of contract in respect of the three dishonoured cheques. When the case went on appeal, four appellate Judges decided the appeal in the ratio of two for and two against the appellant with the result that the trial court’s decision stood undisturbed.

The plaintiff’s account at the material time had an overdraft facility for £120 which could not be exhausted by the 3 cheques put together. Two of the appellate Judges held that the words “Refer to Drawer” are not libelous per se as such words could have an innocent meaning like “We are not paying this cheque, so go back to the drawer.” The other two
appellate Judges held a contrary view namely that the words “Refer to drawer” were capable of a defamatory meaning eg that “there was no fund or no sufficient fund in the drawer’s account to pay the cheque.”

In a libel action, it is the duty of the judge to decide as a point of law whether the words complained of by the plaintiff are capable of any defamatory meaning. If the answer to this question is in the affirmative then the judge must leave to the jury the question whether the words complained of by the plaintiff actually defamed or libelled the plaintiff: see for example Tolley v. Fry (1931) A.C. 333.

In the present case the words complained of were “Refer to Drawer” (R/D) which were endorsed on plaintiff’s cheque, exhibit A, by the defendant bank. Some judges have held that those words are not capable of a defamatory meaning per se but other judges hold a contrary view. I pitch my tent with those who hold the opinion that in certain circumstances the words “Refer to Drawer” are capable of an adverse reflection on the reputation, solvency or honour of the drawer of the cheque as the words may mean that the drawer’s account is nil or insufficient to pay the cheque. As a matter of fact, the smaller the amount of the cheque the greater the adverse reflection of the good faith and solvency when his cheque is marked “R/D” for no good reason. Although I hold that the words “Refer to Drawer” are capable of a defamatory meaning yet I think a libel action based on such words my fail if the defendant bank can establish that the remark “Refer to Drawer” was as a result of a serious irregularity in the form of the cheque eg absence of drawer’s signature or differ in words and figure about the amount to be paid. In the case in hand, Prince Adesanya, the drawee of the cheque, said he was of the opinion that the plaintiff had no money in the bank hence the cheque was dishonoured and marked “R/D.” I hold therefore that, in the circumstances of this case the words “R/D” defamed the plaintiff as the cheque had no substantial irregularity in form. However,
I am not awarding any substantial damages under this head. I award only ₦10 for the libel due to the endorsement R/D on exhibit A. The reason is that I have already made a substantial award under the damages for the breach of contract in respect of the same dishonoured cheque. The universal practice is to award substantial damages under one of the two heads but not under both heads of (a) breach of contract and (b) libel for a dishonoured cheque.

Therefore, I give judgment for the plaintiff for ₦300 as damages for breach of contract and ₦10 as damages for libel in respect of the dishonoured cheque exhibit A, with ₦100 costs against the defendant bank.
Umaigba v. New Nigeria Bank Limited

HIGH COURT OF BENDEL STATE

GBEMUDU J

Date of Judgment: 31 MAY 1979

Banking – Cheques – Forged cheque – Collecting banker discovering forgery after clearance of cheque – Customer withdrawing proceeds of cheque – Whether bank estopped from debiting customer’s account – Proof of negligence

Banking – Cheques – Forged cheque – Duty of paying bank – Whether bank has duty of care to payee to recognise customer’s signature and detect forgery on apparently regular cheque

Facts

The plaintiff’s claims against the defendant were for:

“(a) A declaration that the debiting of the plaintiff’s account NNB 169.5233 for the month of November, 1978 as at November 24th, 1978 with the sum of ₦37,307 is improper, wrongful and unjustified.

(b) A declaration that the defendant bank be ordered to credit the plaintiff’s account with the said sum of ₦37,307 as demanded by the plaintiff.

(c) That the plaintiff be entitled to 9% bank rate of interest on the ₦37,307 as from November 24th, 1978, or the current bank rate of interest until judgment in this action from the defendant.”

The plaintiff, a dealer in motor vehicles, was presented by two customers with a Bendel State Water Board cheque as payment for a vehicle order. The cheque was apparently signed by three Board officials, made out in the name of one of the customers, and endorsed to the plaintiff’s trading account by the customer. The plaintiff endorsed the cheque for deposit to his account and presented it to the bank with a request for
special clearance. The bank returned it the same day unpaid because the third signature was irregular. The plaintiff represented the cheque three days later, with the signature corrected, and on this occasion the bank cleared it and paid the proceeds into the plaintiff’s account. The next day the plaintiff withdrew most of the money to pay back to the customer, alleging that the proposed sales deal had fallen through.

two weeks later the bank notified the plaintiff that since the cheque was forged, his account had been debited with the amount it represented. The plaintiff instituted the present proceedings to reclaim the sum, and interest upon it, from the bank, contending that:

(i) the bank was estopped from recovering the proceeds of the cheque from his account, by its assurance to him that the cheque was cleared, upon which he acted to his own detriment; and

(ii) the bank had been negligent in not checking the signatures on the cheque with the Water Board when the initial query arose on the cheque’s first presentation to the bank.

The defendant bank alleged that the whole so-called sales transaction was fraudulent, and that the plaintiff knew or had the opportunity to know that the cheque was forged, and was, therefore, estopped from reclaiming his loss from the bank. It contended that:

(i) money paid under mistake of fact could be recovered; and

(ii) the fact that the cheque was cleared did not mean that the bank represented it as genuine.

Held –

1. The mere fact that a banker had honoured a cheque on which his customer’s signature had been undetectably forged did not carry with it an implied representation by the banker to the payee that the signature was genuine. And therefore there was no bar to the defendant’s right to recover the money as having been paid under a mistake of fact.
2. The honouring of a cheque by the paying banker represents no more than that he believes the signature to be genuine. The mere fact that the plaintiff in this case had acted to his detriment by spending or paying away a substantial part of the money in reliance on the original clearance is not sufficient to bar the defendant’s right to recover it.

3. In deciding whether or not to honour a customer’s cheque, at any rate when it is in proper form and the customer’s signature appears to be genuine, a bank owes no duty of care to the payee.

   In the instant case, the defendant was not negligent in not detecting that the third signature had been forged.

Plaintiff’s claims dismissed.

Cases referred to in the judgment

Nigerian

Malomo v. Olushola (1955) 15 W.A.C.A. 12
Wada v. Alkali (1962) 2 All N.L.R. 73; (1962) N.N.L.R. 76

Foreign

Akwei v. Akwei (1943) 9 W.A.C.A. 111
Baylis v. Bishop of London (1913) 1 Ch. 127; [1911 – 1913] All E.R. 273
Commissioners of Taxation v. English, Scottish and Australian Bank Ltd (1920) A.C. 683; (1920) 123 L.T. 34
Constantine (Joseph) SS Line Ltd v. Imperial Smelting Corp Ltd (1942) A.C. 154; [1941] 2 All E.R. 165
Lloyds Bank Ltd v. Savory (EB) and Co (1933) A.C. 201; [1932] All E.R. 106
Lumsden and Co v. London Tree Sav Bank (1971) 1 Lloyd’s Rep 114
Morgan v. Ashcroft (1938) 1 K.B. 49; [1937] 3 All E.R. 92
Counsel
For the plaintiff: Okeaya-Inneh
For the defendant: Ehiwario

Judgment

GBEMUDU J: In this case the plaintiff’s claims against the defendant is for:

“(a) A Declaration that the debiting of the plaintiff’s account NNB 169.5233 for the month of November, 1978 as at November 24th, 1978 with the sum of ₦37,307 is improper, wrongful and unjustified.

(b) A declaration that the defendant bank be ordered to credit the plaintiff’s account with the said sum of ₦37,307 as demanded by the plaintiff.

(c) That the plaintiff be entitled to 9% bank rate of interest on the ₦37,307 as from November 24th, 1978, or the current bank rate of interest until judgment in this action from the defendant.”

Pleadings were ordered, filed and exchanged. The case for the plaintiff was presented by Samuel Umaigba and his sales manager. One Dr Okojie came with one Suleman Lawal on November 3rd, 1978 to the Umaigba Trading Stores. Dr Okojie introduced Lawal to Umaigba and Lawal wanted to buy six units of Volkswagen 1500 Beetles and three Volkswagen delivery vans. Mr Lawal presented a Bendel State
Water Board cheque for ₦37,307 issued in his name and drawn on the Murtala Mohammed Way Branch of the New Nigeria Bank Limited, Benin City. The cheque was endorsed for payment to Umaigba Trading Stores by Lawal but the vehicles were not to be released till the cheque was cleared. The cheque was accordingly on the same day, November 3rd, 1978 paid into the account of the said trading stores with the Mission Road Branch of the New Nigeria Bank Limited with a request for special clearance. On November 6th, 1978 the plaintiff received from the defendant notification that the cheque was cleared and a commission of ₦10 debited to the account of the plaintiff. On November 7th, 1978, Lawal and Okojie emerged in Umaigba Trading Stores, this time not to collect Lawal’s vehicles but his money. The plaintiff told Lawal that he would pay bank charges and would also be assessed by the Inland Revenue on the ₦37,307 and Lawal promised to compensate him with ₦3,000. The plaintiff then went to the bank and withdrew the sum of ₦34,307 and paid the amount to Lawal. According to the plaintiff he does not know the whereabouts of Lawal but Dr Okojie is at present in police hands.

On November 24th, 1978 the plaintiff was informed by the defendants that they were debiting his account with the sum of ₦37,307 “being your cheque BEB 063125 returned unpaid.” The plaintiff wants the court to advise his bankers “to pay back my ₦37,307 to my account with 9% interest.”

The defence called four witnesses, the assistant manager at the Mission Road Branch of the bank, the assistant superintendent of police who investigated the case, the chief accountant at the Water Board and the manager of the bank at the Murtala Mohammed Way Branch. The plaintiff maintains a current account in the name of Umaigba Trading Stores, account No. 5233, in the Mission Road Branch of the defendant’s bank. On November 3rd, 1978, the plaintiff came with a cheque for ₦37,307 and asked that the cheque be cleared specially. The cheque was properly endorsed and
the plaintiff signed the cheque thus giving consent for the cheque to go into his account. The cheque was sent to the Murtala Mohammed Way Branch through a messenger the same day and it was returned the same day “unpaid” because the third signature was irregular. The cheque was sent back to the plaintiff the same day through his junior brother Douglas. On November 6th, 1978 the cheque was represented by the plaintiff who wanted special clearance again. It was sent to the Murtala Mohammed way branch. They sent the cheque back and wanted confirmation of the endorsement at the back. This was done, the cheque returned and was paid, and the plaintiff was advised that the cheque was cleared. The query on the third signature was rectified before the cheque was represented on November 6th, 1978. On November 16th, 1978 the manager of the Murtala Mohammed Way Branch and a man from the Bendel State Water Board informed the defendants that the cheque was forged.

In this case the Murtala Mohammed Way Branch would pay the Water Board and debit, the Mission Road Branch, who would in turn debit the account of the customer. After a cheque has been cleared the account of the customer could still be debited if the cheque was found to be forged. This was the view of the first and forth defence witnesses, both bankers. “It is not the banking practice that a bank takes liability once a cheque has been okayed. We incurred no liability for paying the forged cheque,” in the words of the fourth defence witness, the manager of the Murtala Mohammed Way Branch.

At the end of the case Counsel addressed the court. Mr Ehiwario addressed it as follows: the plaintiff did not prove his case. The transaction was a fraudulent one and this was hatched by the plaintiff, Lawal and Okojie and consequently the unsuspecting defendant paid the sum of ₦37,307 by mistake into the account of the plaintiff through a mistake induced by the plaintiff. The plaintiff was a party to the fraud, or knew about it or had the opportunity of knowing about it.
In reality there was no sales transaction between the plaintiff and Lawal, the whole show was put up to meet this case. If there was a proper sales transaction, that would have been reflected in the invoice and other books of account kept by the plaintiff. The court should disregard the sales invoice which the plaintiff put in evidence and also compare the alleged signature of Lawal on the sales invoice and the forged cheque. The signatures were not that of one and the same person.

The plaintiff and his sales manager witness contradicted themselves in material particulars. The plaintiff said that Dr Okojie introduced Lawal to him and he referred Lawal and Okojie to his sales manager to invoice the vehicles, but his sales manager said in evidence that Lawal and Okojie came to him first, he prepared the invoice and minuted to the plaintiff. This was so because he, the sales manager knew nothing about the transaction. The deal was between the plaintiff, Lawal and Okojie.

The court should look at the attitude of the plaintiff from November 3rd, 1978 to November 7th, 1978. On November 3rd, 1978 the cheque was presented and returned, unpaid, because the signature of the chief accountant of the Water Board was irregular; on November 6th, 1978, it was rectified and represented; on November 7th, 1978 Lawal came for his money instead of vehicles; ₦3,000 commission was paid to the plaintiff by Lawal; the plaintiff knew how the irregular signature was regularised; Counsel concluded that all these lead one to conclude that these plaintiff was a party to the fraud or knew about it and should not benefit by his fraud. Counsel cited the case of *Bank of England v. Vagliano Bros.* (3). It is the duty of a customer to warn the bank of a fraud: *M’Kenzie v. British Linen Co* (12). The plaintiff had knowledge of the fraud and should warn the bank: *Greenwood v. Martins Bank Ltd* (7). The plaintiff is estopped from turning round and claiming his loss from the bank.
The bank was not negligent in the performance of its duty. The amount of ₦37,307 could be said to be paid under mistake of fact. The bank can recover from the payee: *Jones Ltd v. Waring and Gillow Ltd* (9); *Morgan v. Ashcroft* (14). The mere fact that the cheque was cleared did not mean that it was genuine: *National Westminster Bank Ltd v. Barclays Bank Intl. Ltd* (15) (1975) 1 Q.B.D. 654 at 662; [1974] 3 All E.R. 840); *Halsbury’s Laws of England* (4ed), paragraph 66 at 52. The action should be dismissed.

Mr Okeaya-Inneh replied: The plaintiff’s claim is as at paragraph 34 of the statement of claim. We alleged estoppel and negligence on the part of the defendant bank as at November 6th, 1978. There was no letter or document to the plaintiff informing him that the cheque was forged. As at November 6th, 1978 the defendant gave the plaintiff the impression that everything about the cheque was in order.

Counsel referred to Spencer Bower and Turner, *Estoppel by Representation*, (2ed), pages 27–28 (1966). That was final but if the defendant could establish that they were not negligent it could not be final.

The plaintiff would succeed in his claim if the defendant failed to show some irregularity in the cheque in their statement of defence and in the production of positive evidence. The cheque was not proved to be forged and the evidence of the assistant superintendent of police should be expunged from the records.

The defendant was negligent. Counsel cited the cases of *Lumsden and Co v. London Tree Savannah Bank* (11); *Baker v. Barclays Bank Ltd* (2).

1. The defendant was negligent in that having regard to the facts surrounding this cheque from November 3rd to November 6th, 1978, they failed to check with the Water Board as to the signatories: *Commissioners of Taxation v. English, Scottish and Australian Bank Ltd* (5).

2. The defendant was negligent in respect of the cheque itself: See *Halsbury’s Laws of England*, (4ed), paragraph 113 at 86; *Lloyds Bank Ltd v. EB Savory and Co* (10).
3. No statutory defence was pleaded to take away the charge of negligence from the defendant: *Wada v. Birnin Kebbi Chief Alkali* (16); *Malomo v. Olushola* (13); *Akwei v. Akwei* (1). This case ought to succeed.”

In this case the court is asked to order the defendants to pay the sum of ₦37,307 back to the plaintiff on grounds of estoppel and/or negligence. I will deal with the issue of estoppel first. The basis of this argument is that once the defendant had notified the plaintiff on November 6th, 1978 that the cheque was cleared, and on the strength of this the plaintiff withdrew the sum of ₦34,307 from his account with the defendant on November 7th, 1978, the defendant could not on November 24th, 1978 debit the account of the plaintiff in the sum of ₦37,307, the same cheque earlier cleared having now been returned unpaid. The cheque was returned unpaid because the signature of the chief accountant was said to be forged. The chief accountant was the third witness for the defendant in this case. He said in evidence: “The signature of the chief accountant looks like mine but it is not” (referring to the forged cheque). The witness was the person who first discovered the fraud: see the evidence of the manager of the Murtala Mohammed Way Branch.

The plaintiff has not been accused of forging the cheque and in my view section 137(1) of the Evidence Act (Cap 62) does not apply. It is enough to prove that the cheque was returned unpaid. I agree that the evidence of the assistant superintendent of police about the handwriting analyst’s report on the cheque is hearsay and inadmissible. But what evidence is left on the matter is enough to show that the cheque was returned unpaid because it was forged just as it was so returned on November 3rd, 1978. The standard of proof required to prove a criminal offence in civil proceedings is no higher than the standard of proof ordinarily required in civil proceedings. However, the more serious the allegation the higher the degree of probability that is required. See the case of *Hormal v. Neuberger Prods. Ltd* (8). Proof required is proof on the balance of probability, and not the higher standard of proof beyond all reasonable doubt required in criminal matters.
In the instant case two bank experts said that after a cheque had been cleared the account of a customer could still be debited if the cheque is found to be forged. That was banking practice. The plaintiff did not give evidence on what was the significance of “special clearance” of the cheque but he insisted that the vehicles alleged purchased by Mr Lawal would not be released until the cheque was cleared.

The case of *National Westminster Bank Intl. Ltd* (15) would appear to be on all fours with this case and I completely share the views and findings of the learned trial Judge in that case. The mere fact that a banker had honoured a cheque on which his customer’s signature had been undetectably forged did not carry with it an implied representation by the banker to the payee that the signature was genuine. There is no implied representation by the defendant which would lay the foundation for an estoppel against the bank and therefore there was no bar to the defendant’s right to recover the money as having been paid under a mistake of fact. The honouring of a cheque by the paying banker represents no more than that he believes the signature to be genuine. The mere fact that the plaintiff in this case had acted to his detriment by spending or paying away a substantial part of the money in reliance on the original clearance is not sufficient to bar the defendant’s right to recover it: see the case of *Baylis v. Bishop of London* (4). I hold that estoppel does not avail the plaintiff.

The next point raised by the plaintiff’s Counsel as to why the sum of ₦37,307 should be paid back to the plaintiff was because of the negligence displayed by the defendant in this transaction. In *Constantine (Joseph) SS Line Ltd v. Imperial Smelting Corp. Ltd* (6), the House of Lords held that, if the plaintiffs wished to show that frustration was due to the defendant’s negligence the plaintiffs must allege and prove it. The plaintiff was the only witness who gave evidence for himself. He did not give evidence on the negligence of the defendant, nor was any answer given under cross-examination by the
defendant’s witness from which negligence could be inferred. However, Counsel for the plaintiff pressed the point in this address that failure by the defendant to check the Bendel State Water Board as to the signatories on the cheque, having regard to the facts surrounding the cheque for the sum of ₦37,307 from November 3rd to 6th, 1978, amounted to negligence.

On the part of the defendant, the cheque was presented on November 3rd, 1978 with a request for special clearance at their Mission Road Branch. Since the paying bank was the Murtala Mohammed Way Branch of the bank, the cheque was sent there through a messenger. On the same day it was returned unpaid as the third signature, that is, the signature of the chief accountant, was found to be irregular. On November 6th, 1978 the cheque was represented after the query on the third signature was rectified. The cheque was again sent to the Murtala Mohammed Way Branch by the Mission Road Branch of the defendant bank. According to the manager of the Murtala Mohammed Way Branch, on November 6th, 1978, the signatures on the cheque were compared with the ones on the signature card and they were all right; the amount in figures agreed with the amount in words; the cheque leaf was within the series bought by the defendant, the cheque was not post-dated and the endorsement was regular.

In deciding whether or not to honour a customer’s cheque, at any rate when it is in proper form and the customer’s signature appears to be genuine, a bank owes no duty of care to the payee. See the National Westminster Bank case (15). I had said before that the paying banker is thereby representing no more than that he believes the signature to be genuine. The chief accountant testified and said:

“I am conversant with the signatures of these other signatories. The signature of the chief accountant (on the cheque book) looks like mine but it is not. The signatures of the general manager and the secretary look like theirs but I cannot say that they are.”
It will thus be seen that the defendant was not negligent in not detecting that the third signature had been forged. On November 3rd, 1978 when the defendant was in doubt, the cheque was returned unpaid. The plaintiff has not told the court how the irregular signature was rectified if he was not aware of the fraud. I hold that the defendant was not obliged to contact the Water Board on November 6th, 1978:

(i) there is no evidence that the paying bank was in any difficulty;

(ii) payment merely signifies the belief that the signature is genuine;

(iii) the paying bank owed no duty of care to the payee that is the plaintiff. The allegation of negligence fails. Lumsden and Co’s case (11) cited by Counsel is irrelevant. Baker v. Barclays Bank Ltd (2) is inapplicable.

Looking at the entire case it is manifest that the plaintiff would fail. He and his sales manager contradicted themselves. The plaintiff said that Dr Okojie introduced Lawal to him and Lawal said he wanted to buy six buses and three 1500 Volkswagen Beetles and he asked the sales manager to invoice the vehicles. But the sales manager said that he received Dr Okojie and Lawal, prepared the sales invoice and minuted same to the plaintiff. This may look immaterial but the signature of Lawal on the sales invoice is different from what the plaintiff said was his signature on the cheque. In my view the sales invoice was written up to meet this case and I place no reliance on it.

On November 3rd, 1978, the cheque for N37,307 paid into the Umaigba Stores account with the defendant was returned as the third signature was irregular. This should have put the plaintiff on guard and on enquiry. The signature was rectified and the cheque represented on November 6th, 1978 there was no evidence as to who rectified it or what happened to the cheque between when it was returned by the bank on November 3rd, and when it was represented on November 6th. This court is entitled to know.
On November 6th, clearance was issued and on November 7th, Lawal with Dr. Okojie went to the plaintiff to collect his money. He paid a commission of N3,000 to the plaintiff and collected N34,307 according to the plaintiff. The bank has according to banking practice debited the account of the plaintiff with the sum of N37,307 as the cheque was found to be forged. Lawal cannot be found. He who comes to equity must come with clean hands. From all that I have narrated it is my view that the hands of the plaintiff are not clean. I am convinced that he knew that the cheque was forged or at least was not sure that it was genuine, and he wanted to try his luck if the bank would pass the cheque. A careful look at paragraph 3 of the sales invoice will reveal: “M/D the cheque has been cleared . . . 6 November 1978.” The figure 6 was written into the figure 3. The plaintiff, his sales manager, Lawal and Okojie believed that the cheque would be cleared on first presentation. The plaintiff has failed to prove the case he has brought to court. In the result the plaintiff fails on all the legs of his claim and the action is dismissed with N200 costs to the defendant.
Co-operative Bank of Eastern (Nigeria) Limited v. Eke

HIGH COURT OF ANAMBRA STATE
UMEZINWA J
Date of Judgment: 10 JULY 1979

Banking – Account – Combination of account of customer by bank – Right of bank – Position where account in personal name and the other in business name

Banking – Banker/customer – Customer drawing in excess of amount in account – Effect – When extends to security deposited for another purpose or does not belong to customer

Banking – Banker/customer – Pleadings – Banker alleging that customer indebted to it in statement of claim – How the customer to deny allegation – Whether mere traverse sufficient

Banking – Banker’s lien – Nature of – Lien over title documents deposited as security for overdraft – Whether particular or general lien – When it does not attach to security deposited

Banking – Overdraft – Deposit of title documents by customer – Failure to return title document – When overdraft not granted – Effect – Whether customer entitled to damages – Bank claiming right of lien – When it avails the bank

Facts

The plaintiff bank brought an action against the defendant to recover the balance of an overdraft, together with bank charges and interest, and the defendant counterclaimed for damages for breach of contract, an order for the return of a title deed and power of attorney deposited by her with the plaintiff bank, and damages for their wrongful detention.
The defendant operated two accounts with the plaintiff bank, one a personal account and the other in her business name. She was granted overdraft facilities on the former, which became overdrawn.

She subsequently applied for an overdraft on her business account and deposited with the bank, as security for it, a title deed to property belonging to a third party together with a power of attorney, executed by the third party, authorising her to use the title deed as security for a loan.

After some negotiation, the bank refused to grant the second overdraft, but instead of returning the documents deposited by the defendant, it retained them as security for the overdraft on her personal account.

The plaintiff bank brought the present proceedings to recover the amount of the defendant’s overdraft on her personal account.

The defendant denied liability to repay the amount claimed, but gave no reasons for this denial. She counterclaimed for damages for breach of contract (alleging that the plaintiff had made a binding agreement to grant a second overdraft) and for an order for the return of the title deed and the power of attorney, contending, \textit{inter alia}, that the bank’s retention of the documents was unlawful in that (i) the bank could not hold as security for a loan on the defendant personal account, title deeds which had been deposited in respect of an overdraft application on the business account, since in the absence of a contrary express agreement there was an implied agreement that the two accounts should be kept separate and distinct, and (ii) a banker’s \textit{lien} did not attach to a security deposited by a customer if it was known to belong to someone else, or was deposited for a special purpose.

The bank contended in reply that (i) although it had no general \textit{lien} over property deposited for safe keeping, it did
have a general *lien* over property deposited for the security of a loan, and that securities deposited to secure specific advances became liable for general *lien*, for past present or future loans, even after the discharge of the specific advance; (ii) a bank had the right to merge several accounts kept by a customers in the same right, which did not necessarily mean in the same name, and (iii) the defendant as an attorney could not sue in her own name for the return of the title deeds but should have sued in the name of the donor of the power of attorney.

**Held** –

1. Where a bank as plaintiff alleges in its statement of claim that a customer is indebted to it, it is not sufficient for the customer to merely deny the allegation in the statement of defence He must go further and dispute its validity in law or set up an affirmative case of his own in answer to it.

2. A *lien* is right to retain property belonging to a debtor until he has discharged a debt due to the retainer of the property. A *lien* may be either particular or general *lien*. A particular *lien* arises from the particular transaction connected with the property subject to the *lien*; a general *lien* arises not only out of the particular transaction but also out of the general dealing between the two parties in respect of other transactions of a similar character.

3. A banker’s *lien* is a general *lien* and covers all securities deposited with them as bankers by a customer, unless there be an express contract, or circumstances that show an implied contract, inconsistent with *lien*.

4. A general *lien* does not derive from the common law. It has arisen from judicial decisions recognising the usage of trade. It usually arises, not from special agreement, but out of the business relations between the parties; a general *lien* nevertheless may be created by special agreement.

5. Although bankers have a general *lien* upon the securities
of a customer deposited with them to secure an overdraft, this *lien* does not attach to securities deposited by a customer and known to the bank to belong to some other person and to have been deposited for a special purpose.

6. When the deposit of deeds is made for the purpose of obtaining credit, it will not cover moneys previously advanced and still due unless an intention to cover then appear from the circumstances.

7. Where a customer draws a cheque for a sum in excess of the amount standing to his credit in his current account, it is in effect a request for loan, and if the cheque is honoured the customer has borrowed money; but it does not follow that a transaction of this kind is a borrowing upon security not belonging to the customer and deposited for another purpose.

8. Where a banker opens two accounts with a customer, one in the customer’s own name and the other in a business name, there is, in the absence of any express agreement to the contrary, an implied agreement that the accounts are to be kept distinct and separate. The banker has no right to combine them or to transfer assets or liabilities from one account to another without the consent of the customer.

9. A donee of a power of attorney cannot sue in his own name. The donor should sue in his own name through his attorney. In the instant case, the defendant counter claim for damages for wrongful detention of the title documents was incompetent because the title deed did not belong to her. She was a mere donee of the power of attorney.

Judgment for the plaintiff.

**Cases referred to in the judgment**

*Nigerian*

*British and French Bank Ltd v. Opaleyeye* (1962) All N.L.R. 26
*Johnson v. Sabaki* (1968) 2 All N.L.R. 282
a

Paul v. George (1959) 4 F.S.C. 198
Yassin v. Barclays Bank DCO (1968) N.M.L.R 380

b

Foreign
Cuthbert v. Roberts, Lubbock and Co (1909) 2 Ch.D. 226
London and Globe Finance Corp, Re: (1902) 2 Ch.D. 416

c

Nigeria rule of court referred to in the judgment
High Court (Civil Procedure) Rules Eastern Nigeria, Cap 61, 1963, Order 33, rules 11 and 13

d

Books referred to in the judgment
Coote on Mortgages, (1972), (9ed) at pages 90-92
Jowitt’s Dictionary of English Law
Paget’s Law of Banking, (1972), (8ed) at 501
Sheldon, Practice and Law of Banking, (1962), (9ed) at 344

Counsel

f

For the plaintiff: Izundu
For the defendant: Egbue

Judgment

UMEZINWA J: In this action the plaintiff, a commercial bank, claims against the defendant as follows:

(a) ₦12,970.39 being the amount due and owned as balance of principal money, interest and bank charges on the overdraft account of the defendant with the plaintiff at the plaintiff’s Ogui Branch, Enugu.

(b) Interest at the rate of 9% per annum from June 1st, 1975 till judgment and final liquidation of the debt.

The defendant counterclaimed as follows:

(a) ₦50,000 damages for breach of contract.

(b) An order for the return of the title deed and power of attorney deposited by the defendant with the plaintiff.
Pleadings were ordered, duly filed and delivered. In paragraph 7 of the plaintiff’s statement of claim, it pleaded as follows:

“Wherefore the plaintiff claims from the defendant:

(a) The sum of ₦12,970.39 being the amount due and owed as balance of principal money, interest and bank charges by the defendant in her account with the plaintiff as at May 31st, 1975.

(b) Interest on the said sum at the rate of 9% per annum with monthly rests from June 1st, 1975 until judgment.

(c) Interest at the rate of 5% per annum from the date of judgment until final liquidation of the debt.”

Since a statement of claim supersedes the writ of summons, I will therefore deal with the plaintiff’s claim as pleaded in paragraph 7 of its statement of claim.

In his evidence, Boniface Agbo, a bank manager in charge of the plaintiff’s Ogui Branch, Enuguu stated that on June 12th, 1973, the bank granted the defendant overdraft facilities. The overdraft carried a bank rate interest of 12% per annum with monthly interests. The overdraft must be repaid on demand. For this particular overdraft, a ledger was maintained. He tendered a certified true copy of the defendant’s statement of account as at May 31st, 1975. It is evidence that as at May 31st, 1975 the defendant’s account with the bank was in debit in the sum of ₦12,970.39. This amount represented principal and interest that the defendant owed to the plaintiff. Notwithstanding that demands have been made on the defendant to pay, she has failed to pay this amount. In addition to this amount he stated that the plaintiff claims interest on the amount at the rate of 9% per annum with monthly rests from June 1st, 1975 until the date of judgment. Thereafter, the plaintiff claims interest on the judgment debt at the rate of 5% per annum until the judgment debt is finally liquidated. The defendant, he stated, operated her account and drew cheques on the account.
Dealing with the defendant’s counterclaim, the witness stated that the plaintiff entered into no agreement with the defendant on February 6th, 1974 to grant her any overdraft of N20,800. The defendant, he stated, applied to the plaintiff for another overdraft of N20,800 and to secure the overdraft, she deposited her title deed. The defendant’s application for this overdraft was refused and she was so informed orally. He stated that the defendant never travelled overseas with the knowledge of the plaintiff to negotiate some business.

He then gave evidence of the normal procedure adopted when a customer makes an application for overdraft facility. The applicant fills an application form supplied to him by the bank. He states in the application form the amount of overdraft he is asking for and the securities offered to secure the overdraft. The application is then processed and if the bank agrees to grant the overdraft, the application is then sent to the legal department for the preparation of a legal mortgage. Where the application is not granted the applicant is informed and his titled deeds returned to him. He stated that the title deeds are never posted back to the applicant but returned to him personally and he signs for them. He admitted that in this case, after refusing the defendant’s application for an overdraft, her title deeds were not returned to her because at the time she made the application she was indebted to the bank and so the bank held her title deed as a banker’s lien. In any event, he stated that the defendant was invited to come and collect her title deeds but she did not come.

Under cross-examination, the witness stated that the defendant had two accounts with the plaintiff. She maintained one account in her personal name and the other account in her business name of Morley Maria Sisters Enterprises. He stated that the demand to the defendant to pay up her indebtedness with the bank was made in writing. When, in February, 1974, the defendant applied for an overdraft of N20,800, she sent with her application her title deed and a power of attorney. The witness could not remember in respect of which
account the defendant applied for the overdraft. The defendant may have shown to the bank a local purchase order given to her by the Ministry of Agriculture so as to improve her prospects of obtaining the overdraft she applied for. He stated that he was not aware that the defendant and her solicitor came to their office to demand her title deed.

In her evidence the defendant admitted having two accounts with the plaintiff at its Ogui Branch, Enugu. One of the accounts is in her personal name, the order in her business name; these accounts she stated were opened in 1973. Although she had denied this in her statement of defence, the defendant admitted that the plaintiff granted her overdraft facilities in respect of the account she opened in her name.

According to her, on October 11th, 1973, she went to the plaintiff with a letter under which a contract was awarded to her by the Ministry of Agriculture and Natural Resources of the Former East-Central State. She stated that she approached the manager of the bank for an overdraft facility to the tune of N20,800. She applied for the overdraft facility in respect of her second account opened in her business name. She needed the overdraft so as to execute the contract awarded to her in her business name. When she showed the bank manager the letter awarding her the contract, he gave her a form to fill in. She also submitted to the bank manager the local purchase order given to her by the Ministry. Her own photostat copy of this local purchase order was admitted in evidence. She stated that the bank manager followed her to the Chief Agricultural Engineer where they held a meeting with him. It was agreed that the Ministry would make all payments in respect of the contract to the plaintiff. She tendered a letter from the Ministry embodying this arrangement. According to the defendant, the bank manager then arranged for her to see the general manager in the bank manager’s office. When she saw the general manager, they were all agreed that the contract awarded to her was good
business. The plaintiff, she stated, then agreed to grant her the overdraft facilities if she produced some security. She then produced a title deed and a power of attorney.

With the agreement for the grant of overdraft concluded, the defendant stated that she travelled to the United Kingdom on February 18th, 1974 to arrange for the supply of equipment ordered by the Ministry because they were not available for supply locally. According to her, she returned to Nigeria on July 17th, 1974 after spending 118 days in the United Kingdom. While in the United Kingdom, the defendant stated that she obtained proforma invoices for the equipment she was to supply to the Ministry under the contract from three business houses in the United Kingdom.

On her return to Nigeria, the defendant stated that she realised that the plaintiff was no longer willing to grant her the overdraft facilities. She then demanded back her title deeds but they were not returned to her. She instructed her solicitors to write to the plaintiff demanding the return of her documents. He did so, and the plaintiff wrote a reply. The defendant stated that on the receipt of the plaintiff’s reply, she went to the secretary of the bank to collect her documents but was told that the documents could not be found. The defendant stated that although she cannot deny that the plaintiff granted her overdraft facilities in her own name, she does not know the amount she was owing the plaintiff because the plaintiff has not been sending to her any statements of her account. It is her evidence that she never received any letter from the plaintiff requesting her to pay up her indebtedness. She then gave particulars of the special damages she claims. These are: ₦513 for air ticket for London; ₦3,540 for the cost of her stay in London; ₦6,000 for loss of profit; ₦25,000 for breach of contract; ₦14,000 for detention of title deeds; ₦947 for detention of her power of attorney; making a total claim of ₦50,000.

Under cross-examination the defendant stated that she applied for the loan of ₦20,800 in October, 1973 in her business
name so as to execute the contract awarded to her by the Ministry. She admitted knowing that it is the duty of the general manager at the plaintiff’s head office to approve overdrafts. She also admitted that the plaintiff did not at any-time write to her accepting her application for overdraft facilities. The general manager and the branch manager according to her agreed to grant her the overdraft facility. She stated that it was on February 6th, 1974 that the plaintiff agreed to grant her the overdraft facility. She admitted that at the time she made her application for this overdraft, the plaintiff’s head office where the general manager stayed was at Aba. However, according to her, at the time she made her application the general manager came to Enugu on an official tour. She denied the suggestion that she was told by the plaintiff’s legal officer that her documents of title would not be released to her until she had settled her debt to the plaintiff. She stated that she completed the transaction for the supply of the equipment in the United Kingdom in February, 1974 but kept on waiting until July, 1974 for the plaintiff to send her the money with which to pay for the equipment.

Learned Counsel for the defence, Mr Egbue, conceded that the defendant owes some amount of money to the plaintiff but contended that no demand for payment was made by the plaintiff before taking out this action against the defendant. Since no demand for payment was made he submitted in law the action is incompetent. He supported this submission by citing the case *Johnson v. Sabaki* (4). He therefore submitted that the plaintiff’s case should be dismissed.

Dealing with the defendant’s counterclaim, learned Counsel submitted that where a customer of a bank maintains two accounts, one in his own name and one in his business name, there is, in the absence of an express agreement, an implied agreement that the accounts should be kept separate and distinct. For this submission he relied on *British and French Bank Ltd v. Opaley* (1). The court was urged to hold that the application for the loan of ₦20,800 was made in respect
of the account in the defendant’s business name. Therefore, the plaintiff cannot hold the title deeds as a security for the loan in the defendant’s own name.

It was his submission that where a customer applies to his bank for a loan on the security of the deposit of a lease, which loan was declined and the customer left the bank without stating for what purpose the deed was deposited with the bank, the bank has no *lien* in respect of an outstanding debt due by the customer to the bank. In this connection, he referred to Coote on *Mortgages*, (9ed) at pages 90-91 (1927). Deposit of a deed made by a customer for the purpose of obtaining credit will not cover monies previously advanced and still due unless the intention to cover it appears from the circumstances of the case. He referred to Halsbury’s *Laws of England*, (3ed), paragraph 265 at page 169; also Coote on *Mortgages*, *ibid*, at page 92. He submitted that where a deposit of a deed is made by a customer for a particular purpose, the bank cannot hold the document for any other purposes. For this submission, he referred to Sheldon, *The Practice and Law of Banking*, (9ed), at 344 (1962). A banker’s *lien*, he contended, does not attach to a security deposited by a customer and known to the bank to belong to some other person and to have been deposited for a special purpose. In support of this submission, he relied on the case *Cuthbert v. Roberts, Lubbock and Co* (2).

The court was urged to hold that there was a binding contract by the plaintiff to grant to the defendant a loan of ₦20,800. The court was urged to prefer the evidence of the defendant to that of the plaintiff’s witness. Reasons were given why the evidence of the defendant should be preferred. Learned Counsel finally submitted that if the plaintiff has no *lien* on the title deed and the power of attorney, failure on its part to return them on demand makes the detention of the documents unlawful. The court was urged to hold that the plaintiff knew that the materials, which the Ministry of Agriculture and Natural Resources contracted with the defendant
to supply, were to be purchased abroad. Therefore, the plain-
tiff is liable to pay as damages for breach of contract the cost
of the airfare to and from London, the defendant’s stay in
London, loss of profit as claimed and the return of the title
deeds.

In his reply learned Counsel for the plaintiff submitted that
it is too late in the day for the defendant to complain that the
plaintiff’s claim is not competent on the ground that no de-
mand was made before the action was instituted. Non-
compliance with a condition precedent to an action must be
specifically pleaded. Where it is not so pleaded, it amounts
to a waiver. Learned Counsel refers to Order XXXIII, rules
11 and 13 of the High Court Rules. He cited in support of
the submission Ibrahim Yassin v. Barclays Bank DCO
(3)(1968 (2) ALR Comm at 137; 1968 N.M.L.R. at 387);
Paul v. George (6). In any event, he referred the court to
paragraph 6 of the statement of claim and the evidence of
the plaintiff’s witness that several demands for payment
were made from the defendant and he urged the court to en-
ter judgment for the plaintiff in terms of its claim.

Dealing with the defendant’s counterclaim, learned Coun-
sel referred to the definition of lien in Jowitt’s Dictionary of
English Law and Halsbury’s Laws of England, (3ed), para-
graph 271 at page 148; He referred to the distinction be-
tween a general lien and a particular lien as contained at
Halsbury’s Laws of England, paragraph 262 at pages 143-
144. He submitted that a bank has a general lien over a
property for the security of a loan whenever the loan trans-
action takes place. But it has no lien over a property merely deposited for safekeeping. He supported this submis-
sion by referring to Halsbury’s Laws of England, (3ed),
paragraph 390 at page 210. It was his contention that securi-
ties deposited as cover for specific advances become liable
for general lien even after the discharge of the specific ad-
advances. He supported this submission by citing London and
Globe Finance Corp, Re. (5). He also referred to Paget’s
Law of Banking, (8ed) at page 501 (1972). He submitted that a lien attaches to the property of a customer whether the loan is present, past or future. A bank, he contended, has the right to merge several accounts kept by a customer in the same right; the same right he argued does not necessarily mean the same name. He submitted that the cases relied upon by learned defence Counsel were in respect of an account for specific purposes.

Learned Counsel argued that as an attorney, the defendant in her counterclaim cannot sue in her own name for the return of the title deeds but in the name of the donor of the power of attorney. The court was urged to hold that there was no binding contract between the plaintiff and the defendant in respect of the defendant’s application for a loan of N20,800; rather there were negotiations for the loan which was not approved. The claim for wrongful detention of the title deed and power of attorney, learned Counsel contended, is misconceived. The court was urged to dismiss the defendant’s counterclaim.

The defendant has no defence to the plaintiff’s claim. I accept the submission of learned Counsel for the plaintiff that if the defendant’s defence to the plaintiff’s claim is that no demand in writing was made by the plaintiff before it instituted the action, she should have raised it in her pleadings and made it an issue. The plaintiff in paragraph 6 of its statement of claim pleaded as follows:

“The defendant has defaulted in settling her said overdraft facility accorded her as aforesaid and as on May 31st, 1975 the defendant is indebted to the plaintiff in the sum of N12,970.39 which despite repeated demands the defendant has failed or neglected to pay the said sum or any part thereof.”

How did the defendant meet this in her statement of defence? She merely pleaded that she denies paragraph 6 of the statement of claim. It is often not enough for a party to deny an allegation in his opponent’s pleading. He must go further and dispute its validity in law, or set up an affirmative case of his
own in answer to it. It will not serve his turn merely to traverse the allegation: he must confess and avoid it. Order XXXIII, rules 11 and 13 provide as follows:

“11. When a party denies an allegation of fact he must not do so evasively, but answer the point of substance. And when a matter of fact is alleged with divers circumstances it shall not be sufficient to deny it as alleged along with those circumstances, but a fair and substantial answer must be given.”

“13. The defence must allege any fact not stated in the statement of claim on which the defendant relies in defence, as establishing, for instance, fraud on the part of the plaintiff, or showing that the plaintiff’s right to recover or to any relief capable of being granted on the petition, has not yet accrued, or is released, or barred, or otherwise gone.”

In Ibrahim Yassin v. Barclays Bank DCO (3) one of the submissions made by Counsel for the appellant on appeal to the Supreme Court was that the respondents did not prove the necessary condition precedent to found their action, namely, a demand made in writing for payment. The court held that a failure of a condition precedent to found the plaintiff’s claim exists must be specifically pleaded by the defence: not having so pleaded it, nor raised the issue at the hearing, the defence had neither complied with Order 32, rule 11 nor with Order 32, rule 13 of the Rules of the Supreme Court, would not be allowed to raise it on appeal. Order 32, rules 11 and 13 of the Supreme Court are in pari material with Order XXXIII, rules 11 and 13 of the High Court Rules (Laws of Eastern Nigeria, 1963, Cap 61).

Judgment will be entered for the plaintiff in terms of its claim as pleaded in paragraph 7 of its statement of claim.

I shall now deal with the defendant’s counterclaim. In this connection all that I need consider in detail is the claim for wrongful detention of the title deed and power of attorney respectively. For I do not believe the defendant that the plaintiff reached any agreement with her to grant her an overdraft of N20,800. The parties in my view had not gone
beyond the process of negotiation before the plaintiff decided not to grant the overdraft facility to the defendant.

It is not in dispute that to secure the loan of ₦20,800 which the defendant asked for in her business name so as to execute her contract with the Ministry of Natural Resources and Agricultural Extension, she deposited the title deed and the power of attorney to secure the loan. Although the overdraft facility was not granted to the defendant, the plaintiff still retains the two documents and has failed to return them to the defendant in spite of demands for their return. It is the defendant’s case that failure to return these documents on demand is unlawful and for this she claims ₦14,000 for the detention of the title deed and ₦947 for the detention of the power of attorney. The plaintiff’s answer to this counterclaim is that it is exercising its right of **lien** over the title deeds and power of attorney for the balance outstanding against the defendant in her account, which was opened in her name. The issue that falls for determination is whether the plaintiff has such right of **lien**.

A **lien** is the right to retain property belonging to a debtor until he has discharged a debt due to the retainer of the property. A **lien** may be either a particular or general **lien**. A particular **lien** arises from the particular transaction connected with the property subject to the **lien**; a general **lien** arises not only out of the particular transaction but also out of the general dealing between the two parties in respect of other transactions of a similar character. A banker’s **lien** is a general **lien**, and covers all securities deposited with them as bankers by a customer, unless there be an express contract, or circumstances that show an implied contract, inconsistent with **lien**. A general **lien** does not derive from the common law. It has arisen from judicial decisions recognising the usage of trade. It usually arises, not from special agreement, but out of the business relations between the parties; a general **lien**, nevertheless, may be created by special agreement: see Sheldon, *The Practice and Law of Banking*, (9ed), at-page 344 (1962).
Learned Counsel for the defendant has submitted that the plaintiff has not got any general *lien* over the title deed and the power of attorney on the ground that they were deposited with the plaintiff for a particular purpose, namely the loan in the defendant’s business name for the execution of her contract with the Ministry of Natural Resources and Agricultural Extension and also on the ground that the documents belong to some other person. I agree with this submission. Dealing with the extent of security created by the deposit of title deeds, the learned author of Halsbury’s *Laws of England*, (3ed), paragraph 265 at 169, stated as follows:

“When the deposit of deeds is made for the purpose of obtaining credit, it will not cover moneys previously advanced and still due...unless an intention to cover them appears from the circumstances...”

In *Cuthbert v. Roberts, Lubbock and Co* (2), it was held that although bankers have a general *lien* upon the securities of a customer deposited with them to secure an overdraft, this *lien* does not attach to securities deposited by a customer and known to the bank to belong to some other person and to have been deposited for a special purpose. Where a customer draws a cheque for a sum in excess of the amount standing to his credit in his current account, it is in effect a request for a loan, and if the cheque is honoured the customer has borrowed money; but it does not follow that a transaction of this kind is a borrowing upon security not belonging to the customer and deposited for another purpose.

In this case before me the securities deposited were for the particular purpose of securing the overdraft facility of ₦20,800 in the defendant’s account opened in her business name and for the particular purpose of executing her contract with the Ministry. Added to these is the fact that the title deed that the defendant deposited with the plaintiff does not belong to her but belong to one Paul Asaije. Indeed the power of attorney was executed by him in favour of the defendant empowering her to raise a loan of ₦24,000 from the plaintiff and to use the title deed to secure the loan.
Learned Counsel for the plaintiff rightly submitted that a bank has the right to merge several accounts kept by a customer in the same right. I do not agree, however, with his contention that accounts need not necessarily be in the same name. In *British and French Bank Ltd v. Opaley* (1), Bairamian FJ held, *inter alia*, that where a banker opens two accounts with a customer, one in the customer’s own name and the other in a business name, there is in the absence of any express agreement to the contrary, an implied agreement that the accounts are to be kept distinct and separate. The banker has no right to combine them or to transfer assets or liabilities from one account to another without the consent of the customer. I hold, therefore, that plaintiff has no right of *lien* over the title deed and power of attorney deposited with it by the defendant.

The defendant, however, has one procedural hurdle to grapple with in her claim for damages for wrongful detention of the two documents. The title deed does not belong to her. She is a mere donee of a power of attorney. It is trite law that a donee of a power cannot sue in his own name. The donor should sue in his own name through his attorney. The defendant’s counterclaim is therefore not properly before me. It is accordingly struck out.

The plaintiff’s claim succeeds. Judgment is entered for the plaintiff against he defendant as follows:

- (a)₦12,970.39 being the amount due and owed as balance of principal interest and bank charges by the defendant in her account with the plaintiff.
- (b) Interest on the said sum at the rate of 9% per annum with monthly rests from June 1st, 1975 to July 10th, 1978 amounting to ₦5,771.27.
- (c) Interest on the whole judgment debt at the rate of 3% per annum from date of judgment until the judgment debt is finally liquidated.
- (d) Costs to the plaintiff against the defendant fixed at ₦150.
United Bank for Africa Limited v. Savannah Bank of Nigeria Limited

HIGH COURT OF LAGOS STATE

SAVAGE J

Date of Judgment: 7 December 1979

Banking – Cheques – Forged cheque – Duty of care by paying banker to payee – Extent of – Between the collecting bank and the paying bank who to ensure that cheque not forged

Banking – Cheques – Forged cheque – Paying bank clearing forged cheque – Liability therefrom

Tort – Negligence – Liability of – When paying bank entitled to recover proceeds of the forged cheque from collecting bank

Facts

The plaintiff who are bankers, claimed from the defendant, also bankers the sum of N13,120.40 being money had and received by the defendant to the use of the plaintiff. In the alternative the plaintiff claimed the said sum as damages for conversion of the said sum, payment of which the defendant obtained from the plaintiff by presenting a forged cheque.

A cheque, made out in favour of a firm which was a customer of the defendant bank, was presented by the defendant bank to the plaintiff bank for collection. The cheque had apparently been drawn by authorised agents of a company with an account at the plaintiff bank. After the plaintiff bank had cleared the cheque for collection, it discovered that the signature on the cheque had been forged. It therefore asked the defendant bank to treat the cheque as a late return and to put a caution on the customer’s account. The defendant bank agreed to treat the cheque as a late return on receipt of an indemnity from the plaintiff bank, but did not put a caution on its customer’s account until six weeks later.
The plaintiff bank brought the present action to recover the sum of money paid out to the defendant bank on the forged cheque, contending that the defendant bank had acted negligently in not putting a caution on its customer’s account on receiving notice of the forgery. The defendant bank contended that the plaintiff had been negligent in initially clearing the cheque without detecting the forged signature.

**Held**

1. If money was paid to another bank which presented a forged cheque for collection then the money is recoverable unless that the bank can satisfy the court that it acted in good faith and had parted with the entire proceeds of the money before it received notice of the forgery.

2. A banker cannot debit his customer’s account on the basis of a forged signature, since he has in that event no mandate from the customer for doing so.

3. A banker in deciding whether or not to honour a customer’s signature when it is in proper form and the customer’s signature appears to be genuine owes no duty of care to a payee.

4. A forged cheque is not a cheque. It is only a sham piece of paper.

5. As between the paying bank and the collecting bank, in the absence of negligence no estoppel by representation can arise.

Judgment for the plaintiff.

**Cases referred to in the judgment**

**Foreign**


**Counsel**

For plaintiff: *Williams* (with him *Odimaiya*)

For defendant: *Adeleke*
Judgment

SAVAGE J: The plaintiff’s writ of summons is endorsed as follows:

“The plaintiff claims from the defendant the sum of ₦13,120.40 being money had and received by the defendant to the use of the plaintiff. In the alternative the plaintiff claims the said sum as damages for conversion of the said sum, payment of which the defendant obtained from the plaintiff by presenting a forged cheque.”

The plaintiff and the defendant are each bankers duly licensed as such to carry on business in Nigeria. A firm known as Niger Contacts International was, at the time material to this action, a customer of the defendant bank.

The plaintiff led evidence and established that a document purporting to be a cheque dated December 28th, 1972, drawn on the Ebutte-Metta Branch of the plaintiff bank and purporting to bear the signature of the authorised agents of a company known as Stokvis Nigerian Tools and Dye Company Limited, as the drawer, and made payable to Niger Contacts International, was paid in to the credit account of the said Niger Contacts International about January 4th, 1973. The document was crossed and marked “Account Payee only.” Stokvis Nigerian Tools and Dye Company Limited, was at all times material to this action a customer of the Ebutte-Meta Branch of the plaintiff bank. On or about January 5th, 1973, the said document, which was a forgery, was presented by the defendant bank to the plaintiff bank for collection. It purported to be a cheque for ₦13,120.40 dated December 28th, 1972 and purported to have been signed by the authorised agents of Stokvis Nigerian Tools and Dye Company.

The plaintiff bank pleaded in paragraphs 7 and 8 of the statement of claim as follows:

“7. In presenting the forged document to the plaintiff bank as aforesaid, the defendant bank acted in the mistaken belief...
that the said document was a genuine cheque and the plaintiff bank in paying the proceed of the forged document to the defendant bank also acted under mistaken belief that the forged document was a genuine cheque bearing the signature of their customer Stokvis Nigerian Tools and Dye Company Limited.

8. On or about February 2nd, 1973, a representative of the plaintiff bank informed the assistant manager (Mr A Evans) of the defendant bank of the forgery and by a letter of the same date demanded reimbursement of the sum of money (₦13,1290.40) paid to the defendant by reason of the mistake in paragraph 7 thereof.”

The defendant bank in its statement of defence pleaded as follows in paragraphs 7 and 8 thereof:

“7. With reference to paragraph 7 of the plaintiff’s statement of claim, the defendants will contend at the trial that it was the duty and responsibility of the plaintiffs to ascertain and verify the authenticity of the signatures of the signatories of the account of their customers.

8. The defendants will aver at the trial that the plaintiffs were negligent by not discovering that the signatures of the signatories to their customer’s account the subject-matter of this action was neither genuine nor authentic at the time their customer’s cheque was cleared: in consequence the plaintiff is estopped from claiming the amount the subject-matter of this action from the defendants.”

Mr Searle, manager of the plaintiff bank, in the course of his evidence, told the court of how he got in touch with Mr Evans and Mr Reilly of the defendant bank, the Bank of America (now known as the Savannah Bank of Nigeria Ltd) on February 2nd, 1973 and informed them that a forged cheque had been received and that the proceeds of the forged cheque had been collected by the Bank of America. He therefore asked Mr Evans if he would accept it as a late return. In banking practice, banks should cooperate with one another. Mr Evans, however, wanted an indemnity from the plaintiff bank, which was in fact prepared and sent across to Mr Evans with a covering letter dated February 2nd, 1973.
Then followed the exchange of a series of letters between the plaintiff bank and the defendant bank. Mr Searle had hoped that the defendant bank would accept a late return and reimburse the plaintiff bank. This did not happen and Mr Searle wondered if there was some reason why the Bank of America would not co-operate or assist in the way banks normally do, particularly as the defendant did tell the plaintiff bank that there were funds in the account to which proceeds had been credited. The normal thing to do, Mr Searle said, was to put a caution on the account pending enquiries. Following the discovery of the forgery Mr Searle said that there still was no change in the attitude of the defendant bank, and he therefore took the matter up with Mr Reilly of the defendant bank: the witness got the impression that one of the referees of the then applicant, Niger Contacts International, when the defendant bank was opening a current account for the said applicant was a highly placed person and the defendant bank appeared to be afraid of what might happen if they did not honour the account.

Mr Ifidon, a bank official with the Savannah Bank, gave evidence on behalf of the defendant bank. Niger Contacts International were their customers. They acted, he said, in accordance with the instructions on the forged cheque, and at the time it was paid in, they were not put on notice as to the irregularity in the signature. They had no specimen signature of the drawer of the cheque. However, their customer was in credit up to ₦7,773.38 at the time, and the defendant bank blocked this amount.

The plaintiff bank’s claim is in two alternatives, the first being a claim in the sum of ₦13,120.40 being money had and received by the defendant to the use of the plaintiff, or secondly in the alternative the plaintiff claims the said sum as damages for conversion of the said sum, payment of which the defendant obtained from the plaintiff by presenting a forged cheque.
On the evidence before the court, I am satisfied that there is no dispute that the document in question is a forged cheque. Mr Ifidon himself said that at the time they got the indemnity they did not know that it was forged, and added that they knew it was forged when the plaintiff bank contacted them.

Mr Searle had been a banker for 25 years and I have no reason to doubt his testimony, which I accept. He asked Mr Evans, the manager of Bank of America whether the particular case would be accepted as a late return. Mr Evans asked for an indemnity, hence one was written. There was not one word about the proceeds of the cheque having been paid out by the defendant bank. They were warned by the plaintiff bank, “Please block account” but Mr Evans wrote a letter which showed quite clearly that the defendant bank did not block the said account in fact the last paragraph of the letter reads in part – “... We await a valid authority to block the funds in the account.” Mr Ifidon gave evidence for the defendant. He said nothing about this authority. It is not known which authority was being awaited.

Although the defendant bank was warned on February 2nd, 1973, they did nothing, and as it happened they did nothing until March 16th, 1973. The evidence of the witness of the defendant bank that they blocked the account when they had notice went to no issue because they heard from the plaintiff bank on February 2nd, 1973 whereas they claimed in their defence that it was on February 8th, 1973 that they blocked the account.

I believe it is trite law that money paid in circumstances such as this is irrevocable at the issuance of the bank that paid out the money. If the money was paid to another bank, as in this case, which presented a forged cheque for collection, then the money is still recoverable unless that other bank can satisfy the court that it acted in good faith and had parted with the entire proceeds before it received notice of the forgery. But in this case, Chief Williams, learned Counsel for the plaintiff bank, contended that the word “unless” did not exist.
Learned Counsel for the defendant bank urged the court to hold that the plaintiff bank itself was negligent by not discovering that the signature on the forged cheque was not that of their customer, and therefore neither genuine nor authentic at the time their customer’s cheque was cleared, and that in consequence the plaintiff bank was estopped from making a claim against the defendant bank in the amount involved.

I am unable to accept the contention that the plaintiff bank had acted negligently. I must and do reject it. It is not correct to say that as between a banker and his customer, a banker is under a duty to know his customer’s signature. A banker, in deciding whether or not to honour a customer’s signature when it is in proper form and the customer’s signature appears to be genuine, owes no duty of care to a payee. See *National Westminster Bank Ltd v. Barclays Bank International Ltd* (2) (1975) 1 Q.B.D. 654 at 662; [1974] 3 All E.R. at 841. In that case, Kerr J who read the judgment said, *inter alia*:

“...I see no basis for any suggestion that a bank owes a duty of care to a payee in deciding to honour a customer’s cheque, at any rate when this appears to be regular on its face...”

But as I said earlier the usual common saying that a banker is under a duty to know his customer’s signature is incorrect even as between the banker and his customer. As it was said in the head note to the *Westminster Bank* case in the *Law Reports* (1975) Q.B. at 655:

“The principle is simply that a banker cannot debit his customer’s account on the basis of a forged signature, since he has in that event no mandate from the customer for doing so.”

I can find no evidence of negligence on the part of the plaintiff bank in this case and I am unable to hold that merely by honouring a forged cheque which was not detected at the time, the bank represented that the cheque was genuine. Like Kerr J said in the *Westminster Bank* case, I see no basis for any suggestion that a bank owes a duty of care to a payee in
deciding to honour a customer’s cheque, when this appears to be regular on its face. A forged cheque is not a cheque. It is only a sham piece of paper. If it were a case in which the payee had any doubt about the cheque, then he should either disclose such a doubt, or if he chooses not to do so, he should not be entitled to treat the paying bank as a hand writing expert able to detect forgery. The plaintiff bank in fact at the earliest opportunity warned the defendant bank who took no action, apparently because of the involvement of one of the referees of their customer who was said to be a highly placed person in the community.

As between the paying bank and the collecting bank, the same principle applies that, in the absence of negligence, no estoppel by representation can arise.

I refer to the Privy Council decision in *Imperial Bank of Canada v. Bank of Hamilton* (1). The plaintiffs were the bank of Hamilton and the defendants were the Imperial Bank of Canada. A cheque for $5, certified by the defendant bank’s stamp, was fraudulently altered to $500 and paid by the respondent to the appellant, a holder for value, under a mistake of fact, which was not discovered till the next day. When the bank of Hamilton discovered the fraud, it immediately gave notice to the Imperial Bank of Canada and demanded repayment of $495, being the amount paid by the Bank Hamilton in respect of the cheque, less the $5 for which it was drawn and certified. This demand not having been complied with an action was brought by the Bank of Hamilton to recover $495. The plaintiffs, that is, the Bank of Hamilton, got judgment. From the judgment, the Imperial Bank of Canada appealed and lost. The judgment was affirmed. The Imperial Bank of Canada again appealed to the Supreme Court and again they lost. Finally they appealed to the Privy Council, and once more lost.

On these authorities, therefore, it is quite clear that the United Bank for Africa, the plaintiff bank, ought to succeed in this action to recover the said amount of N\textcurrency 13,120.40. The
plaintiff therefore succeeds on the first claim. This being so, there is no need to consider the second claim which is in the alternative, suffice it to say that there was enough evidence of negligence on the part of Savannah Bank to find for the plaintiff bank.

There will therefore be judgment for the plaintiff against the defendant in the sum of ₦13,120.40. The plaintiff will have the costs of this action assessed at ₦500.
Yesufu v. African Continental Bank Ltd (2)

SUPREME COURT OF NIGERIA

IRIKEFE, BELLO, ESO NNAMANI, UWAIS JJSC

Date of Judgment: 25 JANUARY 1980

Judgment and order – Non-suit – Order of non-suit – When made – Principles guiding order of non-suit – Whether hard and fast rule exist

Practice and procedure – Non-suit – Order of non-suit – When made – Principles guiding order of non-suit – Whether hard and fast rule exist

Words and phrases – “Non-suit” – Meaning of

Facts

The plaintiff/respondent bank claimed against the defendant/appellant, Chief Festus Sunmola Yesufu the sum of ₦1,128,057.40 being money granted to the appellant at his request by way of overdrafts and other facilities drawn on his current account No. 2285 at the Benin City Branch. The facilities were granted at a compound interest of 9% per annum. The appellant used his landed properties in Benin City as security for the overdraft. The said sum of ₦1,128,057.40 included the principal, interest and other bank charges calculated up to and inclusive of 30th April, 1976. The respondent also claimed an order of specific performance compelling the appellant to make and execute a valid legal deed of mortgage of the landed property deposited with the respondent by way of an equitable mortgage by the appellant. It also sought a declaration that it was entitled to exercise the power of sale over the appellant’s landed property situate in Benin City. At the trial, the respondent tendered a lot of documents including a letter written by the appellant to the respondent admitting his indebtedness.
Upon conclusion of trial the learned trial Chief Judge entered judgment for the respondent in the sum of N661,993.42, and dismissed the other claims. Both parties were dissatisfied with the judgment, so appealed to the court of Appeal. The Court of Appeal allowed both the appeal and the cross-appeal, the sum total of which resulted in setting aside the judgment and order of award by the trial court, and in its place entered a non-suit.

Still dissatisfied, the appellant appealed to the Supreme Court contending that an order of dismissal was the most appropriate order to have been made in the circumstance. The appeal turned out on whether it was proper to non-suit the respondent as the Court of Appeal had done or whether it was proper to dismiss the respondents claims under the circumstances.

**Held** –

1. It is the law that a non-suit order should not be made unless two elements are present in the aborted trial, namely:

   (a) It must appear on the record of the case taken as a whole that the plaintiff have not failed in toto; and

   (b) That in any case, the defendant would not be entitled to the judgment of the court.

2. In considering whether to grant a non-suit instead of dismissal, the court has to weigh all the facts and circumstances of the case and see whether the scale of justice tilted on the side of a non-suit, or on the side of dismissal. In other words, the court has to do what is fair and just to the parties in the circumstances, of the case. In the instant case the respondent proved at the trial court, by the appellant's admission in exhibit 8, that the appellant is indebted to the respondent in a certain sum of money. The respondent only failed to prove the quantum. That being the case, the scale of justice weighed in favour of a non-suit, since, in view of the evidence of his indebtedness to the respondent, the appellant would not
be entitled to judgment of dismissal and it would also be wrongdoing the respondent to enters such judgment. Having regard to the circumstances of the case, particularly of the amount involved, a second non-suit is not unfair or unjust to the appellant.

3. A non-suit means giving the plaintiff a second chance to prove his case. The court would have to consider whether an order of non-suit would be wronging the defendant, and on the other hand whether dismissal of the suit would be wronging the plaintiff. Surely, every case will depend on its own merit and it would not be right to lay down a hard and fast rule about when to enter a non-suit more than to invoke a general statement.

Appeal dismissed.

e Cases referred to in the judgment

Nigerian

Awosanya v. Algata (1965) 1 All N.L.R. 228, 230
Craig v. Craig (1960) 1 All N.L.R. 173
Dada v. Ogunremi (1967) N.M.L.R. 181, 185
Dawodu v. Gomez 12 W.A.C.A. 151, 152
Epi v. Aighedion (1973) N.M.L.R. 31, 35
George v. UBA (1972) 8-9 S.C. 254, 281
George v. UBA (1972) 1 All N.L.R. 341
Mandillas and Karaberis v. Oridota (1972) 2 S.C. 47, 50
Nwakuchu v. Azubike 15 W.A.C.A. 46
Nigerian Fishing Co v. Western Nigeria Finance Corporation 327/67 of 27/6/69
Odiete v. Okotie (1972) 6 S.C. 254, 258
Ogunde v. Ojomu (1972) 4 S.C. 105, 107
Olayioye v. Oso (1969) 1 All N.L.R. 281, 284, 285
Zaria v. Abdul Small (1973) 6 S.C. 61, 68
Editorial Note

Earlier in 1976 in Suit No. S.C. 42/1975 the same case was on appeal to the Supreme Court non-suited for the same reason. Unfortunately, the respondent did not take advantage of the order of non-suit. See *Yesufu v. ACB* (1974) 4 S.C. 1.

Counsel

For the appellants: *Ajayi* (with him *Adeniyi* and *Okwesa*)

For the respondents: *Williams* (with him *Fasinro* and *Odu-naja*)

Judgment

**UwaIs JSC:** We dismissed this appeal on 26th November, 1979 and reserved our reasons. My Lords, I now give my reasons for agreeing that the appeal be dismissed.

In the court of trial, the plaintiffs (the African Continental Bank) who are now the respondents in this Court and who would hereinafter be referred to as the respondents in this judgment took out a writ of summons against the defendant, Chief Festus Summola Yesufu who is the appellant in this Court, and would hereinafter be referred to as the appellant:

“...for the sum of ₦1,128,057.40 (one million, one hundred and twenty-eight thousand, fifty-seven naira, forty kobo) being money granted to the defendant at his request, by way of overdraft accommodation and/or facilities from the plaintiff who are bankers. As at 30th April, 1976, the defendant was granted the total sum of ₦1,128,057.40, aforesaid, as overdraft drawn on his current account No. 2285 with the plaintiff at Benin City within the Benin Judicial Division. The said sum of ₦1,128,057.40 which included the principal, interest and other bank charges calculated up to and inclusive of 30th April, 1976, has since become due and payable by the defendant to the plaintiff, but in spite of repeated demands made by the plaintiffs, the defendants neglects and/or refuses to pay.”

There were also a claim for interest at the rate of 9%, a declaratory claim and a claim for specific performance to wit:

“(a) A declaration that the plaintiff is entitled in terms of the deed of mortgage registered as No. 29 at page 29 in Volume 10 of the Lands Registry in the Office at Benin City, to exercise
the power of sale over the defendant’s landed property situate and lying at No. 48 Lawani Street, Benin City the title deed of which was of the Lands Registry in the Office at Benin City.

(b) Specific performance compelling the defendant to make and execute a valid legal deed of mortgage of the landed property together with any building thereon situate and lying at Ward ‘C’ Lawani Street, Benin City, the title deed of which was registered as No. 41 at page 41 in Volume 48 in the Lands Registry in the office at Benin City and deposited with the plaintiff by way of an equitable mortgage by the defendant, as an additional security for the overdraft facilities/accommodation aforementioned granted to the defendant.”

After pleadings had been duly filed and evidence taken, the learned trial Chief Judge of Bendel State v. E Ovie Whiskey CJ in a considered judgment entered judgment for the respondents in the sum of ₦661,993.42. He dismissed all the other claims.

Both parties were dissatisfied with this judgment and they both appealed to the Federal Court of Appeal. Their Lordships of the Federal Court of Appeal Eboh, Agbaje and Nnaemeka Agu JJCA having heard arguments on the appeal and cross appeal, in a well considered judgment, allowed both the appeal and the cross appeal the sum total of which resulted in setting aside the judgment and order of award made by the learned Chief Judge in favour of the respondents and in its place they entered a non suit. In entering the order of non suit their Lordships said:

“There is no doubt in our minds that the defendant is indebted to the plaintiff in some amount of money having regard especially to exhibit 8 in this case. It is just that it is not possible to quantify the amount of his indebtedness on the authorities and the evidence before the court. We are however satisfied that this is not a case where the plaintiffs’ case should be dismissed since that undoubtedly will be wronging the plaintiff. On the evidence before the lower court the defendant definitely is not entitled to judgment since it is clear that he owed something to the plaintiff. The defendant even admitted in cross examination that at the time a
document. exhibit 54 was made ie 31st December, 1969, he was owing the plaintiff about £9,000 (₦18,000). The order we propose therefore, to make guided by the decision of the Supreme Court in Dada v. Ogunremi (1967) N.M.L.R. 181 at 185, is to non suit the plaintiff.”

It is against this order of non-suit the appellant has appealed to this Court, and quite naturally, this was the only point taken in this appeal before us.

It will now be convenient to set out the facts led to this order of non-suit.

The appellant, a customer of the respondents was granted overdraft facilities at a compound interest of 9% per annum to be drawn on his current account which he maintained with the respondents in their Benin City Branch. He used his landed properties in Benin City as security for the overdraft. The appellant drew various sums on the account. He also operated the account for what he referred to in his pleadings as negotiating or discounting a number of bills or sight drafts which were drawn on irrevocable import letters of credit opened in his favour and/or his company by his overseas customers to whom he exported various grades of locally processed rubber.

To prove their case, the respondents tendered a lot of documents. Those relevant for the purpose of this judgment would be referred to presently.

Exhibit A is the statement of account of the appellant with the respondents. It shows statement from 12/11/66 to April, 1976 and the last item therein shows debit of ₦1,108,057.40. This exhibit was tendered to prove paragraph 11 of the appellant’s statement of claim.

Exhibit 8 dated 21st July, 1991, was written during the currency of exhibit A by the appellant to the respondents and it reads:

“SARAH and YESUFU TRADING COMPANY
P.O. BOX 151,
Benin.

[...]

[...]
The Senior Solicitor,
African Continental Bank Limited,
Head Office,
P.M.B. 2466,
Lagos.

Dear Sir,

Re: My overall indebtedness
I intend to liquidate my total indebtedness with the bank on or before the end of September, 1971 or substantially reduce the amount. The two months should be regarded as months of grace to enable me double my efforts towards the clearing of this adverse balance.

Considering my past relationship with the bank, I hope you will use your good offices to make this consideration. I will also like the senior solicitor to give me sometime to reconcile some of the outstandings which are expected to be credited to my account to reduce my indebtedness and have not been done.

Litigation as you know is protracted and might not be in the interest of the cordial relationship that has always existed between the bank and myself.

Kindly give this my unflinching proposal your consideration. If I fail, you can go with your court action for recovery. I give my honour on this transaction and I promise that I won’t fail.

I have outstanding Bills and as soon as they mature or the proceeds are received, I will pay same to reduce the balance and I am also expecting some money from Finance Houses for the expansion of my business.

Be rest assured that I will not fail.

Yours faithfully,

For: SARAH and YESUFU TRADING COMPANY
(Sgd) FS YESUFU

MANAGING DIRECTOR.”

Exhibits 18-18N are the original ledger cards containing statement of account of the appellant the last entry showing that the appellant was in debit to the tune of ₦763,798.27 when the account was closed as the case was already in court.
The learned trial Chief Judge, in coming to the decision aforesaid, relied mainly on exhibits B, 18-18N and disregarded exhibit A. He believed exhibit A was discredited in cross examination. He accepted the contents of exhibit 18 to 18N as evidence of the transaction between the parties, and regarded exhibit 8 as an acknowledgment of indebtedness by the appellant to the respondents. He said, in regard to this exhibit:

“I am satisfied beyond any shadow of doubt on the evidence before me, that exhibit 8 is a letter written by the defendant to the plaintiffs admitting his indebtedness to the plaintiffs on the 21st July, 1971.”

And then found for the respondents as already stated.

The learned justices of the Federal Court of Appeal, though satisfied that exhibits 18 to 18N were admissible, however held, relying on section 37 of the Evidence Act, that the statements contained in exhibit 18 to 18N are not sufficient to charge the appellant with liability. On exhibit 8, the learned Justices held:

“We are satisfied as the learned Chief Judge was and as the Supreme Court too was in *African Continental Bank Ltd v. Festus Sunmola Yesufu* (1978) 2 SC 93 at 110 when a similar document was involved, that exhibit 8 does not raise any doubt the defendant’s admission of indebtedness to the plaintiff. But one cannot point to anywhere in exhibit 8 as to the amount of indebtedness admitted by the defendant. So in our view beside exhibit 8 the plaintiff would still have to furnish legal evidence of the indebtedness of the defendant to it in the sum claimed on the writ of summons . . .”

And having so held, the learned Justices concluded that an order of non-suit would meet the justice of the case.

It is to be noted that the order of non-suit which was made in this case is the Second of such order in the case. The case had once been heard in the Benin City High Court between the same parties in Suit No. B/10/72 though the claim then was for £376,320.10.10 that is N752,641. Judgment was given by the High Court in favour of the plaintiffs, that is,
the present respondents and on appeal to this Court (see S.C. 42/1975 reported in (1974) 4 S.C 1) the court. Fatai Williams JSC (as he then was) Madarikan and Nasir JJSC held that in view of an admission of an indebtedness made in a letter admitted in evidence as exhibit O (which is now exhibit 8 in the instant case) it would not be fair or just to dismiss the plaintiffs claim in its entirety. The court therefore entered a non-suit.

The powers of entertaining a non suit should, it is admitted, be employed advisedly. As it was pointed out by this Court in Craig v. Craig (1960) All N.L.R. 52, and also in Mandillas and Karaberis v. Oridota (1972) 2 S.C. 47, 50 these powers are never only for the purpose of allowing a plaintiff who had failed to prove his case to have another opportunity of doing so. In Craig v. Craig (supra) this Court said:

“Inevitably a non suit means giving the plaintiffs second chance to prove his case. This court has to consider whether in this case that would be wronging the defendant, and on the other hand whether the dismissal of the suit would be wronging the plaintiffs.”

See also the general observations in the Nigerian Fishing Co v. Western Nigeria Finance Corporation S.C. 327/67, a judgment of this Court delivered on 27th June, 1969, but unreported. Surely, every case will depend on its own merit and it would no be right to lay down a hard and fast rule about when to enter a non-suit more than to invoke a general statement. See Dawodu v. Gomez 12 W.A.C.A. 151, 152; Nwakuche v. Azubike 15 W.A.C.A. 46, Dada v. Ogunremi (1967) N.M.L.R. 181, 185.

It is rather unfortunate that the respondents did not take advantage of the order of non-suit made by this Court in 1976 especially as that order of non-suit was made precisely as a result of the letter, exhibit O in that case (and now exhibit 8 in the instant case) whereby the appellant made an admission of indebtedness to the respondents. Nevertheless, it is my considered view that, having regard to that admission,
it would clearly be wronging the respondents if they are not given yet another chance (albeit the last chance, as there must be an end to litigation), for I am in clear agreement with the Federal Court of Appeal when that court held that:

“On the evidence before the lower court defendant definitely is not entitled to judgment since it is clear that he owed something to the plaintiff.”

The appellant, upon this admission, should not in the interest of justice be permitted to get away with what he admittedly owes. A thorough examination of the exhibits in this case (even apart from exhibits S, 18-18N) bear out the correctness of this conclusion of the Federal Court of Appeal. Indeed, it would be difficult for the appellant, in view of the facts of this case, to deny owing “something to the plaintiff.”

On 8th July, 1970, according to the evidence of the second plaintiff witness, Raphael Olufemi Oguntobi, the appellant met the witness at the advances Control Department at the Lagos Head Office of the respondents’ bank. Minutes of the meeting were contained in exhibit 2 which is as follows:

“AFRICAN CONTINENTAL BANK LIMITED

Date: 8th July, 1970

From: Advances Control Department
Lagos Head Office
To: The Manager,
Benin Ring Road Branch.

Our Ref. R00/0000

Subject: Mr F.S. Yesufu . . . £227,747.3.7
Sarah and Yesufu Trading Co
(Warri Branch)

£183,344.15.6

An interview was held today (11.30 am) between Mr FS Yesufu Eke and Mr SAO Sule, (Manager, Head Office). The following members of the staff were also in attendance: Mr AJ Sule and Mr RO Oguntobi for Advances Control Department.

The purpose of the meeting was to find out how Mr F.S. Yesufu Eke would liquidate his accounts at Benin Ring Road Branch and also at Warri. After Mr FS Yesufu Eke had stated his supposed
difficulties with the bank and Mr SAO Sule’s reiterating the bank’s willingness to help him always, Mr FS Yesufu promised:

1. To pay into the Warri account £30,000 in July, 1970 either by cash or bills but that he should be allowed to withdraw any excess above £30,000 so that he might plough this back into his business.

2. To clear up the balance of Warri account within the year.

3. To reduce Benin Ring Road account regularly and to clear it very soon. The Manager, Head Office also directed that branch managers should not put embargo on the accounts of the customer and that the customer should be allowed to withdraw between 40 and 50% of any payments for his business pursuits.

(Sgd)
For: Manager
Advance Control Dept.”

The appellant at that meeting not only admitted “owing something” to the respondents but undertook to liquidate the debt within a year. Obviously he failed to honour this pledge for it was quite a year later he wrote exhibit 8 which I have already discussed (supra) showing his intention to liquidate his “total indebtedness with the bank on or before the end of September, 1971 or substantially reduce the amount.”

Another exhibit worth examining is exhibit 54. The Federal Court of Appeal did refer to this exhibit in their judgment. In that exhibit, a letter by the appellant to the respondents, the appellant expressed a regret:

“that owing to the difficulties in getting U.S.A. and Canada ports (sic) ship to Sapele port and also our own transaction with the Marketing Board which we have not been able to complete because of some hitch in documents”

he would be unable to meet up the balancing of the accounts with the respondents at the end of December, 1969. This is a clear admission of indebtedness. Finally, and as the Federal Court of Appeal pointed out in their judgment, the appellant also admitted in trial court that he owed about ₦18,000 as at the date he wrote exhibit 54. Certainly, all these present a clear picture of an admission of indebtedness to the respondents though the exact amount was in doubt.
It is as a result of all these that I hold the respectful view that the Federal Court of Appeal was right in coming to the conclusion that it would be unjust to dismiss the claim of the respondents with this admission by the appellant on record.

As I said earlier, it most unfortunate the respondents failed to take full advantage of the opportunity granted them by this Court in the earlier appeal S.C. 42/1975. For the least, the respondents should then have done, after being granted an order of non-suit, to use the words of the Federal Court of Appeal:

“...by way of supporting evidence for the entry in exhibits 18 to 18N, would be to put the cheques so drawn by the defendant in evidence or if they have been destroyed or lost to give secondary evidence of them.”

The respondents could not have a better indication.

It is therefore, for the foregoing reasons, that on the evidence before the trial court, the appellant is certainly not entitled to judgment having clearly admitted owing something to the respondents, that I find myself in respectful agreement with the dismissal of the appeal and affirmed the order of non-suit made by the Federal Court of Appeal.

IRIKEFE JSC: This is a second appeal. The respondents’ claim against the appellant in the Benin Judicial Division of the High Court of Bendel State reads as follows:

“The plaintiffs’ claim against the defendant is for the sum of N1,128,057.40 (one million one hundred and twenty-eight thousand fifty-seven naaira, forty kobo) being money granted to the defendant at his request, by way of overdraft accommodation and/or facilities from the plaintiff who are bankers. As at 30th April, 1976, the defendant was granted the total sum of N1,128,057.40 aforesaid, as overdrafts drawn on his current account No. 2285 with the plaintiff at Benin City within the Benin Judicial Division. The said sum of N1,128,057.40 which includes the principal, interest and other bank charges calculated up to and inclusive of 30th April, 1976, has since become payable by the defendant to the plaintiff, but in spite of repeated demands made by the plaintiff, the defendant neglects and/or refuses to pay.”
There were other claims which are not now relevant for the purpose of this appeal.

After a hearing in which evidence was called on either side, Ovie Whiskey, (CJ) on 21st June, 1977 upheld the respondents claim and awarded the sum of ₦661,993.42 out of the total sum shown on the writ. The appellant being aggrieved by the decision, appealed to the Court of Appeal which court, on 31st May, 1979 allowed his appeal and made an order non-suiting the action. The Court of Appeal came about its ultimate order in the appeal in the following words:

“There is no doubt in our minds that the defendant is indebted to the plaintiff in some amount of money having regard especially to exhibit 8 in this case. It is just that it is not possible to quantify the amount of indebtedness on the authorities and the evidence before the court. We are however satisfied that this is not a case where the plaintiffs’ case should be dismissed since that undoubtedly will be wronging the plaintiffs. On the evidence before the lower court the defendant definitely is not entitled to judgment since it is clear that he owed something to the plaintiffs. The defendant even admitted in cross-examination that at a time a documents, exhibit 54 was made ie 31st December, 1969, he was owing the plaintiffs about £9,000 (₦18,000). The order we propose therefore to make guided by the decision of the Supreme Court in Dada v. Ogunremi (1967) N.M.L.R. 181 at 185 is to non-suit the plaintiffs.”

The appellant being again dissatisfied with the order of non-suit has now appealed to this Court. After hearing the appellant’s Counsel on 26th November, 1979 and without calling upon the respondents’ Counsel we dismissed this appeal and indicated that we would give our reasons for doing so at a later date. The following are my reasons.

This appeal involves a short point of law and in so far as the facts are material for its determination, there is substantial agreement on them as between the parties. The said facts are set out in the judgment of my learned brother, Eso, JSC
which I had had the privilege of reading. It is common
ground that the appellant operated a current account No.
2285 at the respondents’ bank in Benin City at all times ma-
terial to this action. It is also common ground that the appel-
ellant had written exhibit 8 dated 21st July, 1971 to the re-
spondents asking for time to liquidate his unspecified in-
debtedness to the respondents and also for an opportunity to
reconcile documents, in order to reduce the quantum of the
said indebtedness, after it might have been ascertained.

In deciding upon an order of a non-suit, the Court of Ap-
peal took the view that such evidence as had been produced
before the court of trial in the form of ledger entries, was in-
conclusive and ineffectual, to meet the needs of the standard
of proof in civil matters, in the absence of the production, if
available, of the actual cheques from which such entries
were compiled.

At the hearing before us, the only point made by Counsel
appearing for the appellant was that an order non-suiting the
claim was an oppressive order in the circumstances of this
case as it is tantamount to affording the respondents an
unlimited opportunity to establish its claim. I do not agree
with this submission. It is the law that a non-suit order
should not be made unless two elements are present in the
aborted trial, namely:

“(a) It must appear on the record of the case taken as a
whole that the plaintiffs have not failed in toto, and

(b) That in any case, the defendant would not be enti-
tled to the judgment of the court.”

This clearly brings into focus the element of fair play, which
is all that court proceedings are about.

It would be facile to argue that the above two elements do
not exist in this case. In my view, they impinge violently on
one’s attention.
The attitude of this Court as regards the order of a non-suit may be found in the following cases, to mention just a few:

(a) Craig v. Craig (1960) 1 A.N.L.R. page 173
(b) Dada v. Ogunremi (1967) N.M.L.R. page 181
(c) Onwunalu v. Osademe (1971) 1 All N.L.R. page 1425
(d) George v. U.B.A. (1972) 1 All.N.L.R. (Part 2) page 347

I found nothing that commended itself to me in the argument of the appellant’s Counsel and I had no doubt in my mind that the appeal lacked merit and should be dismissed as it was in fact done.

The decision of the Court of Appeal in this matter dated 31st May, 1979 is hereby affirmed.

Belloc JSC: The main question for determination at the hearing of this appeal on 26th November, 1979 was whether it was proper to non-suit the plaintiff as the Court of Appeal had done or whether it was proper to dismiss the plaintiff’s claims under the circumstances of the case. We decided that the Court of Appeal had acted rightly in non-suiting the plaintiff and we dismissed the appeal accordingly.

The several claims of the plaintiff in the trial court, the facts and the circumstances of the case have been fully set out by my learned brother, Eso JSC in his reasons for the judgment of the court which he is about to deliver, and which I had the opportunity to read in draft form. I do not intend to recount them.

In the consideration of the appeal of the defendant, the Court of Appeal observed and concluded:

“We are satisfied that barring exhibits 18-18N in this case there is nothing to show that the defendant was indebted to the plaintiff in the sum of ₦661,993.40 for which judgment was given against him by the learned Chief Judge as overdraft. Since as we have pointed out the entries in exhibits 18-18N are not alone sufficient to fix the defendant with liability, we are satisfied that the judgment of the learned Chief Judge in this matter cannot stand.”
In respect of the cross appeal of the plaintiff, the court of Appeal concluded as follows:

“Since we have held that the judgment in favour of the plaintiff cannot stand, it follows that the declaratory reliefs sought by the plaintiff and the interest claimed by the plaintiff on the overdraft the subject matter of the action before the court cannot stand also.”

The Court of Appeal then went on to state the factors they took into account before making the order of non-suit. As regards the plaintiff’s claim for interest, they expressed the view that the trial Chief Judge was in error in holding that the plaintiff was estopped from charging interest from March, 1972. They held that the plaintiff was entitled to interest on the overdraft to the defendant, if proved, from March, 1972 up to the date of judgment. They were also of the opinion that the Chief Judge erroneously applied section 68 of the Stamp Duty Law (Cap 118), Laws of Western Nigeria to exhibit 4 and that he was wrong in holding that the Mortgage Deed, exhibit 4 was enforceable only in respect of the sum of the Magistrate Deed. Exhibit 4, was enforceable only in respect of the sum of 800 stated therein. Finally, the Court of Appeal stated:

“There is no doubt in our minds that the defendant is indebted to the plaintiff in some amount of money having regard especially to exhibit 8 in this case. It is just that it is not possible to quantify the amount of his indebtedness on the authorities and the evidence before the court. We are, however, satisfied that this is not a case where the plaintiff’s case should be dismissed since that undoubtedly will be wronging the plaintiff. On the evidence before the lower court, the defendant definitely is not entitled to judgment since it clear that he owed something to the plaintiff. The defendant even admitted in cross-examination that at the time the document, exhibit 54 was made ie 31st December, 1969, he was owing the plaintiff about £9,000 (₦18,000). The order we propose therefore, to make guided by the decision of the Supreme Court in Dada v. Ogunremi (1967) N.M.L.R. 181 at 185 is to non-suit the plaintiff.”

The ground of appeal relating to the order of non-suit is wanting in brevity but since it embraces the substance of the
argument of learned Counsel for the appellant in his brief, I think it is necessary to set it out in full. It reads:

“1. The learned Justices of Appeal erred in law in non-suiting the plaintiff after allowing the defendant’s appeal and setting aside the judgment of lower court when the proper order should in the circumstances, have been one dismissing the plaintiff’s case in its entirety.

Particulars of Error:

(a) The pleadings and the judgment of the lower court made it clear that there was a previous action, Suit Number B/10/72 on the same subject matter between the same parties, in which the plaintiff was non-suited on appeal by the Supreme Court vide Appeal Number S.C. 42/1975 reported in (1976) 4 S.C. pages 1-22 but the learned Justices of Appeal did not advert to this and the great injustice the defendant will suffer by the door being left open for the plaintiff to start fresh proceedings all over against the defendant especially, in view of their Lordships’ opinion which in effect allowed the plaintiff’s cross-appeal on item (b) of its claim viz: the right to interest up to including the date of judgment in an action.

(b) The insufficiency or lack of evidence on which the order of non-suit was based, was on a point more specifically pleaded and put in issue by the defendant in paragraphs 7 and 8 of the statement of defence.

(c) The failure of the plaintiff to prove its case was not the result of any technical or legal hitch in the course of the proceedings therefore the defendant is fully entitled to a judgment dismissing the plaintiffs’ case.

(d) There was no evidence or finding by their Lordships that the production of the cheques referred to in the judgment will prove or support the entries in exhibits 18-18N, the pivot of the plaintiffs’ case or to the amount claimed or any especially, when the plaintiff by their 4th witness failed to justify entries in exhibits 18-18N, and by documents which did not support or prove those entries.

(e) The learned Justices of Appeal did not advert to section 148(d) of the Evidence Act (Cap 62) Laws of the Federation
of Nigeria.; had they done so, they would have found that that section read with section 37 of the Act, makes the issue in the instant case, one of failure by the plaintiff to discharge the onus of proof wherefore, an order of non-suit is inappropriate as affording yet another opportunity to the plaintiff who has failed to discharge the onus of proof.

(f) The basis of the transaction between the parties as found by the lower court being one of alleged indebtedness arising from a purported exercise of a right of recourse in the matter of the collection, negotiation and discounting of overseas bills drawn under irrevocable letters of credit for exported commodity, a non-suit by reference to any other basis works hardship and is unjust to the defendant. Wherefore, their Lordships also failed to advert to the pertinent portion of the evidence of the third witness for the plaintiff: “On the face of the invoice we worked out the value of the goods shipped by him (the defendant) and we credit the amount to him…The payment by the Bank of New York was usually made to our Head Office at Lagos… If the payment by the Bank of New York was at par with the invoice value which we had credited to the defendant’s account, we would do nothing to his account, but if there was a difference, because he was short-paid, the short payment would be debited to his account. It is this type of transaction that has resulted into the defendant’s indebtedness.”

(g) The Justices of Appeal are not justified in making the order of non-suit by reference to exhibit 8 when as their Lordships also found, there was no letter of demand stating a specific sum of indebtedness to which exhibit 8 could be related: a fortiori exhibit 8 was not an admission of any debt owed to the bank.”

In his argument, learned Counsel for the appellant points out that the Court of Appeal based the order of non-suit on the decision in Dada v. Ogunremi (supra) and submits that Court of Appeal erred in failing to appreciate that the facts and the circumstances of that case are different from those of the case in hand, the distinguishing factor being that there
was a counterclaim in the Dada’s case whereas there is no such claim in the present case.

Relying on Craig v. Craig (1960) 1 All N.L.R. 173 at 177 and Mandillas and Karaberis v. Oridota (1972) 2 S.C. 47 at 50, learned Counsel argued that the discretion to make an order of non-suit ought to be judiciously exercised and that in determining whether a suit should be non-suit or dismissed, each case must be decided on its facts. He further contends that in the exercise of the discretion, the court would not non-suit a plaintiff who has failed to prove his case. He contends that the plaintiff in the case in hand has failed to prove its case.

Learned Counsel refers to Awosanya v. Algata (1965) 1 All N.L.R. 228 at 230 and submits that the plaintiff having been non-suited previously on the same facts in Yesufu v. African Continental Bank (1976) 4 S.C. 1 a second order of non-suit is unjust and oppressive to the defendant since the possibility of a third action may render him liable for a higher sum than previously claimed due to accrued interest charges.

Learned Counsel further contends that a non-suit is generally granted in cases where a plaintiff is unable to obtain judgment on account of some technical and legal hitch. He cites Mandillas and Karaberis v. Oridota (supra), Ogunde v. Ojomu (1972) 4 S.C. 105 at 107 and Odiete v. Okotie (1972) 6 S.C. 83 at 90 in support of his proposition. He argues that there is no hitch whatever in the case in hand and that exhibit 8 is not an admission of liability in view of other subsequent correspondence denying liability. He contends that the plaintiff has failed to prove its case as pleaded and that this is not a proper case to make an order of non-suit but to dismiss the suit.

Before considering the submission of learned Counsel, I think it is pertinent to reiterate the test to be applied before making an order of non-suit as stated in numerous cases by
In this Court. In *Dada v. Ogunremi (supra)* upon which the Court of Appeal relied, this Court said at page 185:

“We have given consideration to the nature of the order to make in the circumstances of the case. We have no doubt that on the evidence before the court, the defendants are not entitled to the judgment of the court. With regards to the plaintiff’s case, whilst it is true that in a Claim for a Declaration of Title the plaintiff must succeed on the strength of his own case and not on the weakness of the case of the defendant, it is well established that where neither of the parties before the court is entitled to judgment the court is entitled to enter a non-suit instead of dismissal.”

The case of *Craig v. Craig* (1960) 1 All N.L.R. 173 at 177 stated the text as follows:

“Inevitably a non-suit means giving the plaintiff a second chance to prove his case. The court has to consider whether in this case that would be wronging the defendant, and on the other hand whether the dismissal of the suit would be wronging the plaintiffs.”

See also *Olayioye v. Oso* (1969) 1 All N.L.R. 281 at 284, 285 and *Onwunalu v. Osademe* (1971) 1 All N.L.R. 14 at 17.

It seems to me from the authorities that in considering whether to grant a non-suit instead of dismissal, the court has to weigh all the facts and circumstances of the case and see whether the scale of justice has titled on the side of a non-suit, or on the side of dismissal. In other words, the court has to do what is fair and just to the parties in the circumstances of the case.

I entirely agree with the submission of learned Counsel for the appellant that a plaintiff who completely fails to prove his case is not entitled to a non-suit. The court decided so in *George v. UBA* (1972) 8-9 S.C. 254 at 281, *Olayioye v. Oso* (supra) and *Odiete v. Okotie* (supra).

However, I do not agree with learned Counsel that the plaintiff in the case in hand failed to prove its claims in their entirety. The plaintiff proved in the trial court, by the defendant’s admission in exhibit 8, that the defendant is indebted to the plaintiff in a certain sum of money. The plaintiff only failed to prove the quantum. That being the case, it seems to
me that the scale of justice weighed in favour of a non-suit since, in view of the evidence of his indebtedness to the plaintiff, the defendant would not be entitled to judgment of dismissal and it would also be wronging the plaintiff to enter such judgment. Having regard to the circumstances of the case, particularly of the amount involved, I do not think that a second non-suit is unfair or unjust to the defendant.

c I do not consider it necessary to comment on the other grounds of appeal since they are concerned with the observations of the court of Appeal which are obiter dicta.

d **NNAMANI JSC:** On the 26th November, 1979 this Court dismissed the appeal of the defendant/appellant and indicated that it would give its reasons later. On the 21st June, 1977, Ovie Whiskey, CJ gave judgment for the plaintiff/respondents in this suit in the sum of N661,993.42. Both the defendant/appellant and the plaintiff/respondents appealed to the Federal Court of Appeal. Benin Judicial Division. The Federal Court of Appeal allowed both appeals, non-suited the plaintiffs/respondents stating in the concluding part of their judgment:

“There is no doubt in our minds that the defendant is indebted to the plaintiff in some amount having regard especially to exhibit 8 in this case. It is just that it is not possible to quantify the amount of his indebtedness on the authorities and the evidence before the court. We are however satisfied that this is not a case where the plaintiffs’ case should be dismissed since that undoubtedly will be wronging the plaintiff. On the evidence before the lower court the defendant definitely is not entitle to judgment since it is clear that he owed something to the plaintiff. The defendant even admitted in cross-examination that at the time a document, exhibit 54 was made ie 31st December, 1969, he was owing the plaintiff about E9,000 (N18,000). The order we propose therefore to make guided by the decision of the Supreme Court in Dada v. Ogunremi (1967) N.M.L.R. 181 at 185 is to non-suit the plaintiff.”

It is against this judgment that the defendant/appellant has appealed to this Court. I must pause here to state that I agree completely with the facts of this case as stated in the judgment
of my learned brother Eso JSC just delivered and part of which I had the privilege of seeing.

Only one ground of appeal was argued before us. That is:

“(i) The learned Justices of Appeal erred in law in non-suiting the plaintiff after allowing the defendant’s appeal and setting aside the judgment of the lower Court when the proper order should in the circumstances have been one dismissing the plaintiffs’ case in its entirety.

Particulars of Error

(a) The pleadings and the judgment of the lower Court made it clear that there was a previous action, Suit No. 8/10/72 on the same subject matter between the same parties in which the plaintiff was non-suited on appeal by the Supreme Court vide Appeal number S.C.42/1975 reported in (1976) 4 SC pages 1-22, but the learned Justices of Appeal did not advert to this and the great injustices the defendant will suffer by the door being left open for the plaintiff to start fresh proceedings all over again against the defendant especially, in view of their Lordships opinion which in effect, allowed the plaintiffs’ cross-appeal on item (b) of its claim viz: the right to interest up to and including the date of judgment in an action.

(b) The insufficiency or lack of evidence on which the order of non-suit was based, was on a point more specifically pleaded and put in issue by the defendant in paragraph 7 and 8 of the statement of defence.

(c) The failure of the plaintiff to prove its case was not the result of any technical or legal hitch in the course of the proceedings wherefore, the defendant is fully entitled to a judgment dismissing the plaintiffs’ case.

(d) There was no evidence or finding by their Lordships that the production of the cheques referred to in the judgment will prove or support the entries in exhibits 18-18N, the pivot of the plaintiffs’ case or to the amount claimed or any especially, when the plaintiff by their 4th witness failed to justify entries in exhibits 18-18N, and by documents which did not support or prove those entries.
(e) The learned Justices of Appeal did not advert to section 148(d) of the Evidence Act, Cap 62 Laws of the Federation of Nigeria; had they done so, they would have found that section read with section 37 of the Act, makes the issue in the instant case, one of failure by the plaintiff to discharge the onus of proof wherefore, an order of non-suit is inappropriate as affording yet another opportunity to the plaintiff who has failed to discharge the onus of proof.

(f) The basis of the transaction between the parties as found by the lower court being one of alleged indebtedness arising from a purported exercise of a right of recourse in the matter of the collection, negotiation and discounting of overseas bills drawn under irrevocable letters of credit for exported commodity, a non-suit by reference to any other basis works hardship and is unjust to the defendant. Wherefore, their Lordships also failed to advert to the pertinent portion of the evidence of the third witness for the plaintiff: “On the face of the invoice we worked out the value of the value of the goods shipped by him (the defendant) and we credit the amount to him. . . The payment by the Bank of New York was usually made to our Head Office at Lagos… If the payment by the Bank of New York was at par with the invoice value which we had credited to the defendant’s account, we would do nothing to his account but if there was a difference, because he was short-paid, the short payment would be debited to his account. It is this type of transaction that has resulted into the defendant’s indebtedness.

(g) The learned Justices of Appeal are not justified in making the order of non-suit by reference to exhibit 8 when as their Lordships also found, there was no letter of demand stating a specific sum of indebtedness to which exhibit 8 could be tied or could be related: a fortiori exhibit 8 was not an admission of any debt to the bank.”

Learned Counsel for the appellant in addition to his brief of argument in which cited several legal authorities contended that the issue of a non-suit is in the discretion of the court. He drew the court’s attention to exhibits 8 and 36. He also reminded the court of a previous Suit between the parties
Yesufu v. African Continental Bank Ltd (1976) 4 S.C. 1-22 in which the plaintiffs were non-suited as a result of a technical or legal hitch on the question of the admission of the only available evidence on which the plaintiffs' claim was based, and argued that the situation was different in the instant case. Learned Counsel drew the court’s attention to circumstances which he thought if considered by the Federal Court of Appeal would have resulted in an outright dismissal of the plaintiffs’ case. He also contested the view of the Federal Court of Appeal that exhibit 8 represented as admission of indebtedness by the defendant/appellant. Referring to the case of Dada v. Ogunremi (1967) N.M.L.R. 181 relied on by the Court of Appeal, learned Counsel for the appellant contended that the facts and circumstances of that case are quite different from the present one as he claimed that the defendant/appellant was not counterclaiming and property interests were not involved. Finally, he argued that to give the plaintiff/respondent another chance would cause hardship to the appellant.

After studying the pleadings, facts and circumstances of this, it is difficult not to come to the conclusion that the plaintiffs/respondents had failed to discharge the onus on them which was to prove their case within the balance of probabilities. In a matter in which the evidence necessary is essentially documentary, it is quite evident that the plaintiffs/respondents did not do much, to put it mildly, in trying to prove their case, exhibit A which was the statement of account prepared by them and tendered in evidence was discredited by one of their own witnesses. The trial Chief Judge had no alternative but to disregard it. Even though the learned trial Chief Judge seems to have based his judgment on exhibits 8 and 18-18N, his actual award of ₦661,993.42 to plaintiffs/respondents was arrived at by deducting errors in exhibits 18-18N amounting to ₦73,759.78 from the total amount of ₦735,153.10 the last entry on exhibit 18N. Even exhibits 18-18N, which was the pivot of the plaintiffs/respondents’ case, was insufficient, without something
more, to charge the defendant with liability particularly having regard to section 37 of the Evidence Act. In paragraph 8 of their statement of claim the plaintiffs/respondents stated:

b  “The plaintiffs from time to time, send to the defendant periodic statements of his account with the plaintiffs.”

No attempt was made to use copies of these statements or to demand the production of the originals.

c  Again in paragraph 10 of the same statement of claim, the plaintiffs stated:

d  “The plaintiffs and/or through their solicitors wrote several letters, demanding that the defendant should liquidate his outstanding indebtedness to the plaintiffs, but although the defendant admitted liability and promised to pay up the said debt he has since refused and/or neglected so to do…”

e  In spite of this it would appear that all that was used was the letter to which exhibit 8 was a reply.

Finally on this point, in paragraph 11 of the statement of claim the plaintiffs stated:

f  “…plaintiffs may also found on various cheque issued by the defendant on his said current account as well as vouchers, debit notes and other relevant documents/books kept by the plaintiffs touching on defendant’s said current account.”

g  Not one cheque or other document was tendered in evidence. The Federal Court of Appeal after dealing with the insufficiency of exhibit 8 continued, and I agree with their views.

“So in our view besides exhibit 8 the plaintiff would still have to furnish legal evidence of the indebtedness of the defendant to it in the sum claimed on the writ of summons. For as was observed by the Supreme Court in Zaria v. Abdul Small (1973) 6 S.C. 61 at 68 it is the duty of the plaintiff in this case in consonance with section 135 of the Evidence Act to leave facts to the court which on a proper appraisal would enable the court to give its judgment. Definitely on the face of exhibit 8 alone plaintiff would not be entitled to judgment in the sum claimed by it. We have pointed
out above that exhibits 18-18N would not be sufficient having regard to section 37 of the Evidence Act to charge the defendant with liability in respect of the overall debit balance shown thereon or part thereof. On the evidence for the plaintiff and the authority of Cuthbert v. Roberts Lubbock and Co (supra) the overdraft granted to the defendant by the plaintiff consisted of the cheques drawn by the defendant on the plaintiff when the former was not in fund which cheques were honoured. The least the plaintiff could have done by way of support evidence for the entries in exhibits 18-18N could be to put the cheques so drawn by the defendant in evidence or if they had been destroyed or lost, to give secondary evidence of them. Neither was done . . .”

The question then is, in the fact of all this ought the Federal Court of Appeal to have made an order of non-suit?

One may just in passing mention that in the High Court of Judicature in England there is now nothing like a non-suit. Before the Judicature Act and at Common Law, it was open to a plaintiff who is compelled through lack of some necessary piece of evidence for some other adequate reason to abandon his present proceedings, but may wish to preserve his right to bring a fresh action under more favourable circumstances. See Odgers’ Principles of Pleadings and Practice in Civil actions in the High Court of Justice by Casson and Dennis at page 232.

The courts have consistently decided that the order of non-suit should not be used merely to give the plaintiff another chance at proving his claim. But they have also held where there is a hitch defendant must not be allowed to take advantage of it.

In Odiete v. Okotie (1972) S.C. 83 Coker JSC delivering the judgment of the court, stated at page 90:

“We observe that the present case learned Counsel for the plaintiffs has asked us to enter a non-suit for its clients. We are unwilling to do this for the order of non-suit is not to be employed for affording yet another opportunity to a party who had failed to discharge the onus of proof which lies on him but only when in the interest of justice (italics mine) the plaintiff has only failed to get judgment on account of a hitch of which the defence is not, in the opinion of the court, entitled to take advantage . . .”
It is settled law too, that the matter of granting an order of non-suit is one which is in the discretion of the court, a discretion which is to be exercised with great care. Each case is however to be determined on its merits and peculiar circumstances.

In the case of Dawodu v. Gomez (1947) 12 W.A.C.A. 151 the court was called upon to apply Order XLV, rule 1 of the Supreme Court (Civil Procedure) Rules (Cap 211) Laws of Nigeria, 1948 which stated that:

“The court may in any suit, without the consent of the parties non-suit the plaintiff, where satisfactory evidence shall not be given entitling either the plaintiff or defendant to the judgment of the court.”

Dismissing the appeal, it held that it was impossible to lay down any hard and fast rules to the proper occasions when a non suit should be preferred to a dismissal and each case must be considered on its merits. See also Epi v. Aighedion (1973) N.M.L.R. 31 at page 35. On the same point and for a situation in which this Court referred to the fact that there may be circumstances which in the interest of justice may make it necessary that an order of non-suit rather than dismissal be made. In Dada v. Ogunremi (1967) N.M.L.R. 181, a case decided by this Court and relied on by the Federal Court of Appeal, it was held that where neither of the parties before the court is entitled to judgment the court is entitled to enter a non-suit instead of dismissal. Learned Counsel for the appellant had argued that this was wrongly relied on by the Federal Court of Appeal. I am unable to agree with this.

For the reasons I have already given, judgment could not have been given on the evidence before the court in favour of the plaintiff/respondent. Nor as I shall presently show would it have been in the interest of justice that judgment be given in favour of the defendant. It is immaterial in my view that the defendant in Chief Dada’s case did not counter-claim. An order of dismissal of the claim in that suit would have been a judgment “in favour” of the defendant.
I am satisfied from a review of these authorities and the evidence before the High Court that the Federal Court of Appeal exercised its discretion properly when it made an order of non-suit. In *Keshinro v. Bakare* (1968) N.M.L.R. 230 at page 232, this Court held that the onus is on the appellant to satisfy the Appeal Court that the trial Judge (or in this case the Federal Court of Appeal) was wrong to exercise his discretion in the way he did by non-suiting rather than dismissing the plaintiff’s claim. The defendant/appellant has clearly in my view failed to discharge that burden. There were also circumstances in this instant case such as an order in the interest of justice. It would have amounted to grave miscarriage of justice if the claim of the plaintiff had been dismissed in the face of clear, and in my view, unequivocal admission by the defendant of his indebtedness to the plaintiff/respondent, albeit the exact amount was not clear on the evidence available. In exhibit 8, dated 21st July, 1971, the defendant/appellant wrote thus:

“The Senior Solicitor,

African Continental Bank Ltd, Head Office,
P.M.B. 2466,
Lagos.

Dear Sir,

Re: My overall Indebtedness

I intend to liquidate my total indebtedness with the bank on or before the end of September, 1971 or substantially reduce the amount. The two months should be regarded as months of grace to enable me double my efforts towards the clearing of his adverse balance. Considering my past relationship with the bank, I hope you will use your good offices to make this consideration. I will also like the Senior Solicitor to give me sometime to reconcile some of the outstandings which are expected to be credited to my account to reduce my indebtedness and have not been done. Litigation as you know is protracted and might be in the interest of the cordial relationship that has always existed between the bank and myself.
Kindly give this my unflinching proposal your consideration. If I fail, you can go on with your court action for recovery. I give my honour on this transaction and I promise that I won’t fail. I have outstanding Bills and as soon as they mature or proceeds are received, I will pay same to reduce the balance and I am also expecting some money from Finance Houses for expansion of my business.

Be rest assured that I will not fail.

Yours faithfully,

For: SARAH and YESUFU TRADING COMPANY
(Sgd) FS Yesufu
MANAGING DIRECTOR.”

Though exhibit 2 was produced by the plaintiff, it is the minutes of a meeting in which the defendant’s indebtedness was discussed. In exhibit 36, dated 6th September, 1971.

There is at least an implied admission of indebtedness though there is argument as to the amount. The defendant ends his letter thus:

“Meanwhile you are advised to go through your books thoroughly for more clarification on this matter while I assure you of my co-operation at all times . . .”

Then finally, there is exhibit 54 dated 31st December, 1969 in which the defendant wrote:

“The Manager,
African Continental Bank Ltd,
Ring Road,
Benin City.

Dear Sir,

We regret to inform you that owing to the difficulties in getting U.S.A. and Canada port ship to Sapele and also our transaction with the Marketing Board which we have not been able to complete because of some hitch in documents, we will be unable to meet up the balancing of account with your bank at the end of this month. This we regret the inconveniences it might cause, but by the grace of God before January, 20th we hope to liquidate all the outstanding debt.

Yours faithfully,
SARAH and YESUFU TRADING COMPANY LTD.  
(Sgd) FS Yesufu  
MANAGING DIRECTOR.”

On the question of hardship the learned Counsel of the appellant referred us to the case of Awosanya v. Algata (1965) 1 All N.L.R. 228 in which this Court decided that if the dismissal of the claim might work injustice to the plaintiff and no injustice or hardship need result to the defendant from non-suiting the plaintiff, an order of non-suit would produce the juster result. I cannot see any injustice that a fresh action would cause the defendant. He would resist the action with the defence he has used in the present suit. A fresh action may involve a slightly higher sum of money in the claim due to the fact that the Federal Court of Appeal allowed the plaintiff’s appeal too and ordered that interest be charged on the overdraft to defendant, if proved, after March, 1972 and up to the date of judgment. Not to have ordered a non-suit would have been unjust and unfair to the plaintiff/respondent. This was also the view of this Court in the earlier action between the parties Yesufu v. African Continental Bank Ltd (1976) 4 S.C. 122 in which exhibit 8 in this suit was tendered as exhibit O. There the document exhibit 8 (statement of account which was the pivot of the plaintiff/respondent’s case in that suit was admitted error, but exhibit O was a clear admission by the defendant of his indebtedness to the plaintiff/respondent.

The appeal of the defendant/appellant was therefore dismissed with costs to respondent assessed at N300.

UWAIS JSC: The instant appeal is grounded against the order of non-suit made by the Federal Court of Appeal after setting aside the decision of the learned Chief Judge, Ovie Whiskey, CJ.

Learned Counsel for the appellant argued that following the decision in Dawodu v. Gomez 12 W.A.C.A. 151 the Federal Court of Appeal ought to have dismissed the respondent’s case, notwithstanding the decision in Dada v. Ogunremi
(1967) N.M.L.R. 181 which supported the view that where neither party is entitled to judgment a non-suit should be entered instead of a dismissal. His reason, in support of the submission, being that the respondents failed to produce at the hearing of the suit before the learned Chief Judge, the cheques on which the appellant was purported to have withdrawn the money allegedly owed, by him, in spite of the demand by the appellant. In his statement of defence, that the said cheques be produced at the trial of the action.

In his reply learned Counsel for the respondents conceded that the cheques should have been produced at the hearing of the case in response to the appellant’s pleadings.

The respondents averred in paragraph 7 of their statement of claim thus:

“The plaintiffs as bankers and in the normal course of banking business, at various times and at the request and/or instructions of the defendant paid out moneys to and for the benefit of the defendant and debited same to the account of the defendant. Such payments include *inter alia*, letters of credits, mail transfers, bank correspondents, (sic) standing orders, cable charges, traveler’s cheques, inter bank transactions, customs charges and other charges and interest and personal cheques.”

While the appellant replied in paragraph 8 of his statement of defence with the following averment:

“8. Except as appears by paragraph 3 hereof which is repeated in this connection, the defendant denies paragraph 7 of the statement of claim, and will put the plaintiffs to strict proof of any disbursements allegedly made on his behalf and on orders or instructions, not instructions, not only as to the particular item of disbursement on the account but also as to the mandate, orders, requests or instructions on which such money was paid out or debited to defendant’s account. Furthermore, the defendant does not admit that the plaintiffs rendered him all or any of the services enumerated in paragraph 7 of the statement of claim or that the services if any are distinct and entirely separate from the transaction hereinbefore referred to in paragraph 3 of this statement of defence or were such as the plaintiffs are entitled to charge for
or separately wherefore, the defendant puts the plaintiffs to strict proof that they rightly and correctly debited his account with the charges for the said services or that they kept accurate and proper accounts/records of their dealings with the defendant.”

The order of non-suit was made by the Federal Court of Appeal by reason of the appellant’s admission and also in the Court of Appeal:

“There is no doubt in our minds that the defendant is indebted to the plaintiff in some amount of money having regard especially to exhibit 8 in this case. It is just that it is not possible to quantify the amount of his indebtedness on the authorities and evidence before the court. We are however satisfied that this is not a case where the plaintiffs case should be dismissed since that undoubtedly will be wronging the plaintiff. On the evidence before the lower court the defendant definitely is not entitled to judgment since it is clear that he owed something to the plaintiff. The defendant even admitted in cross-examination that at the time a document exhibit 54 was made ie 31st December, 1969, he was owing the plaintiff about £9,000 (₦18,000).”

It is not clear from the record of proceedings if the Federal Court of Appeal called upon the parties to address them before non-suiting the respondent as laid down and followed by this Court in *Craig v. Craig* (1960) 1 All N.L.R. 173 at page 177 and emphasisd in a long line of authority thereafter. However this is not the issue argued before us and the point need not be dwelt upon further.

In *Dawodu v. Gomez* (supra) cited by learned Counsel for appellant the West African Court of Appeal was asked to substitute an order of dismissal with an order of non-suit and the court rejecting the plea stated:

“We have been invited to set out views as to the proper occasions when a non-suit should be preferred to a dismissal. Obviously, it is quite impossible to lay down a hard and fast rule and each must be considered on its merits.”

Also in *Craig’s* case (supra) this Court observed that:

“Inevitably a non-suit means giving the plaintiff a second chance to prove his case. The court has to consider whether in this case...
that would be wronging the defendant, and on the other hand whether the dismissal of the suit would be wronging the plain-tiffs.”

In my view the Federal Court of Appeal followed these principles in non suiting the respondents and I think rightly too. The evidence adduced shows that the appellant was owing the respondents some money, the exact sum of which was not actually determined by the trial court. The appellant by admission in his letter, exhibit 8, to the respondents as well as under cross-examination at the trial of the suit confirmed that he was owing the respondents. In the light of this it will surely be inequitable and wronging the respondents to debar them from recovering the amount owing by entering an order of dismissal. I am satisfied that the justice of the case, as established by the evidence, demands that an order of non-suit was the appropriate order to be made.

The appeal therefore fails and I dismiss it.
Wema Bank Limited v. Okutoro

HIGH COURT OF LAGOS STATE

JOHNSON J

Date of Judgment: 6 FEBRUARY 1980

Suit No: L.D.181/77

Banking – Action for overdraft – Statute of limitation – When does time begin to run

Banking – Banker/customer relationship – Nature of contract thereof

Facts

The plaintiff’s claim against the defendant is for the sum of N6,424.92k (six thousand, four hundred and twenty-four naira and ninety-two kobo), being balance due to the plaintiffs for overdraft granted by the plaintiffs to the defendant at Ebute-metta Branch in the normal course of their business as banker to the defendant and for the money paid by the plaintiff’s to the defendant as bankers at his request and for bank charges, incidental expenses and interest upon money due from the defendant to the plaintiffs which said sum the defendant has refused and/or neglected to pay in spite of repeated demands.

The plaintiff contended that the relationship between a customer and a banker constitutes a specialty contract and as such section 8 of Limitation Law is not applicable.

Held –

1. A contract between a banker and its customers because of the traditional implications is a specialty contract and is no less a simple contract as others in common legal parlance.

2. In an action for overdraft, cause of action accrues when a demand is made, and time begins to run thereof.

3. In establishing that a demand has been made, there must be proof not only of posting but also of delivery.

Plaintiffs’ claim dismissed.
a Cases referred to in the judgment

Foreign

b Garden v. Bruce (1868) L.R. 3 C.P. 301
Joachimson v. Swiss Bank Operation (1921) 3 K.B. 110

Nigerian statute referred to in the judgment

c Limitation Law (Cap 70), Volume 4, Laws of Lagos State, 1973, section 8(1)(a)

Counsel

d For the plaintiff: Ladapo
For the defendant: No appearance

Judgment

e JOHNSON J: The plaintiff’s claim against the defendant is for the sum of ₦6,424.92k (six thousand, four hundred and twenty-four naira and ninety-two kobo), being balance due to the plaintiff’s for overdraft granted by the plaintiff’s to the defendant at Ebute-metta Branch in the normal course of their business as bankers to the defendant and for the money paid by the plaintiff’s to the defendant as bankers at his request and for bank charges, incidental expenses and interest upon money due from the defendant to the plaintiffs which said sum the defendant has refused and/or neglected to pay in spite of repeated demands.

h The plaintiffs also claim interest on the said sum of ₦6,424.92k at the rate of 9 % per annum from the 1st February, 1977 until judgment and 5 % per annum thereafter until final liquidation of the whole debt or any part thereof.

i To the said writ of summons was attached a statement of claim with a statement of account marked Annexure A. The defendant also filed a statement of defence which was later amended with the leave of the court. The matter came to trial on the amended statement of defence. The substance of the claim contained in the statement of claim is contained in
paragraphs 3-6 which are quoted hereunder:–

“3. By an agreement between the parties, the defendant became a customer of the plaintiffs whereby the defendant opened an account at the plaintiffs Ebute-metta office by which he took overdraft amounting to N6,424.92k at various times between January, 1972 to January, 1977 subject to the interest commission and other bank charges as agreed by the parties.

4. During the said period, the defendant took the said overdraft while operating a current account with the plaintiffs thereby incurring a debt in the total sum of N6,424.92k with interest at the rate of 9% per annum as at 25th January, 1977.

5. The plaintiffs and their solicitors have made repeated demands on the defendant to pay the said debt, but the defendant has refused and/or neglected to pay despite several promises.

6. The plaintiffs will rely on the comprehensive statement of account of the defendant, attached with this statement of claims and marked “Annexure A.”

The defendant in his amended statement of defence denied the above quoted paragraphs and put the plaintiff to the strictest proof thereof. He denied being a customer of the plaintiff and claimed that one Jaiyesimi wrote an application for him to the plaintiffs’ bank for a loan for his business.

After making several other averments he made an issue of the limitation of time in paragraphs 19-21 as follows:–

“19. That if the defendant signed an acknowledgement for an indebtedness of the sum of N2,847.84k as alleged which is denied he at no time acknowledged the debt of N6,424.92k as claimed or at all.

20. That if the defendant acknowledged in writing a debt of N2,847.84k on 17th October, 1969 as alleged, which is denied such acknowledgement is over 6 years as at 18th February, 1977 when the summons was taken out and consequently barred by the law of limitation of actions.

21. That the defendant will rely on the law of limitations of action having made alleged debt unrecoverable.”

At the trial, the plaintiff called witnesses and the defendant gave evidence in his own defence.
Although the present claim is by Wema Bank Ltd, against the defendant, it is proper at this stage to account for the difference in name between the original party with whom the defendant had transaction and the present party. The original transaction was between the defendant and Agbonmagbe Bank Limited. This bank was converted to Wema Bank Limited sometime in 1970 as evidenced by exhibit A, the certificate of incorporation of the company.

The present plaintiff is therefore a successor-in-title to Agbonmagbe Bank Limited. The defendant admitted that he took a loan from Agbonmagbe bank limited and that he used his house as guarantee for that loan. He claimed in his evidence at the trial that he no longer owes Agbonmagbe any money and that he had repaid the loan he got from the bank and took back the deed of his house.

The above account was given when the defendant gave evidence-in-chief. Under cross-examination, however, it became patent that the substance of his evidence is founded on a combination of falsehood and untruths. He looked completely surprised when his lie that he had got the original document of his house back from the bank was punctured by the production of the said original document from the custody of the learned Counsel for the plaintiff for his examination.

He has to admit that the document put in evidence and admitted as exhibit H is the original conveyance of his land and building.

I have no hesitation in coming to the conclusion that the defendant is not a witness of truth and that he was merely telling lies to avoid payment of the money claimed by the plaintiff.

I am satisfied and find as a fact that he was a customer of the Agbonmagbe Bank Ltd, (the predecessor-in-title of the present plaintiff and that he got a loan from the said bank as stated by the witness for the plaintiff).
That the defendant is indebted to the plaintiff appears to me well established. The only question which presents a problem is whether or not the claim is statute-barred.

The learned Counsel for the defendant submitted with special reference to exhibit F and that date of the writ summons which is the 18th February, 1977 that the claim has been outstanding for more than 6 years and is consequently caught by the provision of section 8(1)(a) of the Limitation Law, Cap 70, Volume 4, Laws of Lagos State of Nigeria, 1973.

That section reads:–

“The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued:

(a) Actions founded on simple contract.”

Mr Ladapo, the learned Counsel for the plaintiff in a counter-submission claimed that the relationship between a customer constitute a specialty contract and not a simple one to which section 8 of the limitation is applicable.

He contended that time runs only when demand is made. And in support he cited the case of Joachimson v. Swiss Bank Operation (1921) 3 K.B. 110.

He further claimed that the last letter of demand is exhibit E dated the 29th August, 1975. I must say that I am in agreement with the learned Counsel for the plaintiff that the contract between the defendant and the bank is a specialty contract, but this is merely by reason of its nature as a banker and customer transaction with its usual traditional implications. Besides this, it is no less a simple contract as others in common legal parlance. I also agree that a demand ought to be made before time starts to run.

In fact Willes J in Garden v. Bruce (1868) L.R. 3 C.P. act page 301 stated what the best test is as to when the statute begins to run, as follows:–

“The six years must be six years on every day of which the plaintiff could have sued out a writ against the defendant.”
When we may ask did the cause of action in this case arise?

The defendant claimed it was in 1969 when exhibit F was written by him.

The plaintiff on the other hand claimed that it was in 1975 when exhibit E, the letter of demand was written. Let us assume for a moment that the cause of action arose by virtue of exhibit E in 1975. What evidence is on record that the demand was in fact made on the defendant by that letter? In asking this question I am not unmindful of the fact that certain registers were tendered in evidence to show the movement of correspondence in the plaintiff’s bank. But there is no proof whatsoever of either the posting or the delivery of exhibit E to the defendant. There may be from available records the evidence of record of posting, but not of actual posting. It seems to me essential that to establish that a demand was made, there must be proof not only of posting but of delivery. This is neither here as I had earlier stated.

In the absence of this proof, one cannot say that a demand was in fact made on the defendant in 1975 to take the claim outside the limitation law. The best evidence of demand available is the writ which is dated the 18th February, 1977.

Exhibit B which was tendered and admitted as a statement of account of the defendant, showed a balance brought forward and, subsequent entries from January, 1973 to January, 1977. That statement described in the averment contained in statement of claim as comprehensive, can hardly be said to qualify as such. It contains a huge sum of money brought forward, without any details of its origin and/or computation. There is also no evidence of any agreement as to the terms on which a loan was made to the defendant. The court is therefore left in the dark as to the actual conditions governing the grant of the loan to enable it determine from the plaintiff’s evidence the true time when the cause of action could be deemed to have arisen, besides the one which can be presumed from the available facts examined above. Exhibit F written by the defendant would appear to suggest that
a demand might have been made as far back as 1969.

Both from the evidence of the defendant and the first plaintiff witness, 1969 would appear to be the date of accrual of the cause of action. Whether therefore, we take this date of the writ as the operative date for a debt incurred in 1969, the legislative law would apply.

If the demand was made as far back as 1969 and no action was taken until 1977, a period of well over six years there can be little doubt that this claim is caught by the limitation law and consequently it is statute-barred.

The plaintiff’s claim in the circumstances is liable to dismissal and is accordingly dismissed with costs to be assessed.
Co-operative Bank Limited v. Otaigbe

HIGH COURT OF BENDEL STATE

Akhigbe J

Date of Judgment: 18 JULY 1980

Banking – Accounts – Customer’s indebtedness to bank – How proved when customer denies liability

Banking – Loans – Customer drawing in excess of amount to his credit – Effect

Facts

The plaintiff’s claim against the defendant is for the sum of N5,172.86 being an amount due and owing as overdraft, interest and bank charges thereon on the account of the defendant with the plaintiff.

The overdraft, totalling N4,000, was granted in bits by the plaintiff to the defendant at the request of the defendant at Benin City between September, 1972 and November, 1972.

The defendant’s account with interest and bank charges as at 30th June, 1975 showed a debit balance of N5,172.86 which sum the defendant has refused and/or neglected to pay despite repeated demands.

The plaintiff claims from the defendant the sum of N5,172.86 together with interest at 10% per annum from 1st July, 1975 until judgment.

Held –

1. A bank seeking to prove customer’s indebtedness should produce cheques drawn on it by the customer or if lost or destroyed secondary evidence of them should be produced.

2. If a customer draws a cheque for a sum in excess of the amount standing to the credit of his current account, it is really a request for a loan.

Plaintiff non-suited.
Cases referred to in the judgment

Nigerian

ACB v. Yesufu (No. 4) Federal Court of Appeal, February 28th, 1980, Suit No. FCA/B/105/78 Unreported
Anyakwo v. ACB Ltd (1976) 2 S.C. 41
Craik v. Craig (1967) N.M.L.R. 52; (1966) 1 All N.L.R. 173
Dada v. Ogbediemi (1967) N.M.L.R. 181
Emegokwue v. Okadigbo (1973) N.M.L.R. 192; (1973) 4 S.C. 113
George v. Dominion Flour Mills Ltd (1963) 1 All N.L.R. 71
George v. U.B.A. Ltd (1972) 1 All N.L.R. (Part 2) 347; (1972) 8-9 S.C. 264
Ogboda v. Adulugba (1971) 1 All N.L.R. 68
Onwunelu v. Osademe (1971) 1 All N.L.R. 14

Foreign

Cuthbert v. Roberts, Lubbock and Co (1909) 2 Ch.D. 226

Nigerian statute referred to in the judgment

Evidence Law (Laws of Bendel State), 1976 (Cap 57), section 37

Counsel

For the plaintiff: Sillo
For the defendant: Ofuya

Judgment

AKHIGBE J: The plaintiff’s claim against the defendant is for the sum of N5,172.86 being an amount due and owing as overdraft, interest and bank charges thereon on the account of the defendant with the plaintiff.
The overdraft, totalling N4,000, was granted in bits by the plaintiff to the defendant at the request of the defendant at Benin City between September, 1972 and November, 1972.

The defendant’s account with interest and bank charges as at 30th June, 1975 showed a debit balance of N5,172.86 which sum the defendant has refused and/or neglected to pay despite repeated demands.

The plaintiff claims from the defendant the sum of N5,172.86 together with interest at 10% per annum from 1st July, 1975 until judgment.

Pleadings were ordered filed and duly exchanged. The defendant denied liability. The pertinent paragraphs of the statement of claim are as follows:

3. Some time in 1966 the defendant commenced business with the plaintiff in Benin City. Between September, 1972 and November 1972 overdrafts totalling N4,000 were granted in bits by the plaintiff to the defendant at the request of the defendant at Benin City with interest thereon at 10% per annum.

4. The defendant made no efforts whatsoever at repayment of the overdrafts and by 30th June, 1975 as a result of interest and bank charges the defendant’s account showed a total debit balance of N5,172.86. A statement of account marked exhibit A and filed with this statement of claim shows clearly the position of the defendant’s account as at 30th June, 1975. The defendant’s account is No. A.C. 199.

5. The plaintiff at the hearing will rely on:

(a) all correspondence between the plaintiff and the defendant and all books, cheques tellers, papers and other writings and documents relating to the business between the defendant and the plaintiff and to the indebtedness of the defendant in this case; and

(b) the statement of account filed with this statement of claim.”

Only one witness testified on behalf of the plaintiff. He is Emmanuel Ade Adenupe, a manager of the plaintiff’s bank in Benin City in charge of the administrative and other jobs of the bank. He testified that the defendant is a customer of the bank and has been a customer of the bank since 1966. He
told the court that between September, 1972 and November, 1972 there were banking transactions between the parties which resulted in an in and out overdraft for the defendant leading to a deficit of about N4,000. He said that the defendant kept a current account with them, which is kept in the form of a ledger. He said that he has gone through the accounts of the defendant and made out a certified copy of the statement of the defendant’s account (exhibit A). As the manager, he told the court that at the end of June, 1975 the defendant owed the plaintiff, according to the statement of account, the sum of N5,172.86. He said that the plaintiff forwarded a copy of the letter of demand and two copies of letters written by the company’s lawyer to the defendant demanding the amount. He said that the cheques the defendant lodged with the bank were unpaid ie dishonoured; that according to the statement of account the following cheques for the following amounts were dishonoured: £1,800.13s.4d (ie N3,601.33); £2,000 (ie N4,000); and £3,000 (ie N6,000). He said that these cheques were paid in but returned unpaid, and they sent them by post to the defendant; that the bank sent an advice to the defendant that the cheques he paid in were not honoured for £1,800.13s.4d and exhibit F, a debit note in respect of cheques for £2,000 and £3,000. He told the court that if the cheques that were returned had been honoured the defendant would have had a substantial credit balance of N8,428.47 with the plaintiff. He also told the court that the account of the defendant has been dormant before coming to court, and that the defendant has not paid the sum of N5,172.86 to his bank, and that he was therefore asking for judgment in terms of the plaintiff’s writ of summons and statement of claim.

Under cross-examination he said that according to the records the cheques that were not honoured were posted to the defendant. He said that as a banker if a cheque is dishonoured they debit the customer and send the cheque back to him. He said that they did not register the dishonoured cheques to the customers, that it was not their custom then.
He said that it is not true that the bank manager promised to give the defendant a loan for N14,000 for his contract, as he was not aware of such an approval and it is not in their records. He said the defendant has not been paying regularly to the bank.

At the end of the evidence of this witness the plaintiff closed its case.

As indicated earlier in this judgment, the defendant denied liability. The pertinent paragraphs of the statement of defence are as follows:

7. On or about September, 1972 the Afro Construction Company which is a limited liability company assigned a contract for the building of a bridge at Ubuneke to the defendant for the contract sum of N20,000.

8. The defendant showed the assigned contract to the manager of the plaintiff and requested financial assistance to execute the said contract with the promise that all payments made to the defendant as a result of the assigned contract would be paid into the defendant’s account with the plaintiff.

9. The plaintiff’s manager acting for the plaintiff at Benin City agreed to offer financial assistance to the tune of N14,000 to the defendant to enable him to undertake the contract.

10. Payments were regularly made by the defendant to offset any overdrafts granted by the bank during the month.

11. The defendant will rely on the statement of account produced by the plaintiff to the extent that at the end of October 1972, his account was not overdrawn.

12. The defendant will contend that on September 29th, 1972, October 31st, 1972 and November 15th, 1972 he paid into his account with the plaintiff £1,800.13s.4d (N3,601.34), £2,000 (N4,000) and £3,000 (N6,000) respectively but that the plaintiff has not informed him of the fate of the cheques, to enable him to recover, if necessary, from persons who issued the cheques to him.

... 

14. The defendant avers that the cheques for £1,800.13.4d (N3,601.34) £2,000 (N4,000) and £3,000 (N6,000) which
he paid into his account as contained in paragraph 12 above were never returned to him and he had assumed that the cheques had been honoured.

15. The defendant avers that on or about December, 1972 he issued some cheques, which the plaintiff refused to honour, and the defendant had requested a statement of account but the plaintiff failed to give him the necessary information.

16. The defendant will further contend at the trial that the failure of the plaintiff to honour any further cheques issued by him in pursuance of the agreement of the bank to help him carry out the said assigned contract led to termination of the contract which he could not complete within the scheduled time for lack of funds and the defendant informed the plaintiff of the court action threatened by those who awarded the contract.”

Micheal Osemende Otaigbe (the defendant), a businessman, said that he opened a current account with the plaintiff in 1966 in Benin City when he was a teacher and that all his salaries and personal emoluments were paid into the account by the Ministry of Education. He said when he resigned his appointment; he continued to operate his account with the bank, when he became a businessman. He told the court that he got business from Afro Construction Company (Nig.) Limited to build a bridge at Ubuneke near Auchi and the contract cost₦20,000. He said as a result he approached the bank manager, Mr Adewale, in September, 1972 to assist him in financing the project; that he asked the manager to give him ₦14,000 and he (the manager) agreed, although the agreement was oral. He said he started paying cheques from the Afro Construction Company into his account with the bank. His account number was 199. He said he received regular statements of his account while he was a tutor. After that time he did not receive any statement of account from the plaintiff. He said that according to the statement of account he paid in the sum of £1,800.13.4d (ie ₦3,601.33) on September 29th, 1972 and on October 31st, 1972 he paid in a cheque for £2,000 (ie ₦4,000); and on November 15th, 1972 he paid in another cheque for £3,000 (ie ₦6,000).
He told the court that the plaintiff never informed him that any of these cheques were unpaid. He said he issued a cheque for £50.10s (i.e. ₦101) on the bank in December, 1972 and the plaintiff bank did not honour the cheque. He said that he went straight to the bank but the bank manager was not available and he was directed to one Mr Eson, the accountant, whom he asked why his cheque was not honoured and he (Mr Eson) told him (the defendant) that they were still waiting for clearance for the various cheques he had paid in. He said that he asked for statement of account and none was given to him, nor sent to him, and that he did not receive any letter as to his indebtedness to the bank from any lawyer. He said that according to his own calculation his account should be in credit. He said that the plaintiff has his postal address and they did not inform him that his cheques were dishonoured. He denied owing the bank the sum of ₦5,172.86 or any amount, rather, he said that the bank is indebted to him after reconciling his account.

Under cross-examination he said he did not receive any statement of account and the next thing he got was a summons in respect of this case. He told the court that he went to the bank between January, 1973 and December, 1973 to find out the position of his account and the lodgments made but the accountant refused to disclose to him the facts of the various cheques he had paid into his account. He said that his lodgments were up to ₦10,000, and if the cheques were cleared he would be in credit with the bank. He said that at that time he was issuing cheques to his sub-contractors with this credit account and none of these people came to him with a dishonoured cheque. He said between January, 1974 and December, 1974 he went to the bank to ask for his statement of account but he was not given it. He said that he threatened the manager that he was going to take legal action against them and that the next thing he saw was a writ of summons in this case. He said that these cheques were issued to him by the Afro Construction Company. He said he did not check with those who issued the cheques because
they were not returned to him, to confront them with the
city; that he was still in this address up to 1974 and receiv-
ing letters by post through the address. He maintained that
he did not receive the letter of demand, or the lawyer’s let-
ters or the debit notes. He said that he did not know that he
was indebted to the bank but he knew he had a substantial
amount with the bank and the bank had refused to tell the
fate of his cheques. He said he made oral demands of the
bank, but he did not write, and that he did not owe the bank
the sum of N5,172.86.

Learned Counsel for the defendant in his address said that
the document referred to in paragraph 4 by the plaintiff was
signed by somebody and checked by another person and nei-
ther of those two persons was called as a witness in this
case; that the statement of account which was admitted was
only marked “certified true copy” and signed by another
person and that as a matter of accounting, an account could
have the same result with different debits and credits. He
maintained that the statement of account, exhibit A, was
wrongly admitted. He referred to section 37 of the Evidence
Law (Cap 57) and said that the statement of account is not
by itself enough to charge the defendant with the liability as
claimed, he referred to section 135 of the Evidence Law on
the burden of proof, and also cited the case of ACB v. Yesufu
(No.4) decided on February 28th, 1980 in the Federal Court
of Appeal.

He said that by paragraph 5 of the statement of claim they
said that they were going to rely on all documents relating to
this debt and the statement of account filed with the state-
ment of claim was not the one tendered in court. He said that
throughout the evidence there was no one cheque tendered
as evidence that the defendant overdrew that account; that
according to section 37 of the Evidence Law, the tendering
of the statement of account alone cannot fix the defendant
with the liability claimed, unless there was an admission or
the defendant agreed to the liability. On this contention he
cited the case of *ACB v. Yesufu (No.2)* (1) decided on May 31st, 1979 by the Federal Court of Appeal, Benin city. He said that according to paragraph 3 of their statement of claim, the overdraft totalling ₦4,000 was granted in bits by the plaintiff to the defendant, but that in their evidence, the only witness said that the dishonoured cheques put the defendant in overdraft and that this was at variance with paragraph 3 of the statement of claim and he cited the case of *Emegokwue v. Okadigbo* (7).

He said the plaintiff tendered two debit notes addressed to MO Otaigbe, Benin and that this was supposed to be notice of dishonoured cheques. He submitted that the address on the debit notes was not sufficient to enable them and any attachments, if there were any, to reach the defendant. He further submitted that they did not constitute notice according to law and that there is no evidence of any dishonoured cheques before the court. And as to the question of notice, a cheque is a bill of exchange and sections 48 and 49 of the Bills of Exchange Act (Cap 21) apply.

He referred to the letters alleged to have been written to the defendant and said that the first one was addressed to Michael Otaigbe, 24 Eki Street, Benin City, and the second was addressed to Michael Otaigbe c/o Mr Esame of 1, Ogbemudia Street, Benin City. He submitted that these letters should carry no weight. He said that it has been suggested that if the debit notes had not been made, the defendant would have had a credit balance of ₦9,646 and it was asked why the defendant did not go to withdraw the money. On this, he submitted that the defendant could not be compelled to withdraw the money as the defendant is still a customer and he still has legal rights.

He finally urged the court to dismiss the case of the plaintiff, as the case has not been proved. He referred to the statement of account, exhibit A, and cited the case of *Anyakwo v. ACB* (3).
By virtue of section 135 of the Evidence Law, the burden of proof was squarely on the shoulders of the plaintiff to adduce evidence on all allegations of facts, upon which its claim was grounded. He further referred the court to paragraphs 12, 14 and 18 of the statement of defence where the defendant pleaded that he was not in possession nor did he receive the documents in reference to their notice to produce.

Learned Counsel for the plaintiff in his reply said that the plaintiff gave evidence through the bank manager who said that as a branch manager, he was in custody of books of account of the bank and that he examined the accounts of the defendant in relation to the statement of account, exhibit A, which is a certified true copy of the account of the defendant with the plaintiff; that he was satisfied that the entries in the statement of account agreed with all the material facts in the ledger accounts of the defendant before he signed the statement of account, exhibit A. He further said that according to the records the defendant had been a customer of the bank; that he was satisfied that at June 30th, 1975, the balance owed by the defendant to the plaintiff stood at ₦5,172.86. He said that the defendant in his defence, admitted that he is a customer of the plaintiff bank and when confronted with the statement of account he admitted that 24 Eki Street, was his address at the time he opened the account with the bank.

On the issue on what is supposed to be proved by the bank in relation to the ledger account, the ledger itself is referred to as primary evidence or you establish secondary evidence in accordance with section 96(1)(b) of the Evidence Law. He said that as far as this section 96(1)(b) is concerned, the plaintiff has proved the evidence of what is contained in the ledger account of the defendant from September, 1972 to June 30th, 1975. He said that the plaintiff in filing its statement of claim, annexed a statement of account of the defendant from September, 1972 to the period when the claim was filed on October 29th, 1975. He said that the purpose was to
give the defendant notice of what was contained in his ledger account and it was therefore up to the defendant to question any entry or allegation of facts contained in the account as lodged in the court. He referred to Order 27, rules 15 and 18 of the High Court (Civil Procedure) Rules (Cap 65). He said that it was open to the defendant to call for inspection where there was an error or mistake in the account. The plaintiff having lodged the account of the defendant, the onus was on the defendant, where he felt there was any error, to apply to the court to order the inspection of the ledger accounts but the defendant did not do this.

He said that the court would have to consider the evidence adduced as a matter of fact and urged the court not to believe the allegation by the defendant of non receipt by him of the three letters written to him (the defendant) by the plaintiff, two of them addressed to 24 Eki Street, Benin City, and the last one addressed to 1, Ogbemudia Street, Benin City.

On the issue of the file copies of the dishonoured cheques returned to the defendant, he said the two advice notes carried cheques amounting to ₦13,601.20 and that the defendant’s case was that he was not informed and that he had no notice of these cheques but in the statement of account, exhibit A, these cheques were shown as having been dishonoured, and a debit entry was made on the account of the defendant.

He said that under cross-examination the defendant admitted that if the cheques were through (as he tried to make the court believe that they were) the defendant would have been in credit as at that date to the tune of ₦9,624. He said that as far back as 1972, he issued a cheque of ₦50 but it was dishonoured and said that a person who was supposed to have a credit of ₦9,000 plus, could have sued the bank if he had a cheque for only ₦50 dishonoured. He said that at paragraph 16 of his statement of defence, he complained of lack of funds at the same time as he claimed to have a credit of over
N9,000. On the issue of whether or not he received all the letters and debit notes in question, he said that it is true as a matter of fact that at the time of the transaction in 1972 the situation in the country with regard to postal services may not have been hazardous as it is today. He said that it was true that the plaintiff might have been reckless in merely posting the returned cheques to the defendant without having them registered, but that alone is not a reason to say that the defendant did not receive the posted cheques. He said that the court can deduce from the surrounding circumstances of the case that he did.

On the case cited by learned Counsel for the defendant, he said that the case is not relevant in this particular case because the plaintiff in this case established the essential elements sufficient to grant judgment in favour of the plaintiff as the plaintiff has discharged the onus imposed on him by section 96 of the Evidence Law and he urged the court to give judgment in favour of the plaintiff as per the writ of summons and the statement of claim.

My findings of fact from the evidence adduced both by the plaintiff and the defendant is that the defendant is a customer of the plaintiff bank and operated current account No. 199 at the plaintiff’s Benin City Branch at all times material to this action.

The main ground of disagreement between the parties is as to the overdraft of N4,000 alleged to have been granted to the defendant by the plaintiff, an allegation of fact which was denied both in the statement of defence and in the defendant’s oral evidence in court. In paragraph 5 of the statement of claim, the plaintiff averred that at the hearing it was going to rely on (a) all correspondence between the plaintiff and the defendant and all books, cheques, tellers, paper and other writings and documents relating to the business between the defendant and the plaintiff and to the indebtedness of the defendant in this case; and (b) the statement of account filed with this statement of claim.
At the trial, the statement of account filed with this action and attached to paragraph 4 of the statement of claim was not tendered but a different statement of account which was admitted and marked exhibit A was tendered in evidence in this Court. It is trite law that parties are bound by their pleadings and that any evidence which is at variance with the averments in the pleadings go to no issue, and should be disregarded by the court. The Supreme Court in the case of Emegokwue v. Okadigbo (7) on this proposition of law quoted the view of their court as stated in an earlier decision in the case of George v. Dominion Flour Mills Ltd (8) (1963) 1 All N.L.R. at 77:

“The fairness of a trial can be tested by the maxim audi alteram partem. Either party must be given an opportunity of being heard; but a party cannot be expected to prepare the unknown; and the aim of pleadings is to give notice of the case to be met; which enables either party to prepare his evidence and arguments upon the issues raised by the pleadings, and saves either side from being taken by surprise. Incidentally, it makes for economy. The plaintiff will, and indeed must, confine his evidence to those issues: but the cardinal point is the avoidance of surprise.”

On the same point that parties are bound by their pleadings the Supreme Court in the case of National Inv and Parties, Co Ltd v. Thomson Org. Ltd (10) observed as follows (1969 (1) A.L.R. Comm. at 371; 1969 N.C.L.R. at 115:

“A plaintiff must call evidence to support his pleadings, and evidence which in fact adduced which is contrary to his pleadings should never be admitted. It makes no difference … that the other side did not object to the evidence or that the judge did not reject it. It is of course the duty of Counsel to object to inadmissible evidence and the duty of the trial court anyway to refuse to admit inadmissible evidence, but if, notwithstanding this, inadmissible evidence is still through oversight or otherwise admitted, then it is the duty of the court when it comes to give judgment to treat the inadmissible evidence as if it had never been admitted.”

In another case, George v. UBA Ltd (9) the Supreme Court referred with approval to their decision in Ogboda v. Adulugba (11), where they emphasised the same point as follows (1971) 1 All N.L.R. at 72-73:
“We have pointed out numbers of times that the evidence in respect of matters not pleaded really goes to no issue at the trial and the court should not have allowed such evidence to be given. (See Chief Jimbo and others v. Aminu Asani and others S.C. 373/67 dated the 13th March 1970). Even when such evidence had been wrongly allowed, the trial court should disregard it as irrelevant to the issues properly raised by the pleadings.”

As I have said earlier in this judgment, in paragraph 4 of the statement of claim, a statement of account marked exhibit A was attached, and this statement was prepared by an official, checked and examined by another official of the bank and both of them signed the document. During the trial a statement of account also marked exhibit A was tendered, different from the one filed with the statement of claim. This exhibit A, which is marked “certified true copy”, was tendered through the bank manager, who gave evidence as sole witness for the plaintiff.

From the evidence adduced by the plaintiff through its sole witness through whom the certified copy of the statement of account not pleaded was tendered, it is clear that this is the only documentary evidence in respect of the alleged overdraft, despite the averment in paragraph 5(a) of the statement of claim that books, cheques, tellers, papers etc, in relation to the indebtedness of the defendant to the plaintiff, were to be produced. In my view the plaintiff is caught by this rule that the plaintiff is bound by its pleadings, and tendering the certified copy of the statement of account not pleaded is of no effect.

Assuming I am wrong in my findings above, in respect of the certified copy of the statement of account then the next question is whether the standard of proof required in cases of this nature has been discharged. By virtue of the provisions of section 135 of the Evidence Law (Cap 57) the burden of proof is clearly on the shoulders of the plaintiff to adduce evidence on all the allegations of fact upon which his
claim is grounded. Section 37 of the Evidence Law is of guidance in this respect and section 37 reads thus:

“Entries in books of account, regularly kept in the course of business, are relevant whenever they refer to a 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 therefore clear from the wording of this section that the plaintiff will still have to furnish legal documents to prove the indebtedness of the defendant to the plaintiff bank in respect of the sum of money claimed in the writ of summons and statement of claim. I hold the view that apart from the unpleaded statement of account, which is of no effect, cheques drawn on the bank by the defendant in respect of the overdraft should have been produced, and if lost, secondary evidence about them.

I am guided by the views expressed in the Supreme Court in the case of ACB v. Yesufu (No. 2) (1) ((1980) 1 2 S.C. at 81 - 82) by Nnamani JSC in his judgment quoting with approval the views of the Federal Court of Appeal of Benin City in the same case when it said (1979 (1) A.L.R. Comm. at 160 - 161; 1979 N.C.L.R. at 160 - 161):

“For as was observed by the Supreme Court in Jolasimi Zaria v. Abdu Small . . . ((1973) 6 S.C. at 68) it is the duty of the plaintiff in this case in consonance with section 135 of the Evidence Act, to leave facts to the court which on proper appraisal would enable the court to give it judgment . . . We have pointed out above that exhibits 18-18N (ledger cards) would not be sufficient, having regard to section 37 of the Evidence Act, to charge the defendant with liability in respect of the overall debit balance shown thereon or part thereof. On the evidence for the plaintiff and the authority of Cuthbert v. Robarts, Lubbock and Co . . . the overdraft granted to the defendant by the plaintiff consisted of the cheques drawn by the defendant on the plaintiff when the former was not in funds, which cheques were honoured. The least the plaintiff could have done by way of supporting evidence for the entries in exhibits 18-18N would be to put the cheques so drawn by the defendant in evidence, or if they had been destroyed or lost, to give secondary evidence of them. Neither was done.” (parenthesis supplied)
The case of Anyakwo v. ACB Ltd (3) in my view is apparently on all fours with the instant case. In that case, the claim by the plaintiffs as bankers against the defendant who was their customer was for the sum of £67,883.5s.3d, being money lent by them to the defendant. The defendant denied liability and counterclaimed for the sum of £100,000 as special damages for breach of contract. The plaintiffs’ claim was based on the statement of account, which was signed by three officers of the bank. One signed as having prepared the statement and another as having checked it and the third as having examined it. None of these three officers was called to testify for the plaintiffs. The only witness called by the plaintiff admitted that he knew very little about the statement of account. The learned trial Judge nevertheless only non-suited the plaintiffs, after dismissing the defendant’s counterclaim, but the Supreme Court held on appeal among other things as follows: ((1976) 2 S.C. at 63):

“The plaintiffs here knew that their claim was based on the statement of account . . . They knew, or ought to have known, right from the beginning, that, in order to succeed, they had to prove how the debit balance of £67,883.5s.3d . . . was arrived at. Nevertheless, they called only one witness who did not appear to know anything about the transaction.”

The appeal was allowed, the order of non-suit set aside and the plaintiffs’ claim dismissed.

In the present case there is no counterclaim by the defendant, but I am not satisfied nor impressed by the claim of the defendant that his cheques for £1,800, £2,000 and £3,000 respectively paid into his account which the bank said were dishonoured and returned to him, were not received by him; at least, he was put on notice as far back as when the plaintiff’s writ of summons dated August 13th, 1975 was served that those cheques were not honoured, and he admitted in evidence that he took no steps whatsoever to contact the Afro Construction Company which issued him with the said cheques up to the time he testified in court on March 26th, 1980.
I am not unaware of the views expressed in the same case of Anyakwo v. ACB (3) by Fatayi Williams JSC (as he then was) delivering the judgment of the courts as follows (ibid, at 62-64):

“It is not unimportant to observe that the plaintiffs were without legal advice. They had the advantage of Counsel not only in presenting their case in court but also in preparing and formulating the particulars of claim. This is not the case of an unassisted litigant who, through ignorance, may perhaps plead his case the wrong way or fail to produce all the necessary evidence in support. The plaintiffs here knew that their claim was based on the statement of account . . . they knew, or ought to have known, right from the beginning, that, in order to succeed, they had to prove how the debit balance of £67,883.5s.3d which they claimed from the defendant was arrived at. Nevertheless, they called only one witness who did not appear to know anything about the transaction. In these circumstances was the trial Judge right in nonsuiting the plaintiffs/respondents thereby giving them the opportunity of bringing fresh proceedings, if they so desire, against the defendant/appellant.

All things considered, to give the plaintiffs/respondents a second chance, thereby enabling them to harass the defendant/appellant by instituting fresh proceedings, would, in our judgment, be a grave injustice to the defendant/appellant in the circumstances of this case . . .”

The difference between the above cited case and the instant case is apparent from paragraphs 7, 8, 9 and 16 of the statement of defence and portions of both evidence in chief and cross examination.

The indebtedness of the defendant to the plaintiff can be seen, if paragraphs 7, 8, 9 and 16 of the statement of defence are read together with portions of the defendant’s evidence-in-chief and cross-examination, which are reproduced hereunder:

“7. On or about September 1972 the Afro Construction Company which is a limited liability company assigned a contract for the building of a bridge at Ubuneke to the defendant for the contract sum of ₦20,000.
8. The defendant showed the assigned contract to the manager of the plaintiff and requested financial assistance to execute the said contract with the promise that all payments made to the defendant as a result of the assigned contract would be paid into the defendant's account with the plaintiff.

9. The plaintiff's manager acting for the plaintiff at Benin City agreed to offer financial assistance to the tune of ₦14,000 to the defendant to enable him to undertake the contract.

... The averment in paragraph 16 “that the failure of the plaintiff to honour any further cheques issued by him in pursuance of the agreement of the bank to help him” (emphasis supplied) as in paragraph 9 of the statement of defence, led to his termination of the contract, which he could not complete within the scheduled time for lack of funds, is a clear admission that money initially passed as a result of the said agreement to the defendant from the plaintiff. See Cuthbert v. Roberts, Lubbock and Co (5).

The defendant said inter alia during examination-in-chief as follows:

“My account number was account No. 199. I drew cheques on that account. I received regular statements of account up to the time I was a tutor at Edokpolo Grammar School. After that time I did not receive any statement of account from the plaintiff bank. According to the statement of account I paid in the sum of £1,800.13s.4d (ie ₦3,601.33) on September 29th, 1972. Also on October 31st, 1972 I paid in a cheque for £2,000 (ie ₦4,000). On November 15th, 1972 I paid in an amount of £3,000 (ie ₦6,000). The plaintiff bank never informed me that any of these cheques were returned unpaid. I issued a cheque for £50.10s (ie ₦101) to the bank in December, 1972, but the bank did not honour the cheque. I went straight to the bank but when I got there the bank
manager was not available. I was directed to one Mr Eson, who described himself as the accountant of the bank. I asked him why my cheque was not honoured, and he said that they were still waiting for clearance for the various cheques I paid in. I asked for my statement of account from the bank and no statement of account was given to me or sent to me. I did not receive any letter from any solicitor as to my indebtedness to the bank or not. From my own calculation my account should be in credit.”

During cross-examination, the defendant said, among other things:

“My lodgments were up to N 10,000. If the cheques were cleared, I would have had a lot of credit with the bank; but at the same time, I was issuing cheques to some of my sub-contractors, hence I wanted a reconciliation of the accounts. I was issuing cheques to my sub-contractors on this my account No. 199, and none of these people came to me with a dishonored cheque, this was at the time I was making my payments or lodgments with the bank.”

The above quoted portion of the evidence of the defendant are self explanatory, particularly as he maintained that he was issuing cheques to his sub-contractors on this same account and none of the sub-contractors came to him with a dishonoured cheque, see Cuthbert v. Robarts, Lubbock and Co (5). Where Cozens Hardy, MR said ((1909) 2 Ch at 233; [1908–1910] All E.R. at 165): “If a customer draws a cheque for a sum in excess of the amount standing to the credit of his current account, it is really a request for a loan . . .”

In the Supreme Court case of ACB v. Yesufu (No 2) (1) Irikefe JSC said ((1980) 12 S.C. at 52):

“It is the law that a non-suit order should not be made unless two elements are present in the aborted trial, namely:

(a) It must appear on the record of the case taken as a whole that the plaintiff has not failed in toto, and

(b) That in any case, the defendant would not be entitled to the judgment of the court.

This clearly brings into focus the element of fair play, which is all that court proceedings are all about.”
The attitude of the Supreme Court as regards the order of non-suit may be found in the following cases, to mention just a few: Craig v. Craig (4); Dada v. Ogunremi (6); Onwunalu v. Osademe (12) and George v. U.B.A. Ltd (9).

Order 28, rule 3 of our High Court (Civil Procedure) Rules (Cap 65) provides thus:

“The court may in any suit, without the consent of parties, non-suit the plaintiff where satisfactory evidence shall not be given in entitling either the plaintiff or defendant to the judgment of the court.”

I am not unaware of the decision in Anyakwo v. ACB (3) where the desirability of the judge calling on Counsel for the parties to address the court, before making the order of non-suit was pointed out. This provision is not applicable in the instant case, because the above cited case started at the Lagos High Court where the provision of non-suit ie our Order 28, rule 3 of our High Court (Civil Procedure) Rules is not applicable as the provision was deleted in the new High Court of Lagos State (Civil Procedure) Rules which came into force on September 1st, 1973, and the Judge non-suited the plaintiff on July 31st, 1974 when he had no power to do so.

After careful consideration of the evidence adduced in this case, I hold the view that this is an appropriate case in which to make an order of non-suit, and in the circumstances, the plaintiff is hereby accordingly non-suited.
Yesufu v. African Continental Bank Limited (3)

SUPREME COURT OF NIGERIA
SOWEMIMO, BELLO, IDIGBE, ESO, NNAMANI JJSC


Banking – Banker and customer relationship – Nature of – Bank reversing credit entry in current account of customer – Effect

Banking – Banker discounting bill of customer – Liability of discounting banker for failure to give account – Guiding principles

Banking – Discounting of Bill – Bank debiting customer’s account with “differentials” – Burden of proof of “differentials” – Section 141, Evidence Act Cap 62

Words and phrases – “Discounting” – Meaning of – Nature of transaction – Guiding legal principles

Facts

The plaintiff/appellant’s claim against the defendant/respondent was as follows:

1. The sum of ₦610,942.52 being the value of bills of exchange or sight drafts for exported commodity negotiated and/or discounted by the plaintiff with the Ring Road, Benin City Branch of the defendant bank but which, the defendant bank FAILED or neglected to pay to the plaintiff or to credit to plaintiff’s account with the defendant bank and/or CLAIMED TO HAVE SHORT – COLLECTED BUT WITHOUT plaintiff’s prior consent, authority or knowledge and to his prejudice.

In the alternative:

2. ₦700,000 being general damages for negligence or breach of duty by the defendant in their dealings with the plaintiffs in the matter of the Bills or drafts aforesaid.

Particulars of negligence

1. Failure to get plaintiff’s authorisation for any short collection on the said bills and debiting same to his account without his consent.
2. Failure to notify the plaintiff or timely of the dishonour by non-payment or non-payment, according to its tenor of any of the bills one which payment is still outstanding wholly or in part.

3. Failure to return any bill allegedly not paid to the plaintiff and wrongfully debiting his account with the value thereof.”

The appellant, a customer of the respondent operated a current account with the Benin City Branch of the bank. He also operated an account for negotiating and discounting his bills of lading and other shipping documents which were drawn on letters of credit opened in his favour by his overseas customers to whom he exported rubber. The usual practice was that whenever the respondents discounted his bills, which was at less than 1% of the value of the goods shipped, they would credit his account with the discounted values of the bills in Nigeria currency. However, payments to the respondents by his customers for goods shipped were made in United States Dollars. With particular reference to certain bills admitted in evidence as exhibits 7-27A, the respondents credited his account with the proceeds of the discounted bills at the time of the discounting but subsequently, without his knowledge and consent, the respondents debited his account with what appeared to be the face value of some of very bills and also with what appeared to be the difference between the realised value of some of the bills and their face values. It was the plaintiff/appellant’s case that the respondents failed to account for any of the bill reflected in exhibits 7 to 27A and failed to return the bills to him. Furthermore, the respondents debited his account with the sum of £10,099.4s.5d for devaluation of pound sterling when the transactions between him and the respondents, and between him and his overseas customers were transacted in U.S. dollars and naira and that there was no devaluation of either currency at the material time.

The respondents at the trial denied having accepted any bill of the appellant for negotiation and discounting but...
admitted accepting his bills other than the bill specified in exhibits 7-27A in closure which they denied having accepted at all, for collection purposes; that in accordance with their arrangement with the appellant they credited his account with the face values of the bills less one percent as overdrafts at the time of acceptance to enable the appellant to carry out his business; that in accordance with banking practice when any of the bills was under-collected or was dishonoured by non-payment, they debited his account with the shortfall. They averred that as collecting bankers, they always informed the appellant whenever there was under-collection or non-payment. The respondents offered no answer to the question of devaluation.

The learned trial Judge entered judgment for the appellant in the sum of ₦576,383.53. He found that all the shipments made by the appellants were against irrevocable letters of credit and that the respondents discounted the bills and shipping documents and did not accept the bills for collection. He also found that the entries in exhibit 3 correctly stated what the respondent did in operating the appellant’s account but that some of the entries did not correctly reflect the real transactions between the parties. The respondent was found liable on exhibit 3 ie the differential wrongly charged for ₦314,568.23 and also the sum of ₦261,815.30 being the full value of the bills exhibits 7-27A.

The respondent appealed to the Court of Appeal. The judgment of the lower court was set aside.

The plaintiff appealed to the Supreme Court.

Held –

1. The relation in law between a banker and his customer is that of debtor and creditor.

2. When a bank credits the current account of its customer with a certain sum, the bank becomes a debtor to the customer in that sum and conversely when a bank debits
the current account of its customer with a certain sum, the customer becomes a debtor to the bank in that sum.

3. Since the relation between a banker and his customer is that of debtor and creditor, whichever party is the creditor is entitled to sue, if demand for payment was not complied with, the other party for money lent.

4. When a bank reverses a credit entry of a certain sum in the current account of its customer by debiting the account with the same sum, such reversal in practical terms means that the bank has liquidated its liability as debtor to the customer.

5. In strict commercial law, “discounting” is purchasing, not lending. The discounter of a bill becomes the owner. If it turns out to be of less value than the price paid for it, the loss falls upon the discounter; and if a profit is made upon the transaction, it belongs wholly to the discounter.

6. When a banker a discounts a bill he buys if for its face value less a sum representing interest for the period which the bill has to run. The banker takes the bill as transferee for value, and has the holder’s normal right to sue on the bill if it is dishonoured. In the case of a customer the amount of the bill, less discount, is normally carried to current account, and if the bill is unpaid the current account is normally debited and the bill is returned to the customer. If the banker wishes to retain his right of recourse to other parties because his customer’s account cannot meet the debit, the banker retains the bill and debits a suspense account.

7. Where a banker discounts the bill of his customer and credits the customer’s current account with the discounted value of the bill, the banker is only entitled to debit the current account subsequently with the value of the bill if the bill is unpaid and the banker has returned it to the customer. Where the banker retains the bill, he has no right to debit the current account of the customer with the value of the bill.
8. Where a bank discounts the bills of its customer and credits the current account with the amount of the bills less discount, such entries in law amount to admissions by the bank that they are debtors to the customer in respect of those bills.

9. “Differentials” is a matter specially within the knowledge of the respondents and therefore the burden of proving what “differentials” meant and that they were entitled to charge the appellant with liability for the differentials squarely rested on the respondents and they failed to discharge the burden.

10. Having charged the appellant with devaluation of sterling, the onus of proving that the devaluation of sterling, if any affected the currency of the transactions between the appellant and the respondents and that they were entitled to charge him with such devaluation also lay on the respondents as those facts were specially within their knowledge. The respondents did not discharge the burden of proof imposed on them by section 141 of the Evidence Act.

11. A banker has a duty to give an account to his customer of the customer’s bill he discounted irrespective of whether the bill was drawn against a revocable or irrevocable credit, confirmed or unconfirmed credit or no credit at all.

Appeal allowed.

Cases referred to in the judgment

Nigerian


Foreign

Carstairs v. Bates (1812) 3 Camp/301 N.P.

Foley v. Hill [1848] 2 H.L. 28
Bellos v. Evans [1939] 3 All E.R. 491 at 498
Joachimson v. Swiss Bank Corporation [1921] 3 K.B. 110

Nigerian statute referred to in the judgment
Evidence Act (Cap 62), section 141

Counsel
For the appellant: Ajayi
For the respondents: Dafe

Judgment

Bello JSC: In the High Court of Bendel State sitting at Benin City, the plaintiff, who is the appellant in this Court, took out a writ of summons against the defendants, the African Continental Bank, who are the respondents in this Court, claiming:

1. The sum of N610,942.52 being the value of bills of exchange or sight drafts for exported commodity negotiated and/or discounted by the plaintiff with the Ring Road, Benin City Branch of the defendant bank but which, the defendant bank FAILED or neglected to pay to the plaintiff or to credit to plaintiff’s account with the defendant bank and/or CLAIMED TO HAVE SHORT collected but without plaintiff’s prior consent, authority or knowledge and to his prejudice.
   In the alternative.
2. N700,000 being general damages for negligence or breach of duty by the defendant in their dealings with the plaintiff in the matter of the bills or drafts aforesaid.

Particulars of Negligence
1. Failure to get plaintiff’s authorisation for any short collection on the said bills and debiting same to his account without his consent;
2. Failure to notify the plaintiff or timely of the dishonour by non-payment or non-payment, according to its tenor of any of the bills on which payment is still outstanding wholly or in part;
The case for the applicant at the trial as averred in his copious pleadings may be summarised thus:

1. That the respondents negotiated and discounted his bills of lading specified in his pleadings and, with the exception of the bills reflected in exhibits 7-27A inclusive, at the time of discounting the respondents credited his account with the proceeds of the discounted bills but subsequently, without his knowledge and consent, the respondents debited his account with what appeared to be the face value of some of the very bills and also with what appeared to be the difference between the realised values of some of the bills and their face values.

2. That in the case of the bills reflected in exhibit 7-27A negotiated and discounted by the respondents, the respondents failed to account for any of them at all and did not credit his account with the proceeds of their discounted values and failed to return the bills to him.

3. That the respondents debited his account with the sum of £10,099.4s.5d (Nigerian pound then) for devaluation of pound sterling when the transactions between him and the respondents, and between him and his overseas customers were transacted in U.S. dollars and naira and that there was no devaluation of either currency at the material time.

Paragraph 15 of the amended statement of claim set out the particulars as follows:

“Particulars of Claim:

Documents lodged with bank but not credited OBC

<table>
<thead>
<tr>
<th>Date</th>
<th>Amount</th>
<th>Check</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>22/69</td>
<td>15,393</td>
<td>7</td>
<td>–</td>
</tr>
<tr>
<td>37/69</td>
<td>1,167</td>
<td>2</td>
<td>8</td>
</tr>
<tr>
<td>38/69</td>
<td>313</td>
<td>10</td>
<td>–</td>
</tr>
<tr>
<td>62/69</td>
<td>8,201</td>
<td>13</td>
<td>8</td>
</tr>
</tbody>
</table>
Despite the verbosity of their pleadings, the respondents’ case at the trial court was a simple one. They denied having accepted any bill of the appellants for negotiation and discounting but admitted accepting his bills, other than the bills specified in exhibits 7-27A inclusive which they denied having accepted at all, for collection purposes; that in accordance with their arrangement with the appellant they credited his account with the face values of the bills less one percent as overdrafts at the time of acceptance to enable the appellant to carry out his business; that in accordance with banking practice; when any of the bills was under collected or was dishonoured by non-payment, they debited his account with the short fall. They averred that as collecting bankers, they always informed the appellant whenever there was under collection or non-payment. The respondents offered no answer to the question of devaluation.
The appellant testified at the trial that he had been a customer of the respondents since 1965 and had been operating a current account which he maintained with the respondents at their Benin City Branch. He also operated the account for negotiating and discounting his bills of lading and other shipping documents which were drawn on "reasonable" letters of credit opened in his favour by his overseas customers to whom he exported rubber. He stated that whenever the respondents discounted his bills, which was at less one percent of the value of the goods shipped, they would credit his account with the discounted values of the bills in Nigerian currency. However, payments to the respondents by his customers for goods shipped were made in US dollars.

The appellant further testified that because of the paucity of staff brought about by the Nigerian civil war, the respondents did not send to him any statement of account from 1968 until August, 1971 when, as the result of his insistent requests, he received the comprehensive statement of account covering the period 20th August, 1966 to 30th July, 1971, admitted in evidence as exhibit 3. To his amazement, he discovered that some bills of lading which had been discounted and had been credited to the account since between 1967 and 1969 were in 1971 reversed and debited to the account. He also saw the account was debited with several sums against entries described as "differentials" in respect of some bills of lading he had discounted between 1967 and 1969. He showed severally to the trial court all the entries in exhibit 3 in respect of the bills complained of. He identified each entry by the number of the bill, its value and the date it was credited, debited or reversed as the case may be. He said the respondents did not inform him if any of the bills had been short paid or had been dishonoured by non-payment by his overseas customers. The respondents did not return to him any of the bills reversed in exhibit 3.

The appellant produced counterfoils of bills of lading and shipping documents to the value of £130,907.13s.0d
(₦261,815.30) admitted in evidence as exhibits 7-27A, the originals of which he said he had delivered to the respondents for discounting in 1968 and 1969. An employee of the respondents, whose duty was to receive all documents dispatched to the branch bank and who gave evidence for the appellant, confirmed having received all the bills in question and said that he handed the same to ER Oritseje, the then manager of the respondents’ branch where the account of the appellant was maintained. The appellant said, since then the respondents have not accounted for any of the bills to him and have not returned any to him either. Finally, the appellant showed to the trial court the debit entry in exhibit 3 made on 9/8/69 for £10,099.4s.0d purporting to be devaluation of sterling. He said there was no devaluation of naira or dollar, which were the currency of their transactions at the material time.

Two witnesses gave evidence for the respondents. One was the controller of foreign business of the respondents and the other was their manager at the time of the trial of the case of the respondents’ branch at Benin City where the account of the appellant was maintained. Apart from their conflicting evidence on the meaning of “OBC” neither witness said anything tangible in support of the respondents’ defence. Their controller simply stated: “OBC” is not a general banking term. It may just be closer by the case (sic) and it may mean “outward bills for collection.” It appears he knew nothing about the case.

According to their manager, “OBC (Outward Bills for Collection) is used as regards documents handed in on collection basis. In the case of an OBC document (sic) is a document strictly on collection basis, we give it out (sic) our number and advise the customer of this number. If however, it was a document presented against a letter of credit, the letter of credit is quoted as the document. In the case of an OBC we enter it up in our register and when payment is received the customer is advised.”
The manager could not say whether they had received the originals of exhibits 7-27A. On the issue as to whether the respondents were discounting or collecting bankers of the appellant, his evidence is equally consistent with the appellant’s case and with the respondents’ defence. He said:

“I know the plaintiff in this case, he was a customer of the A.C.B. He enjoyed facilities with the bank and we were discounting bills and also accepting bills for collection from him.”

However, the witness did not say whether any of the bills complained of in exhibit 3 had been accepted by his branch for discounting or collection. He was silent on all the issues involved in the case.

I think it is pertinent to observe that the defence of the respondents left much to be desired. Not an iota of evidence was adduced to explain any of the entries in exhibit 3 complained of by the appellant, i.e., why some of the credit entries were reversed, what differential meant and the reasons for debiting his account with such differential and how devaluation of sterling, if any, affected the transactions in Nigerian currency and the American dollars and to explain the nor accountability of the originals of the bills exhibits 7-27A. No evidence whatever was led to show that any of the appellant’s bills was presented by the respondents to the appellant’s overseas customers or the customers’ bankers for acceptance or payment. The respondents did not give evidence of any underpayment or dishonour by non-acceptance or non-payment of the appellant’s bills by his customers or their bankers. Not a scintilla of evidence indicating what happened to his bills or their whereabouts or why the respondents did not return any of them to the appellant if they were not accepted or not paid. Having regard to the totality of the evidence, it is not surprising therefore that in his meticulous and thorough judgment the learned trial Judge found as follows:

(1) that all the shipments made by the appellant were against irrevocable letters of credit and that the respondents
discounted the bills and shipping documents and did not accept the bills for collection;

(2) that the entries in exhibit 3 correctly state what the respondents did in operating the appellant’s account but that some of the entries did not correctly reflect the real transactions between the appellant and the respondents;

(3) after having disregarded the values of some bills which he found not pleaded by the appellant, and the values of unpaid cheques, which he found not proved by the appellant, he found the respondents liable is the sum of N314,568.23 in respect of the claim founded on exhibit 3 ie the differentials wrongly charged therein, the amounts short credited therein, the amounts wrongly reversed and the sum wrongly charged for devaluation which he found never took place; and

(4) he also found the respondents liable in the sum of £261,815.30 being the full value of the bills exhibits 7-27A.

He entered judgment for the appellant in the sum of N576,383.53 with N1,500 costs.

The Court of Appeal stated two reasons for setting aside the award of N314,563.23 made by the learned trial Judge in respect of the claim arising from exhibit 3. The first reason was founded on the decision of that Court in F.C.A.1B/98/77, A.C.B. v. Yusufu, delivered on 31st May 1979 (unreported), in which that Court held that although entries in a statement of account prepared by a banker were relevant and admissible in evidence by virtue of the provisions of section 37 of the Evidence Act, those entries were not by themselves sufficient to charge the banker’s customer with liability in view of the qualifying provisions of the same section. Thinking that what is good for the goose is also good for the gander, the Court of Appeal found that the learned trial Judge had charged the respondents with liability on the entries in exhibit 3 alone, ie without any supporting evidence outside exhibit 3, and therefore following their
former decision held that the trial Judge had erred in law in finding for the appellant on the basis of exhibit 3 alone.

The second reason was stated in the leading judgment of Agbaje JCA (Omo Eboh and Ete JJCA concurring) thus:

“There is in my view another reason, besides the probative value of exhibit 3 as indicated by section 37 of the Evidence Act, why the plaintiff’s claim based on exhibit 3 alone should not succeed. The plaintiff was complaining in part of wrong debit entries in exhibit 3. The relief, the plaintiff was seeking about the wrong debit entries was not that the entries should disappear but that in fact they should be treated as credit entries. For how otherwise can one interpret the plaintiff’s claim for payment to him of the amount represented by the debit entries? In the absence of evidence tending to show not only that he was wrongly debited with the figures involved but also showing that in fact the transactions represented by the entries should have been credit entries, I fail to see how the plaintiff could conceivably succeed on the mere proof that his account was wrongly debited with the amount. In this regard, I am talking of the following amount as £10,099:4s: said to be the devaluation, and £14,844.3.10d and £51,793.2.1d said to be price differentials on Overseas Bills for Collection 1-38/68 and on OBC 1-38/68 – 16/69 respectively. And in the case of proceeds of OBCs 22/69, 37/69, 38/69, 62/69, 16/67, 22/67 and 23/67, I do not see how the plaintiff can possibly make the defendant bank liable to him for the proceeds of these bills without first proving at least that he gave them to the defendant bank for discounting or collection as the case might be as the plaintiff did in the case of bills represented by exhibits 7 to 27A in these proceedings.”

Purporting to follow the decision of this Court in the case of A.C.B. v. Yesufu (1978) 2 S.C. 93 at 102-104, the Court of Appeal set aside the award of N261,815.30 concerning the bills exhibits 7-27A on the ground that the appellant did not prove at the trial that any of the bills in question was backed by an irrevocable letter of credit. I think it is germane to the issue to set out a portion of the judgment of Agbaje JCA concurred by the two other Justices:

“So following this case again since exhibits 7 to 27A are not bills of exchange properly so called there was no duty on the defendant
bank to give notice of their dishonour to the plaintiff. The duty of the defendant bank in respect of the said documents is spelt out at page 112 of *ACB v. Yesufu* (supra).

‘In the absence of any agreement to the contrary, a collecting banker has a duty to collect the face value of a bill and if he collects any amount less than the value of the bill he may be liable to his customer for a breach of contract. This common law rule is founded on the liability of an agent exceeding his authority’.

Since as I said above exhibits 7 to 27A were not backed by irrevocable letters of credit for the plaintiff to succeed in his claim against the defendant bank based as it were on the delivery of the documents to the defendant for the collection of their proceeds, he had to prove that the defendant collected their face values and failed to pay them over to him or that the defendant collected less than the face value without his express instruction to do so and thereby caused his loss for which the defendant must be liable. There was no evidence from the plaintiff that the defendant collected anything as any of the documents referred to as exhibits 7 to 27A. In the circumstances I do not see how the plaintiff could ask the defendant to pay over to him the proceeds of the shipping documents. So the learned trial Judge in my view was in error in giving judgment for the plaintiff against the defendant for the proceeds of exhibits 7 to 27A. If the defendant did not collect the proceeds of any of the documents the defendant was not obliged as a matter of law to give the plaintiff notice of non-payment of the bill because as I have said earlier on in this judgment the documents, exhibits 7 to 27A, are none of the bills of exchange properly so called.’

In his first ground of appeal, the appellant attacked the decision of the Court of Appeal that the learned Justices of that court erred in law in holding that the statement of account, exhibit 3, was not alone sufficient to charge the respondents with liability when the statement, which was made and acknowledged by the respondents, constituted an admission of the contents thereof by the respondents. This ground was argued together with the second ground of appeal, which reads:

“The Federal Court of Appeal misdirected itself in law and on the facts and failed to understand the plaintiff’s case with regards to
the wrong debit entries made in the bank statement exhibit 3 when it said:

(the portion of the Judgment of Agbaje JCA which I have earlier on set out, stating the reason for quashing the award relating to exhibit 3, was quoted in full and)

When:

(i) The plaintiff’s contention in respect of the said entries were that the debit entries complained of should not have been made at all as there was no basis for claiming and enforcing against the plaintiff a sum on account of devaluation and price differential.

(ii) That by making the said debit entries the defendant had wrongly enhanced the plaintiffs liabilities to the defendant on its account and that the only way to rectify this is to either credit the plaintiff’s account with the amounts wrongly debited or to leave the plaintiff’s account as it now is and pay to the plaintiff the amount by which his account had been wrongly debited.

(iii) The oral and the documentary evidence in the proceedings show that OBCs 22/69, 37/69, 38/69, 82/69, 16/67, 22/679 and 23/67 were in fact reflected in the bank statements exhibit 3.

(iv) The evidence and case of the plaintiff was that the defendants had acknowledged the receipt of the aforesaid “OBCs” by giving him credit for them in exhibit 3 but had later ‘reversed’ the entries in respect of them and failed to make a subsequent credit entry in respect of the same.”

Learned Counsel for the appellant, Mr Ajayi, SAN, submitted that the Court of Appeal wrongly applied the provisions of section 37 of the Evidence Act having regard to the basis upon which the statement of account, exhibit 3, was relied upon by the appellant. He conceded the proposition that where a document made by plaintiff seeking to rely upon it is produced in evidence, the court may consider the entry by itself insufficient by virtue of the section to charge the defendant with liability. But the provisions of the section, learned Counsel further contended, do not also enure (sic) for the benefit of the maker of such statement when the entry therein is sought to be used against the maker as an admission:
Reviewing the pleadings and the evidence upon which the trial Judge charged the respondents with liability for the claim in exhibit 3, learned Counsel pointed out that in his pleadings and evidence, the appellant established that he had delivered his bills entered in exhibit 3 to the respondents who discounted them and credited his account with the discounted values of the bills but that some years later, without the knowledge and consent of the appellant, the respondents reversed some of those credits. He further pointed out that the respondents did not in their pleadings deny having received the appellants bills but admitted formerly discounting the bills and crediting his account with the discounted values of the bills and that subsequently, they altered that practice to merely giving the appellant overdraft facilities and would only credit his account after they had collected payment from his overseas customers.

In respect of the bills that were reversed, learned Counsel contended, the onus was on the respondents to show that the bills had been dishonoured by the appellant’s customers, which they failed to do, and they did not return the bills to the appellants.

Referring to the sums debited as differentials, learned Counsel contended that the burden was on the respondents to show that they were entitled to charge the appellant with such sums and they also failed to do so.

Finally, learned Counsel contended that since the appellant had proved the currency of their transactions not devalued, the burden was on the respondent to show the basis for charging him with the alleged devaluation. The respondents also failed to discharge the burden.

The complaint of the appellant in grounds 3 and 4 is that the Federal Court of Appeal erred in law in holding that because the appellant had failed to prove that exhibits 7-27A had been backed by irrevocable letters of credit, in order to...
succeed in his claim based on those bills, the appellant had to prove that respondents had collected their face values and failed to pay them over to the appellant or that the respondents had collected less than their face values without his express authority. Learned Counsel for the appellant submitted that bills of lading were title documents of the goods shipped and anyone in possession of them could convert them into money. He contended that since the appellant had proved the delivery of the bills to the respondents, the failure of the respondents to credit his account with their values or to return the bills to him constituted a breach of their duty as bankers and the respondents are consequently liable on the bills.

Although the grounds of appeal and the appellant’s brief run to 6 and 13 pages respectively, the respondents brief is a mere 2 page affair. Learned Counsel for the respondents did not improve their performance at the hearing of the appeal either. Their oral submissions were, in my opinion, an exposition of fishing expedition. The substance of their reply to the comprehensive and meticulous submissions of Mr Ajayi, SAN, in respect of the claim based on exhibit 3, is that the Federal Court of Appeal rightly applied the provisions of section 37 of the Evidence Act because the entries in exhibit 3 were per se insufficient proof of the respondents liability.

In respect of the claim founded an exhibits 7-27A, learned Counsel for the respondents submitted that the onus was on the appellant to prove that the bills of lading upon which he based his claim were drawn against irrevocable letters of credit and that his failure to do so was fatal to his claim. Learned Counsel cited sections 134 and 135 of the Evidence Act; *African Continental Bank v. Festus Sunmola Yusufu* (1978) 2 S.C. 93 at page 106 and 3 Halsbury’s *Laws of England* (4ed), page 104 purporting to buttress their contention. Finally learned Counsel submitted that mere presentation of the bills of lading, exhibits 7-27A, to the respondents did not fix the respondents with liability to the appellant for their
face values or with any other legal duty to the appellant. They relied on Halsbury’s *Laws of England*, page 105, paragraph 138 and the Bills of Exchange Act but did not refer to any particular section of the Act. I agree with the submissions of Mr Ajayi, SAN, that by setting aside the award based on exhibit 3 on the grounds of the two reasons stated by the Federal Court of Appeal, that Court did not fully appreciate the quantum and purport of the evidence upon which the learned trial Judge charged the respondents with liability in respect of the portion of the appellant’s claim relating to the entries in the statement of account, exhibit 3. For the proper appreciation of the evidence, I consider it necessary to state elementary principles of banking law and practice.

Since the celebrated case of *Foley v. Hill* (1848) 2 H.L. Case 28 the relation in law between a banker and his customer has been that of debtor and creditor – see also *Hirschorn v. Evans* [1938] 3 All E.R. 491 at page 498. When a bank credits the current account of its customer with a certain sum, the bank becomes a debtor to the customer in that sum: *Joachimson v. Swiss Bank Corporation* (1921) 3 K.B. 110; and conversely when a bank debits the current account of its customer with a certain sum, the customer becomes a debtor to the bank in that sum: see Paget’s *Law of Banking* (8ed) page 84. Whichever party is the creditor is entitled to sue, if demand for payment was not complied with, the other party for money lent: see *Joachimson v. Swiss Bank Corp* (supra).

It follows from the foregoing that when a bank reverses a credit entry of a certain sum in the current account of its customer by debiting ‘the account with the same sum, such reversal in practical terms means that the bank has liquidated its liability as debtor to the customer.

It is also relevant to state the law relating to discounting of bills because from the incontrovertible evidence before him, the learned trial Judge found, quite rightly in my view, that...
the appellant delivered all the bills of lading in question to respondents, who accepted the same, for discounting. In strict commercial law, “discounting” is purchasing, not lending. The discounter of a bill becomes the owner. If it turns out to be of less value than the price paid for it, the loss falls upon the discounter; and if a profit is made upon the transaction, it belongs wholly to the discounter: Carstairs v. Bates (1812) 3 Camp 301 N.P. and London Financial Association v. Kelk (1884) 26 Ch.D. 107 at 134. However, in the case of a banker discounting the bill of his customer, the law is stated to be in these terms:

“When a banker discounts a bill he buys it for its face value less a sum representing interest for the period which the bill has to run. The banker takes the bill as transferee for value, and has the holder’s normal right to sue on the bill if it is dishonoured. In the case of a customer the amount of the bill, less discount, is normally carried to current account, and if the bill is unpaid the current account is normally debited and the bill is returned to the customer. If the banker wishes to retain his right of recourse to other parties because his customer’s account cannot meet the debit, the banker retains the bill and debits a suspense account. Whether the bill is taken from a customer for collection or as security, or is discounted for hire, is a question of fact. The presumption in favour of a bill being taken by way of absolute transfer rather than of pledge or security is not so appropriate in the case of banker and customer as in other cases.” See Halsbury’s Laws of England (4ed), page 112, paragraph 151.

From the foregoing it is clear that where a banker discounts the bill of his customer and credits the customer’s current account with the discounted value of the bill, the banker is only entitled to debit the current account subsequently with the value of the bill if the bill is unpaid and the banker has returned it to the customer. Where the banker retains the bill, he has no right to debit the current account of the customer with the value of the bill.

I now proceed to consider the quantum and purport of the evidence upon which the trial Judge charged the respondents with liability. In respect of the bills, which were reversed in
exhibit 3, the appellant proved that he had delivered those bills to the respondents for discounting; that the respondents had entered those bills in exhibit 3 and had given him credits for the amounts of the bills less discount. Such entries in law amount to admissions by the respondents that they were debtors to the appellant in respect of those bills: Joachimson v. Swiss Bank Corporation (supra). The appellant also proved that later, without giving him any value or consideration and without returning the bills to him, the respondents reversed those credit entries by debiting his current account, exhibit 3, with the values of those bills. Such debit entries were tantamount to liquidating their liability as debtors to the appellants Paget’s Law of Banking (supra). It is apparent that the respondents were not entitled to debit the account with the values of those bills without having returned the bills to him. They were only entitled to debit the account with the values of those bills if they show that the bills had not been paid by the appellant’s overseas customers and the respondents had returned the bills to the appellants pages 1, 12 paragraph 151. The respondents failed to prove either.

The appellant also proved that the respondents debited his account with “differentials.”

He said he did not know what “differentials” meant but that if it meant that his bills were underpaid by his customers, he had not authorised the respondents to collect underpayment. It is obvious that “differentials” is a matter specially within the knowledge of the respondents and therefore the burden of proving what “differentials” meant and that they were entitled to charge the appellant with liability for the differentials squarely rested on the respondents and they failed to discharge the burdens. See section 141 of the Evidence Act.

Finally on the issues relating to the entries in exhibit 3, the appellant proved that the respondents charged him with liability for devaluation of sterling when the currency of his transactions with the respondents and his overseas customers had not been devalued.
In my opinion, having charged the appellant with devaluation of sterling, the onus of proving how devaluation of sterling, if any, affected the currency of the transactions between the appellant and the respondents and that they were entitled to charge him with such devaluation also lay on the respondents as those facts were specially within their knowledge. The respondents did not discharge the burden of proof imposed on them by section 141 of the Evidence Act.

I think it is apparent from the foregoing that the Court of Appeal erred in quashing the finding of liability on the portion of the appellant’s claim based on exhibit 3 on the grounds of section 37 of the Evidence Act and the burden of proof required of the appellant. It seems that the Court of Appeal did not fully appreciate the totality of the evidence and did not assess it correctly. Proper assessment of the totality of the evidence would reveal, as I have shown in this judgment, that respondents’ liability for part of the appellant’s claim based on wrong entries in exhibit 3 was not found on merely such entries alone as the Court of Appeal thought. Liability was founded on the oral testimony of the appellant which proved the entries complained of to be wrong and unjustified and the failure of the respondents to discharge the burden of proof that lay on them.

It remains to deal with the other part of the appellant’s claim relating to exhibits 7-7A which, as I have earlier pointed out, the Court of Appeal purporting to follow the decision of this Court in the *ACB v. Yesufu* (*supra*) set aside on the ground that the appellant failed to prove the bills to have been drawn against irrevocable letters of credit. The facts of that case were that Chief Yusufu, who was a customer of the bank, delivered letters of credit and shipping documents for collection to the bank which lent him money against the documents. The bank presented the bills to the New York bankers of the appellant’s customers and some of the bills were paid and some were not paid. Later the bank
claimed the values of the unpaid bills against Chief Yusufu as owing to them by way of overdraft. On the question whether the bank’s claim was defeated by reason of the bank’s failure to inform Chief Yusufu of the dishonour of the bills, this Court held that the fact that the bills were not paid raised the presumption that they were revocable; that the onus which lay on Chief Yusufu to show otherwise had not been discharged and accordingly the bank was under no duty to give notice of non-payment to Chief Yusufu. To put it briefly, that case dealt with the question as to whether a collecting banker has a duty to give notice of dishonour of a bill of his customer drawn against a revocable credit. This Court said he has no such duty.

The facts of the case in so far as they relate to exhibits 7-27A are palpably different from the former case. The facts of the case in hand are concerned with the liability of a discounting banker NOT a collecting banker, who fails to give an account to his customer whose bills he accepted for discounting. To reiterate the evidence: the appellant proved at the trial that he shipped his rubber to the values of the bills, exhibits 7-27A, to his overseas customers and discounted the bills to the respondents; that the respondents failed to credit his account with the discounted values of the bills as they ought to have; that the respondents did not give any value to him and did not return the bills to him. Except for their denial in their statement of defence of having received the bills, the respondents did not adduce any evidence concerning the bills. For the reasons I have stated in my consideration of the reversed entries in exhibit 3, the learned trial Judge was perfectly right in finding the respondents liable for the values of the bills.

For the avoidance of doubt, I may emphasise that a banker has a duty to give an account to his customer of the customer’s bill he discounted irrespective of whether the bill was drawn against a revocable or irrevocable credit, confirmed or unconfirmed credit or no credit at all. The respondents failed to discharge that duty in respect of the bills in question.
I may as well point out that sound commonsense and business prudence demand such accountability. This is so because if the transaction is really one of discounting, the banker must pay the purchase price of the bill to the seller for in that case the banker becomes the owner: London Financial Association v. Kelk (supra). However if the transaction is a pledge, the banker has only control over the bill, which is merely “the symbol of the goods” while the general property in the goods remains with the seller who is the true owner: per Lord Wright in Ross T Smythe and Co Ltd v. TD Bailey, Son and Co [1940] 3 All E.R. 60 at page 68. It is for these reasons that the law imposes a duty on a banker to whom his customer has entrusted his bill for negotiation and collection to account as to the fate of the bill.

I would accordingly allow the appeal and set aside the decision of the Court of Appeal including the order as to costs. In its stead the judgment of the trial court is hereby restored, to wit, that judgment shall be entered for the appellant is the sum of N576,383.53 (five hundred and seventy-six thousand, three hundred and eighty-three naira fifty-three kobo) with N1500 costs.

The respondents shall pay the appellant’s costs in the Court of Appeal assessed at N200 and the costs in this Court assessed at N300.

SOWEMIMO JSC: I agree with the judgment of my brother Bello, JSC, and the order made by him, allowing the appeal against the judgment of the Federal Court of Appeal, Benin City and restoring the judgment of the Bendel State High Court. I also agree with his order as to costs.

IDIGBE JSC: My Lords, I have had the advantage of reading in draft the judgment just delivered by my brother, Bello JSC. I agree with it and for the reasons expressed in that judgment, I too would allow this appeal.
**Eso JSC:** I agree with the judgment just read by my Lord Bello, JSC. I have had a preview of the judgment and I have nothing to add.

**Nnamani JSC:** My Lords, I am in entire agreement with the judgment just delivered by my learned brother, my Lord Bello, JSC, a draft of which I had the advantage of reading. I am also of the view that the appellant is entitled to succeed on all the main issues argued before us in this appeal. I would therefore allow the appeal and set aside the judgment of the Federal Court of Appeal, Benin Judicial Division dated 28th February, 1980. I am in agreement with the orders proposed in the judgments of my Lords, Bello and Sowemimo, JSC.
Okafor v. Union Bank of Nigeria Limited

HIGH COURT OF LAGOS STATE
OGUNTADE J
Date of Judgment: 23 FEBRUARY 1981
Suit No.: L.D./248/80

Banking – Cheques – Duty of bank to customer

Banking – Cheques – Wrongful dishonour of – Bank claiming domestic or internal arrangement as a defence – Whether avails bank

Banking – Cheques – Wrongful dishonour of – Measure of damages

Damages – Nominal – What it means

Facts

The plaintiff, an accountant in a company, operated a current account with the defendant at its 40 Marina, Lagos Branch. The plaintiff’s case was that on the 1st February, 1978 he caused a sum of ₦900 to be transferred by his wife to his account with defendant’s bank. The plaintiff averred further that on 2nd February, 1978, he gave a cheque to the tune of ₦1,125 to one Mr Yesufu and that when the cheque was presented on the 4th February, 1978, it was dishonoured and endorsed “Refer to Drawer.” The plaintiff contended also that when the cheque was dishonoured, he had a credit balance up to ₦1,272.57k in his account with the defendant and that failure of the defendant to pay his cheque was wrongful. He therefore by his writ of summons claimed the sum of ₦50,000 as damages.

Defendants averred that at the time the cheque was presented, the previous day’s work had not been entered into the respective ledger cards. The defence witness said “The practice in my own bank is that before we post anything into the ledgers we make sure that the machining of the vouchers agree with the postings of the control. The system of various
banks differs. It is not that in our bank when we debit a transferor’s account the transferee’s account is immediately credited.” He said in his evidence that it took two days for transfer into account of customers within the same branch to be credited.

Held –

1. The moment a bank places money to its customers credit, the customer is entitled to draw upon it, unless something occurs to deprive him of that right.

2. Only a person “in trade” or “in business” can recover substantial damages without proof of any special damaged. This is not to say that other persons whose cheque are wrongfully dishonoured cannot recover substantial damages but such damages suffered must be pleaded and proved. Damages in such cases do not follow the event unless proved.

3. Having regards to the injury that a customer whose cheque is wrongly dishonoured may suffer, a paying banker should meticulously search all sources by which funds come in and satisfy itself that there is no fund not yet credited in the customer’s ledger before refusing payment. It cannot be a valid defence to a banker by saying that in his bank the procedure before funds get to individual’s account takes this or that time.

4. If it can be established that funds have been paid to a customer’s credit before a cheque is presented, a banker would be in breach of its duty by refusing to pay. It cannot and it must not be otherwise. A customer cannot be held responsible for what is essentially a domestic or internal arrangement of each bank.

5. It cannot be a defence to a negligent banker who wrongfully dishonours his customer’s cheque to say it was only relying on its own standard practice.

6. In order to be able to recover substantial damages, the plaintiff has to plead and prove the damages suffered by him as damages in such cases do not without more follow the event.
7. A breach of a duty by a banker to pay a customer’s cheque was a breach of contract.

8. The plaintiff not being a trade or a person in business and not having proved any special damages is entitled only to nominal damages.

9. Nominal damages are damages as any equivalent or satisfaction to the party recovering them. They are given when the plaintiff in an action for an invasion of his right establishes his right but does not show that he has sustained any damages.

Judgment for the Plaintiff.

Cases referred to in the judgment

Nigerian


Khartoum v. Holland (W.A) Lines and Bank of West Africa Ltd (1961) 1 All N.L.R. (Part 2) 318

N.I.P. Ltd v. Thompson Organisation Ltd (1969) 1 All N.L.R. 142

Oyenuga v. Provisional Council University of Ife (1965) N.M.L.R. 9


United Nigeria Insurance Co Ltd v. Muslim Bank (W.A.) 1972 Comm L.R. 8

Foreign

Beaumont v. Great head (1846) C.B. 494
OGUNTADE J: The plaintiff by his writ of summons filed on 25th February, 1980 claims the sum of ₦50,000 against the defendant being damages suffered by the plaintiff as a result of the defendant’s breach of contract or duty in dishonouring plaintiff’s cheque No. 364560/4202458 made payable to Mr BA Yesufu.

The plaintiff filed his statement of claim on 25th February, 1980. In a summary the plaintiff’s case as may be gathered from the statement of claim is that he is an accountant under Flag Aluminium Products Limited operated a current account with the defendant’s branch at 40 Marina, Lagos and that on 1st February, 1978 he cause a sum of ₦900 to be transferred to his current account number 45050 by his wife having previously ascertained on the 31st January, 1980 that his credit balance was not enough to cover a cheque for ₦1,125 which he planned to issue to one Mr Yesufu in payment of his house rents. The plaintiff averred further that he
a gave a cheque to Mr Yesufu for N1,125 on 2nd February, 1980 which when presented on 4th February, 1980 was dishonoured and endorsed “Refer to Drawer.” Plaintiff then issued another cheque to Mr Yesufu but defendant instead called for the cheque previously dishonoured and paid same.

b The plaintiff contends that as at 4th February, 1980 when his cheque was dishonoured he had a credit balance of N1,272.57 in his account and that failure of defendant to pay was wrongful and caused Mr Yesufu to write him a letter impugning his credit. He therefore claims the sum of N50,000 as damages.

c The defendant entered appearance to the writ on 26th March, 1980 and filed its statement of defence on 2nd May, 1980. Although the said statement of defence was filed out of time, the defendant did not deem it fit to ask for extension of time within which to file the statement of defence. This case has been fought on the basis that the statement of defence was validly filed and it would appear that the plaintiff had not taken any objection to the lateness of the statement of defence by proceeding to file the Summons for Direction on 16th July, 1980. The Affidavit of Service of the statement of defence shows that plaintiff was served on 13th May, 1980. When plaintiff proceeded to file Summons for Direction over two months after service the of statement of defence the plaintiff did not file a motion for extension of time to file the Summons for Direction and it must be noted that the defendant did not object.

d However, in the interest of justice and having regard to the fact that this case was fought on the basis that these papers referred to above validly served, I shall overlook the procedural delays and I accordingly make an order that both the statement of defence and Summons for Direction be deemed as properly filed.

e The defendants in their statement of defence admit that plaintiff is their customer in respect of a current account but denies that the said account was operated for business purposes.
They went on further to state that the order for transfer of N900 into plaintiff’s account came too late on Friday 1st February, 1980 and that they had no reasonable notice to enable them to effect the transfer into plaintiff’s account before a cheque drawn on the account was presented at 8am on Monday 4th February, 1980 and that in these circumstances the plaintiff’s cheque was dishonoured. They denied that they acted wrongfully or that plaintiff suffered any damages.

In proof of his case plaintiff gave evidence and called three witnesses. Plaintiff’s evidence is in substantial conformity with his statement of claim. He gave evidence that he checked the state of his account on 31st January, 1980 and discovered he had little over N300 and therefore instructed PW1 his wife to transfer a sum of N900 into his account to be able to cover a cheque for N1,125 issued in favour of PW2 his landlord on 2nd February, 1980. PW1 maintained a savings account with the same branch as plaintiff. The cheque issued in favour of PW2 was when presented on 4th February, 1980 dishonoured. He tendered a photocopy of the said cheque as exhibit A. As a result of defendant’s failure to pay the cheque PW2 was angry and wrote plaintiff a letter tendered as exhibit B. The plaintiff issued another cheque to PW2 on 5th February, 1980 but defendant asked PW2 to represent the original of exhibit A, earlier dishonoured and this was later paid. The cheque issued in favour of PW2 was received in evidence as exhibit C. The plaintiff concluded his evidence-in-chief by asking for N50,000 damages.

Under cross-examination plaintiff *inter alia* admitted that his current account with defendant is not a trading account and that he is an employee of Flag Aluminium Products Limited. He stated that he travelled by air to Kaduna on 1st February, 1980. He claimed that a credit slip of N900 had been issued and that the last direct information he had on the state of his account was on 31st January, 1980 when his credit balance was N372.57.
The next plaintiff’s witness was his wife who gave evidence to the effect that on the instruction of the plaintiff she on 1st February, 1980 called at the defendant’s branch at 40 Marina and effected a transfer into plaintiffs account. Her pass book was debited and she gave information as to whose account she wanted the sum of ₦900 transferred. This was to plaintiff’s account and the transfer was done during the official banking hours.

The next plaintiff’s witness was Mr Busari Adebisi Yesufu who gave evidence that plaintiff was his tenant and that he was drawee of the original of exhibit A for ₦1,125 which the plaintiff gave him on 2nd February, 1980. This witness presented the original of exhibit A on 4th February, 1980 and after waiting about 1.5 hours the cheque was returned unpaid. He was very angry and in his anger wrote exhibit B because plaintiff had previously assured him the cheque would be alright as plaintiff said he had just made a transfer to the account. Plaintiff have him another cheque but on getting to the bank on 6th February, 1980, having waited for 40 minutes he asked to see one Mr Benson on whose intervention the original of exhibit A was called for and paid and exhibit C was returned to him.

The last plaintiff’s witness was Mr Samuel Chigbo Chiajulu Awani an Inspector Grade 1 and banker under African Continental Bank Limited who is also an associate member of the institute of bankers having qualified in 1977. This witness said “If any amount is to be transferred from a Savings account to any kind of account the pass book is required. There must also be a letter of authority to transfer by the holder of the account for verification purposes. If the bank executes such transfer the account of the person transferring is immediately debited and the account of the person to whom such funds are being transferred to is credited immediately. The process is simultaneous. This must be so because it not possible to raise a credit without debit otherwise the day’s account will not be balanced.”
Under cross-examination this witness said he had not worked with the defendant bank before and that he has continuously been a banker since 1965 except for six months he spent with Icon Merchants Bank Limited while on vacation. There is no hard and fast rule about posting of the vouchers into accounts whether the day’s work is balanced or after but it must be the same day, he concluded.

The only witness for the defendant is Mr Paul Okonwo who works with defendant at 40, Marina. He knows plaintiff and said PW1 on 1st February, 1980 about midday came to the savings counter to instruct that N900 be transferred from her savings account into plaintiff’s account. A little later this witness said the transfer was to be made to Ngozi Okafor’s account. On 5th February, 1980 plaintiff came to say the transfer was to be made into his account. But meanwhile, on 4th February, 1980 at about 9am before the previous day’s work was posted, a cheque for N1,125 was presented for payment on account of plaintiff. exhibit A is the copy of the cheque. At the presentation of the original of exhibit A the cash in plaintiff’s account was not sufficient to pay the cheque. The previous day’s work had not been entered into the respective ledger cards before original of exhibit A was presented. This witness said “The practice in my own bank is that before we post anything into the ledgers we make sure that the machining of the vouchers agrees with the postings of the control. The system of various banks differs. It is not that in our bank when we debit a transferor’s account the transferee’s account is immediately credited.” The original of exhibit A was therefore returned unpaid but it was later represented on 5th February, 1980 when it was honoured. He said in his evidence that it takes two days for transfers into account of customers within the same branch to be credited. He denied defendant’s liability for N50,000 and concluded that about the time this transaction took place he was supervisor in the current account section and that the transaction fell within his schedule of duties.

Under cross-examination this witness admitted that it is true that PW1 gave instructions to transfer on 1st February,

Oguntade J

Okafor v. Union Bank of Nigeria Ltd 639

1980 the sum of ₦900 into account No. 45050 although he claimed that he did not know the owner of the account. He also said that it is correct that when the defendant debits an account from which funds are being transferred a credit is raised into the transferee’s account. Of important significance in this witness’s evidence is what he said thus: “We do not require any notice before a customer transfers money from savings to current account. If a customer presents a cheque and we discover there is not sufficient fund in his ledger we send lodgment slips to various departments through which funds come in and also go through vouchers to make sure that there is no fund not yet credited into his ledger. We checked various departments as I said when exhibit A was presented but the voucher we discovered was not in plaintiff’s name but in Ngozika Lizzie Okafor’s name.” Somewhere later in his evidence this witness said: “It is true we issued a statement of account to plaintiff showing his balance as at 1st February, 1980 as ₦1,272.57.”

In re-examination learned Counsel sought to tender the debit voucher in which PW1’s instruction to transfer was endorsed. I gave a ruling refusing leave to tender the said document and I shall have cause later in this judgment to dwell further on why as at that stage I refused the request of Mr Oggunade for defendant.

In his address to court, Mr Oggunade for defendant asked me to discountenance all evidence by plaintiff as regard the transaction of 1st February, 1980 because the plaintiff pleaded that ₦900 was paid in on 1st February, 1978.

He further submitted that the plaintiff’s case is in contract as per his writ of summons and pleadings and not in Tort. He referred me to the case of Khartoum v. Hollad (W.A) Lines and Bank of West Africa Ltd (1961) 1 All N.L.R. Part II page 318 at 323. He further submitted that plaintiff must be held to the case put forward by him and referred me to ACB Ltd v. Attorney–General of Northern Nigeria (1967) N.M.L.R. page 23.
Mr. Ogunade further submitted that there was not sufficient or reasonable time allowed defendant by plaintiff to enable defendant credit his account. He then referred me to Chitty on *Contracts*, Volume 2, page 216, paragraph 2540 and the popular *Marzetti* case.

He further referred me to Halsbury’s *Laws of England*, (4ed), Volume 3, page 49, paragraph 62 on the proposition that the plaintiff not being a trader or a person in business as shown in the case of *Balogun v. National Bank of Nigeria Ltd* (1978) 3 S.C., the plaintiff if he succeeds can only get nominal damages. Finally he referred me to *Gibbons v. Westminster Bank Ltd* (1939) 2 K.B. at page 882 on the quantum of damages. In the established status of plaintiff it cannot be said that a sum of N1,125 dishonored is small to make him loose his credit much.

In reply, Mr Ibegbue conceded that his case is founded in contract but submitted that persons in trade include persons engaged in some occupation usually skilled but not learned as a way of livelihood. He submitted that plaintiff an accountant under Flag Aluminium comes within the definition of persons in business within the Hirat Balogun case. He submitted that the letter exhibit B written to plaintiff by PW2 is injurious and asked me to consider what efforts plaintiff went through to see that the cheque was honoured. He also asked me to take into consideration the fact that the cheque dishonored was issued in settlement of plaintiff’s rents.

As regards paragraph 5 of the statement of claim he asked me to exercise my power of amendment under Order 25, rule 1 since the error is typographical. The defendant is clearly in breach of its duty to plaintiff by failing to honour original of exhibit A on 4th February, 1980 when there was sufficient fund in plaintiff’s account to do so. He referred me to *Ashubiojo v. A.C.B. Ltd* (1960) L.L.R. page 156 at 157. If the court finally holds, he submitted that plaintiff is entitled

Oguntade J

Okafor v. Union Bank of Nigeria Ltd 641

a to nominal damages; Counsel submitted ₦5,000 was nominal enough.

b It is important for me before considering this case to dispose of the submission by Mr Ogunade as regards the averment pleaded in paragraph 5 of the statement of claim which mentioned the date money was transferred into plaintiff’s account as 1st February, 1978. Having regard to the other averments in the statement of claim and the evidence led at trial, I am satisfied this is a genuine typographical error. The defendant in paragraph 4 of the statement of defence admitted the averment contained in paragraph 2 of the statement of claim which makes the mistake a mutual one. The defendant cannot now be complaining of a point they had themselves admitted. I feel satisfied that the only way to make sense out of the pleadings is to use my power under order 25 rule 1. This is being done in the interest of justice and the two parties as I do not see that the exercise of my power will adversely affect or otherwise prejudice the case of the parties who had fought the case and led evidence on the basis that paragraph 5 referred to 1st February, 1980 and not 1st February, 1978. The said date on paragraph 5 is accordingly amended to read 1st February, 1980.

c In the case before me the parties seem to be on common ground on many issues. There is no dispute on the fact that plaintiff operated a current account No. 45050 at defendant’s branch at 40, Marina, Lagos. There is no dispute on the fact that PW1 who is plaintiff’s wife gave order for the transfer of the sum of ₦900 to plaintiff’s account on 1st February, 1980 which was a Friday. There is also no dispute as to the fact that the cheque issued by plaintiff in favour of PW2 was presented for encashment on 4th February, 1980, a Monday and that the said cheque was dishonoured with the endorsement “Refer to Drawer.” There is also no dispute as regard the fact that the said cheque which is the original of exhibit A was eventually paid on 5th February, 1980. In so far as these facts are not in dispute, I take them as proved and I accept them as true.
The basic point of controversy is the element of time. For while it is not in dispute that there was an order that N900 be transferred to plaintiff’s account on 1st February, 1980 a Friday, the defendants are contending that having regard to their internal procedure the time available to them was no sufficient or reasonable to enable them reflect the credit on plaintiff’s ledger before about 9 am on Monday 4th February, 1980 when the original of exhibit A was presented and dishonoured.

Leaving the facts of the case aside for a while, Counsels for plaintiff and defendant agree that plaintiff’s action is founded in contract and a breach thereof. The basic law governing the breach of duty of a banker to pay as highlighted by the case of *Marzetti v. Williams* (1830) 1 Bing N.C. 198 and also (1824 – 1834) All E.R. Rep page 226 is as shown in these apt words by the learned authors of Paget’s *Law of Banking* at page 312 thus:

“Every authority from *Foley v. Hill* to *Joachimson v. Swiss Bank Corporation* and the Bills of Exchange Act alike recognise that the bankers primary function and duty is to honour his customer’s cheques provided the state of account warrants his doing so and there is no legal reason to the contrary. Apart from this contractual obligation, or as a consequence thereof, the paying banker must remember that his customer’s credit is or may be seriously injured by the return of one of his cheques dishonoured, and the smaller the cheque the greater the possible damage to credit.”

The principle enunciated in the case of *Marzetti* though very old remains of undoubted and veritable authority.

It has also been decided in the case of *Evans v. London and Provincial Bank* (1917) The Times March 1, *Gibbons v. Westminster Bank Ltd* (1939) 3 All E.R. page 577 and lately *Balogun v. National Bank of Nigeria Ltd* (1978) 3 S.C. (a case in which all the authorities were reviewed by the Supreme Court) that only a person “in trade” or “in business” as in *Hirat Balogun* case can recover substantial damages without proof of any damages. This is not to say that other persons whose cheques are wrongfully dishonoured cannot
recover substantial damages but such damages suffered must be pleaded and proved. Damages in such cases do not follow the event unless proved. Otherwise all they can get is nominal damages. In the case of Evans v. London and Provincial Bank with Lord Reading LCJ presiding, a housewife who did not prove any special damages was awarded one shilling.

In the light of the established law governing this case, I shall now examine the facts to determine (1) If the cheque of the plaintiff was wrongfully dishonoured and if so (2) What is the measure of damages.

In resolving the first issue above the question I have to ask myself whether or not plaintiff had funds standing to his credit in defendant’s possession to warrant defendant honouring the original of exhibit A on 4th February, 1980. I have used the words “To his Credit” advisedly for reasons which will shortly appear. I might otherwise have said “In his (plaintiff’s) Account.” Learned Counsel for plaintiff referred me to the case of Ashubiojo v. ACB Ltd (1966) L.L.R. 56. The point that came up for decision in the case is similar to that in the instant case. Taylor CJ as he then was posed this question to himself: “The points that arise therefore are whether (1) On the 19th January, 1966 the plaintiff had N24.5k standing to his credit in the said bank? As observed above Taylor CJ used the expression “to his credit.” The learned CJ then referred to the case of Capital and Counties Bank Ltd v. Gordon [1903] A.C. 240 at 249 where Lord Lindley said: “It must never be forgotten that the moment a bank places money to its customer’s credit the customer is entitled to draw upon it, unless something occurs to deprive him of the right.”

The learned Law Lord used the expression “a bank places money to its customer’s credit.” While not disagreeing with the expression, I am of the view that the social milieu that we live compel that there must be imported into that expression “and where a bank has funds to its customer’s credit.”
Were it not so an intolerable and oppressive situation would arise to the disadvantage of customers and banks would come to court saying that it takes varying days in their own practice to place money to its customer’s credit’. In the Ashubiojo case there was evidence from the bank’s employee that he further went to the cashier to check whether any payment in hand had been made by the plaintiff and found that none had been made. In the case before me the defendant’s witness also gave similar evidence that he sent lodgment slips to various departments through which funds come in to see if any amount had been paid in on account of plaintiff. If that had not been the case, the time in my view has come when the courts and the law should exact that much duty from a banker. I remember particularly in this connection the dictum in the Marzetti case that “the paying banker must remember that his customer’s credit is or may be seriously injured by the return of his customer’s cheque dishonoured and the smaller the cheque the greater the possible damage to credit.” Having regards to the injury that a customer whose cheque is wrongly dishonoured may suffer, a paying bank should meticulously search all sources by which funds come in and satisfy itself that there is no fund not yet credited in the customer’s ledger before refusing payment. It cannot be valid defence to a banker by saying that in his bank the procedure before funds get to individual’s account takes this or that time. If it can be established that the funds have been paid in to a customer’s credit before a cheque is presented, in my view a banker would be in breach of its duty by refusing to pay. It cannot and it must not be otherwise. A customer cannot be held responsible for what is essentially a domestic or internal arrangement of each bank. Looking at the evidence of PW3 and that of DW1, one would discover that the practice varies from bank to bank. So, who suffers for this? See the case of United Nigeria Insurance Co Ltd v. Muslim Bank (W.A.) (1972) Nigerian Commercial Law Report page 8 where the Supreme Court held that the defendant company had failed to observe
the standard expected of a reasonable banker.

In my view therefore it cannot be a defence to a negligent banker who wrongfully dishonours his customer’s cheque to say it was only relying on its own standard practice.

The defence witness gave evidence that attempts were made to see if payments were made for or on account of plaintiff before the original exhibit A was dishonoured. This witness had earlier agreed that on the 1st February, 1980, PW1 caused₦900 to be transferred to account No. 45050. The plaintiff averred in paragraph 5 of the statement of claim that he is the owner of account No. 45050. This averment was admitted in paragraph 4 of the statement of defence. That issue is therefore closed as parties are bound by their own pleadings. (See *N.I.P Ltd v. Thompson Organisation Ltd* (1969) 1 All N.L.R. page 142 and also *George and others v. Dominion Flour Mills Ltd* (1963) 1 All N.L.R. page 77). The result is that a sum of ₦900 was placed into the plaintiff’s credit on 1st February, 1980. This point brings me to an incident that happened during the proceedings when Mr Ogunade insisted on tendering a document showing that the sum of ₦900 transferred on 1st February, 1980 was to the credit of another person not plaintiff just because in answer to a question during cross-examination of DW1 the witness had admitted that the document was in the bank’s possession. The document was not pleaded and indeed if it was relied upon, it would have amounted to defendant putting up an entirely new case for their case had all along been that they had not sufficient time to effect transfer of ₦900 into plaintiff’s account and not that the ₦900 transferred in was to the credit of another person who was not the plaintiff. I had assumed that this attempt fundamentally infringed the established law on pleadings and I refused to admit the document but Mr Ogunade insisted that he should be heard on this small point which I did. I nonetheless overruled him. Even if I was prevailed upon to admit the document, it would have gone to no issue pleaded. I thought I
should mention this point in passing having regard to the
fact that Mr Ogunade, an otherwise calm and suave practi-
tioner appeared to have lost his cool under a situation were
he was clearly wrong. Mr Ogunade referred me to the case
of A.C.B. Ltd v. Attorney–General of Northern Nigeria
(1967) N.M.L.R. page 231 on the principle that parties must
be held to their unit of summons and pleadings. This is good
law and that is why I was surprised to observe Mr Ogunade
who made the above proposition of law almost in the same
breath asked me to accept in evidence a document the effect
of which would have put the case on an entirely new foot-
ing. See Oyenuga v. Provisional Council, University of Ife
(1965) N.M.L.R. page 9. On several occasions I had reason
to stop plaintiff leading evidence as to time of the day be-
cause it was not pleaded and because as the pleading stood
time was a serious issue in dispute. Having so treated the
plaintiff how could I have fairly allowed defendant to set up
a new case in re-examination? So much for that. In view of
my observations above I disregard all evidence led by de-
fendant on the point that PW1 came to the bank to transfer
₦900 to any other person apart from plaintiff on 1st Febru-
ary, 1980.

Further in the light of my finding above I hold that the
plaintiff had to his credit at the end of the working hours of
defendant on 1st February, 1980 the sum of ₦1,272.57E.

The defendant’s witness has stated that the defendant tried
to see if there were payments made for or on account of
plaintiff before exhibit A was dishonoured. If they did do,
why was the transfer of ₦900 to plaintiff not discovered?
The only inference is either that the defendant did not do any
such thing or if they did so it was not done thoroughly;
whichever way one looks at it a breach of defendant’s duty
to plaintiff would be established. A feeble attempt was made
to the effect that a transfer from savings account of ₦900
could not be regarded as a cash lodgment. I do not see any
sense in this assertion. I have to remind myself that if PW1
has chosen she could have withdrawn cash from her account and paid same into plaintiff’s account. It would have been a circuitous way of doing the same thing PW1 did. I am also of the view that if there were no funds or cash in PW1’s account her pass book would not have been debited as defence witness admitted. I find as a fact that the defendant knew and accepted that what PW1 was transferring to account No. 45050 which belongs to plaintiff on 1st February, 1980 was cash. Can it then be said that defendant did not have sufficient money to plaintiff’s credit on 4th February, 1980 to honour the original of exhibit A. A very helpful case on the point is the case of the Brimmes; Tenax Steamship Co Ltd v. Owners of the Motor Vessel Drimmes (1974) 3 All E.R. (C.A.). The case touched upon bank payment and time of payment on a transfer order where payer and payee both have accounts with the same bank as in this case. The shipowners of the Vessel Brimmes had exercised their charter party rights of seizure because charterers had sent a telex message to their common bankers to transfer the due funds to the shipowner’s account a few hours before the latter exercised their right of seizure. It therefore became important to determine what time the funds were paid as the bankers contended that they had not had time to comply with the telex order for transfer of funds. Edmund Davies LJ delivering the lead judgment of the Court of Appeal said at page 98:

“There is no contest that where the indirect method of payment was resorted to, payment was as the learned Judge held effected when the bankers cheque issued by the other New York bank was received by MGT, New York.” He went on further at the same page 98 ‘But the shipowners’ contention that the tendering of the commercial equivalent of cash would suffice, found favour with the trial Judge.

In particular he concluded that any transfer of funds to MGT for the credit of the shipowners’ account so as to give them the unconditional right to the immediate use of the funds transferred was good payment. In my judgment this was clearly right and if the parties had used different banks delivery and acceptance of a banker’s draft or equivalent document would have constituted the time of payment.”
Applying the authority of the \textit{Brimmes} case (\textit{supra}) to this case it would appear that the proper time when the funds were unconditionally transferred to the use of plaintiff was when PW1 effected the transfer on 1st February, 1980.

I hold therefore that the original of the cheque exhibit A was wrongfully dishonoured by the defendant on 4th February, 1980.

On the quantum of damage there does not appear much problem on the line of established authorities. The case of \textit{Balogun} (\textit{supra}) decided by the Supreme Court has virtually pre-decided the point. In Nigeria the meaning of persons in trade has been extended to include persons in business. The learned Counsel for the plaintiff has asked me to hold that the plaintiff is a person in business. If one may ask, what kind of business? The evidence before me from the plaintiff himself is that he is an accountant in the employment of Flag Aluminium Products Limited. He opened his account as a personal account not a business account. In the \textit{Balogun} case (\textit{supra}), the plaintiff and appellant at the Supreme Court was a lawyer in private practice. The account concerned was a “clients’ account.” The payee of the cheque was a client. It would be staining the meaning and intendment of ‘persons in business’ to include persons working for an employer. That would virtually include everybody but a few. The Supreme Court gave an extensive and highly elucidating judgment which left no doubt as to persons who can be regarded as being in business. I have no hesitation whatsoever in concluding that the plaintiff is not a person in business.

In order to be able to recover substantial damages, the plaintiff has to plead and prove the damages suffered by him as damages in such cases do not without more follow the event. See the cases of \textit{Oyewole v. Standard Bank of Nigeria Ltd} (1962) All N.L.R. page 32; \textit{Ashubiojo v. AC Ltd} (1966) 2 All N.L.R. page 203; \textit{Aderibigbe v. National Bank Nigerian Ltd} (1977) 7 C.C.H.C.J. page 1401.
The learned Counsel for the plaintiff conceded that his claim is founded in contract. In Halsbury’s *Laws of England*, Volume II, (3ed), paragraph 388, there is the following passage: “In actions of tort which are in substance founded upon contract and might have been brought in contract the same principle applies.” The same was held in *Khartoum v. Holland (W.A) Lines v. Bank of West Africa Ltd* (1961) 1 All N.L.R. Part 2 page 318 at 323.

In the case of *Marzetti v. Williams* (1830) 1 Bing N.C. 198 it was held that a breach of a duty by a banker to pay a customer’s cheque was a breach of Contract.

In conclusion I cannot resist the temptation to refer to the *Gibbons v. Westminster Bank Ltd* [1939] 3 All E.R. 577 which have been followed so many times by Courts in Nigeria on the quantum of damages.

In the result I hold that plaintiff not being a trader or a person in business and not having proved any special damages is entitled only to nominal damages.

Mr Ibegbue has suggested that if I do not find that the plaintiff is entitled to nominal damages, I should award him N5,000. Nominal damages are damages to such a small amount as to show that they are not intended as any equivalent or satisfaction to the party recovering them. They are given when the plaintiff in an action for an invasion of his right establishes his rights but does not show that he has sustained any damages (see *Beaumont v. Greathead* (1846) C.B. 494.

In the circumstances of this case I award in favour of plaintiff the sum of two hundred and fifty naira which I consider nominal enough.

I shall hear the parties on costs.

Miss Azigbo: I ask for N500. The out of pocket is N110.

Mr Osinusi: I offer N50.

Court: I award in favour of the plaintiff costs assessed at N200.
Federal Republic of Nigeria v. Lawal

HIGH COURT OF OYO STATE
ADIO J
Date of Judgment: 11 FEBRUARY 1982
Charge No.: I/38C/80

Banking – Dishonoured cheques (Offences) Act, 1977, No 44 – What prosecution must prove

Facts

The accused charged with a one count charge for issuing a cheque which was dishonoured contrary to Dishonoured Cheques (Offences) Act, 1977, No. 44. The accused in defence, explained that he was expecting some money to be deposited into his account by a friend of his; which was not done, and it was on this expectation that he issued the cheque.

Held –

1. It is not enough for an accused charged with the offence under section 1 of the Act, only to say that at the time he issued the cheque he believed that some money was in his account from which the cheque could be honoured or that there was an arrangement whereby he would overdraw his account to the extent that would enable the cheque to be honoured.

2. The belief of the accused that sufficient money was available in his account for the payments of the amount for which he had power to overdraw his account must be based on reasonable ground. The overdraft facility must have been actually granted by the bank and it is not something to be assumed.

Accused found guilty and convicted.
Cases referred to in the judgment

Nigerian

Lawal v. R (1963) 1 All N.L.R. 175 at 178

Foreign

COP v. Cartman (1896) 1 Q.B. 655

R v. Parker 2 Mood 1


Counsel

For the state: Olufon

For the accused: Akinrinade

Judgment.

ADIO J: The charge preferred against the accused was that he, on or about the 17th day of March, 1978, at Kudeti Area Ibadan, issued a National Bank Cheque No. BN-P131326 for the sum of ₦360 to one Tirimisiyu Aniso which was dishonoured contrary to and punishable under section 1 of the Dishonoured Cheques (Offences) Act, 1977, No. 44. The accused pleaded not guilty to the charge.

The prosecution led evidence that on the 2nd day of February, 1978 one Tirimisiyu Aniso (1st PW) sold some clothes to the accused. The accused asked the first p.w. to come for the money (₦360) the following day. The promise was not kept as the PW1 did not meet the accused when he called at the house of the accused. When the first PW, subsequently saw the accused, the accused told the first PW, that he wanted to collect some money from somewhere. On 17th March, 1978 after the first PW had expressed his dissatisfaction over the delay in paying for the clothes, the accused issued a National Bank cheque No. BN-P131326, exhibit D, for the sum of ₦360 in the name of the first PW and gave it to him. The first PW presented the cheque to the National Bank, New Court Road, Ibadan. The cheque was not honoured and it was returned to the first PW with the remark “Represent.” When the first PW informed the accused about
it, the accused asked the first PW to be patient as money would be paid into his (accused’s) account. The cheque was again presented, for payment, to the bank on 22nd May, 1978, it was not honoured and the first PW was told that there was no fund in the account of the accused from which the cheque could be paid. The first PW informed the accused what happened. The first PW made a report of the incident to the police. Eventually, the accused paid the whole N360 to the first PW in cash on the 23rd September, 1978.

The second PW, SA Alebiosu, was an employee of the National Bank, New Court Road, Ibadan. He told the court that the accused was a customer of the bank and that the number of the current account of the accused was 2650. His evidence on the situation of the account on the two occasions that the cheque was presented for payment was, inter alia as follows:

“Sometime a cheque for N360 issued by the accused was presented for payment. At the time the cheque was presented for payment only N2.10k (two naira, ten kobo) was the balance in the account. The bank returned the cheque unpaid. The word ‘Represent’ was written on the cheque. When the word ‘Represent’ is used it is to enable the customer to make fund available in his account for the cheque to be paid if represented. When the cheque was represented again the balance in the current account of the accused was still N2.10k (two naira, ten kobo). The bank had no alternative but to write ‘Refer to Drawer’ on the cheque which signified that the customer had no fund in his account in the bank from which the amount on the cheque could be paid.”

The witness added that the account of the accused, was semi-dormant in March, 1978, that is, that the account was not operated as there was no money paid in or paid out. He produced a statement of account, exhibit A, and pointed out that there was no further entry beyond March, 1978 as the accused did not take any money out or pay any money in.

The accused himself identified the cheque in question as the cheque issued by him. The cheque which the accused issued in favour of the first PW was dated 17th March, 1978,
and was for the sum of N360. The accused admitted that on the day that he issued it and gave the cheque to the first PW, he (accused) did not have N360 in his bank account. He also confirmed that the first PW informed him when the cheque was dishonoured and endorsed “Represent” and when it was dishonoured and marked “Refer to Drawer.”

The evidence of the first PW that the accused issued the cheque in question to him for the purpose of paying N360 representing the purchase price of the clothes which he sold to the accused is true and I accept it. I also accept, as true, the evidence of the second PW that at the times that the cheque was presented at the bank for payment, the accused had only the sum of N2.10k as balance in his account. In short, the fund in the account of the accused at the material time was not sufficient. In view of the evidence before me, I make the following findings of fact:–

(a) That the accused issued cheque No. BN-P131326 dated 17th March, 1978 for the sum of N360 in favour of the first PW, Tirimisiyu Aniso;

(b) That the cheque, when presented for payment not later than three months after the date of the cheque, was dishonoured on the ground that insufficient funds were standing to the credit of the accused in the bank on which it was drawn; and

(c) That the cheque aforesaid was issued by the accused to the first PW for the purpose of paying for the clothes which the accused bought from the first PW.

There was no evidence that the accused had authority of the bank to overdraw on his account. Indeed, there was no such indication on the part of the bank. Each time the cheque was presented and there was insufficient fund in the account of the accused, the bank dishonoured the cheque. The accused has not challenged or disputed the power of the bank to dishonour the cheque. The accused, therefore, knew that he had no authority to overdraw on his account.
When the first PW sold the clothes and delivered them to the accused, the first PW was entitled to be paid in cash. I say this because the evidence and the circumstances of this case showed that there was no arrangement whereby the accused was allowed to buy the clothes and to pay for them at a future date or in instalments. Indeed, the evidence was that the accused asked the first PW to come for his money the following day. Rather than pay the first PW in cash, the accused induced him to take a cheque instead. If nothing is said to the contrary, the legal implication is that the giver of a cheque represents that it will be honoured. See *R v. Turner* [1974] A.C. 357 at page 367. The accused at one stage told the court that he post-dated the cheque. When cross-examined by the learned state Counsel, the accused admitted that he did not post-date the cheque. He said that he dated the cheque 17th March, 1978, and that 17th March, 1978 was the day on which he gave the cheque to the first P.W. The true position is, from the evidence before me, that the cheque was not post-dated. In any case, the giving of a post-dated cheque implies a representation that it will be paid on the due date. See *R v. Parker* 2 Mood. 1. When a person gives a post-dated cheque on the bank in which he has an account, for more than he has in his account, his cheque does not mean that he has money at the bank, but that it will be paid when presented. See *Lawal v. R* (1963) All N.L.R. 175 at page 178. The cheque was presented after 17th March, 1978 on two different occasions namely April and May, 1978 but it was dishonoured by the bank. What the accused gave to the first PW was a dud cheque. A dud cheque is a cheque which is dishonoured because the drawer has insufficient or no funds in his bank account and has no authority to overdraw. In effect, the purported settlement of the debt (₦360 which represented the purchase price of the clothes) was ineffective. Indeed, the accused eventually had to pay the amount in cash to the first PW. Subject to what the court has to say about the provision of subsection (3) of section 1 of the Dishonoured Cheques (Offences) Act, 1977.
as it applies at all, to the facts of this case, what the accused did was contrary to section 1(1)(b) of the Dishonoured Cheques (Offences) Act, 1977 which provides, *inter alia*, that any person who obtains credit for himself, by means of a cheque that when presented for payment not later than three months after the date of the cheque, is dishonoured on the ground that no funds or insufficient funds were standing to the credit of the drawer of the cheque in the bank on which the cheque was drawn, shall be guilty of an offence.

There is, however, subsection (3) of section 1 of the Act which provides that a person shall not be guilty of an offence under the section if he proves to the satisfaction of the court that when he issued the cheque he had reasonable grounds for believing, and did believe in fact, that it would be honoured if presented for payment within the period specified in subsection (1) of the section. The learned Counsel for the accused argued that though the prosecution had established:

1. the accused obtained credit for himself;
2. the accused issued a cheque in furtherance of the transaction; and
3. the cheque was dishonoured.

The provisions of subsection (3) of section 1 of the Act were applicable as the accused had proved that he had reasonable grounds to believe that the cheque would be honoured. The learned Counsel cited *COP v. Cartman* [1896] 1 Q.B. 655 and submitted that the attitude of the mind of the accused was an element to be taken into account by the court in deciding the punishment to be imposed. The learned State Counsel submitted, in effect, that the provisions of subsection (3) of section 1 of the Act did not apply as the accused had not satisfied the court that at the time that he issued the cheque he had reasonable grounds for believing, and did believe in fact, that it would be honoured if presented for payment within the time specified in subsection (1) of the Act.
The question of what punishment should be imposed does not arise at this stage. The crucial question is whether the circumstances in which the accused issued the cheque in question and gave it to the person who sold the clothes to him in purported payment of their price, were such that the provisions of subsection (3) of section 1 of the Act applied. In this connection, it is necessary to refer to the evidence of the accused which was, *inter alia* as follows:

“On the day I gave Tirimisiyu the cheque I did not have ₦360 in my bank account. I told Tirimisiyu that I was expecting money from one Alhaji Mohammed Akindele. He asked me to give him the cheque so that he could be sure of being paid. After I gave the cheque to Tirimisiyu he came to me and said that he took the cheque to the bank and that the cheque was not honoured because there was no money in my account. At that stage I did not know whether there was sufficient money in the bank. Alhaji Akindele obtained my account number to enable him to pay money into my account.”

The allegation of the accused that when he gave Tirimisiyu (first PW) the cheque he told him that he was expecting money from Alhaji Akindele, was denied by the first PW. What the accused said in the statement (exhibit C1) which he made to the police was, *inter alia*, as follows:

“I know Tirimisiyu selling cloth and caps around and who also has a shop around Gege in Ibadan. On 15th March, 1978 I bought lace materials from Tirimisiyu worth three hundred and sixty naira (₦360) and I gave him National Bank Cheque for this amount to be cashed by him on 17.3.78 from the bank.”

The foregoing, quoted from the statement which the accused made to the police, showed that the allegation that the accused informed the first PW, when he (accused) gave the first PW the cheque, that he (accused) was expecting money from Alhaji Akindele was not true and I reject it. The cheque was dated 17th March, 1978 and, according to the statement of the accused quoted above, it was to be cashed by the first PW on 17th March, 1978 that is, on the same date, from the bank. In the same way, the allegation of the accused that the first PW took the cheque to be sure of being
paid is also not true and I reject it. Moreover, the evidence of the first PW, which I have no good reason to doubt and which I accept, was that the accused asked him to come for the said money on the day following the day on which the clothes were delivered to the accused. The first PW went to the house of the accused on the said day but did not meet him. When the first PW was tired of the delay in effecting payment for the clothes he made it known to the accused. It was then that the accused gave the first PW a cheque. The circumstances in this case were such that the accused was required or expected to pay for the clothes when they were delivered to him or within a reasonable time thereafter. The accused had no money at the material time with which he could pay and the allegation that he told the first PW that he was expecting money from somewhere and the issuing of the dud cheque to the first PW were only some of the clever devices used to put off the first PW and thus gain time which would enable him to pay at his own convenience.

The next question is whether the accused has proved to the satisfaction of the court that when he issued the cheque in question in this case, he had reasonable grounds for believing, and did believe in fact, that it would be honoured if presented for payment not later than three months after the date of the cheque. It is not enough for an accused, “charged with an offence under section 1 of the Act merely to say that at the time that he issued the cheque he believed that some money was in his account from which the cheque could be honoured or that there was an arrangement whereby he could overdraw his account to the extent that would enable the cheque to be honoured. The belief of the accused that sufficient money was available in his account for the payments of the amount for which the cheque was issued or that he had power to overdraw his account must be based on reasonable grounds. The overdraft facility must have been actually granted by the bank and it is not something to be assumed. When the belief that the cheque will be honoured if presented for payment is based on payment of money into
the account of the accused by person or persons owing him,
the circumstances should be such that it was reasonable for
the accused to expect that such payment would have been
made into his account before the cheque was duly presented
for payment. Unless the foregoing conditions are satisfied it
cannot be said that the accused had reasonable grounds for
believing, and did in fact, believe that the cheque would be
honoured.

In this case, the evidence of the accused was that he did
not have N360 in his account at the time that he issued the
cheque. I have given consideration to the allegation of the
accused that the first PW took the cheque from him so that
he (first PW) might be sure that he would be paid and I have
found that the allegation was not true. I rejected it. The ac-
cused also alleged that he informed the first PW that one Al-
haji Akindele was owing him and that he was expecting
money from the said Alhaji Akindele. The first PW denied
that he was informed of anything of that nature. I have no
good reason to doubt the evidence of the first PW on the
point and I accept it. The allegation about the alleged debt
was that one Alhaji Akindele was owing the accused over
N1,400 There was an agreement relating to the money but
the accused did not bring it to the court and did not produce
it. Alhaji Mohammed Akindele obtained his bank account
number to enable him to pay the money into his (accused’s)
account. Alhaji Mohammed Akindele testified for the ac-
cused. According to him, he owed the accused the sum of
N1,700, He was to send it in January, 1978 through his bank
in Zaria to the account of the accused in Ibadan. He had
some financial difficulties and he sent a message to that ef-
f ect to the accused in April, 1978. He eventually paid the
accused N1,000 in cash in May, 1978 and paid the sum of
N700 in July, 1978. The name of the bank in which the ac-
cused had an account and the number of the account of the
accused in the bank are two vital things which, in my view
should be known to the defence witness, Alhaji Mohammed
Akindele, if, in fact, he was to send money through his bank

in Zaria to the account of the accused in Ibadan. However, the evidence of the witness, under cross-examination by the learned State Counsel, was, *inter alia* as follows:

“I can’t remember the name of the bank, in which the accused had an account. I can’t remember the number of the account of the accused.”

The conclusion to which I have come, from the evidence before me, is that there was no arrangement of any kind for the payment of any money by the witness (Alhaji Mohammed Akindele) or any person or persons into the account of the accused. The alleged debt owed by the said witness to the accused was a ruse; it was an afterthought. The evidence of the first PW was that the accused paid him the whole ₦360 on the 23rd September, 1978. The accused, in the statement which he made to the police, alleged that he paid ₦160 cash to the first PW on the 14th June, 1978 and that he promised to pay the balance on the 2nd July, 1978. Whatever is the correct position out of the two versions, it shows that the allegation about Alhaji Mohammed Akindele owing the accused the sum of ₦1,700 out of which he paid ₦1,000 in cash to the accused in May, 1978 could not be true. If Alhaji Akindele paid ₦1,000 in cash to the accused in May, 1978 why did the accused not pay the ₦360 which he owed the first PW in full in June, 1978? Instead, all he was able to pay, if his evidence is accepted, was ₦160 and he promised to pay the balance on the 2nd July, 1978. I reject the evidence of the accused and his witness Alhaji Mohammed Akindele that the said witness was to pay money into the account of the accused in January, 1978 because the evidence is not true. The accused has not proved to the satisfaction of this Court that when he issued the National Bank Cheque No. BN-P131326 (exhibit D) for the sum of ₦360 he had reasonable grounds for believing, and did believe in fact, that it would be honoured if presented for payment within the period specified in subsection (1) of the Dishonoured Cheques (Offences) Act, 1977. His oral evidence was that he did not have ₦360 to his credit in his account when he
issued the cheque, and according to the statement which he made to the police the cheque was to be cashed by the first PW from the bank on the 17th March, 1978, which was the date of issue that the cheque bore. The prosecution has proved its case against the accused beyond reasonable doubt. I find the accused guilty of the charge and I convict him accordingly.
State v. Esho

HIGH COURT OF OYO STATE

APARA J

Date of Judgment: 26 July 1982

Banking – Cheques – Issuing dishonoured cheque – Issuing cheque without sufficient funds

Facts

The accused was charged with a two count charge of obtaining money by false pretence contrary to section 359 of the Criminal Code, Volume 1, Cap 28, Laws of Western Nigeria, 1959, and issuing a dishonoured cheque contrary to and punishable under section 1(i)(b) of the Dishonoured Cheques (Offences) Decree No. 44 of 1977. The accused testified that he had an expectation that his bank will credit his account with some funds since the bank has promised to grant his overdraft facilities, before he issued his cheque.

Held –

1. If the accused person had reasonable grounds to believe that his cheque would be paid when he issued it, then he would not be guilty.

Accused discharged and acquitted.

Counsel

For the state: Falola

For the accused: Adedeji

Judgment

APARA J: The accused in this case was originally charged as follows:

STATEMENT OF OFFENCE – 1ST COUNT

“Obtaining money by false pretence, contrary to and punishable under section 359 of the Criminal Code, Volume 1, Cap 28, Laws of Western Nigeria, 1959.”
PARTICULARS OF OFFENCE

“ADISA ESHO (m) on or about the 20th day of March, 1978, at Ile-Ife, in the Ife Judicial Division, with intent to defraud, obtained from Samuel O. Ajayi (m) a University of Ife cheque No. 010441 for the sum of N4,800 by falsely pretending that he had for sale a Datsun car which would be delivered to the said Samuel O. Ajayi within two weeks.”

STATEMENT OF OFFENCE – 2ND COUNT

“Issuing a dishonoured cheque, contrary to and punishable under section 1(b) of the Dishonoured Cheques (Offences) Decree No. 44 of 1977.”

PARTICULARS OF OFFENCE

“ADISA ESHO (m) on or about 28th day of September, 1978, at Ile-Ife, in the Ife Judicial Division, obtained credit for himself by means of a cheque, National Bank of Nigeria Ltd, Ilesa Branch, cheque No. 056570 in the sum of N4,800 issued to Mr Samuel O. Ajayi and made payable to the University of Ife, Ile-Ife, which cheque was dishonoured on the grounds that insufficient funds were standing to his credit in the said bank.”

When the trial of the case opened, Mr Adedeji, learned Counsel for the accused, successfully raised a plea of autrefois acquit on his behalf in respect of the first count. This having been disposed of, the trial of the accused continued on only the second count.

The case for the prosecution was that Samuel Ajayi, an Administrator in the University of Ife gave the sum of N4,800 to the accused on the 20th March, 1978 to purchase a car from him. At that time, the accused was a motorcar dealer. The accused promised to deliver the car to Samuel Ajayi within a period of two weeks. When the period elapsed and the accused failed to deliver the car as promised, Samuel Ajayi demanded his money back. The matter became protracted until August, 1978 when the accused gave Samuel Ajayi a cheque dated 28th September, 1978. This cheque was however dishonoured by his bank. One Olalekan Adio, an accountant with the National Bank in which the accused operated and still operates his business account, testified...
a for the prosecution. The gist of his evidence was that although the accused operated an account with his bank at the material time of this case, he enjoyed no overdraft facilities there, and this was why his cheque which was given to Samuel Ajayi was dishonoured. This witness however admitted that at the material time of this case, he was neither the manager nor the accountant in the bank in which the accused operated his account. He only testified on the strength of bank documents available to him. This, in brief, was the gravamen of the prosecution case.

b The accused, on his part, admitted that he took ₦4,800 from Samuel Ajayi and promised to deliver a car to him. His defence, however, was that he paid this money to a company in Lagos through which he usually got his allocation of motor vehicles which he sold to his customers. This company suffered some reverses and a total of ₦45,600 which he, the accused, paid to the company in Lagos was completely lost, consequently, his own company in Ife suffered a lot of reverses from which he is still to recover. In effect, he could not fulfil his promise to deliver a car to Samuel Ajayi. However, on the 1st of August, 1978 he issued and gave his cheque to Samuel Ajayi for ₦4,800. Although this cheque was issued on the 1st of August, 1978, he post-dated it to 28th September, 1978. Before doing this, he had negotiated a private arrangement with Alhaji Adisa Nosiru his bank manager, who promised to grant him overdraft facilities. His turnover in September, 1978, according to exhibit A, a photostat copy of his account at his bank, was ₦11,200. His defence was that with this turnover and the promise of his bank manager Alhaji Nosiru, he had all reasonable hope when he gave a cheque for ₦4,800 to Samuel Ajayi that the cheque would be honoured.

c The submissions of his Counsel are on record. In my view the case against the accused is built on a very shaky foundation. To start with, the accountant who was paraded before this Court by the prosecution was not the actual officer the
accused dealt with in the bank. That accountant admitted much in his evidence for he said he was only testifying on the basis of bank documents available to him. It was because of this that he said that the bank did not extend credit facilities to the accused. The actual bank manager with whom the accused negotiated an arrangement for overdraft facilities was not brought to court by the prosecution to confirm or deny this point. Obviously, the accused cannot be compelled to bring this bank manager to court. If that was done, then it would have been like asking him to prove his innocence. That would be against the spirit of the law which makes it imperative for the prosecution, not merely to prove the guilt of the accused but to prove it beyond all reasonable doubts. This brings me to the Dishonoured Cheques (Offences) Decree No. 44 of 1977 under which the accused has been charged: section 3 of that Decree provides that if the accused person had reasonable grounds to believe that his cheque would he paid when he issued it, then he would not be guilty. The accused testified in this Court that he struck an arrangement with his bank manager to grant the overdraft facilities, and that he was relying on this arrangement when he issued the cheque for ₦4,800 to Mr Samuel Ajayi. This part of his testimony has not been discredited in any way by the prosecution. I therefore accept it. On the strength of this section 3, I find that the case against the accused has not been proved. The accused is therefore found not guilty. He is discharged and acquitted.