**AFRICAN CONTINENTAL BANK LIMITED**

**v.**

**FESTUS SUMOILA YESUFU**

IN THE SUPREME COURT OF NIGERIA

10TH FEBRUARY, 1978

SUIT NO. SC 288/1976

**LEX (1978) SC 288/1976**

OTHER CITATIONS

3PLR/1978/2 (SC)

(1978) 2 S.C. 93

**BEFORE THEIR LORDSHIPS**

DARNLEY ARTHUR ALEXANDER, C.J.N.

GEORGE SODEINDE SOWEMIMO, J.S.C.

MUHAMMED BELLO, J.S.C.

**BETWEEN**

AFRICAN CONTINENTAL BANK LIMITED – Appellant

AND

FESTUS SUMOILA YESUFU - Respondent

**ORIGINATING COURT(S)**

HIGH COURT OF BENIN CITY

**REPRESENTATION**

Mr. M. A. AGBAMUCHE, Esq. for the Appellants.

Dr. M. ODJE for the Respondent.

**ISSUES FROM THE CAUSE(S) OF ACTION**

AGRICULTURE AND FOOD LAW:- Export-based agricultural enterprise – Banking and financial services connected therewith – Duties owed by banker distinguished from courtesies – Legal implications for agricultural sustainability

BANKING AND FINANCE:- Banker-customer relations - Letter of credit – Distinction from bills of exchange contemplated under sections 2 and 3 of the Bills of Exchange Act, Cap. 21, LFN 1958 – Duty of a banker when a bill is dishonoured and when a bill is underpaid – When liability would attach to banker therefrom

BANKING AND FINANCE:- Banker-customer relations - Revocable credits – How determined – Whether a credit is presumed to be revocable unless it is otherwise stated on the face of it – Whether dishonor of a letter of credit is evidence that it is a revocable instrument – Onus of proving that an issued credits were irrevocable - On whom lies – Legal effect

BANKING AND FINANCE:- Banking practices - Bill of exchange – Meaning of under sections 2 and 3 of the Bills of Exchange Act, Cap. 21, LFN 1958 – Distinction between dishonor of bill of exchange and its under-payment - Implications for duty of a banker to give notice of a dishonor of a bill to his customer

BANKING AND FINANCE:- Banking transactions - Claim for sum of money outstanding in current account as a debt - Claim for interest from the date of the writ until judgment or payment – How treated

COMMERCIAL LAW:- COMMERCIAL TRANSACTIONS:- Agency – Role of bank in the discounting of an international letter of credit – Where there is under-payment as distinct from dishonoring of instrument – Duty of bank to customer – Effect of failure thereto

DEBTOR AND CREDITOR:- Banker – Recovery of loan arising from overdraft – Where based on transactions and interest connected to bills of exchange or letter of credit – Duties of bankers as distinct from courtesies extended to customer – Distinction between bills of exchange and letters of credit under section 2 and 3 of the Bills of Exchange Act, Cap 21, LFN 1858 – Distinction between dishonor of bills and underpayment of bill - Legal implications

TORT AND PERSONAL INJURY LAW:- Negligence - Duty of Banker to give notice of dishonour of a bill - Ss. 2 and 3 of Bills of Exchange Act Cap. 21 1958, Laws of the Federation of Nigeria – Whether applies to every bill - Duty of customer to prove instrument in question was a bill – Effect of failure thereto

**PRACTICE AND PROCEDURE ISSUES**

EVIDENCE:- Admission via documentary evidence – Construction of

EVIDENCE:- Presumptions - Letters of credit presented but not honoured – Whether raises presumption that are revocable instruments

INTERPRETATION OF STATUTE:- Ss. 2 and 3 of Bills of Exchange Act Cap. 21 1958, Laws of the Federation of Nigeria – Meaning of “Bill of Exchange”

WORDS AND PHRASES:- “Bills of Exchange” – meaning of

**MAIN JUDGMENT**

**BELLO, J.S.C.** (Delivering the Judgment of the Court):

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 Omoregie 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 Appellant 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 PWA, 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 over-draft 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 per cent 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 Respondent’s 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 and 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 under payment. 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 21 at July, 1971, Exhibit I OA, from the Respondent to the Appellants and the evidence relating to the discussion the Respondent had with the Solicitor of the Appellants (PW.4) 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 defendant.”

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 (PWA) to pay the debt, contended that there is 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 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 emphasized 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 to be 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 nut-shell: two wit-nesses (PW.1 and PW.6), 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:Od 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 settled 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 settled 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 Appellant’s claim in its entirety on the only ground that the Appellant did not give notice of dishonour or under-payment 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 under-paid 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 3 Halsbury’s Laws of England, 4th Ed. p.81 para. 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 is 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 sub-sequent dishonour by non-payment unless the bill shall in the mean-time 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 identity the types of bills that are covered by the pro-visions of sections 47, 48 and 49 of the act. “Bill” as defined by section 2 of the Act means “bill of exchange”, and section 3 provides:

“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; e.g. 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 Maulearg). 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 Ex-change 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 their 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.

P.W.1 testified as follows:

“On the 29th of January 1972 the debit was £161,185:4s: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 turnover, exchange and commission on his letter negotiated.

That evidence was reinforced by PWA, 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 3 Digest (Replacement) p.285 para. 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 3 Halsbury’s Laws of England. 4th Ed. at p.100 note 4, Chitty on Contracts Vol.2, 23rd Ed. para. 433 note 6 and Paget’s Law of Banking 8th Ed. p.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 Appellants 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 3 Halsbury’s Laws of England 4th Ed. p.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:

“LD/W/2/12 (LEGAL DEPARTMENT)

The Managing Director,

Sarah AND Yesufu Trading Company, P.O. Box 151,

Benin City.

5th July, 1971

(For the attention of F. S. Yesufu Esq.) ,

Dear Sir,

FINAL NOTICE

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 (Exhibf.10A) dated 21st July, 1971, reads:

‘The Senior Solicitor,

African Continental Bank Ltd., Head Office,

P.M.B. 2466, Lagos.

Dear Sir,

21st July, 1971.

Re: My Overall Indebtedness

I intended 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,

for: SARAH AND YESUFU TRADING COMPANY

(signed)

F. S. Yesufu Managing Director.

It is also relevant to refer to the evidence of the Solicitor (PWA) 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, 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 installment of £20,000 (N40,000)”

‘The defendant by his 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 (N20,000) 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 off-set 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 I OA, 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 (Nigeria) Ltd. v. Chief KO. Eyuafe (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 p.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 PW.1 on those bills reads:

“In exhibits 5 and 7, against 29th October 1969 there is an entry marked “OVER PMT OF N. YORK BILLS” accepted for collection. Debit £17,612:8:10d. 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 El7,612:810d 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 andif 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 PW.1 establishes that by their breach of contract with the Respondent, the Appellants caused a loss of £17,612:8s10d 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 N287,145.52 with interest at the rate of 9 per cent from the 5th day of February, 1972, until the 17th day of December, 1974. We arrive at the sum of N287,145.52 as follows:

Amount claimed: £161, 185:04s:00d

Less under-payment 17. 612:08s:10d £143.572:155: 02d

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 N500 and costs of this appeal assessed at N161.

Appeal allowed.