**AKINSANYA**

**v.**

**UNITED BANK FOR AFRICA LTD**

IN THE SUPREME COURT OF NIGERIA

10TH JULY, 1986

SC.95/1985

**LEX (1986) - SC.95/1985**

# OTHER CITATIONS

# 2PLR/1985/13 (SC)

(1986) NWLR (Pt. 35)273

**BEFORE THEIR LORDSHIPS:**

MOHAMMED BELLO, J.S.C. (Presided)

KAYODE ESO, J. S. C. (Delivered the leading judgment)

MUHAMMADU LAWAL UWAIS, J.S.C.

DAHUNSI OLUGBEMI COKER, J.S.C.

ADOLPHUS GODWIN KARIBI-WHYTE, J.S.C.

SAIDU KAWU, J.S.C.

CHUKWUDIFU AKUNNE OPUTA, J.S.C.

**BETWEEN**

A. M. O. AKINSANYA (Alias M. O. AKINS) (Trading under the name and Style of ROCY MERCHANTS COMPANY)

AND

UNITED BANK FOR AFRICA LIMITED

**ORIGINATING COURT**

COURT OF APPEAL, LAGOS JUDICIAL DIVISION (Coram: Nnaemeka-Agu JCA, Uthman Mohammed, JCA, and Kutigi JCA)

LAGOS STATE HIGH COURT (Yaba Jinadu J., Presiding),

**REPRESENTATION**

A. K. KASUNMU (with him O. A. ONANUGA (Mrs.) - for the Appellants

F. R. A. WILLIAMS, SAN with him Dr. O B. AKIN-OLUGBADE - for the Respondents

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

ADMIRALTY AND SHIPPING/MARITIME – Admiralty jurisdiction – transaction arising from documentary letter of credit – whether amounts to a matter relating to the carriage of goods by sea within the exclusive admiralty jurisdiction of the Federal High Court.

BANKING AND FINANCE:- Letters of credit transaction – Essentials of

COMMERCIAL LAW - CONTRACT – Exclusion clauses – current rule applicable to the enforcement of exclusion of clauses as stated by the House of Lords in Photo Productions Ltd. v. Securicor Transport Ltd. (1980) AC 827

INTERNATIONAL TRADE:– Documentary credit transaction – Nature of obligation of a confirming bank.

INTERNATIONAL TRADE:– Documentary letter of credit – Contract between the issuing bank and the confirming bank – whether there is privity of contract between the buyer and the issuing bank with respect to same.

**PRACTICE AND PROCEDURE ISSUES**

JUDGMENT AND ORDER**:-** Interlocutory or final decision - Test for determining;

COURT:– Federal High Court – Purpose of establishing same.

**MAIN JUDGEMENT**

**KAYODE ESO, J.S.C. (Delivering the leading judgment):**

This appeal involves a most important aspect of commercial law. It deals with Bankers Commercial Credits, an aspect of law that arises in connection with international trade. From in between the first world war, and the second world war, and more so, since the second world war, financing of international trade has been done mainly through Bankers. This is necessary, especially as international commerce has been instrumental in squeezing "the world into a commercial size, and thus making international trade and commerce indeed much easier than domestic commerce. As far back as towards the end of the second world war, Scrutton L.J. had stated principle of confirmed credit with adequate clarity. The Lord Justice said, of commercial credit, in Guaranty Trust Company of New York v. Hannay (1918) 2 K.B. 623.

"The enormous volume of sales of produce by a vendor in one country to a purchaser in another has led to the creation of an equally great financial system intervening between vendor and purchaser, and designed to enable commercial transactions to be carried out with the greatest money convenience to both parties. The vendor, to help the finance of his business, desires to get his purchase price as soon as possible, after he has despatched the goods to his purchaser; with this object, he draws a bill of exchange for the price, attaches to the draft the documents of carriage and insurance of the goods sold and sometimes an invoice for the price, and discounts the bill - that is, sells the bill with documents attached to an exchange house. The vendor thus gets his money before the purchaser would, in ordinary course, pay; the exchange house duly presents the bill for acceptance, and has, until the bill is accepted, the security of a pledge of the documents attached and the goods they represent. The buyer on the other hand, may not desire to pay the price till he has sold the goods. If the draft is drawn on him, the vendor or exchange house may not wish to part with the documents of title till the acceptance given by the purchase is met at maturity. But if the purchaser can arrange that a bank of high standing shall accept the draft, the exchange house may be willing to part with the documents on receiving the acceptance of the bank. The exchange house will then have the promise of the bank to pay, which if in the form of a bill of exchange, is negotiable, and can be discounted at once. The bank will have the documents of title as security for its liability on the acceptance, and the purchaser can make arrangements, to sell and deliver the goods. "

An equally clear statement of this branch of the law will be found in the case of **Pavia AND Co. S.P.A. v. Thurmann-Nielsen** **1952 2 Q. B. 84** where Denning L.J., as he then was, dealt with the increasing sale of goods across the world. He said:-

"The sale of goods across the world is now usually arranged by means of confirmed credits. The buyer requests his banker to open a credit in favour of the seller, and in pursuance of that request the banker, or his foreign agent, issues a confirmed credit in favour of the seller. This credit is a promise by the banker to pay money to the seller in return for the shipping documents. Then the seller, when he presents the documents, gets paid the contract price. The conditions of the credit must be strictly fulfilled, otherwise the seller would not be entitled to draw on it. "

However, before I discuss the law further, I would like to set out the facts of this case, then deal, first with one matter arising out of an application by Chief Williams (S.A.N.) learned Senior Advocate representing the Respondents, that is, the United Bank for Africa Ltd., in this case, seeking enlargement of time within which the Respondents may file their notice of Appeal on the decisions by the learned Justices of the Court of Appeal on the issue of jurisdiction, of the trial Court, to deal with this matter.

A.M.O. Akinsanya trading in the name and style of Rocky Merchants, a company with headquarters in Lagos, having decided to import 10,000 metric tons of cement, struck a deal with a Swiss company, known as the Association for Economicatone Industrial Development in the Middle East and African Country (otherwise known as ASDECAMO, for short) and after the deal, he approached and contracted with the United Bank for Africa Ltd. to open a letter of credit for the transaction in favour of ASDECAMO. ASDECAMO will hereinafter in this judgment, be referred to as the Swiss Company or ASDECAMO indiscriminately.

Hereinafter, in this judgment, A.M.O. Akinsanya, aforesaid, will be referred to as the Appellant, while United Bank for Africa will be referred to as the Respondent. The letter of credit was for $570,000 and the application for the letter of credit was tendered as Ex.B. The particulars tendered are that the letter of credit was to be "irrevocable/confirmed " and the amount $570,000 was to be available to the Swiss Bank at sight once:-

"accompanied by the following documents ..… combined Certificate of Origin, value and invoice "FORM C " in triplicate including original.

Commercial invoice.

Certificate of Origin.

Insurance Covers by consignees.

Packing List.

Full set of clean on board Bills of Lading, issued to order and endorsed in blank marked 'Fragile Prepared/Collected detail latest September 3rd 1978' "

One of the very important conditions is:-

"It is understood that our engagement (that is Appellant's engagement) to pay shall continue in force notwithstanding any changes in our and/or your constitution and that no responsibility is to attach to yourselves or your correspondents as to the documents, beyond seeing that they purport to be in order. "

It was on the strength of this application, that the Respondent, after sending a cable, dated 31st July 1978, to the Banque Pour Le Commerce Int. S.A. a Swiss Bank, hereinafter referred to as the Swiss Bank, confirmed that letter of credit by Exhibit C.

Two of the important conditions for the payment of the Letter of Credit, which affect this case, are:-

(i) presentation of full set of 'clean on board' Bill of Lading;

(ii) shipment of the goods may be made either:-

(a) by Conference Line Vessel,or

(b) by non-Conference Line Vessel, but if by non-Conference Line Vessel, the shippers must present with the other documents, called for in this Credit, a photocopy of a current Ship Entry Notice in the name of the carrying Vessel duly signed by the Nigeria Ports Authority.

(iii) Bills of Lading must state that the carrying Vessel, if not registered in Nigeria, is not more than fifteen years from date of first registration. This clause is to comply with the Merchant Shipping (Amendment Decree, 1978 which takes effect from 13th August, 1978 and prohibits foreign vessel more than 15 years from trading in or from Nigerian waters ".

Now, this is important; for the main complaint of the Appellant in this case is that Ex. D., which is the Bill of Lading was not signed by ASDECAMO but by Bryanston Italiana SRL Pescara/Italy. And that words "conference MED " were typed on a “west Africa joint service " paper. Indeed the sum total contention of the appellant was that Ex. D was a forgery and it was upon the presentation of this forged document that ASDECAMO was paid the sum of $570,000.00.

In an ordinary contract action, what happened to the cement must necessarily have been of interest but this is not necessarily relevant here for in determination of this type of case, as would soon be seen, only documents are relevant. There would have been no problem however, if the appellant received the goods and ASDECAMO was paid for them, as per agreement.

However, no cement was shipped.

There was no ship by name ’Thomas Mann’ the name of the Vessel which was inserted in Exhibit D, as the ocean ship that carried the cement. The so-called ’Thomas Mann’ was disclaimed by Conference Line. It did not belong to them nor, indeed, to any other line. The whole transaction was a colossal fraud on the Appellant. The Respondent’s enquiry yielded no useful result.

On 17th October, 1978, they sent a cablegram to the Swiss Bank as follows:-

"Natioper Paris

*Attention Department Afrique you are advised that on 21st July 1978 on Behalf of Lagos Central Clients Rockey* *Merchant Company we open a letter of Credit in favour of ASCACAM (Association Pour Le Development* *Economique et Industries En Afriwue et Moyen Orient) 1219 Le Lignon Geneva stop the L/C covered 10,000 metric* *tons of cement value US $570,000 stop PBCI BASLE Confirmed the L/C their reference 31-485/MM our LOB* *0380/1433 stop PBCI negotiated documents on 12th September 1978 stop. We hold B/Lading issue by Black Star Line* *Limited (Ghana) who are part of the UK Conference Lines stating that the cement was shipped on S. S. Thomas Mann* *which loaded at Bari Italy on 4th September, 1978 stop. The shippers are described as Bryanston Italian of Pesdara* *Italy. We now find that the UK Conference Line representatives her disclaims all knowledge of the vessel Thomas* *Mann stop Enquiries at BNL Bari indicate vessel never loaded at Bari stop Vessel has not arrived in Nigeria waters* *stop. We therefore request that you urgently advise PBCI of position and request that they contact ASDECAMO who* *purportedly Bank with Banque Populare Swiss A/C No. 949-740/0 Geneva to obtain any information that may be* *available stop. Would you also request BNP London to contact Black Star Line London office for any trade on this* *ship’s movements stop Can you also endeavour to make enquiries on Bryanston Italiana stop We await your Telex* *reply regards Foulkes.*

Midbank Lagos UBA Ltd. Head Office, Lagos

cc: Mr. Caron

Mr. Martin

Mr. Perrin "

The sum total result was a revelation that ASDECAMO had perpetrated fraud on the Appellant. Curiously though, on 18th October, 1978 the Appellant collected the shipping documents from the Respondents and signed EX J with the following endorsement.

"We have examined the document which we hereby affirmed to be acceptable in all respects. Any guarantee held in respect of any discrepancy noted or not noted may be released. Please debit our account accordingly ".

And this was signed by the Appellant. And the exhibit shows the amount involved to be $576,653! And this of course followed a letter from the Respondent to the Appellant asking the latter to call for inspection and collection of the documents

The Appellant’s evidence on this was: -

"I was requested to go to Geneva and testify before a Magisterial Tribunal on 18/10/78. I finally agreed to go to Geneva on the condition that if all the colleagues (sic) send out by U. B. A could be given to me, so also the replies there to. I asked for the photocopies that agreed ".

The Appellant sued the respondents in the High Court of Lagos State (Yaba Jinadu J.), who, after taking evidence, found against the Appellant. The Appellant appealed to the Court of Appeal and that court, in a well-considered judgment by Nnaemeka-Agu J. C. A concurred with by Uthman Mohammed and Kutigi JJ. C. A dismissed the Appellant’s appeal.

It is from this decision that the Appellant has finally appealed to this Court. In their judgment, the Court of Appeal raised for the first time the issue of jurisdiction of the trial Court. They recalled learned counsel for an address on the issue as to whether or not, this was an admiralty matter, in which case, the jurisdiction would be with the Federal High Court. Both learned counsel were under no difficult in concluding that the issues here not in admiralty, they are not matters of carriage of goods by sea, but one of an for goods in a normal contract between parties dealing with international commercial credit contract.

Nnaemeka-Agu J. C. A. dismissed this issue of lack jurisdiction in the State High Court. He said:-

"The gist of the complaint against the respondent bank is that it did not properly discharge its duty with respect to those documents with which the credit was negotiated. It was never been suggested that it was their duty to see that the goods were imported. It was a straight forward banker-customer relationship in international commercial credit transaction. I hold that it was not an admiralty matter but a bank transaction within the jurisdiction of a State High Court "

The other Justice, Uthman Mohammed and Kutigi JJ. C. A held to the contrary. Both learned counsel have appealed against this majority decision on jurisdiction. I will consider the issue of jurisdiction later. What I would wish to deal at this stage is the application by Chief Williams for an enlargement of time within which to file notice of appeal against the decision of the Court of Appeal on jurisdiction.

It is, I think better to set out the affidavit relied upon by learned counsel

"Xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx

2. The Notice of Appeal at pages 189-190 of the Record of Appeal herein was filed in the court below on the 4th day of January 1985.

3. I am informed by chief Rotimi William, and I very believe that at the time he filed the Notice of Appeal, he took the view that the appeal herein was from a final decision of the Court of Appeal, so that it was in order to file the Notice of Appeal with three months.

4. The Appellant herein has duly and punctually complied with the conditions of appeal

5. I am informed by Chief Rotimi Williams and I verily believe that it was only recently that it occurred to him that in the light of the decision of this Court in *Omonuwa v. Oshodin* SC/51/84 delivered on 1st February 1985 this Court is likely to regard the decision appealed from in this case as interlocutory and not final.

6. I am informed by Chief Rotimi Williams and I verily believe that he intends humbly and respectfully to request this Honourable Court to reconsider its decision in the aforementioned case of *Omonuwa v. Oshodin* which is reported in (1985) 2 N. W. L. R 924. The motion in support of which I swear to this Affidavit has been filed in case this

Honourable Court is not disposed to reconsider its decision aforesaid ".

On this issue, Chief Williams has filed a detailed brief, which I must say, had been of tremendously assistance in my examination of this thorny problem. And what learned counsel was saying, in effect, is that the decision of this court in *Omonuwa v. Oshodin* (1985) 2 N. W. L. R 924. Made as recently as bare as barely a year ago, would set back the movement of the law. Learned senior Advocate argued in that brief, that "unnecessary confusion, uncertainly and anomalies, would arise if the pronouncements of this *Omonuwa v. Oshodin (supra)* were followed’

In regard to proceedings and orders made by a Court of first instance, it was Chief Williams submission that this court has followed, for about 40 years, the tests laid down by Alverstone C. J in *Bozson v Altrincham* (1903) 1 Q. B. 547. That these test have been adopted in the decision of the West African Court of Appeal, *Blay v. Solomon* 12 W. A. C. A 177, and confirmed by the Federal Supreme Court in *Ude v. Agu* (1971) 1 All N. L. R. 61, rejecting the tests *Salaman v. Warner* Q. B.

734. The decision in *Omonuwa v. Oshodin (supra)* did not apply to the Court of first instance and so, learned counsel submitted, this Court should be very slow in upsetting a decision which has stood unchallenged for almost forty years.

In regard to the Court of Appeal, Chief Williams submitted that whether a decision of the Court of second instance is final or interlocutory, must not be determined in relation to the proceedings before the court or tribunal of first instance but of the Court of Appeal.

The complaint by Chief Williams is clear, and the present appeal is a good example, for the complaint. When this case came before the Court of Appeal from the Lagos State High Court, that court, *suo motu,* raised the issue of jurisdiction. There was a split decision. The majority decided that the Court of first instance, that is, the Lagos State High Court, has no jurisdiction over the matter, it being an admiralty matter which should have gone before the Federal High Court. Nnaemeka-Agu J. C. A took different view and held that it was a matter for the Lagos State High Court. The decisions were given on 21st November, 1984.

If the majority decision (that is , that the Court had no jurisdiction) was a final decision which the meaning of that expression in s.31(2) of the Supreme Court Act 1960, the notice filed by learned counsel on 14th January 1985, (within the three months period would have been within time, but would have been filed out of time if he decision was interlocutory (that is, as it was filed more than 14 days after the decision).

The question then is, what is it? Is the decision final or interlocutory? Chief Williams said that our decision in Omonuwa *v.* *Oshodin (supra)* would make it interlocutory. But would it? And if it would, could this Court have been right in not following the old authorities established for upwards of forty years? In *Omonuwa v. Oshodin (supra),* this Court, as per Karibi-Whyte J. S. C said (and this was one of the portions relied upon by Chief Williams).

"In my opinion, an interlocutory order on appeal ranks as an interlocutory appeal. the judgment of the Appeal Court is a judgment on an interlocutory. *It can only assume the character of a final judgment when it finally determines the right* *of the parties*

Would the rights of the parties in the instant appeal be finally determined if the trial court had no jurisdiction to deal with the rights? In other words, if a court is incompetent to deal with a matter before it, are the rights of the parties in the matter still subsisting? As the Court of Appeal decided that the Lagos State High Court was incompetent and devoid of jurisdiction, would that be the end of the matter? But, in so far as the majority decision of the Court of Appeal was concerned, it had finally determined the suit brought *before that Court* by declaring that the Court of trial had no jurisdiction. The subsequent examination of the issues by the majority of the Court had the trial Court had jurisdiction should not exist to complicate matters or inhibit the conclusion that a decision by the Court of Appeal that the trial Court had no jurisdiction had finally determined the rights of the parties? And finally, would the pronouncement of this Court in Omonuwa v. Oshodin, that a decision "can only assume the character of a final judgment when it finally determines the right of the parties " still make the decision of the Court of Appeal in the instant appeal, on jurisdiction, against which the United Bank for African is appealing, final, and not interlocutory, contrary to the submission of learned counsel?

There is of course the problem that would arise if the minority decision were the judgment of the Court and there is an appeal therefrom, that is, from a decision that the State High Court has jurisdiction. The problem that would arise is where the decision is final or interlocutory. I think an answer to all these to all these will depend on what test the Court to apply-the Bozson v. Altrnicham U. D. C test-see (1903) 1Q. B 547 or the Salaman v. Warner test (1891) 1 Q. B. or has Omonuwa v. Oshodin propounded another test, and if so, what is it? I will have to discuss all these cases to answer these questions.

Let me say straight away, that I am in full agreement with Chief Williams, that the ratio in Omonuwa v. Oshodin (supra) did not touch the age long distinction, settled in this country, between final and interlocutory decision, in courts of first instance.

Let me trace mater historically. In Blay v. Solomon 12 W. A. C. A 177 Verity, C. J. examined the issue briefly, but thoroughly.

He said

"In Standard Discount Co. v. Le Grange (2) Brett, LJ. said:-

"No order, judgment or other proceeding can be final which does not at once affect the status of the parties for whichever side the decision be given ".

In Bozson v Altrincham Urban District Council, in a passage cited with approval by Swinfen Eady, LJ. in M. Isaac and Sons Ltd. v. Salbstein Anor. Alverston, L.C. J., said:-

"It seems to me the real test for determining this question ought to be: does the judgment or order, as made, final dispose of the rights of the parties?’

In Ex parte Moore, in re Faithful, Brett, M. R. said:-

’If the Court orders something to be dome according to the answer to the enquiries, without any further reference to itself, the judgment is final’.

We think that the application of these principles to the present case is conclusive’.

Let us then call this, the Blay v. Solomon cum Bozson v. Altrincham test. And the emphasis which is placed by the test is that the judgment or order is final only when it finally disposes of the rights of the parties, that is, makes an order which would not bring the matter further back to itself. Omonuwa v. Oshodin recognises the good reasoning in the Bozson v. Altrincham test and though critical of it, as 'the nature of the order made…. test '. Yet, realised that it has been approved and applied in our courts. Karbi-Whyte, J. S. C said:-

"In Standard Discount Co. v. Le Grange and Salaman v. Warner, the test applied was the nature of the application to the Court, and not the nature of the order made, in Salter Rex and Co. v. Ghosh (1971) 2 All E. R. 865. Denning MR. considered the test of the nature of the order, applied in Bozson v Altrincham UDC (supra), and observed that although Lord Alversone C. J.'s test in Bozson's case may be right in logic, Lord Esher's test of the application in Salaman v. Warner was right in experience. Bozson v. Altrincham UDC. (supra) has been approved and applied in our court and I think this is good reasoning ". (Italics mine)

There is no doubt that there is lot of force in the criticism, made in Omonuwa v. Oshodin, of the "nature of the order " test. It is true "it ignores the issue or issue giving rise to the application and consequently the order'. Omonuwa v. Oshodin however, recognised that:-

"All the cases …agree on the proposition that a decision between the parties can only be regard as final when the determination of the Court disposes of the right of the parties, and not merely an issue, in the case".

The difference between the tests in Salaman v. Warner and Bozson v Altrincham (or Blay v. Solomon) is borne out vividly from the submission of counsel the Bozson v Altrincham case. The dicta of the Lord Justices in the case are rather short. I will like to set out both the submission of counsel and then the dicta of the Court.

Learned counsel for the defendants:-

"The test for ascertaining whether an order is final or interlocutory, as laid down by the Court of Appeal in Salaman v. Warner is that an order is not a final order unless it is one made on such an application or proceeding that, for whichever side the decision is given, it will, if it stands, finally determine the matter in litigation. In the present case the decision of Wills, J. as given did in fact put an end to the litigation but it would have been otherwise if the decision had been in favour of the plaintiff, because then the case would have had to go before the official referee. The order of Wills, J. was therefore, according to the rule enunciated in Salman v. Warner an interlocutory order. The principle of that case was affirmed in In re Herbert Reeves AND Co. but there is an earlier decision of the Court of Appeal, Shubrook v. Tufnell, which was not cited in Salaman v. Warner, and which appears to in conflict with it ".

THE EARL OF HALSBURY LC.: the learned counsel for the defendant has very properly called our attention to the fact that the authorities on this point are not in harmony. I prefer to follow the earlier decision. I think the order appealed from was a final order, and the appeal is therefore brought within the prescribed time.

Lord Alverstone C. J I agree. It seems to me that the real test for determining this question ought to be this: Does the judgment or order, as made, finally dispose of the rights of the parties? It if does, then I think it ought to be treated as a final order; but if it does not it is then, in my opinion, as interlocutory order B ".

In Salama v. Warner, itself, Lord Esher M. R., put the matter thus:-

"Taking into consideration all the Consequences that would arise from deciding n one way and the other respectively, I think the better conclusion is that the definition which I gave in Standard discount Co. v le Grange is the right test for determining whether an order for the purpose of giving notice of appeal under the rules is final or not. The question must depend on what would be the result of the favour of either of the parties. If their decision, whichever way it is given, will, if it stands, finally dispose of the matter in dispute, I think that for the purposes of these rules it is final. On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute, but, if given in the other, will allow the action to go on, then I think it is not final, but interlocutory. That is the rules which I suggested in the case of Standard Discount Co. v. La Grange, and which on the whole I think to be the best rule for determining these questions; the rule which will be most easily understood and invoices the fewest difficulties. As an example of the difficulties produced by the opposite view, take the case where an order is made staying or dismissing an action as frivolous and vexatious: if that is a final order, the period during which an appeal may be brought is a year. In this case, the Division Court allowed what is really equivalent to a demurrer to the statement of claim, and, as, long as that decision stands, it is no doubt final in one sense; but, if they had disallowed the point taken, then the action must have gone to trial. If in such a case the order were final, there would be a year to appeal in, and the case might have to go on after that lapse of time, when there might be increased difficult in dealing with the matter in dispute from the death or disappearance of parties or witnesses. We thing that the rule I have mentioned is the best to adopt, and, applying it to this case, the result is that the order appealed against is interlocutory, not final ".

And that was the situation when Verity C. J. preferred in Blay v. Solomon the Bozson test to the Salaman test.

The matter was brought to a head (for so it was thought) in Ude and others v. Agu and Others (1961) 1 All N. L. R 66.

Brett, F. J. in the Federal Supreme Court emphasised the difference in the two tests and said

"In England, it appears from the notes in the Annual Practice to O. 58 r. 4 of the Rules of the Supreme Court that the Court of Appeal has at different times adopted two different tests determining whether a decision is an interlocutory or a final one for the purposes of an appeal. One, which the editors of the Annual Practice say is generally preferred is that stated by Lord Alverstone. C. J. in Bozson v. Altrincham U. D. C. (1903) 1 K. B 547.

Does the order as made finally dispose of the rights of the parties? If it does then I think it ought to be treated as a final order: but if it does not it is then, in my opinion, an interlocutory order ".

The other, as stated in Salaman v. Warner (1891) 1 Q. B 734, is that an order is an interlocutory order unless it is made on an application of such a character that whether order had been made thereon must finally have disposed of the matter in dispute.

Thus, one test looks at the nature of the proceedings; the other (which is generally preferred) looks at the order made.

In Blay v. Solomon (1947) 12 W. A. C.A. 175 the West African Court of Appeal followed the test which looks at the order made, and in my view it is clearly the proper test for this Court to adopt, particularly having regard to the fact that there is a constitutional right of appeal against a final decision of a High court sitting at first instances, whereas an appeal against an interlocutory decision is now left to be conferred by legislation and no such legislation has yet been enacted, so that an appeal does not at present lie at all against an interlocutory decision ".

And so, it has been that the Courts in this country have adopted the test that looks at the order made as against the rest that looks at the nature of the proceedings. It is also clear that before Omonuwa v. Oshodin, the two test have been regarded as contradictory.

In England, the position is clear from the White Book, It has always been held that there is a difference in the tests offered in Salaman v. Warner and the test in Bozsonn v Altrincham. The nature of the application or proceedings test (Salaman v. Warner) has always been regarded as different from the nature of the order test.

In the White Book, that is, the Supreme Court Practice (UK Rules), under the heading of Pleading and under Order 18/11/5, is a note to the effect that an order dismissing the action under O. 33 R. 7 is a final order within O. 59, R. 4(1) if it finally disposes of the rights of the parties: if it does not, then it is an interlocutory order (Bozson v. Altrincham U.D.C. (1903) 1 K. B. 547 which to this extent overrule Salaman v. Warner (1891) 1 Q. B. p. 736; Re Grossdell, 1906, 2 K. B. 569). Bozson v. Altrincham, it was agreed, has overruled Salaman v. Warner.

In regard to appeals to the Court of Appeal: Under Order 59/4/2, the following note appears:

"An interlocutory order is to be contrasted with a final Section 68(2) of the J. A. 1925 Vol. 2 Pt. 9A provides any doubt which may arise as to what decrees, order or judgments are final, and what are interlocutory, shall be determined by the Court of Appeal ". Accordingly, its decision whether the order is final or not is not subject to appeal. the test, as stated by Lord Alverstone C. J. in Bozson v. Altrincham U. D. C 1903 1 K. B 547 p. 548 is, 'Does the ………. Order, as made, finally dispose of the rights of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not, it is then in my opinion, an interlocutory order'. A different test is stated in Salaman v Warner (1891) 1 Q. B 734, namely, that an order is an interlocutory order unless it is made on an application of such a character that whatever order had been made thereon must finally have disposed of the matter in dispute …. The latter test (sic, that is, the test in Salaman v. Warner, or rather the nature of application test) …. Regards the nature of the Proceedings; the former (which is generally preferred) looks at the order made ".

And so, it was recognised, even in the United Kingdom Practice Book, that the Bozson v. Altrincham is generally preferred.

But notwithstanding the preference, the English Court of appeal that has a final say in matter, as a result of the judicial Act (1925) s. 68 refused to be glue to the preferred test. Lord Denning M. R would seem to be more enamoured of the Salaman v. Warner test, as would be seen presently, in some of the decisions in the Court of Appeal.

I have no difficult in agreeing with Chief Williams at this stage, therefore, that in this country in so far as the court of first instance is concerned, the nature of the order test should be adhered to and the test as pronounced by Alverstone, C. J. In Bozson v. Altrincham should be upheld by the Courts. There is no more magic in the Bozson v. Altrincham test. It is as a matter of practical convenience to stick to one test if it has been accepted for so long, and there is really nothing wrong with that.

I will deal with the difficulties as they arise in a Court of Appeal, presently, but meanwhile as a final point of the issue, as it arises in the Court of first instance, I will make reference to another jurisdiction. Chief Williams directed our attention to the development of the law in Malaysia. In the case of Heron bin Mohd. V. Central Securities PC 1983, 76; the Privy Council held

"They think that the true definition is this. I conceive that an order is 'final' only where it is made upon an application or other proceeding which must, whether such application or other proceeding fail or succeed, determine the action.

Conversely, I think that an order is 'interlocutory' where it cannot be affirmed that in either event, the action will be determined'

The Court compared this with the test advances by Lord Alverstone C. J. in Bozson son v. Altrincham U. D. C. namely:-

"Does the judgment or order, as made finally dispose of the right of the parties?

If it does, then I think it ought to be treated as final order: but if it does not, it is then, in my opinion, interlocutory order’.

The Malaysia Court of Appeal unanimously adopted the test in the Bozson case in preference to that in the Salaman case’.

I have said earlier that the court of Appeal in England would appear to prefer the Salaman v. Warner test. For an appreciation of the difficulty in this matter and before I turn to the decisions of this court in Omonuwa v Oshodin I would like to refer to a 1971 judgment of the Court of Appeal in England where Lord Dinning MR. in Salter Rex AND Co. v Ghosh (1971) 2 Q. B. 597 preferred to apply the Salaman test. He said it had always been applied in practice, while the Bozson test has not only always been right n logic in this country, it had also been applied in practice or rather ’preferred’ in practice.

In the English case (supra) Lord Denning’s Application of the Salaman test made a difference to the case. If the Bozson test had been applied, the order appealed from, that is, refusing a new trial would have been final and not interlocutory as the Salaman test, when applied, made it. But that is England. And this is the type or problem that would arise if the two tests are kept afloat in this country, I can appreciate learned counsel Chief Williams’ concern therefore for asking the Courts in this country to keep to one test only - and that is the one suggested in Bozson v. Altrincham, for as this court said in Omunuwa v. Oshodin (supra), despite the elusive impression of decided cases, the ideal is to provide a workable test, for the determination of the issue when it arises. And a workable test, to my mind, ought to be certain. I think, to leave it fluid, as it is done in England, would provoke decisions like that of Lord Denning M.R. in Salter Rex AND Co. v Ghosh (supra) or Technistudy Ltd. v. Killand (1976) 3 All E. R 632 when in the latter the Master of the Rolls suggested ’rumaging’ through the Practice Books to see what has been done in the past! And I am of the opinion, with respect to the learned Master of the Rolls in England, that such attitude would make an already difficult problem only the more compounded. For indeed, this is what it does in England.

In Becker v. Marvin City Corpn. PC (1977) A. C. 271 a Privy Council appeal from Australia, Lord Edmund Davies, delivering the decision of the Board, noted the frequent difficulty given rise to by the situation of enquiring whether a decision is final or interlocutory. In Hunt v. Allied Bakeries Ltd. (1956) 1 W. L. R. 1326 Lord Evershed M.R. had to adjourn, make enquiries as to the practice of the court and also consult the other divisions of the Court of Appeal before deciding whether an order was final or interlocutory. In Re Page (1910) 1 Ch. 489 Buckley L. J. felt some difficulty especially as the order in the case would put an end put as end to the matter and logically, per adventure, that would have been final. He said:-

’to my mind, it would be reasonable to say that this is a final order

But then, he continued:-

*’I am not prepared to differ from the view taken by the other members of the Court. I yield my judgment to them without* *saying that I am complete satisfied …'*

Such is the difficulty. Such is the uncertainty! There is no doubt that I see nothing obnoxious in the *Salaman v. Warner* test, as a test; but I think it is more practicable and more certain to keep to just one *test* - the *Bozson v. Altrincham* test which has been preferred in this country for so long.

Very recently, in this court, in Western Steel Work Ltd. and Anor. v. Iron AND Steel Workers Union (1986) 3 N. W. L. R 671 at p. 625 Obaseki, J. S. C, tendered to agree with the observation of Lord Denning M. R. as stated above in the two cases, I have referred to, when the learned Master of the Rolls said it was impossible to lay down any principles about what is final and what is interlocutory. Obaseki J.S.C went on and said:-

"*Whether the question of jurisdiction of any court is raised, it is a question that* touches the competence of the court that is raised. It *does not raise* any issue touching the rights of the parties in the subject matter of the litigation or dispute ". (Italics mine)

It is to be observed, with all respect, that, once the nature of the Order test is accepted, the order is final if, in the words of Brett M.R., in Ex Parte Moore, in Re Faithful (supra)

"the court orders something to be done according to the answer to the enquiries, without any further reference to itself ".

In other words, if the court of first instance orders that a matter before it be terminated (struck out) for it has no jurisdiction to determine the issue before it, that is the end of all the issue arising in the cause or matter and there is no longer, any issue between the parties in that cause or matter that remains for determination in that court. But it would be interlocutory if its order is that it has jurisdiction for there will be reference of the remaining issues in the case to itself. When a Court of Appeal rules and orders that a court of first instance had no jurisdiction in a cause which had been brought before it that is the end of the matter inn so far as that particular litigation goes between the parties in that Court of Appeal. There is no further reference to the Court which has made the order in either case. And that has determined the rights of the parties in both case before the court making the order. And applying that test to the instant case, if the order made by the majority of the Court of Appeal had been made by the trial court itself that trial court had no jurisdiction, that is final. And accordingly to the nature of that order, there is no further reference I to that court of trial. If the order had been by the trial court that it had jurisdiction, that is had jurisdiction, that is interlocutory according to the nature of the order made as there are issues still to be determined. The result will not be the same if the nature of the proceedings or application test is followed.

I have so far discussed the problem as arising in the Court of trial. And this takes me now to the problem as arising in the Court of Appeal and the test suggested in the Omonuwa v. Oshodin case.

I have held the view and it is my conclusion that the decision of this Court in Omonuwa v. Oshodin should not relate to the problem as arising in the court of trial. I accept the submission of Chief Williams, on this point that the ratio of the case could not be made to apply to decisions in the Court of First instance.

And now to deal with the issue as the problem arises in the Court of Appeal, the decision in Omonuwa v. Oshodini criticised the non application of earlier also as the Blay v. Solomon test); In both D. P. P. v. Chike Obi (1961) 1 All N. L. R. 458 and Adegbenro v. Akintola (1962) 1 All N. L. R 442 at 474. Karbi-Whyte J. S. C said:-

"In these two cases, the court has applied neither the test of the nature of the order nor of the application in determining the application from which the order was made. With due respect, this approach has never been the test applicable and clearly not the law.”

The Court relied on the function of determining a reference to it and was not concerned with the determination of the rights of the parties.

Learned senior Advocate, Chief Rotimi Williams has criticised this Statement of the Court as not being correct. He said:-

"There may well have been some typographical error in the print of the first sentence quoted above. Nevertheless, it seems plain that his Lordship took the view that the established tests for ascertaining whether a judgment is final or interlocutory was not applied. With the utmost respect to his Lordship, that is not so ".

What the court did in the Chike Obi (supra) case was to distinguish the proceedings on the reference from the proceedings in the course of which the question arose in the lower court. They did the same thing in the Adegbenro v. Akintola case (supra) the court holding as follows:-

"Is it a final decision? The decision may not be final in the proceedings before the Chief Justice, but so far as the Federal Supreme Court is concerned it is final. The Court has finally disposed of the matter referred to them, namely the question as to the interpretation of the Constitution. This Constitution accords with that adopted by Brett, Ag. C. J. F. Dr Chike Obi v. Director of Public Prosecutions (No2) F. S. C 56 OF 1961. Their Lordships have accordingly reached the conclusion that the decision of the Federal Supreme Court on the reference under s. 108 was a final decision … . "

While these decisions fully support the submission of Chief Williams that the it is the Court that makes the order that matters, the Court did not in fact look at it from the 'nature of the application' or 'nature of the order' angle as such I would agree, however, that Bozson v. Altrincham U. D. C was applicable and if it had been so applied, the decision in each of the two cases would have been the same, that is, it was clearly final and not interlocutory'. And when this Court said that its approach has never been the test applicable ", all the court was saying was that the approach of not applying either test but applying the test of relying

"on its function of determining a reference to it and not being concerned with the determination of the rights of the parties- has never been the test applicable and clearly not the laws ".

I think it might all be question of semantics - the difference being between, not applying a test and non-applicability of a test.

Now, what is the test suggested by this Court in Omonuwa v. Oshodin? Karbi-Whyte J. S. C said:-

"All the cases cited agree on the proposition that a decision between the parties can only be regarded as final when the determination of the Court disposes of the rights of the parties (and not merely an issue) in the cases. Where only an issue is the subject matter of an order or appeal the determination of that Court which is a final decision on the issue or issues before it, which does not finally determine the rights of the parties, is in my respectful opinion interlocutory'… .

The learned justice of the Supreme Court went on with full concurrence of all the other justices:

In my opinion, the ideal approach is to consider both the nature of the application, and the nature of the order made in determining when an order or judgment is interlocutory or final in respect of the issues before it s between the parties to the litigation… "

Apparently, that is taken as applying the Salaman v. Warner test, (as already discussed) as against the Bozson v. Altrincham test. But with respect, it cannot be taken as so applying it, that is, in contradistinction to the Bozson v Altrincham test, as has been discussed earlier in this judgment. For, the judgment under reference, Omonuwa v. Oshodin, classified both Salaman v. Warner and Omonuwa v. Oshodin together as belonging to one class. Karbi-Whyte J. S. C said:-

"1. "It would seem clear from the cases and the dicta cited that two tests for determining what is interlocutory or what is final have emerged from the cases. There are the cases which adopt the nature of the application to the cases which adopt the nature of the application to the court as the determining factor whether the order is interlocutory or final, and there are other which consider the nature of the order made. Whereas Gilbert v. Endean; Blake v. Lathem; Salter Rex AND Co. v. Ghosh, the Technistudy Ltd. v. Kellard 1976; represent the first view, Salaman v. Warner; Bozson v. Altrincham U. D. C. Blay AND Ors v. Solomon present the second view ".

However, I think the important thing is how the judgment has been understood (or misunderstood). In Agbajo v. A-G Federal Republic of Nigeria (1986 2 NWLR 938, the Court of Appeal, as per Omo-Eboh J. C. A (see also the judgments of the justices) were in no doubt that the decision of Omonuwa v. Oshodin binds, the Court of Appeal, and clearly so, to adopt the two tests, that is, the nature of the application and the nature of the order test. Incidentally, the Court of appeal found difficulty in fitting in the Salaman v. Warner test into the case and so ended, and rightly in my view, with the Bozson v. Altrincham test.

Obaseki J. S. C in Warner Steel Workers Ltd. and Anor. v. Iron and Steel Ltd. and Anor. (supra) put the matter thus -

"where (in the Court of Appeal) this question (is) whether a ruling on an issue of jurisdiction raised in limine is final or interlocutory… the ruling that a dismissal on grounds of want of jurisdiction is a final judgment ".

I think the correct attitude is to be found in the dictum of Brett M. R. in the case of Ex parte Moore, In Re faithful which I have referred to supra. Once there is no further reference to a court after it has made its order, that something be done according to the answer to the enquiries, all the rights and not just an issue or some issues, have been determined. In which case, in a Court of Appeal, it is regard to the proceeding before that Court, and the nature of the order made thereupon by the court, that would determine whether the matter is final or interlocutory. See Chike Obi v. D. P. P (supra); Adegbenro v. Akintola (supra). And this will still be in accord with the Bozson v. Altrincham test if applied in the Court of Appeal.

And so, in interpreting section 31(2) (a) of the Supreme Court Act which provides:-

"31-(2)The periods prescribed for the giving of notice of appeal or notice of application for leave to appeal are:-

a. In an appeal in a civil case, fourteen days in an appeal against an interlocutor decision and three months in an appeal against a final decision:

the expression "an interlocutory decision "or " a final decision " would be constructed as a decision- interlocutory or final- of the Court of Appeal itself. And in respect thereof, it is Bozson v Altrincham test, or nature of the order made test, that would be applicable.

And applying that test to the instant appeal, the majority in the Court of Appeal having determined that the court of trial had no jurisdiction, and nothing further to determine in regard to the rights of the parties, (their subsequent examination of the issue 9 assuming they are wrong) notwithstanding). The decision is therefore final as being a final decision of the Court of Appeal, and the Appellant would need no leave of this Court to file an appeal on the grounds of jurisdiction. Their application is unnecessary and it is hereby struck out.

The next issue for consideration is jurisdiction. Uthman Mohammed J. C A said pointedly that a State High Court has no jurisdiction to try nay case on a matter concerning the opening of letter of credit, in which there is a collateral agreement of carriage of goods by sea. The learned Justice of the Court of Appeal relied upon the decision of this Court in America International Insurance Company v. Creekay Trader Ltd. (1981) 5 S. C. 81, that the Administration of Justice Act of England, 1956 being the law which had given jurisdiction to the Judges of the English Court of Admiralty is applicable to Nigeria, and the Federal High Court by virtue of section 7(1) of the Federal Revenue Court Act 1973 has the exclusive jurisdiction to hear and determine al claims within the Admiralty jurisdiction. As the conditions for the carriage of the goods in this case, and the age of the ship which must be so used, relate t a claim arising out of an agreement relating to the carriage of goods in a ship or to the use of hire of a ship it is an Admiralty matter by virtue of the decision of this Court in American International Insurance Co. v Ceekay Trader Ltd. (supra) which approved the decision of the English decision in The St. Elefferio (1957) p. 179

In the instant case, the learned Justice of the Court of Appeal held that there was a contract between ASDECAMO, the sellers of the cement and Bryanson Italiana S. R. L. to carry the cement by sea to Lagos adding that the contract was within the overall contract between the buyer and the seller.

Then he concluded:-

"Both Chief Williams and Professor Kasunmu argue that the matter between the appellant and the Respondent involves documents only. I agree that documents were involved but in my opinion the contract of these documents is that vital issue in this case. If one is only concerned about forgery of the documents one could only concern oneself with comparison of handwriting and signature. But one goes to complain against the failure of a contracting partner to comply with terms given in a document, those terms have become part of the overall agreement between the parties.

The appellant is complaining here that because of the additional instruction was not complied with there is said to be a breach of the contract between the buyer and the issuing bank. It is my view that the terms set out in those additional instructions are caught up by s. (i) (h) of the Administration of Justice Act 1956 and therefore within the Admiralty jurisdiction of the Federal High Court. If ASDECAMOA applied to be a made a third party or one of the parties makes it a co-defendant to the suit, the State High Court would have to determine in how the cement was carried in a ship to Apapa or make a ruling on the use or hire of ’Thomas Mann and whether it is a conference line vessel or not. This definitely is not within its jurisdiction.

In addition to my opinion above I will say that the leading documents which formed the bases of this case is the bill of lading.

Contracts of the bill of lading, exhibit D, are the points upon which the appellant argued that the respondents were in breach, because they fail to examine it and discover that the bill carried details which they did not agree upon.

A Bill of Lading is not itself the contract of carriage between the shipper and the ship owner, or the shipper and the charter, but is evidence of its terms.

Let us see if the fact of the case justify that conclusion reached in law by the learned Justice of the Court of Appeal, but first we should examine the argument of Nnaemeka-Agu J. C. A (who dissented) on jurisdiction. The learned Justice of the Court of Appeal referred to the English decision in The Jade (1976) 1 All E.R. 44 and the decision of this Court in American International Insurance Co. v. Ceekay Trader Ltd. (1981) 5. S. C 81 and held:-

"Bearing this principle and the above definition of carriage of goods " in mind it is difficult to say that what is in issue in this case is a contract for carriage of goods in a ship. It appears to me that the contract in question in this appeal is one in contemplation of an order of goods and not one of carriage or other contracts that may emerge from such transactions:

See Uthman Customs and Practice for Documentary Credit (1974) General provisions (c) ".

To determine the issue of jurisdiction having regard to the facts, I think it would be best to examine the nature of this type of transaction. Historically, once the notion of commercial credits was accepted as a patent factor in international trade, attempts were then made from time to time for the standardisation of the conditions on which bankers would be prepared to issue and act on commercial credits. The year 1933 saw the commencement of such standardisation. The International Chamber, documentary Credits, hereafter also referred to as Uniform Customs and Practice for Commercial, Documentary Credits, hereafter also referred to as Uniform Customs. The British Banks had some objections to the rules at the time, and it was not until about thirty years later, that is, in 1962, when the 1962 Revision was completed, that the British and the Dominion Banks saw fit to join the operation of the Rules. In 1974, the Uniform Customs were revised, and it is this revised edition that affects the instant case. Though, it was again revised in 1983, the revision of 1983 is not material to this case, thus action taken having been commenced in August, 1976 the incident itself having happened in 1978.

I will, from time to time, refer to some of the provisions of these Uniform Customs, but meanwhile, I will refer to their general provisions and definitions for they are very important in the determination of this appeal, and more so in the determination of the issue of jurisdiction. The general provisions and definition provide inter alia:-

(b) for the purposes of such provisions, definitions and articles the expressions ’documentary credits(s) ’and ’ credit(s)’ used therein mean any arrangement, however named or described, whereby a bank (the issuing bank), acting at the request and in accordance with the instructions of a customer (the applicant) for the credit),

(i) is to make payments to or to the order of a thirty party (the beneficiary) or is to pay, accept or negotiate bills of exchange (drafts) drawn by the beneficiary , or

(ii) authorise such payments to be made or such drafts to be paid, accepted or negotiated by another bank, against stipulated documents, provided that the terms and conditions of the credit are complied with.

(c) Credits, by their nature, are separate transactions from the sale or other contracts on which they may be based and banks are in no way concerned with or bound by such contracts.

(d) Credit instructions and the credits themselves must be complete and precise.

In other to guard against confusion and misunderstanding, issuing banks should discourage any attempt by the applicant for the credit to include excessive detail.

(e) The bank first entitled to exercise the option available under Article 32 shall be the bank authorised to pay, accept or negotiate under a credit.

The decision of such bank shall bind all parties concerned.

A bank is authorised to pay or accept under a credit by being specifically nominated in the credit. A bank is authorised to negotiate under a credit either:-

(1) by being specially nominated in the credit, or

(2) by the credit being freely negotiated by any bank.

(f) A beneficially can in no case avail himself of the contractual relationships existing between banks or between the applicant for the credit and the issuing bank.

As Lord Denning said, in Pavia AND Co. S. P. A v. Thurmann-Nieber, (1952) 2. Q. B. 84-

"the sale of goods across the world is now usually arranged by means of confirmed credits. The buyer requests his banker to open a credit in favour of the seller and in pursuance of that request the banker, or his foreign agent, issues a confirmed credit in favour of the seller. The credit is a proviso by the banker to pay money to the seller in return for the shipping documents. Then the seller, when the presents the documents, get paid the contract price. The conditions of the credit must be strictly fulfilled, other the seller would not be entitled to draw on it".

A more authoritative statement in the matter of documentary credits is to be found in the pronouncement of Lord Diplock in United City Merchants (Investments) Ltd. v. Royal Bank of Canada (1983) A. C. HL 168. As the law Lord said for the proposition upon the documentary credit point both in the English and Privy Council cases and were in the Courts in the United State of American. That being the case, it is no wonder then, that there is no precedent in this country to turn to in this matter, the more as so as this country is quite young in entering into international commercial credit, which type of transaction is based on documents.

Lord Diplock separated the contracts into four parts and though the present transaction is concerned principally with only one of the contracts, the contract between the Buyer and the issuing Bank, it could be desirable, especially for the proper understanding of this type of transaction, to refer to the four contracts, as specially in the aforesaid judgment of Lord Diplock.

The First Contract

The underlining contract of the sale of the goods in question. In this contract only the Buyer and the Seller are involved.

Indeed, without this underlining contract, the other three contracts, which I will refer to presently, would not arise. The Buyer and the Seller negotiate and agree upon the terms for the purchase of the goods, the mode of the credit and the mode of transportation or dealing of the goods from the country purchase to the country of which the goods are to be delivered

Where the mode of payment chosen in the contract between the Buyer and Seller is that of documentary credit, the Buyer is under duty to the seller to ensure that a credit is issued, within a reasonable time or an agreed time and the credit must comply with the conditions which have been laid down by the parties to the agreement. Indeed, Article 37 of the Uniform Customs provides:

"All credits, whether revocable or irrevocable must stipulate an expiry date for presentation of documents for payments, acceptance or negotiation, notwithstanding the stipulation of a latest date for shipment "

In which case, a statement of the latest date for shipment is not even sufficient. If the credit contains no expire date, the Seller is entitled to reject it. In Article 41 of the Uniform Customs, is the following provision:

"Notwithstanding the requirement of Article 37 that every credit must stipule an expiry date for presentation of documents, credits must also stipulate a specified period of time after the date of issuance of the Bills of Lading or other shipping documents during which presentation of documents for payment, acceptance or negotiation, must be made. If no such period of time is stipulated in the credit, banks will refuse documents presented to them later than 21 days after the date of issuance of Bills of Lading or other shipping document ".

Finally, on the contract between the Buyer and the Seller, the acceptance of documents under a letter of credit does not preclude the Buyer from rejecting the goods subsequently, if the goods, on their arrival, do not conform to the contract of sale.

The second contract is between the Buyer and the Issuing Bank. This is the contract that is material to this case, for the action is between the Buyer (Appellants in this case and the Issuing Bank the Respondent in this appeal). What are the principles involved in this second contract? For, it is after examining the principles, that one could fit the facts of this case into them.

The relationship is one of a Banker and Customer. But not quite. In an ordinary banking transaction, a customer requiring a loan or overdraft facility enter into a simple informal contract known to statute. In an application for a documentary credit under discussion, there is a standard form of application. The form usually incorporates the Uniform Customs and the Buyer is required to fill the document where the terms of the contract are set out in detail. In the instant appeal, such application is Exhibit B. Exhibit B is the form provided by the issuing Bank the Respondents, in this case, and though the Uniform Customers are not specified in Exhibit B, Exhibit C which the Respondent issued to the Paying or Confirming Bank, that is, the Swiss Bank, the following contained.

"Except as otherwise stated this credit is subject to the Uniform Customs and Practice for Documentary Credits (1974 Revision) International Chamber of Commerce brochure No. 290.

It is to be however, that non-incorporation of this Uniform Customs in Ex. B, is certainly not an issue in this case. The Issuing Bank (Respondent in this case) has a duty to ensure that the letter of credit issuing to the Seller, in this case, ASDECAMO, complies strictly with the instructions of the buyer (in this case, the Appellant) contained in the application for the credit and also that the credit is to the effect that payment, acceptance or negotiation is effected only on presentation of documents which fully accord with the terms of the credit.

At this stage, it is to be observed that in Exhibit C, the Documentary credit is irrevocable. Now what is an irrevocable letter of Credit? The Credit In Ex. C is stated to be irrevocable in compliance with Article 1 of the uniform Customs which stipulates that credits may be either revocable or irrevocable and that all credits should clearly indicate whether they are revocable or irrevocable, for by virtue of article 3 an irrevocable credit is a definite undertaking by the Issuing Bank (the Respondent’s herein), provided that the terms and conditions of the credit are complied with:

(i) to pay, or that payment will be made if the credit provide for payment whether against a draft or not;

(ii) to accept drafts if the credits provide for acceptance by the Issuing bank or to be responsible for their acceptance of draft drafts drawn on the applicant for the credit of any other drawn special in the credit.

(iii) To purchase or negotiate, without recourse to drawers and or bona fide holders, drafts on the applicant for the credit or on any other drawer specified in the credit, or to provide for purchase or negotiation by another bank, if the credit provides for purchase or negotiation".

Let us see if, and how the Respondents complied with the instructions contained in Ex. B Ex. C was what followed. It was issued by the Respondent to the Confirming Bank, that is the Swiss Bank, and it is substantial agreement with exhibit B. And that being the case, the Respondent will the under duty to indemnity the buyer, that is the Appellant, against any liability the latter any incur to the seller if the credit fails to be honoured by the Swiss Bank, that is, the Seller, the Swiss Company, performed strictly its own side of the agreement.

The confirming Bank, Banque Pour le Commerce Int. S. A referred to as the Swiss bank, is not the Buyer’s (that is the Appellant’s) agent, It is however the Respondent’s (the Issuing Bank’s agent. The Appellant (Buyer) would be entitled to reject the documents even for and apparent defect on the face of the document and refuse to be bound by the act of the Swiss Bank.

If the Swiss Bank had been the Appellants’ agent, the Appellant would, of course, not have been entitled to do this. This important, for if the Swiss Bank. If the Swiss Bank had been the Appellant’ agent, the Appellant would, of course, not have been entitled to do this. This is important, for if the Swiss Bank honoured a credit, as it is being buyer rejects the documents as he would have the right to do, or as he is doing in the instant case, he could proceed, as he had done in this case, against the Issuing Bank, the Respondent, basing the action on the contract between the Buyer and Issuing Bank, that is, the contract between the Appellant and the Respondent. So it is the conforming, or not, of the documents that matter.

It is this, therefore, that leads me now to a comparison of Ex C. Which indicates the documents which the Swiss Bank must rely upon before honouring the credit and Ex. D., the Bill of Lading presented by the Seller (the Swiss Company) to the Confirming Bank the Swiss Bank. And this is the true basis of the present action.

The Third Contract

I have, earlier in this judgment referred to Ex. B. (the instructions given by the Appellant to the Respondent). I have also referred to Ex. C and had emphasis the importance of "Conference " and "non Conference " Lines in the latter Exhibit and the complaint of the Appellant about the non existence of the supposed carrying vessel "Thomas Mann " and the disclaimer of this "vessel" by Conference Line.

I will therefore leave the facts meanwhile and return to the principle of documentary credit as respects the third contract. This is the contract between the Issuing Bank the Respondent and he confirming Bank, that is the Swiss Bank. The Swiss Bank will only be entitled to reimbursement or remuneration, as the case may be, from the Respondent if it complies strictly with the instructions in the letter of credit. Once it complies with those instructions as I they appear on the face of the documents, there is no problem. But what happens if the Swiss Bank had honoured the credit on defective documents? Let us examine Article 12 of the Uniform customs in this regard. The Article provides -

(a) Banks utilising the services of another bank for the purpose of giving effect to the instructions of the applicant for the credit do so the account and at the risk of the latter (that is the appellant).

(b) Bank assume no liability or responsibility should the instructions they transmit not be carried out, even if they have themselves taken the initiative in the choice of such other Bank.

(c) The applicant for the credit shall be bound by and liable to indemnity the banks against all obligation and responsibilities imposed by foreign law and usage ".

Though it would appear that this article particularly sub (a) and (b) provide both the Issuing Bank, the Appellant, and the Confirming Bank (the Swiss Bank) with immunity, the learned authors of Law of Bankers’ Commercial Credits - H.C Gutteridge and Maurice Megrah are of the view and I am in full agreement that the provision should not be taken to give banks a carte blanch to do as they please and "if one commits a flagrant mistake, the responsibility and the loss will not be with the applicant for the credit ". Applied to this case, the Appellant should not bear the responsibility and loss, if the Swiss Bank pays upon defective documents. This accords with ordinary laws of the land and commonsense. A person shall not profit by his own deceit.

If the confirming bank that is the Swiss Bank, as the agent of the Respondent, had been held to have acted on defective documents and the appellant had as a result thereby incurred a loss, then the Appellant could claim against the Respondent, who could in turn reuse to reimburse the Swiss Bank. But if the documents presented to the Swiss Bank are ex facies in conformity with the relative conditions of the Credit "ex. C " it would not matter if there is dispute between the Buyer (the Appellant) and the Seller ASDECAMO). The Respondent would be obliged to re imburse the Swiss Bank, and debit the Appellant.

The fourth contract

A fourth contract (which does not strictly arise in this case) is between the Confirming Bank and the Seller that is between the Swiss Bank and the Swiss Company. The obligation of the Swiss bank to the Seller (Swiss Company) is as contained in Ex. C. and that exhibit will be the basis of the liability of the Swiss Bank to the Swiss Company. Important again is the fact that the Swiss Company and the Swiss Bank deal in documents and not in goods. Once in the face of it, the documents presented to the Swiss Bank by the Swiss Company, conform with the requirements of the credit, as notified to the Swiss Company, conform, by the Respondent, the Swiss Bank is under contractual obligation to the Seller to honour the credit, AND "notwithstanding that the Swiss Bank has knowledge that the Seller, at the time of presentation of the confirming documents, is alleged by the Buyer to have, or, in fact, has already, committed a breach of his contract with the Buyer for the sale of the goods to which the documents, appear on their face to relate, that would have in an ordinary contractual relationship entitled the Appellant to treat the contract of sale as rescinded, the goods rejected, and the Appellant would have refused to pay the seller.

- see the pronouncement of Lord Diplock in U.C.M v. Royal Bank of Canada [H.L (E)] (1983) A. C. 196 at p. 189.

Again, this is important in this fourth contract. For the contract between the Swiss Bank and the Swiss Company does not stand exclusively for the other three contracts form the transaction. Indeed, the four are interwoven. Once the Swiss Bank is not liable, or in other words once it is shown that the Swiss Bank has conformed to the documents (in this fourth contract) and has paid out the necessary funds to the Seller (the Swiss Company in this case) even when the Swiss Bank has knowledge that the Swiss Company has committed a breach of contract with the Buyer (the Appellant), the Swiss Bank as in the third contract has to be reimbursed by the Respondent, who in turn would rightly debit the Appellant. As Lord Diplock said in U. C. M v. Royal Bank of Canada (supra) case.

"the whole commercial purpose for the system of confirmed irrevocable documentary credits has been developed in international trade is to give to the seller an assured right to be paid before he parts with the control of the goods that does not permit of any dispute with the buyers as to the performance of the contract of sale being used as a ground for non-payment or reduction or deferment of payment.

It is clear then, that the whole commercial credit transaction is concerned with documents and not goods. Lord Diplock went on in the judgment under reference-

"It has, so far as I know, never, never been disputed that as between confirming bank and issuing bank and as between issuing bank and the buyer (sic like the contract involved the instant appeal) the contractual duty of each bank under a confirmed irrevocable credit is to examine with reasonable care all documents presented in order to ascertain that they appear on their face, to be in accordance with the terms and conditions of these credits, and if they do so appear, to pay to the seller/beneficiary by whom the documents have been presented the sum stipulated by the credit, OT to accept or negotiate without resource to drawer drafts drawn by the seller/beneficiary if the credit so provides ".

I am not excluding vitiation by fraud completely. For, if the action had been between the seller and the paying bank, and the seller had perpetrated fraud in the document so prescribed and so presented, then, on the principle of ex turpi cauas oritu non actio, the action would not be permitted by the court to be used by the dishonest persons, that is, the perpetrator of the fraud, to avail himself of the credit.

We now have sufficient material to return to the issue of the jurisdiction of the Court. And the question to ask is whether, from the facts of the case as stated above, could this be said to be a an Ademiralty matter, the jurisdiction for which lies only in the Federal High Court? Uthman Mohammed and Kutigi, JJ. C. A. came to the conclusion that the action involves a claim arising out of an agreement relating to the carriage of goods by sea within the meaning of section 1(i)(h) of the Administration of Justice Act 1956 [English Legislation]. I have earlier on, in this judgment referred to the judgment of this Court in *America* *International Insurance Co. v. Ceekay Traders Ltd.* 1981. All N. L. R. Vol. 1 Part 1 p. 581. There Uwais, J. S. C delivery the lead judgment of the Court carefully, and in full, traced the history of Admiralty Act was passed by this country, right from 1890, when the Colonial Courts of Admiralty Act was passed by the British Imperial Parliament as having effect in colonial Nigeria. The history went up to 1973 when the Revenue Court Act 1973 was enacted. He held that up till that time, the High Court Act 1973 was en acted, the High Court of Lagos had -

"all such jurisdiction whether derived from Statute of general application as at 1st January 1900 or the Colonial Courts of Admiralty Act 1890 or the Common Law as it existed in 1973 or indeed and Statute (such as the Administration of Justice Act 1956) which 23rd September 1963, when the Admiralty Jurisdiction Act 1962 came into operation) gave the High Court of Justice in England jurisdiction in Admiralty ".

He then dealt with the 1973 Act and held -

"It seems to me that the intention and overall effect of all these provisions of the 1973 Act is to oust the High Courts of the States including the High Court of Lagos) of their Admiralty jurisdiction after the same jurisdiction had been vested in the Federal High Court ".

He referred with approved to the case of *The St. Elefterio* (1957) p. 179 that the provisions of section 1 (i) (h) of the Act (English) were wide enough to cover claims *whether in contract or tort* arising out of any agreement relating to the carriage of goods in a ship. The provision of our 1973 Act is as follows:

"The Admiralty jurisdiction of the High Court shall be as follows - that is to say jurisdiction to hear and determine any of the following question or claims -

(h) any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship ".

Chief Williams has asked that we re-examine our approached to the interpretation of this provision of the Act. With respect, I think the important question is, whether or not the judgment of this Court in American International Insurance Co. v Ceekay Traders Ltd. (Supra) applied at all. Are the facts and the nature of this case, as have been stated above, wide enough to amount to an agreement relating to the carriage of goods by sea? Uthman Mohammed J. C. A took the approached by listing the claims upon which the Admiralty Jurisdiction of the English High Court could be invited as contained in Volume 3 of the Atkins’ Court Forms. There were eighteen in all. He then referred to the instruction contained made by Conference or non particularly the instruction relating to shipping being made by Conference or non Conference Line vessel and that Bills of Lading must state that the carrying vessel.

If not registered in Nigeria should not be more than fifteen years from date of First registration. The learned Justice of the Court of Appeal then held that the contents of the documents form the vital issue.

I find the reasoning of the learned Justice difficult to follow, and the respect if as the learned Justice himself had held, it is clear that the whole transaction is documentary credit, and that the Bill of Lading is not itself the contract of carriage between the shipper and the shiponwer or the shipper and the charter, but, is merely evidence of its terms, then, again with respect, I do not see how a purely documentary contract where the Confirming Bank (the Swiss Bank) will only be interested in the ex facie confirmation of Ex. D with the terms in Ex. C could turn metamophoral into a carriage by sea contract between the buyer of the goods, the Appellant, and the Issuing Bank, the Respondent, especially when the Swiss Bank’s prima faices satisfaction with the documents is the satisfaction by an Agent that it is, on behalf of its principal, the Respondents.

The learned Justice is therefore in serious misconception of the law of documentary credit to have concluded that the contract is concerned with the contents, which would lead the court to engage itself in bothering "on how the cement was carried in a ship to Apapa " or whether "Thomas Mann " was in fact Conference Line Vessel or not. [See U. C. M v. Royal Bank of Canada (supra)]

This Court in Bronik Motors Ltd. v. Wema Bank Ltd. (1983) 6 SC. has stated categorically the primary reason behind the setting up of the Federal High Court.

The Court was set up for the purpose of dealing expeditiously with matters pertaining to the revenue of the government of the Federation which it was felt at the time were not being so handled by the State High Court. The Federal High Court has come to stay, and, without any doubt, has justified its existence, but it is not for the Court to impinge upon the jurisdiction of the State High Court, conferred by section 236 of the Constitution, for the purpose of "fleshing " up the jurisdiction of the Federal High Court. To add to the jurisdiction of that court must be by legislation.

From the fact of this case, which comply with the principles of law in international Documentary Credits, [see U. C. M v. Royal Bank of Canada (supra) 1, that all parties to a documentary credit transaction deal in documents only, and not in the goods, what has happened herein, arises from a breach of agreement relating not to the carriage of the goods, that is the cement in this case, but to the conforming or non- conforming of the documents, produced by the Seller, the Swiss Company to the Swiss Bank, acting as agent of the Issuing Bank, the Respondent. What is at issue is whether or not the conditions stipulated in Ex. C have been prima facie conformed with by the Swiss Bank before payment of money to the Seller.

I have dwelt a length on the importance of this ex facie conformation of the documents, present by the Seller, to the Confirming Bank. I am in complete agreement with Nnaemeka-Agu, J. C. A when he said -

"In the instant case, the appellant forward his claim on the letter of credit which the credit which the credit was negotiated was the Bill of Lading, it did not convert the transaction, into a bill of lading transaction which would have succeeded in admiralty "

After all, the action is between the buyer (Appellant) and the Issuing Bank, (Respondent). The Issuing Bank whose agent in regard to accepting and viewing the documents in question the Swiss Bank is, not would not ex obligation be interested in whether or not the goods were ever shipped or that they ever arrived safely or whether or not the entire transaction was a conspiracy between the Swiss Company and the Appellant to defraud the country or anybody else of foreign exchange of currency. If the action had been between the Buyer and the Seller the terms if their agreement might (and I would not put it higher) probably involve both parties’ interest in the carriage of the goods by sea, depending upon the terms of their agreement, that might result admiralty matter. However, all that would be academic, as the present action is between the buyer and the Issuing Bank. The Lagos High Court has jurisdiction and the submission by Chief Williams, on this point fails.

I would now finally come to the merit of this case. I have already set out a good part of the facts. The remaining material facts will be referred to presently. But what is the claim by the plaintiff/Appellant. His claim is as follows -

"1. The sum of N53,493.74 being special and general damages for breach of contract by the Defendant and its agent (The Banque Pour Le Commerce Int. S. A Basle Switzerland) in respect of payments wrongfully made our [on] Letter of credit No. LCB 0380/78/14322 of 31/7/78 issued by the Defendants on the instructions of the Plaintiff, and contrary to the terms and conditions of the said Letter of Credit

2. Alternatively, the Plaintiff claims the sum of N553,49.74 being special and general damages for negligence on the part of Defendant and its said agents, the Banque Pour Le Commerce Int. S.A Basle Switzerland, for accepting and making payments against, a forged Bill of Lading issued by Bryanston. Italiana S. R. L. Pescara Italy, contrary to the aforesaid instructions of the Plaintiff.

3. A declaration that as the payment of 570,000.00 U.S Dollars made by the Defendants Bank to ASDECAMO was made in breach of the terms and conditions of the Letters of Credit mentioned in claim I above, the Defendant is not entitled to debt the Plaintiff’s Account No. 9257 with the Lagos Central Branch of the Defendant/Bank with that amount and or with any interest, and commissions on that amount; and order that the Defendant shall forthwith revert or cancel all debit entries so made ".

From this claim, the complaint was that the Confirming Bank, that is, the Swiss Bank, as agent of the Respondent, wrongfully made out payment on Letter of Credit or in the alternative that the Bill of Lading in the name of Bryanston was forged.

I would now proceed to state the case of the Appellant in this court.

1. Though it is not in dispute, between the parties in this Court, and indeed, it has been found by the Trial court and affirmed by the Court of Appeal that on the Bill of Lading

"The Shipper’s name was put as Bryanston Italiana S. R. L. Pescara/Italy (hereinafter referred to as the Bryanston simpliciter, and or ASDECAMO, the Swiss Company or Seller of the goods".

the Appellant has submitted that, even on the principle of law laid down in the judgment of Lord Diplock, in U. C. M. (Investment) Ltd and Anor v. Royal Bank of Canada and Anor. (supra), the Respondent ought to have noticed the discrepancy presented for payment to the Swiss Bank.

The Appellant also challenged the Respondents reliance on Article 8 of the Uniform customs, and applying that Article as a shield, without recourse to the additional instructions contained at the back of Ex. C in regard to use of Conference or Non Conference Line Vessel and the age of vessel, if not a Nigeria Vessel. Further, that the words "Conference Med ". Should have been authenticated but that they were not. It was also contended the Ex. D, being a forgery, the Respondent would have discovered the irregularity if they had checked the Lloyds Register which they were in possession of.

3. The Court of Appeal’s rejection of the Appellant’s contention that Ex. C (the Letter of Credit) was used as a transferable credit and also that Ex. D (Bill of Lading). Ex.E (Packing List bearing Bryanston) Ex. F. (Certificate of Value signed by Bryanston) and used as a transferable credit and also that Ex.D (Bill of Lading). Ex.E (Packing List bearing Bryanston), Ex.F. (Certificate of Value signed by Bryanston) and Ex.G. are ex facie irregular and inconsist.

4. (i) The interpretation placed by the Court of Appeal upon the Exclusion Clause in Ex. B, which clause provides -

"It is understood that our engagement (Appellant’s) to pay shall continue in force notwithstanding any charge in our and/or your (Respondent’s) Constitution and that no responsibility is to attach to yourselves or your correspondents (Swiss Bank) as to the documents, beyond seeing that they purport to be in order ".

that the Respondent could not as a result of this clause be held liable, even if negligence has been established against it, could not be a correct interpretation.

(ii) That Article 9 and 12 of the Uniform Customs could not save the Respondents, if they were negligent in regard to the forged Ex. E, having regard to Article 7 of the Uniform Customs.

In regard to the appearance of the name "Bryanston " on the Exhibit "D", Chief Williams for the Respondent, contended that credit in this case, had not been transferred to Bryanston, as a credit is transferable only when the overseas seller of the goods assigns his obligations under the contract of sale to a third party, so that the third bears the benefit or even the detriment of the original credit.

In this case, under Exhibit D, the Swiss Company, ASDECAMO, is the original beneficiary of the Credit. On Exhibit D, Bryanston were merely the shippers. All the documents that had to present to the Swiss Bank were presented by the Swiss Company, ASDECAMO, that was paid. The Appellant himself said so in his amended Statement of Claim.

Para. 6(a) of that Statement of Claim reads -

"The Defendant [the Respondent - the Issuing Bank] and its agents (sic the Swiss Bank) … wrongly paid out the amount covered by the letter of credit … to ASDECAMO

In their Statement of Defence the Respondent averred -

4. (1) The Defendants aver that on the 12th September 1978, the agent Banque Pour Le Commerce Int. S. A Basle Swizerland … paid the sum of $570,000.00 to the beneficiary of the credit ASDECAMO) upon presentation to it of the documents.

As Chief Williams rightly pointed out, it was the original beneficiary of the Credit (ASDECAMO) and not the shippers, Bryanston, who were paid the purchase price. It is true Ex. D named Bryanston as "shippers " but then the Port of loading is "BARI " and it does not take much imagination to know that goods from Switzerland, by boat, which Chief Williams described rightly, as land locked, for it is geographically and so notoriously land locked, could not be loaded or shipped from a port in Switzerland which has no port, and that the Swiss company could employ shippers (except they themselves are shippers) to ship them to the country of its destination. Though this type of contract deals with documents and not facts yet, documentary credit are not fictional but real. This certainly cannot answer the theme of Transferable Credits as provide for by Article 46(a) AND (d) of the Uniform Credits which provides -

a. "A transferable credit is a credit under which the beneficiary has the right to give instructions to the bank called upon to effect payment of acceptance or to any bank entitled to effect negotiation to make the credit available in whole or in part to one or more third parties (second beneficiaries) ...”

b. A credit can be transferred only if it is expressly designated as "transferable " by the issuing bank … "

This credit is not a transferable credit and indeed has not been transferred more especially as it was the Swiss Company and not Bryanston that applied for and got benefit of the credit. I am in agreement with and adopt the views of Nneame-ka-Agu, JCA when he said -

"Also that where the seller is not the manufacturer of the goods he may not himself complete the Certificate of Value and of origin which is, by the way, designed to be completed by the Manufacturer, Suppliers or Exporters of the goods. It therefore appears to me to be reasonable and in accordance with the practice of the trade that the name of Bryanston … appears on Exhibit D, E, and F. It is agreed by both counsel that the invoice is also in the name of ASDECAMO and it is common ground that it was they and not Bryanston that was paid therefore ".

With regard to the question whether or not "Thomas Mann" belong to Conference Line, all the Swiss Bank has to demand and insist upon, and the Swiss Company must present before payment is made is "reasonable documentary proof " that the ship belonged to Conference Lines and that the carrying vessel, "Thomas Mann " is not more than fifteen years from date of first registration. Ex. E has the words Conference Med. J " typed upon it. The words were not printed. Also typed upon Ex. D are the words

"We hereby certify that the carrying vessel is not more than 15 years from date of First Registration "

This Exhibit was signed by the Ship owners, though the words "Conference Med. J " were not separately authenticated, but the whole Exhibit was signed by "Black Star Line Ltd. West Africa Service! "

If forgery of this document is relied upon, surely there was no proof, as there is no evidence to suggest that the signature of the Ship owners was obtained before the words in question were added. However, what is of special impression on my mind is that there is concurrent finding of two courts on the point that there was no alteration in Ex. D and no leave of this court has been sought or obtained to upset these finding. Indeed even if leave is sought, no special circumstance has been advanced, to set aside that finding.

Reference has been made to Banque Indochine v. J.h. Rayner Ltd. (1983) 1 Q. B 717 at page 719 per Parker J. and on appeal as per Sir, John Donaldson M.R who had the following to say -

"The letter of credit called for the presentation of documents covering shipment of 2,000 metric tons of sugar and were subject to the special condition "shipment to be effected on vessel belonging to shipping company that is a member of an International Shipping Conference ".

This is an unfortunate condition to include in documentary credit, because it breaks the first rule of such a transaction, namely, that the parties are dealing in documents, not facts. The condition required a state of fact to exist. What the letter of credit should have done was to call for a specific document which was acceptable to the buyer and his bank evidencing the fact that the vessel was owned by a member of a conference. It did not do so and as, accordingly, the confirming bank had to be satisfied of the fact, it was entitled to call for any evidence establishing that fact. All sorts of interesting questions could have arisen at to what evidence could have been called for and what would have been the position if, contrary to that evidence, the vessel was not owned by a conference member. In fact it was so owned and merchants produced the evidence required by the bank before the expiry of the credit. Accordingly no such questions arise".

Professor Kasunmu, in relying on this authority submitted that the AND "special condition " endorsed on the credit must be established as a fact, thus impressing a duty on the Respondent over and above the provisions of Article 8 of the Uniform Customs.

The Court of Appeal took the view that this decision is contrary to the general principle governing documentary credit as set out Lord Diplock in the United City Merchant case. Professor Kasunmu took the view that there is no such conflict and relied upon a passage by Lord Diplock in the case of Singh v Banque de Indochine (1974) 2 All E. R. 754, 758 to the effect that -

"The instant case differs from the ordinary case in that there was a special requirement that the signature on the certificate should be that of a person called Balwant Singh, and that person should also be the holder of Malaysian passport No. E-13276. This requirement imposed on the bank the additional duty to take reasonable case to see that the signature on the certificate appeared to correspond with the signature on an additional document presented by the beneficiary which face of it, appeared to be a Malaysian passport number E-13276 in the name of Bawant Singh. The evidence is what the notifying bank which acted as its agent, in failing to detect the forgery ".

Chief Williams felt that Article 9 of the Uniform, sufficiency, accuracy, problem created by these judgments. Article 9 provides -

"Banks assume to liability or responsibility for the form, sufficiency, accuracy, genuineness, falsification or legal effect of any document … "

The learned author of Law of Bankers Commercial Credits H. C Gutteridge and Maurice Megrah 7th Edn. Said that there is some doubt as to the meaning of the interpretation.

"(the) unfortunate condition to include in a credit because it breaks the first rule of (Documentary Credit) that the parties are dealing with documents not facts …"

in the Banque Indochine v. J. H. Rayner (supra) case.

Article 9 of the Uniform Customs was not referred to by the Court in England in the Banque Indochine v. Rayner Ltd. case nor by Lord Diplock in the Singh v. Banque de Indochine (supra) case. I am however inclined to the view that having regard to Article 9 of the Uniform Customs, and the clean statement of the law by Lord Diplock in U. C. M. v. Royal Bank of Canada (supra) a confirming Bank, that is, the Swiss Bank, in this case, would only be limited to the examination of the document required to be, and are, presented to it and obligation is limited to an ex facie conformation of the documents presented with the documents required to be presented before payment is made.

It is now pertinent to deal with the exclusive clause in Exhibit B - the application of the Appellant for the letter of Credit – Let me state it again.

"It is understood that our engagement to pay shall continue in force notwithstanding any charges in our and/or your constitution and that no responsibility is to attach to yourselves or your correspondents as to the documents beyond seeing that they purport to be in order " We agree to hold you and your correspondents harmless and indemnified in respect of any loss or damage that may arise in consequence of error or delay in transmission of your correspondent' messages, or misinterpretation thereof or from any cause beyond you or their control ".

The question posed Professor Kasunmu, was whether the Respondent could rely upon this clause, if it is established that they are negligent? In Photo Production Ltd. v. Securitor Transport Ltd. (1980) A. C. 827 it has been that in so far an execution clause is concerned, all that has to be done is now construction as the clause, that is, following the Interpretation theory, as against the Rule of Law theory, which was developed as far 1956. See Spurling Ltd. v. Brashaw (1955) 1 W. L. R. 461 at 465; Yeoman Credit Ltd. v Apps. (1962) 2 Q. B. 508. Chatty: On Contracts 25 Edn. Vol. 1 p. 472 at para. 884 put the Rule of Law

Theory as follows -

"The rule was predicated that there was certain breaches of contract (fundamental breaches) which were so totally destructive of the obligations of the party in default that liability for such a could in no circumstance be excluded or restricted by means of an exemption clause".

However in U.G.S. Finance Ltd. v. Nation Mortgage bank of Greece (1964) 1 Lloyds Rep. 446 Peason L.J referred to an exemption clause as a rule of construction see also Glynn v. Margetson AND Co. (1893) A. C 351 and the 1967 case of Suise Atlantique Sociate d' Armendent Martime SA v. NV Rottendamsale Kolar Centrale (1967) A. C. 361. However the rule of construction theory was finally confirmed by the House of Lords in Photo Production Ltd. v. Securitor (supra). In the Sussie Atlantique Case (supra) I think, the pronouncement of Lord Wilberforce is important. He said -

"One may safely say that the parties cannot in a contract, have contemplated that the clause should have so wide an ambit as in effect to deprive one's party's stipulations of all contractual force, to do so would reduce the contract to a mere declaration of interest ".

In construing the instant contract it seems to me that the parties intended, by the clause aforesaid in Ex. B to relieve the Respondent of liability once the Respondent see that the documents purport to be in order, and or where the error or delay in transaction of the Swiss Bank's messages of misinterpretation thereof arise from any cause beyond the Respondents' or their agents' (the Swiss Bank's) control.

And finally, I will now refer to the Appellant's failure to reject the documents and his signature on Ex. J. "accepting " the documents Nneameka-Agu, J. C. A arrived at a decision that -

"even if Ex. J. was received by putting pressure on the Appellant, that would make it voidable and not void. So it would be treated as valid until it set aside ".

The Appellant had explained how he came to sign Ex. J. Even if the explanation is accepted, I do not think a decision on this point is necessary, any more having regard to all my findings I have earlier made in this case for the determination of this Appeal. The Respondent does not need this point to succeed.

The Appellant having failed in all the grounds of appeal already discussed, and the Respondent having failed in his appeal on jurisdiction, both appeals fail, and they must be, and they are hereby dismissed. There will be on order as to costs. BELLO, J.S.C:I had the opportunity to read in draft the very comprehensive judgment just delivered by my learned brother, Eso, J.S.C. I agree with his reasoning and conclusions. I would only add some comments on the decision of this court in Omonuwa v. Oshodin (1985) 2 N.W.L.R (Pt. 10) 924 on the issue of "final" and "interlocutory" decisions.

Now, the judgment of the Court of Appeal from which the appeal has been brought was delivered on 21st November, 1984. The notice of appeal was filed on 14th January, 1985. Section 31(2) of the Supreme Court Act 1960 requires the notice of appeal in a civil case in an appeal against an interlocutory decision to be filed within fourteen days and in the case of an appeal against final decision within three months. The time to appeal is reckoned from the date of the judgment appealed against. The question for determination in the application of Chief Williams, SAN, as to whether the decision of the Court of Appeal that the High Court of Lagos State has no jurisdiction to try the suit was an "interlocutory" or a "final" decision. If the decision was an "interlocutory decision," then there is no proper appeal before this court since the notice of appeal was filed out of time. So Chief Williams applied for extension of time within which to appeal and to deem the notice already filed as having been filed within time. However, if the decision is Page 144 of "final", then there is a proper appeal before the court because the notice of appeal was filed within three months.

The "finality" test was first established in Salaman v. Warner (1891) 1 Q.B. 734 at 736 where Fry L.J. formulated the test in these terms:

"I think that the true definition is this. I conceive that an order is ‘final’ only where it is made upon an application or other proceeding which must, whether such application or other proceeding fail or succeed, determine the action. Conversely I think that an order is ‘interlocutory’ where it cannot be affirmed that in either event the action will be determined."

Subsequently, in Bozson v. Altricham U. D. C. (1903) 1 K.B, 547 at 548 Lord Alverstone C. J . advanced another test as follows:

"It seems to me the real test for determining this question ought to be: Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not, it is then, in my opinion, an interlocutory order."

A careful perusal of the decisions of the Court of Appeal of England relating to the applications of the two tests would show that the court has not shown consistent preference of one test to the other. It has been applying one or the other test indiscriminately. However, in Nigeria in appeals against the decisions of courts of first instance, the appeal courts have been consistent and have adopted unequivocally the test in the Bozson case: Blay v. Solomom (1947) 12 W.A.C.A. 175; Afuwape v. Shodipe (1957) 2 F.S.C. 62; Alaye of Effon v. Fasan (1958) 3 F.S.C. 68; Ude v. Agu (1961) All N.L.R.65: The Automatic Telephone v. Federal Military Government (1968) 1 All N.L.R. 429.

However, in Omonuwa’s case this court appears to state that the tests in Salaman’s case and Bozson’s case should be applied jointly in determining whether an order or judgment is interlocutory or final. In his lead judgment my learned brother, Karibi-Whyte J.S.C. criticised the Bozson case test thus:-

"All the cases cited agree on the proposition that a decision between the parties can only be regarded as final when the determination of the court disposes of the rights of the parties, (and not merely an issue) in the case. Where only an issue is the subject matter of an order or appeal the determination of that court which is a final decision on the issue or issues, before it, which does not finally determine the rights of the parties, is in my respectful opinion interlocutory. The issue before the Court of Appeal in this appeal arose from an interlocutory matter and not (sic) lose that character it is an appeal. The (inconvenience) and anomaly in the result of the nature of the order test (i.e. the Bozson case test) is that an otherwise interlocutory application ends up as a final decision of the Court of Appeal. If this is accepted the anomalous effect of an appeal on such a ‘decision’ is to enlarge the right of appeal of the appellant from the High Court to the Court of Appeal and to this court. This is despite the fact that the rights of the parties have still not been finally determined as was in the Automatic AND Electric Co. Ltd. v. F.M.G. (1968) 1 All N.L.R. 429 and Adegbenro v. Akintola (1962) 1 All N.L.R. 442 at p.474. In the Automatic Telephone AND Electric Co. Ltd.’s case was a reference to the High Court from an arbitration. Though the High Court disposed of the issue on reference before it did not finally determine the rights of the parties in the arbitration; Similarly, the questions on the interpretation of the Constitution to be answered in the Federal Supreme Court in the Adegbenro case. The view that a judgment of the court on an interlocutory matter on appeal before it is final as was held is clearly inconsistent with the principles enunciated in all the decided cases cited in the judgment and with common sense and experience. As I have said, the test applied in these cases relate to the function of the court in disposing a matter before it, it was not concerned with the determination of the rights of the parties." (Italics supplied).

My learned brother seems to distinguish D.P.P. v. Chike Obi (1961) All N.L.R. 186 and Adegbenro v. Akintola (1963) A.C. 614 at p. 627 thus:

"In these two cases the court has applied neither the test of the nature of the order nor of the application in determining the application from which the order was made. With due respect this approach has never been the test applicable and clearly not the laws. The court relied on its function of determining a reference of it, and was not concerned with the determination of the rights of the parties."

He then proceeded to advocate the joint application of the two tests in these words at page 939:

"In my opinion, the ideal approach is to consider both the nature of the application, (i.e. the Salaman case test) and the nature of the order made (i.e. the Bozson case test) in determining whether an order or judgment is interlocutory or final in respect of the issues before it as between the parties to the litigation. Thus where the nature of the application does not aim at finally determining the claim or claims in dispute between the parties, but only deals with an issue, both the application and the order or judgment must be interlocutory.

See Isaacs AND Sons v. Salbstein AND Anor (supra) at p. 146 Alaye of Effon v. Fasan (1958) 3 FSC. 68. However, where an application has the effect by the order therefore of finally determining the claim before the court, the order may properly be regarded as final. See Afuwape AND Ors. v. Shodipe (1957) 2 FSC. 62 at p. 68. This proposition is clearly consistent with the principles as enunciated in the judicial decision and is logical. It also accords with common sense and the practice of the courts. The order appealed against in the case before us does not purport and has not finally settled the right of the parties in the claim before the court, and is therefore an interlocutory order. The determining factor whether an order or judgment is interlocutory or final is not whether court has finally determined an issue before it. It is whether or not it has finally determined the rights of the parties in the claim before the court." (Italics supplied)

In Chief Agbajo v. Attorney-General of the Federation AND 2 Ors. (1986) 2 N.W.L.R. (Pt. 23) 528 the Court of Appeal attempted to apply the two tests but the majority found what Eboh, JCA. christened as "Test No. 1" inapplicable to the circumstances of the case. Chief Williams, SAN, contended that the only issue for determination by this court in Onomuwa case was whether the judgment of the Court of Appeal was a final or an interlocutory decision: see Omonuwa case at p. 931 G of the report. He submitted that, having regard to the only issue before this court, any pronouncement by this court in that case on the question of whether the decision of the High Court was final or interlocutory was purely obiter and not binding. He contended that it would be retrogressive to resurrect some other test, such as the Salaman case test, which had been considered in the past and deliberately rejected. He urged us to interpret section 31 of the Supreme Court Act that the phrase "an interlocutory decision" or "final decision" where it occurs in the section means "an interlocutory decision of the Court of Appeal or "a final decision of the Court of Appeal." He referred to Olubadan-in-Council (1949) 12 W.A.C.A. 464, D.P.P. v. Chike Obi (1961) 1 All N.L.R. 186 and Adegbenro v. Akintola (1963) A.C. 614 showing that a decision may be "final" in an appeal court but not necessarily so in the court of first instance.

I am inclined to agree with the submission of Chief Williams that the pronouncements of this court in Omonuwa case concerning the test applicable in deciding whether or not a decision at first instance was "final" or "interlocutory" are obiter dicta and not binding. I am also of the view that the pronouncements in so far as they tend to show a departure from the previous decisions of this court or the former Federal Supreme Court or the defunct West African Court of Appeal are also obiter dicta because none of those previous decisions was canvassed for reconsideration before us in the Omonuwa’s case.  
On proper reflection, one may observe that the application of the joint test in effect may be tantamount to the resurrection of the Salaman case test which has been rejected since Blay v. Solomon. It may be appreciated that the application of the Salaman case test involves two considerations. The first consideration is the nature of the application while the second consideration is the nature of the order made, which in effect is the application of the Bozson case test. It follows therefore that the test in Salaman case includes the test in Bozson case. Consequently, joint application of the two tests does not add anything new to Salaman case test since the latter test includes Bozson case test. If that had been the case, then joint application of two tests would have been tantamount to reverting to Salaman case test which was rejected 40 years ago when the Bozson case test was adopted.

It seems to me also on the authority of D.P.P. v. Chike Obi (1961) 1 All N.L.R. 186 and Adegbenro v. Akintola (1963) A. C. 614 at p. 627 that in an appeal before a second tier appeal court against the decision of a first tier appeal court on the question as to whether the decision of the first tier appeal court is "final" or "interlocutory" the second tier appeal court is only concerned with the decision of the first tier appeal court and not of the court of first instance, i.e. the trial court. Section 213(l) of the Constitution and section 31(l) and (2)(a) of the Supreme Court Act are germane to the issue. Section 213(l) reads:

"213. (1) The Supreme Court shall have jurisdiction to the exclusion of any other court of law in Nigeria to hear and determine appeals from the Court of Appeal."

And, section 3 1 (1) to (2)(a) of the Act provides:

31. (1) Where a person desires to appeal to the Supreme Court he shall give notice of appeal or notice of his application for leave to appeal in such manner as may be directed by rules of court within the period prescribed by subsection (2) of this section that is applicable to the case

(2) The periods prescribed for the giving of notice of appeal or notice of application for leave to appeal are (a) in an appeal in a civil case, fourteen days in an appeal against interlocutory decision and three months in an appeal against a final decision." (Italics supplied)

Since no appeal lies from the decision of any other court than the Court of Appeal to this court, "an interlocutory decision" and "a final decision" within the scope of section 31 of the Act invariably mean "an interlocutory decision of the Court of Appeal" and "a final decision of the Court of Appeal" and of no other court. I think the issue of "finality" in this respect must be decided from the question as to whether the Court of Appeal has finally disposed of the matter on appeal before it: see Adegbenro v. Akintola (supra) at p.627.

For the avoidance of any doubt, I would like to emphasize that, in my view, the test formulated in Bozson case which has been adopted since Blay v. Solomon (supra) and Ude v. Agu (supra) is still the test to be applied in determining whether a court’s decision is final" or interlocutory, I would apply that test for the resolution of the issue in the case in hand.

Now in the case in hand the Court of Appeal by majority held the trial court had no jurisdiction to entertain the suit notwithstanding the determination by the Court of Appeal of the appeal on the merits which is only a matter of tactical practice for speedy administration of justice in case its decision of jurisdiction turn out to be wrong, the decision on the jurisdiction as far as the Court of Appeal was concerned is final. That court had finally disposed of the appeal before it and there was nothing left.

For the foregoing reasons I hold the decision of the Court of Appeal on the issue of jurisdiction to be final" Consequently the appeal is properly before the court and no leave is required.

**UWAIS, J.S.C:**

I have had the opportunity of reading in draft the judgment read by my learned brother Eso J.S.C. and I entirely agree with it.

This appeal has three aspects. The first aspect relates to the application by the appellant for extension of time and leave to appeal on the issue of jurisdiction raised for the first time and dealt with by the Court of Appeal. The second aspect concerns the appeal against the majority decision of the Court of Appeal which found that the subject matter in dispute pertains to admiralty and that the Lagos State High Court had for that reason no jurisdiction to determine the dispute. The final aspect concerns the decision of the Court of Appeal in the substantive appeal which is based on the transaction between the parties for the opening of a letter of credit.

A. The Application.

The appellant was the plaintiff in the Lagos State High Court. Judgment was given against him and he appealed to the Court of Appeal against the decision. The appeal was heard and arguments were concluded on 27th September, 1984. Judgment was reserved by the Court of Appeal. The case came up again before the court on 14th November, 1984. When counsel were informed by the Court of Appeal.

"we have decided to recall counsel in this appeal to address us on one issue only i.e. whether the Lagos State High Court and not the Federal High Court has jurisdiction to adjudicate in this matter."

Both counsel for the parties were heard and they both submitted that the dispute in the case was based on the relationship between banker and customer and did not relate to shipment of goods. Therefore, both counsel argued that it was the Lagos State High Court that had jurisdiction.

In their judgments, which were delivered on 21st November, 1984. Nnaemeka-Agu, J.C. A, who read the lead judgment, held that the dispute between the parties did not concern admiralty and therefore the Lagos State High Court had jurisdiction. The learned Justice then went on to consider the merit of the appeal. He finally dismissed it. Both Mohammed and Kutigi JJ.C.A agreed on the judgment on the merit but disagreed on the question of jurisdiction. They both held that the subject matter of the dispute concerned admiralty and as such only the Federal High Court had jurisdiction.

Naturally both parties to the case became aggrieved. The plaintiff filed a notice of appeal on 12th February, 1985 complaining against the decision of the Court of Appeal on both the issue of jurisdiction and the merit of the appeal, while the defendant, who got judgment in both lower court, filed its notice of appeal on 14th January, 1985 complaining against the decision that the Lagos State High Court had no jurisdiction. It is pertinent to mention that the appeals were filed as of right as provided under section 213 subsection (2)(a) of the Constitution of the Federal Republic of Nigeria, 1979.

On the 1st February, 1985, this court delivered judgment in Omonuwa v. Oshodin, which has since been reported in (1985) 2 NWLR (Pt. 10) 924. By reason of the decision in Omonuwa’s case, Chief Williams, learned Senior Advocate, for the defendant, felt that it became necessary to apply for the enlargement of time in order to satisfy the provisions of section 31 subsection (2) of the Supreme Court Act, 1960 which provides –

"The period prescribed for the giving of notice of appeal or notice of application for leave to appeal are –

(a) in an appeal in a civil case, fourteen days in an appeal against an interlocutory decision and three months in an appeal against a final decision."

From the foregoing, it is clear that an appeal against the final decision of the Court of Appeal must be brought within 3 months, while an appeal against it’s interlocutory decision ought to be filed within 14 days. If the decision the Court of Appeal in this case, on the issue of jurisdiction, is final, as learned Senior Advocate thought it was, the appeal he filed on 14th January, 1985 would have been filed within time. But if it is an interlocutory appeal, then, he had filed it out of time. This state of uncertainty arose, because of our decision in Omonuwa’s case which Chief Williams, interpreted as saying that the decision of the Court of Appeal in the present case, on the issue of jurisdiction, would be or is an interlocutory decision. In moving the application, Chief Williams, attacked the lead judgment in Omonuwa’s case by arguing that its ratio decidendi on the test to determine whether the appeal in the case was "interlocutory" or "final" is obiter dicta and therefore not binding on us. The argument was advanced on the premise that the sole question to be determined in the case was "whether the decision of the Court of Appeal dismissing the defendant’s appeal to that court was final or interlocutory". It was, he submitted, therefore unnecessary to determine the question whether the decision of the High Court in the case on appeal was interlocutory or final.

Arguing further, Chief Williams drew attention to the decisions of the West Africa Court of Appeal in Blay v. Solomon, (1947) 12 WACA 177 and Federal Supreme Court in Ude AND Ors. v. Agu AND Ors., (1961) 1 All NLR which considered the distinction between final and interlocutory decisions in courts of first instance. Those decisions he submitted were based on the term laid down by Lord Alverstone C.J. in Bozson v. Altrincham (1903) 1 KB 547 and not the test laid down in Salaman v. Warner (1891) 1 Q. B. 734 which was considered and rejected in Ude AND Ors. v. Agu AND Ors. (supra).

Learned counsel said our decision in Omonuwa’s case, as reported at p.938 lines G - H and p.939 A-B of (1985) 2 NWLR (Pt. 10) 924, is to the effect that the principles in Bozson’s case and Salaman’s case would apply in determining whether an appeal is final or interlocutory. This, he submitted would be retrogressive since only the decision in Bozson’s case had been followed by the Nigerian courts with effect from 1947.

I pause here to examine the principles laid down in the cases of Bozson and Salaman. In the latter Fry L.J said at p.736 as follows

"I think that the true definition is this, I conceive that an order is ‘final’ only where it is made upon an application or other proceeding which must, whether such application or other proceeding fail or succeed, determine the action. Conversely, I think that an order is ‘interlocutory’ where it cannot be affirmed that in either event, the action will be determined."

In Bozson’s case Lord Alverstone C.J. observed at p.549 - 50 thus

"It seems to me that the real test for determining this question to be this: Does the judgment or order as made, finally disposes the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not it is then, in my opinion, interlocutory order."

Now it is true that Verity C.J. in the West African Court of Appeal case of Blay v. Solomon (supra) preferred the test laid down by Bozson’s case after referring to the test in Salaman’s case. Again Brett F.J. (as he then was) said in Ude AND Ors case (supra) as follows

"In Blay v. Solomon (1947) 12 WACA 175 the West African Court of Appeal followed the test which looks at the order made and in my view it is clearly the proper test for this court to adopt .... : (Italics mine)

The question is: has our decision in Omonuwa’s case departed from the decisions in the cases of Blay and Ude AND Ors. as argued by Chief Williams? Let us examine what the lead judgment (per my learned brother Karibi-Whyte, J.S.C.) says at pp. 938G - 9B thereof which learned Senior Advocate referred to –

"Applying the principles enunciated in both tests, i.e. the nature of the application, and the nature of the orders, to this appeal, it is inescapable that the judgment of the Court of Appeal, appealed against is an appeal on an interlocutory ruling before the High Court. It is also incontestable that the judgment of the Court of Appeal which remitted the case for trial in the High Court did not finally determine the issues litigated by the parties in the High Court. See Isaac’s AND Sons v. Salbestein AND Anor., (1916) 2 KB 139 at p. 146…..To determine finally an issue before the court which does not finally determine the rights of the parties, does not rank as determining the rights of the parties in the case and in my opinion is not a final appeal inter partes.

In my opinion, the ideal approach is to consider both the nature of the application, and the nature of the order made in determining whether an order or judgment is interlocutory or final in respect of the issues before it as between the parties to the litigation. Thus where the nature of the application does not aim at finally determining the claim or claims in dispute between the parties, but only deals with an issue both the application and the order or judgment must be interlocutory. See Isaacs AND Sons v. Salbestein AND Anor. (supra) at p. 146; Alaye of Effon v. Fasan (1958) 3 F. S. C. 68."

It seems to me that although at the outset the quotation above talks of applying the principles enunciated in both tests" it does not lay down that both tests must apply in determining whether a decision is final or interlocutory The suggested examination of the application is merely further aid to determining the nature of the order or judgement. The fact that our courts follow the test in Bozson’s case was adverted to in the lead judgment in Omonuwa’s case; see p-934 D thereof, where Karibi-Whyte, J.S.C. observed as follows-

"It seems clear to me from the cases in this jurisdiction, that the tests (sic) in the second class of case (sic) has been adopted and applied. The test laid down by Lord Alverstone in Bozson v. Altrincham U. D. C. (supra) has been consistently applied."

And again on p.937H –

"Bozson v. Altrincham U.D.C. supra has been approved and applied in our courts. I think this is good reasoning." Italics supplied.

I therefore hold that the test in Bozson’s case which had been followed in Blay v. Solomon and Ude AND Ors. v. Agu AND Ors. is still the test applicable in determining whether a judgment or order is final or interlocutory. The decision in Omonuwa’s case has not departed from the test.

Applying the test to the present case, the nature of the judgment given by the majority (Mohammed and Kutigi JJ.C.A.) is that the Lagos State High Court had no jurisdiction; and therefore it follows that the appeal before the Court of Appeal was incompetent. That is clearly a final decision in the Court of Appeal. Once the decision is incompetent, there is nothing left in the case to be finally determined in the court. Consequently, by the nature of the judgment of the majority, the decision that the trial court had no jurisdiction cannot be an interlocutory decision. Appeal therefore lies from that decision to this court within 3 months. The respondent’s appeal was filed before the expiration of the 3 months. It is for that reason unnecessary for this application to have been brought. Consequently, I agree that the application should be refused and it is hereby dismissed.

B. Jurisdiction

As narrated under A above, Mohammed and Kutigi JJ.C.A. held that the Lagos State High Court had no jurisdiction to try the dispute between the parties, because the contract between them involved the shipment of goods. But Nnaemeka-Agu J.C.A. held a contrary view. As I observed in the case of Nasaralai Enterprises Limited v. Arab Bank Nigeria Limited (unreported) judgment delivered or to be delivered later today, there are four parties to a transaction concerned with the issue of a letter of credit. This gives rise to four contracts in the transaction. First between the buyer and the seller. Secondly, between the buyer and the issuing bank. Thirdly between the issuing bank and the confirming or correspondent bank. And fourthly, between the confirming or correspondent bank and the seller - see United City (Investments) Limited v. Royal Bank of Canada (1983) A. C. 168 at pp. 182-3. The dispute in the present case relates to the first contract which has nothing directly to do with the shipping of goods. The contract is only concerned with documents and not goods, as provided by article 8 of the Uniform Customs and Practice for Documentary Credits, which applies to the transaction between the parties. The majority, with respect misunderstood the relationship between the parties, because they failed to direct their attention to the article in question. The only occasion when, perhaps, admiralty jurisdiction may be involved in a letter of credit transaction is when there is a dispute in respect of the first contract between the seller and the buyer relating to the carriage of the goods sold by ship.

I therefore hold that the Court of Appeal (per majority) was in error when it held that admiralty jurisdiction was involved and the decision of this court in American International Insurance Co. v. Ceekay Traders Ltd. (1981) 1 All NLR. (Pt. 1) p-58; (1981) 5 S.C. 81 applied.

Chief Williams, argued that the decision in American Insurance Ceekay Traders Ltd (supra) "ought to be followed by this court in so far as it decides that the law relating to admiralty jurisdiction in Nigeria includes the provisions of section 1 (1)(h) of the Administration of Justice Act of 1950 in England". However, counsel submitted that we should overrule the case in so far as it is inconsistent with the decisions of the House of Lords in connection with the interpretation of section 1 (1) (h) of the Administration of Justice Act, 1956. The subsection provides –

1(1) The admiralty jurisdiction of the High Court shall be as follows;  
that is to say, jurisdiction to hear and determine any of the following questions or claims –

(h) any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of ship."

It is said that the words italicised in the subsection should be given narrow as opposed to wide meaning. This is so, because it was decided in the Scottish case of The Aifanourios, (1980) S.C. 346 that the contract of marine insurance over a ship and its cargo was a claim within admiralty jurisdiction.

The decision in the Scottish case was quoted with approval and applied to section l(l)(h) by the House of Lord in Gatoil Inc. v. Arkwright – Boston Co., (1985) A.C. 25, which similarly involved a contract of marine insurance. The decision in the latter case was referred to by the House of Lords in The Antonis P. Lemons (1985) 1 A.C. 711 at pp.728F - 729C, where it was decided that the words "relating to" in section 1(1)(h) must be given a narrower rather than a wider construction. It is significant to mention that the provisions of section 1 (1)(h) are now contained in section 20(2)(h) of the Supreme Court Act 1981 in England.

I have already shown that the decision of the Court of Appeal, that the admiralty jurisdiction applied because the dispute between the parties relates to carriage of goods by ship, was misconceived. Since that decision was wrongly based on the ratio decidendi in the case of American International Insurance Co. Ltd. (supra), should this court now undertake a review of the decision in the case in order to overrule it, in view of the latest judgments of the House of Lords in the cases cited by counsel. The principle on which this court will depart from or overrule its decision has been well stated in a number of cases. The underlying consideration being that the decision has been impeding the proper development of the law or has led to results which were unjust or which are contra contrary to public policy. See Mrs Bucknor - Maclean AND A nor. v. Inlaks Ltd. (1980) 8 I I S.C. 1 at pp. 23-25; Nofiu Surakatu v. Nigeria Housing Development Society Ltd; (1981) 4 S.C. 26; Alhaji Raji Oduola AND Ors. v. Coker AND Ors (1981) 1 5 S.C 197 and Bronik Motors Ltd. v. Wema Bank Ltd., (1983) 1983) 6 S. C 158 at p. 298 (1983) 1 SCNLR 296 a at p.317.

None of the criteria aforementioned has been met in counsel’s submission. Apart from the fact that the House of Lords decisions are merely of persuasive authority, the desire to have the same common law with England though ideal cannot be achieved. The pace at which English law develops is by far faster than that at which ours develops. One only needs to look at the statutes of general application in England as at 1st January, 1900, which are still our laws to see how far the English law has left ours behind Any hope of achieving uniformity with England is now illusion. As put by Rupert Cross at p.22 of the 3rd Edition of his book - Precedent in English Law:

"The desirability of having the same common law throughout the Commonwealth is not as self-evident as it is sometimes made to appear. Much depends on the branch of the law concerned. In commercial matters, for example, where members of the different Commonwealth countries are liable to be affected by the same rule, there is much to be said for uniformity; but the demand for uniformity in other spheres may militate against useful developments. For historical reasons, Australian and Canadian Judges may, faute de A mieux, have to start their thinking with English law, but there is no obvious merit in their binding themselves to adopt the English solution. The first answer to a legal problem is not necessarily the right one, and each of two answers may be equally meritorious."

Consequently, I see no reason to depart from our decision in the American International Insurance Co. Ltd. v. Ceekay Traders Ltd. I hold that the jurisdiction to determine the dispute between the parties was vested in Lagos State High Court and not the Federal High Court.

C. The Substantive Appeal on Merit

The issues for determination here have been set-out in the brief filed by Professor Kasunmu, for the plaintiff. The issues have been well considered by the lead judgment and I have no desire to add anything.

In the result therefore both the appeals by the plaintiff and the defendant have respectively failed. I agree that the appeals should be dismissed and they are hereby dismissed with no order as to costs.

COKER, J.S.C.:

I agree that this appeal fails and should be dismissed for the reasons given by my learned brother Eso, J. S. C. in the lead judgment, the draft of which I have heard the privilege of reading in advance.

The appeal, indeed the whole case, centered around an irrevocable confirmed non-transferable letter of credit issued by the respondent on the application of the appellant for U.S.$570,000.00 to its correspondent bank in Switzerland. The two issues in the appeal relate to jurisdiction of the trial court and the rights and obligation between the customer and the issuing bank.

Jinadu J., in the Lagos State High Court assumed jurisdiction and dismissed the plaintiff s case. In a majority judgment, the Court of Appeal held that the matter was one relating to carriage of goods by sea and therefore fall within the admiralty jurisdiction of the Federal High Court. It therefore allowed the appeal and struck out the suit for want of jurisdiction. On the merit of the case, the court was unanimous that the plaintiffs failed to prove breach of any of the terms of the credit or negligence against the issuing bank that is, the respondent. The essence of a letter of credit, is the four independent and inter-related contracts involve. These are

(a) the contract between the buyer and the oversea seller

(b) the contract between the buyer and the local issuing bank

(c) the contract between the issuing bank and its oversea confirming or correspondent bank and

(d) the contract between the correspondent bank and the seller.

The present proceedings involve the buyer and the issuing bank. Article 8 of the Uniform Customs and Practice Documentary Credits (1974 Ed.) which is applicable to the transaction in question, makes it clear that the parties to the transaction are concerned with documents stipulated in the credit and not goods, which involve only the buyer and the seller as in (a) above. The contract between them may invariably involve the question of delivery of the goods by sea, in which case, the admiralty jurisdiction of the Federal High Court under S.7(l)(e) of the Federal High Court Act, 1973 may be involved as was decided in American International Insurance Co. v. Ceekay Traders Ltd. (1978) 5 S.C. 81.

The second question which was raised in the application of the appellant for leave to appeal. The point was whether an appeal against an order relating to jurisdiction was a final or interlocutory appeal. Chief Williams Senior Advocate, drew attention to our decision in Omonuwa v. Oshodin (1985) 2 N.W.L.R. (Pt.10) 924 where the various authorities were considered as to what constitutes a final or interlocutory decision. Eso, J.S.C., in the lead judgment has discussed the various views of eminent Judges in some local and foreign cases. I agree that for practical purposes, what should be considered is what effect the order appealed against has on the rights of the party involved. If the order determines finally the right of the party, then it is final order, if not, it is interlocutory.

The order of the court below relating to the jurisdiction of the trial court was therefore a final and not interlocutory decision of the court below. This is because the order terminated the right of the plaintiff/appellant as far as the suit before that court was concerned.

The appeal which was filed on 12/2/85 against the decision of the court below given on 21st November 1984, was therefore within time, (i.e. within 3 months) under section 31(2) of the Supreme Court Act 1960.

I agree with my brother Eso, J.S.C. that whatever might have been default of the respondent in debiting the appellant’s account, his right of action has been defeated by the unreasonable delay, amounting to ratification, that is failure to reject the documents, exhibit J which appellant received and signed for on 18/10/78. It was wrongful payment by the respondent’s agent, BANQUE POUR LE COMMERCE Int. S.A. BASLE SWITZERLAND on the 12th September 1978. The authorities show that the appellant if he was not consenting to the payment ought timeously to reject the non-conforming documents as soon as he discovered that the payment was irregular.

For these and other reasons clearly and fully given in the lead judgment, this appeal is dismissed with costs fixed at N300.00 to the respondent.

**KARIBI-WHYTE, J.S.C.:**

I have had a preview of the judgment of my learned brother Kayode Eso, JSC in this appeal. I agree with both the exhaustive reasoning, which he has given for his decision and his conclusion that the appeal be dismissed. I should point out at once that I also agree with the ruling by my learned brother Kayode Eso, JSC that this court has not departed from the principles laid down in Blay v. Solomon (1947) 12 WACA 175 followed in Agu v. Ude (1961) All NLR 65 for determining whether a decision is interlocutory or final. The principles applied in Omonuwa v. Oshodin (1985) 2 NWLR (Pt. 10) 924 is not different. I also agree with the submission of both counsel in this appeal, that the trial High Court had jurisdiction over the subject matter of the action, not being a matter of admiralty.

I however wish to make some comments of my own in clarification of some of the issues canvassed in the matter. I shall begin with the issue of jurisdiction. The Court of Appeal was divided on the question whether the trial High Court had jurisdiction over the subject matter of the action before it. Nnaemeka-Agu, JCA was of the view that the trial Lagos State High Court had jurisdiction, whereas Uthman Mohammed, Kutigi JJ.C.A. held that the Court acted without jurisdiction. Thus it is the majority view that the trial Court acted without jurisdiction. All the justices were however unanimous in the view that the appeal ought to be dismissed on the merits and proceeded to do so. Chief Williams, SAN, has pointed out, and I entirely agree, that having held that the trial High Court acted without jurisdiction, it necessarily follows that the Court of Appeal was not competent to sit on appeal over such a judgment. Consequently the appeal ought to have been struck out. Their Lordships did not do so. Appellant and respondent have both appealed against that part of the judgment that the High Court acted without jurisdiction.

Uthman Mohammed J. C.A. with whom Kutigi JJ.C.A agreed saw the issue in this way. He said, at p. 178

"...it is my view that the Lagos High Court, or in other words a State High Court has no jurisdiction to try any case on a matter concerning the opening of letter of credit in which there is no collateral agreement of carriage of goods by sea ..."

After analysing the facts of the case and several decisions cited to the Court of Appeal by counsel on both sides, such as United City Merchants AND Anor. v. Royal Bank of Canada (1982) 2 WLR. 1039; American International Insurance Company v. Ceekay Traders Ltd. (1981) 5 SC. 81 Societe Generale de Survellance S.A. v. Rastico (Nigeria) Ltd. CAIU51/84 (unreported) and the provision of the Administration of Justice Act, 1956 (England) S. I relating to the admiralty jurisdiction of the High Court, it was submitted to the court, as it was before us that the claim before the High Court was not a claim arising out of an agreement relating to the carriage of goods by ship within the meaning of the expression in S. 1 (1)(h) of the Administration of Justice Act, 1956 (England).

It seems obvious to me despite their imperfect appreciation of the facts of the appeal before them, that the majority misconceived the real issue in controversy before the court of trial.

The claim before the court as endorsed on the writ of summons is for

(a) breach of contract by the defendant and its agent (The Banque pour Le Commerce Lot S A Basle Switzerland) in respect of payments wrongfully made out of letter of credit No. LCB 0380/78/1452 of 31/7/78 issued by the defendants on the instructions of the plaintiff and contrary to the terms and conditions of the said letter of credit.

(b) Alternatively, special and general damages for negligence on the part of the defendant and its agents, the Banque Pour Le Commerce Int. S A. Basle Switzerland, for accepting and making payments against a forged bill of lading issued by Bryanston Italiana S.R.L Pescara Italy contrary to the, aforesaid instructions of the plaintiff.

(c) A declaration that as the payment of 570,000 U.S. Dollars made by the delect defendant’s bank to ASDECAMO was made in breach of the terms and conditions of the letters of credit mentioned in claim I above, the defendant is not entitled to debit the plaintiff s Account No 9257 with the Lagos central branch of the defendant/bank with that amount and or with any, interest, and commissions on that amount; and an order that defendant shall forthwith revert or cancel all debt entries so made.

These are the claims subject matter of the action, before the court. They are for breach of contract in the alternative negligence, and declaration. It is clear from the evidence and exhibits tendered, namely "exhibits B and C", that the claim is founded on the contract between appellant and the respondent for the purposes of issuing letter of credit (exhibit C) in respect of payments for consignment of cement being sold to the appellant by any overseas supplier, in this case ASDECAMO. It is true that the letter of credit "exhibit C" contained additional conditions to be observed before payment was to be made. It is however the law that it is sufficient for the purposes of payment if the documents are ex facie regular. Thus the contract in issue before the court is exhibit B, the application for the letter of credit made by the appellant, and exhibit C the letter of credit issued on behalf of appellant by respondent to the Banque Pour Le Commerce Int. Basle, Switzerland for payment to ASDECAMO.

Again, the alternative claim on negligence is based on the failure of the respondent and its agent in not discovering that exhibit D the bill of lading is a forgery. There is no claim for loss arising out of or during or from the shipment of goods, even though there were averments in the pleading about bill of lading, shipment, foreign exchange payment. In fact this is not a transaction between appellant and the issuer of the bill of lading, exhibit D, Bryanston Italian S. R. L. Finally, the declaration relates to the payment to the supplier of the goods and the consequential debiting of appellant’s account by the respondent.  
It will be helpful at this stage to state in summary form the facts of this case. Appellant desirous of importing 10,000 metric tons of cement met and arranged with a seller who gave his name as ASDECAMO. To facilitate the transaction appellant by "exhibit B" applied to the respondent to open an irrevocable non transferable confirmed letter of credit for U.S. $570,000 to pay for the cost of the cement. The respondent then issued "exhibit C" for the same amount to its corresponding Bank in Switzerland i - e. Banque Pour Le Commerce Int. S.A. Basle Switzerland who then informed the supplier that the payment for the cement was available to him on his presentation of the documents stated in exhibit C. " In this arrangement, there are four parties and four contracts, namely,

(a) The contract between the buyer and his local Bank, the issuing bank which does not involve any transaction for the carriage of goods;

(b) the contract between the issuing bank and the confirming bank, which is founded on document;

(c) there is the contract between the confirming bank and the overseas supplier - seller also founded on documents;

(d) there is the contract between the buyer and the seller.

It is only (d) that generally involves a carriage of goods transaction. Where the bill of lading is required in (b) (c), they are merely evidence necessary and requisite for effecting payment. The very and essential nature (of a letter of credit transaction is that parties deal only in documents and not in goods - see article 8, uniform customs and practice documentary credits (1974 Ed.). Again credits are separate transactions from the sales or other contracts on which they may be based. Banks are not in any way bound by such other contracts.  
In his judgment Uthman Mohammed J. C. A. referred to the additional instructions in the letter of credit "exhibit C", particularly conditions 2 and 3, and held that they are a term of contract, and therefore relate to "any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship" and said,

"it is my view that if any part of this claim is caught up by the provisions of S.1(i)(h) of the Act of 1956, the State High Court would have no jurisdiction to try this action. The first issue to determine therefore is whether conditions 2 and 3 of the additional instructions relate to carriage of goods by ship or the use or hire of a ship."

The learned Justice of the Court of Appeal referred to the Queen of South (1968) 1 All ER. 1169 for the meaning of "an agreement relating to the use or hire of a ship" and to the St. Elefteric (1957) p. 179 referred to in American Insurance Co. v. Ceekay Traders (supra) and held that the words of S. I (i)(h) of the Administration of Justice Act 1956 (England) were wide enough to cover claims in contract or tort arising out of any agreement relating to the carriage of goods in a ship.

After enumerating the contracts involved in a documentary letter of credit transaction the learned Justice of the Court of Appeal said,

"It is my considered view that in the case in hand, since the seller had given additional instructions which laid down a condition on how the goods should be carried and the type and age of the ship involved another contract for "the use and hire of a ship is involved."

He went on to say that the contracts were inter-connected and concluded, “From the facts of this case ASCEDAMO were the sellers and Bryanston Italiana of Italy were mentioned in exhibit D to be shippers. Therefore there was a contract between ASCEDAMO and Bryanston Italiana for the carriage of the cement to Lagos. This contract is within the overall contract between the buyer and seller."  
Surely the learned Justice of the Court of Appeal cannot be taken for granted for suggesting that either Bryanston Italiana or ASCEDAMO was a party to the action before the court. Not being parties to the contract in which the appellant was suing, it is difficult to conceive how a condition, even if acceptable although denied, could affect the contract between appellant and respondent The learned Justice of the Court of Appeal went on to hold that

"...the terms set out in those additional instructions are caught up in S. I (i)(h) of the Administration of Justice Act 1956 and therefore within the admiralty jurisdiction of the Federal High Court."

He then gave an example that if the supplier, in this case ASDECAMO applied to be made a third party, or that one of the parties applies that ASDECAMO be made a co-defendant in the State High Court, the issue whether the cement was carded in a ship to Apapa or whether the use or hire of "Thomas Mann" is a conference vessel or not would call for determination. This it was said is not within the jurisdiction of the State High Court. Finally, the learned Justice was of the view that the dominating factor whether the action was a matter concerning admiralty was the bill of lading. He contended that contracts of carriage of goods by sea are mainly evidenced by a bill of lading. Since the argument of the appellant was founded on the breach of the conditions of "exhibit D, " the bill of lading, and this contains evidence of the terms of agreement between appellant and the respondent.

He concluded.

"The terms so stated in the bill of lading are admiralty issues and any litigation about them must be in an admiralty court."

The learned majority Justices of the Court of Appeal would appear to have misunderstood the nature of the case before the court, and the issues they were expected to determine. As I have already indicated, the action was between the buyer and the issuing banker with respect to claims for breach of contract and in the alternative damages for negligence. The issue of carriage of goods as an additional condition is not a term between the buyer and the issuing banker. It is a condition which the seller is expected to observe in presenting documents for payment. As was pointed out in Ardenes (Cargo Owners) v. Ardennes (Owners) (1950) 2 All ER 517, that a bill of lading is not in itself the contract of carriage between the shippers and the ship-owner, or the shipper and the charterer, but is evidence of its terms. In this case the contract between the appellant and respondent is evidenced by exhibits B and C, and do not involve any of the obligations under S. I (i)(h) of the Administration of Justice Act 1956 (England). Exhibit D, the bill of lading was issued by Bryanston Italiana, who is not a party to the contract. The competing claims for the exercise of jurisdiction between the State High Courts and the Federal High Court started early in the establishment of the latter. Jammal Steel Structures Ltd. v. A. C. B. Ltd. (1973) 1 All NLR (par 2) 208 appeared to have been the genesis of the definition of the scope of its banking jurisdiction. The more recent case of Bronik Motors Ltd. v. Wema Bank Ltd. (1983) 6 S.C. 158 would appear to have placed for the time being the issue beyond controversy that all claims to banking transactions between a bank and its customers as distinguished from banking measures are by virtue of S.7(i)(b)(iii) of the Federal High Court Act 1973 not within the jurisdiction of the Federal High Court, but within the jurisdiction of State High Courts.

In American International Insurance Co. v. Ceekay Traders Ltd. (1981) 5 S.C. 81, this court defined the admiralty jurisdiction of the Federal High Court vested in that court by virtue of S 1(l)(e) of the Federal High Court Act, 1971 to cover "any claim arising out of any agreement relating to the carriage age of goods in a ship or to the use or hire of a ship."

Thus to fall within the purview of this definition, the contract, in this case between the appellant and the respondent, from which the claim before this court is founded should be (i) an agreement relating to the carriage of goods in a ship, or (ii) an agreement relating to the use or hire of a ship. Where the claim is founded on a contract, subject matter of the action does not fall within either category, as in this case, it appears to me obvious that the action cannot conceivably fall within the admiralty jurisdiction of the Federal High Court. It is therefore not necessary for me to consider and express any opinion on the extremely erudite discussion on the construction of section I (1)(h) of the Administration of Justice Act 1956 put before us by Chief Williams S.A. N. in his very helpful brief on this point. I am adopting this course not for lack of appreciation for the industry of counsel, but because it is not relevant to the determination of this ruling. Again it is consistent with the age old tradition in the administration of justice to limit as much as possible the decision to the established facts of the case before the court. It has never been of any assistance, and is indeed a practice more likely to lead to confusion to make judicial pronouncements on matters not actually before the court. It is clearly not enough that the issue sought to be settled is on the grounds of expediency deserving of being quickly settled. I consider it unsafe to take one step more than it is necessary for the determination of the issue.

The claims before the court is founded on a simple customer and banker relationship in a letter of credit. This is not within the admiralty jurisdiction. The majority Justices of the Court of Appeal were wrong. The view of Nnaemeka-Agu J. C. A., is the correct one. The trial Judge had jurisdiction.

The next invitation to us was again by Chief Williams S.A.N. who is urging this court to overrule its recent decision in Omonuwa v. Oshodin (1985) 2 NWLR (Pt. 10) 924. In his brief in support of the motion and in his oral argument before us Chief Williams complained that the ratio decidendi of Omonuwa v. Oshodi (supra) suggests the application of two inconsistent tests for the determination of whether an order was interlocutory or final. He pointed out that the tests in Salamans v. Warner (1891) 1 Q.B. 734 which has been rejected in Ude v. Agu (1961) 1 All NLR. 65 and that in Bozson v. Altrincham Urban District Council (1903) 1 Q.B. 547, which has been accepted and applied by this court in Blay v. Solomon 12 WACA 1775 appeared to have been combined for the purposes of determining whether an order is interlocutory or final. The passage in Omonuwa v. Oshodin (supra) complained of states –

"In my opinion, an interlocutory order on appeal ranks as an interlocutory appeal. The judgment of the Appeal Court is a judgment on an interlocutory appeal. It can only assume the character of a final judgment when it finally determines the rights of the parties.... the order appealed against in the case before us does not purport (to have) and has not finally settled the rights of the parties in the claim before the court (below) and is therefore an interlocutory order."

The words in bracket were supplied by Chief Williams.

Counsel contended that the issue for determination before this court in Omonuwa v. Oshodin was whether the decision of the Court of Appeal dismissing the defendant’s appeal to that court was final or interlocutory. It was not whether the decision of the High Court on appeal to the Court of Appeal was interlocutory or final. It was accordingly submitted that any pronouncement of this court on the latter question must be regarded as obiter. The main complaint of Chief Williams is the combination of the two different tests which he regards as both inconsistent, irreconciliable and contradictory. He pointed out that the right exercised by the Court of Appeal is derived from the provisions of section 31(2)(a) of the Supreme Court Act 1960, and the expression "interlocutory" or "final" decision must be construed as referring to such a decision of the court. There is considerable force, and common sense in this contention. Accordingly he submitted that whether or not a decision of the Court of Appeal or any intermediate court is ‘final or interlocutory must be determined in relation to the proceedings in that court, and not as to whether the rights of the parties has been finally determined. To counsel it is sufficient if the court has disposed of the case between the parties before it.

It is generally accepted that two tests have existed for determining whether an order is interlocutory or final. This view is polarised between the cases which have applied. The less acceptable test formulated by Lord Esher in Salamans v. Warner (189 1) 1 Q. B., 734, and those which have applied the more widely accepted view formulated by Lord Alverstone C.J. Bozson v. Altrincham Urban District Council (supra) As I have already stated the courts of this country have consistently rejected the former and have adopted and followed the latter - see Blay AND Ors. v. Solomon 12 WACA 1775; Ude v. Agu (196 1) 1 All NLR 65.

It is pertinent for a clear understanding of the tests to examine them to see how different they are from each other, and to see whether they are reconciliable. First the test in Salaman v. Warner (supra).

This decision arose from the defence of a point of law that the statement of claim did not disclose a cause of action. After argument the Divisional Court ordered that the action should be dismissed with costs. Plaintiff against who the decision was given gave a four days notice of appeal as from an interlocutory order. At the hearing of the appeal, counsel for the respondents/defendants, took a preliminary objection contending that the notice should have been for fourteen days, the order being final, and the rights of the parties having been determined with costs. The appellant/plaintiff submitted that the order was not final. Relying on Standard Discount Co. v. Le Grange (1876-78) 3 C.P.A 69 submitted that the order was not final since if defendant’s application was dismissed the rights of the parties would not have been determined by the order.

It is significant to observe that Lord Esher as Brett L. J. was one of their Lordships in Standard Discount Co. v. Le Grange (1876-78) 3 CPA 69, and also wrote one of the judgments in Salaman v. Warner. He seized the opportunity to explain what he said in Standard Discount Co. v. Le Grange, (supra) and adopted the test he laid down in that case. In Standard Discount Co. v. Le Grange, range, the issue was whether an order to sign final judgment was interlocutory or final. It was held to be interlocutory. Brett L.J, said, at p.71,

"My reason for so holding is, that the order is not the last step which must be taken in order to form the status of the parties with respect to the matter in dispute; it is in itself ineffectual, and until a further proceeding has been taken, the plaintiffs cannot recover the debt sued for. Another step must be taken before the status of the parties can be fixed, and that step is the entry of the judgment. The order is not the final step in the action, and therefore it is interlocutory."

This is in respect of a determination whether the order is interlocutory. Then came the test about the determination of a final order which was stated at pages 71-72 as follows:

"I think our decision may be founded upon another ground, namely in that no order, judgment or other proceeding can be final which does not at once affect the status of the parties, whichever side the decision may be given; so that if it is delect, given for the plaintiff it is conclusive against the defendant, and if it is given for the defendant it is conclusive against the plaintiff ......"

There is no doubt from the above cited dicta, that Brett L.J’s test for determining whether an order is interlocutory is whether the order is the last step which must be taken in order to fix the status of the parties with respect to the matter on dispute, if it is not, it is interlocutory. On the other hand, it is final when the order is conclusive in determining the rights of the parties whether it is in favour or against. He concluded the judgment by declaring at p.72.

"I cannot help thinking that no order in an action will be found to be final unless a decision on the application out of which it arises, but given in favour of the other party to the action, would have determined the matter in dispute."

The dominant consideration is the order of the court and the finality of the determination of the rights of the parties. There is here nothing said about the application from which the order was made. It is these rules which Lord Esher in Salaman v. Warner described as the right test, and endeavoured to explain further and adopt.

He said,

" I think the better conclusion is that the definition which I gave in Standard Discount Co. v. La Grange is the right test for determining whether an order for the purpose of giving notice of appeal under the rules is final or not. The question must depend on what would be the result of the decision of the divisional court, assuming it to be given in favour of either of the parties. If their decision, whichever way it is given, will, if it stands, finally dispose of the matter in dispute, I think that for the purposes of these rules it is final. On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute, but if given in the other will allow the action to go on, then I think it is not final, but interlocutory. That is the rule which I suggested in the case of Standard Discount Co. v. La Grange ..."

His Lordship described this test as "The best rule for determining these questions; the rule which will be most easily understood and involves the fewest difficulties." I think that in both cases considered the emphasis has been on the order of the court as to the rights of the parties. There was no reference to the nature of the application. When the order of the court determines the rights of the parties with respect to the claim before the court, irrespective of in whose favour the order is made, then the order is final. However, when the order of the court still leaves the claim between the parties to be settled, by proceedings in the case then the order is interlocutory. This test relies on the nature of the order of the court.

The relevance of considering the application is because a final order may be based on an interlocutory application - see A.G. v. G. E. Ry. Co. (1879), 27 W.R. 759. It is conceded that not every order which affects the, status of the parties is final - see Blakey v. Lathan (1889), 43 Ch. D.25, but it is unarguable every order which finally determines the claim of the parties in dispute is a final order.

The view that the test in Salaman v. Warner was based on the nature of the application to the court, and not on the nature of the order which the court eventually made stems from the note in the Supreme Court Practice (1979) under B.S.C. Order 59 r. 4, citing Egerton v. Shirley (1945) K.B. at p. 110 per du pareq LJ. As was stated by du Pareq it is an interpretation given to the words "final order" in Salaman v. Warner. In Salaman v. Warner Fry L.J. agreeing with Lord Esher, said at p.736.

"I think that the true definition is this. I conceive that an order is "final" only where it is made upon an application or other proceeding which must, whether such application or other proceeding fail or succeed, determine the action. Conversely, I think that an order is interlocutory "where it cannot be affirmed that in either event the action will be determined."

Lopes L.J. agreed with the definition suggested by Lord Esher M.R. Thus the nature of the application test was introduced in Fry L.J’s judgment. It however cannot stand alone. It must stand or fall with the nature of the order made as can be discerned from the test itself. In Salter Rex AND Co. v. Ghosh (1971) 2 Q.B. at p.601, Lord Denning M.R. preferred the test of the nature of the application in Salaman v. Warner to determine whether an order for a new trial was a final or an interlocutory. It is too plain to state that an order refusing or granting an application for a new trial does not determine the rights of the parties and is necessarily interlocutory. So whatever test is applied in Salter Rex AND Co. v. Ghosh, (supra) the result will be the same.

The test in Salaman v Warner is now regarded as based on the nature of the proceedings see Denning M R. in Salter Rex AND Co. v. Ghosh (supra) Romer L.J. in Re Herbert Reeves AND Co. (1902) 1 Ch.33. Bozson v. Altrincham Urban District Council.

I now turn to Bozson v. Altrincham UDC (1903) 1 K.B. 547 cited as in contrast and in conflict with Salaman v. Warner. In Bozson’s case, there was an action for damages for breach of contract. An order was made transferring the case to the non-jury list, and that only questions of liability and breach of contract be tried. The rest of the case if any to go to official referee. At the trial Wills J. held that there was no binding contract between the parties and dismissed the action. Judgment was entered subsequently for the defendants. Plaintiff appealed. At the hearing of the appeal respondent relied on Salaman v. Warner and raised a preliminary objection that the appeal arising from an interlocutory order, was out of time. Without calling upon the appellant for a reply the Court of Appeal in very short judgments of six lines each by the Earl of Halsbury L.C. and Lord Alverstone C.J., with Sir F.H. Jeune P concurring without expressing any opinion, the court following Shubrook v. Tufnell 9 Q. B. D 621, overruled the objection. Lord Alverstone C.J. said,

"It seems to me that the real test for determining this question ought to be this: Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not, it is then in my opinion, an interlocutory order."

Here Lord Alverstone C.J. was concerned only with the nature of the order made, and whether it finally disposed of the rights of the parties. Thus the main difference between the two tests is the introduction of the nature of the application in Salaman v. Warner by Fry L.J. Otherwise the rule that an order is final or interlocutory is determined by whether it determined the rights of the parties is common to both formulations. I do not think that the introduction of the nature of the application makes any substantial difference to the result of the applicable rule. So long as the test applied is founded on the nature of the order made, it seems to me irrelevant what the nature of the application is. This is because what makes the difference to the status of the parties is the order and not the application.

Chief Williams has referred to the genesis of Section 31(2) of the Supreme Court Act 1960 and to the fact that the provision was made before this court had an intermediate Court of Appeal. Accordingly the section should now be construed with the intention of the legislation in mind in accordance with the present judicial arrangement. It was submitted that if so construed, final or interlocutory decisions must be determined in relation to the proceedings in that court. He relied on the provision of section 213 of the Constitution. This he said will make for simplicity and avoid unnecessary difficulties in classification.

I think what renders an order of a court interlocutory or final with respect to a matter before it is its effect on the rights of the parties to the litigation. In all the cases, the test and dominant consideration has been whether the rights of the parties have been finally determined or not. It has never been whether the court has disposed of the application or matter before it. The courts may and usually do dispose of an application before it without finally determining the rights of the parties. It is for this reason that an order of the court can only be regarded as a final decision of such court if in the disposal of the case before it, the rights of the parties in the case have been entirely and finally determined. An order is interlocutory where this is not the case. But there are circumstances on appeal when only a point is in issue before the court. The dictum in Adegbenro v, Akintola (1963) A.C 614 at 627, the Privy Council recognised this distinction when it said,

"The decision may not be final in the proceedings before the Chief Justice, but so far as the Federal Supreme Court is concerned, it is final. The court has finally disposed of the matter referred to them, namely, the question as to the interpretation of the constitution..."

The Privy Council did not say that the court had disposed of the rights of the part parties in the action before them. This is because they were not in a position to do so. They were dealing with a reference from the court below The Privy Council went further to say

"...Their Lordships have accordingly reached the conclusion that the decision of the Federal Supreme Court on the reference under section 108 was a final decision and that an appeal lies as of right to Her Majesty in council under section 11 4."

This passage suggests that the decision of the Federal Supreme Court on a reference to it which is not a final determination of the rights of the parties was nevertheless regarded as a final decision of the court because it was a final determination on the question of the interpretation of a provision of the constitution referred to the court. There is no doubt that its decision is a final determination on the issues referred to it. The decision did not finally decide the rights of the parties before the court. This being the relief before the court it is clearly consistent with the rule laid down in the test both in Salaman v. Warner (supra) and Bozson v. Altrincham U. D.C. (supra).

This court was not oblivious of the intention of section 31 of the Supreme Court Act 1960 and the fact that the decision referred to therein is the decision of the court handing it down. But the view adopted in Omonuwa v. Oshodin (supra) was to make a distinction between a final determination in respect of an issue between the parties which does not finally determine the rights between the parties, and a final determination which has the effect of determining finally the rights between the parties. All the cases agree that the latter is a final order in the litigation, whereas the former is on the tests applied, not a final determination. If it is otherwise, there can be as many final orders in respect of the rights of the parties as the court disposes of an issue before it. Thus where the court discharges its function of finally disposing an issue before it without finally determining the right of the parties, such a determination does not fall within the test applied.

The test advocated in Omonuwa v. Oshodin (supra) which suggests the adoption of the nature of the application and the nature of the order is clearly not in conflict with the nature of the order test. As was pointed out in Omonuwa v. Oshodin, an application may be directed at determining an issue in the litigation, in which case any order made in respect thereof which is not aimed at a final determination of the rights of the parties in the litigation will necessarily be interlocutory.

On the other hand where an application is made with the intention of finally determining the right of the parties if successful will obviously be a final order. Again where the order is one which finally determines the rights of the parties, there is no doubt it is a final order. The position taken by counsel is not one of deliberate misreading of the judgment, but stems from the assumption that the alternative nature of application test is a wholesale adoption of the interpretation given to the test in Salaman v. Warner as formulated by Fry L.J. in that judgment. This is not so. What this court has endeavoured to do in Omonuwa v. Oshodin is to recognise the realities of the effect of the nature of the orders made on the application in an action, and to avoid the inconvenient anomaly where an interlocutory order graduates into a final order on appeal because it is the only issue before the appeal court. This would seem to be the position in Olubadan-in-Council v. Lagunju (1949) 12 WACA 464; D.P. P. v. Chike Obi (No. 2) (1961) All NLR 186; Adegbenro v. Akintola (1963) AC 614, where appeals on interlocutory matters by way of reference were regarded as final decisions of the appellate courts.

Chief Williams has contended that the better view is to consider whether a decision is interlocutory or final by reference to the court in which the decision was given without relating it to the determination of the rights of the parties in the litigation before it. It is obvious that where parties to a litigation continue the proceedings in the Court of Appeal, the purpose of these proceedings in that court is to determine finally their rights. Hence in such a situation any orders made in the Court of Appeal with respect to the cause, which does not finally determine, the rights of the parties is an interlocutory decision. The order in the Court of Appeal is not necessarily a final decision merely because it is an order of that court. In my opinion it can only be a final decision if the rights of the parties are thereby determined and the successful party is entitled to the benefit of the order without any further process - see Blay AND Ors. v. Solomon (1947) 12 WACA 175.

I think it is pertinent to mention here that Omonuwa v. Oshodin (supra) has not formulated any new test, and has not advocated a combination of the nature of application test and the nature of the order test as was formulated in Salaman v. Warner, and Bozson v. Altrincham U. D.C. What the court did was to simplify the test already applicable by considering the nature of the application, and the nature of the order made in determining whether an order or judgment is interlocutory or final in respect of the issues before it as between the parties to the litigation. This court then said,

"Thus where the nature of the application does not aim at finally determining the claim or claims in dispute between the parties, but only deals with an issue, both the application and the order or judgment must be interlocutory - see Isaacs AND Sons v. Salbstein (supra) at p.146; Alaye of Effon v. Fasan (1958) 3 F.S.C. 68. However, where an application has the effect by the order therefore of finally determining the claim before the court, the order may properly be regarded as final, - see Afuwape AND Ors. v. Shodipe (1957) 2 F.S.C. 62 at p.68. This proposition is clearly consistent with the principles as enunciated in the judicial decisions and is logical. It also accords with commonsense and the practice of the courts."

The principles as enunciated agrees with the test laid down in Blay AND Ors. v. Solomon (1947) 12 WACA 167 which this court has followed ever since. Omonuwa v. Oshodin, is by no means a departure from that test and is indeed a veritable re-enforcement of its effect if properly understood. I do not therefore see any need to interfere with the decision. I have already set out the nature of the transaction which has given rise to this action. The recapitulation of the salient facts of this case is necessary for a proper understanding and appreciation of the issues involved. Concisely stated, appellant is a Lagos based company. It entered into an agreement with Association for Economical and Industrial Development in Middle East and African countries, hereafter referred to as ASDECAMO, a company based in Geneva for the purchase of 10,000 metric tons of cement. Appellant pursuant to this transaction applied to its bankers (The respondents) by "ex. B" for the issuance of an irrevocable and non transferable letter of credit in favour of ASDECAMO in respect of the order. A letter of credit exh. C. was duly issued in favour of ASDECAMO with the Banque Pour Le Commerce International S.A. hereafter referred to as Swiss bank as the agent for the defendants. "exhibit C" was made subject to the provisions of, the 1974 Uniform Customs Practice for Documentary Credit (UCP) (exh.T) and sets out the terms and conditions for negotiating the credit. On the due date for the payment of "Ex. C", ASDECAMO presented to the Swiss Bank "exhibits A E, F, and G. ", which the Swiss Bank accepted as in compliance with the terms and conditions set out in "Ex. C". Payment was accordingly made to ASDECAMO in accordance with "exhibit C", and the rules governing documentary letters of credit. No cement was in fact shipped to the appellant. The bill of lading "exhibit D" one the documents relied upon by the Swiss Bank for paying ASDECAMO was a forged document, having not been issued by the Black Star Line. In fact there was no such vessel as the "Thomas Mann" claimed to be the carrier of the consignment of cement. The respondents duly received "exhibits D, E, F, and G" from the Swiss Bank and accepted them as complying with the terms of the credit in "exhibit C. " respondents accordingly reimbursed the Swiss Bank and debited the account of the appellant to the amount on the credit. Appellants case is that respondents are not entitled to debit his account as they and their agent, the Swiss Bank, have not complied with the conditions set out in "exhibit C" before paying ASDECAMO.

It was and still is the contention of the respondents that the terms of "exhibit C" were complied with; and that even if they were not complied with (which was denied) they were still not liable by virtue of articles 9 and 12 of UCP and the express exclusion of liability in "exhibit B". Appellants then brought an action against the respondents claiming damages for breach of contract, and in the alternative negligence in the failure to discover the forgery. They also claimed a declaration that respondents were not entitled to debit their account with it in the amount paid out to ASDECAMO. Both the High Court and the Court of Appeal had found in favour of the respondent. In this court, Professor Kasunmu S.A.N. for the appellant has raised all the issues again which were canvassed in the courts below. The issues for determination in this court have been very concisely stated in the briefs filed by Professor Kasunmu S.A.N. for the appellants at p.5, and by Chief Williams S.A. N. at p.6 of this brief. The relevant questions are those concerning the transaction subject matter of the action. The questions formulated are as follows:

1. Whether the Court of Appeal was right in holding that the additional conditions in exhibit C was not binding on respondents and its agents, the Swiss Bank;

2. Whether the Court of Appeal was right in holding that the respondent and its agent the Swiss Bank were not liable for negligence in not discovering that exhibit D was a forgery, and that the words "Conference MED” was authenticated,

3. Whether the Court of Appeal was right in holding that exhibit C was not used as a transferable credit, and that exhibits D, E, F and G, used to negotiate C were ex-facie regular, and consistent;

4. Whether the Court of Appeal was right in holding that respondent’s liability was excluded by the clause in exhibit B, and that articles 7, 9 and 12 of UCP protected respondents from any liability arising from exhibit D or any other documents.

These being the questions for determination, it is therefore necessary to consider the facts of this case in the light of the issues involved. The crux of this case lies in the nature of the contracts which have given rise to this action. A sale of goods transaction with international connotations involves more than the primary parties to the transaction. Thus the local buyer who enters into a contract with an overseas seller on the faith that the overseas seller will perform enters into (a) contract with his bankers to enable him pay for the goods. This primary arrangement leads into other contracts, namely (b) contract between the buyer’s bank and its agent which is another bank in the seller’s country for the purpose of paying the seller, (c) contract between the delect bank in the country of the seller, and the seller, thus there are four independent contracts in respect of the single transaction. - see Lord Diplock in United City Merchants (Investments) Ltd. AND Anor. v. Royal Bank of Canada AND Ors. (1983) A.C. HL 168, at p. 183. There is (i) the contract between the buyer and the seller (ii) the contract between the buyer and his bank known as the issuing bank (iii) if required there will also be a contract between the buyer’s bank (the issuing bank) and a bank (the correspondent or confirming bank) in the country of the seller to confirm the credit and ensure payment; (iv) the contract between the overseas bank, and the seller.

The facts of this case falls within the purview of (ii) above, namely, the contract between the buyer and the issuing bank. Although it seems to me that counsel for the appellant is assuming that the liability involves both (iii) and (iv), namely the contract between the issuing bank and the correspondent bank on the agency principle and between the correspondent bank and the seller on the principle of negligence.

It is clear that there is no contract between the buyer and any of the others other than the issuing bank - see UCP General Provisions (c). Thus any liability arising from the contract between the buyer and the issuing bank must flow from the terms and conditions of the contract binding the parties.

There is evidence that appellant by virtue of exhibit B, applied to respondents for an irrevocable non-transferable letter of credit for US $570,000 in favour of ASDECAMO. In compliance with this request, respondents in "exhibit C", duly opened the letter of credit. It is pertinent to mention here that "exhibit B" contains an indemnity clause in favour of the respondents from any loss or damage that may arise in consequence of error or delay in transmission of messages or misinterpretation or from any cause beyond control. "Exhibit C", the letter of credit provides that it is except as otherwise stated, subject to the Uniform Customs and Practice for Documentary Credits (1974 Revision)  
The obligation of the respondents who is the issuing bank is to ensure the observance of the terms and conditions delect of "exhibit C", the letter of credit. The legal relationship between appellants and the respondents depends solely on the terms of "exhibits B and is not affected by any other contractual relationships in the overall transaction but the respondents are required strictly to adhere to the instructions contained in ‘’exhibit B". Where the documents against which payment is to be made are stipulated. The respondent banker is required at his peril to insist on complete compliance. The banker’s only concern is to carry out the instructions of the buyer.

Although counsel for the appellants accepts the general rule in documentary credit transactions that documentary credit operations deal only in documents and not in goods - see article 8 UCP, and that banks are obliged to pay the basis of documents which ex facie are in accordance with the terms and conditions of the credit, item 2 of the additional instruction in ‘exhibit C", it was submitted, imposed a duty on the respondent beyond being satisfied that the documents tendered are ex facie regular. It was argued that respondent must look outside the documents to check the accuracy of what was being claimed. It was contended that the ex facie rule with respect to documents is subject to exception where the parties are agreed that a particular fact exists. The agreement takes the matter outside the general rule. The tender of the bill of lading "exhibit D" is itself no proof that the fact exists. Respondents have denied the existence of any such obligation, and rely on article 8(b) of the UCP for their defence.

This contention puts into issue the legal obligation of the respondent banker to the appellant buyer with respect to the transaction culminating in the opening of the letter of credit -"exhibits B" and C". Professor Kasunmu’s argument suggests that the obligation extends to the Swiss Bank the agents of the respondents. For this counsel relied on item 8 of the additional conditions to contend that before payment was to be made on the documents, respondents were obliged and bound through their agent, the Swiss Bank, to ascertain that the carrying vessel indicated in "exhibit D" is a conference or non-conference line vessel, and if the latter a photocopy of a current ship entry notice issued by the Nigerian Ports Authority was submitted to the bank along with the other relevant documents. Counsel relied on the recent decision of the English Court in Banque De L’Indochine Et De Suez S.A. v. JH. Rayner (Mincing Lane) Ltd. (1983) 1 Q.B. 711.

The question for consideration is whether as the respondents contend, they are protected by article 8 of UCP and are not required to look outside the documents presented to them, or is it as the appellants contend, the additional condition required an ascertainment of fact, which takes the matter outside the protection of UCP and that respondents are bound to ascertain not only on the basis of the documents tendered, but on other facts establishing the fact. The complaint of appellant on this issue is that the use of the vessel "Thomas Mann" a non-conference line ship was not in compliance with the condition precedent stated in the letter of credit". Accordingly the respondents have not fulfilled one of the conditions of the letter of credit. I think Chief Williams is absolutely right when he submitted that appellant not being a party to the contract between the respondent and the Swiss Bank in "exhibit C", cannot validly complain about any breach (if at all which is however denied) relating to it - appellants relationship with the respondents is evidenced only in "exhibit B", his application for credit "exhibit B" does not contain any of these conditions. It is clearly in article 8g of the U.C.P., that the contract of the issuing banker in this case the appellant, and the correspondent banker, here the respondent, is independent of any other contractual relationship of the documentary credit transaction. There are American cases in support of this position. - See Asburg Park and Ocean Grove Bank v. National City Bank of New York 35 N.Y.S. 2nd 985, 989. Tuet v. Rodriquez, 176 SO. 2nd 550, 552 (1965) both cases cited in support of the proposition in Benjamin’s Sale of Goods, 2nd Ed. para. 2215.

Thus the contract between the issuing banker, the respondent, and the Swiss Bank, evidenced in "exhibit C", is independent of and unrelated to the contract between appellant and the respondent in "exhibit B". There is therefore no privity of contract between appellant and respondent in respect of "exhibit C."  
Counsel for the appellant is right in his contention that the Swiss Bank is bound by the terms of "exhibit C, exhibit C being a contract between respondents and the Swiss Bank. As between them there exists the relationship of principal and agent - see Equitable Trust Co. of New York v. Dauson Partners Lid., 11927) 27 U. LR. 49, 52, followed in Bank MeHi Iran v, Barclays Bank D. C 0. (1951) 2 Lloyds Rep. 367 at 376. The obligations of the correspondent bank to the issuing bank are, clearly spelt out in clause (b) of article 8 UCP as follows:

"Payment, acceptance, or negotiation against documents, which appear on their face to be in accordance with the terms and conditions of a credit by a bank authorised to do so, binds the party giving the authorization to take up the document and reimburse the bank which has affected the payments, acceptance or negotiation."

This being legal position the contention of counsel for the appellants that the Swiss Bank, with which appellant is not in privity and owes no obligation should as regards the relationship of the bank to the respondent with respect to exhibit C, go outside the documents presented by the seller to establish a fact is contrary to the principle and practice of these transactions.

On the facts established before the learned trial Judge and accepted by the court below. There was no doubt that exhibit D" the bill of lading impugned as a forgery ex facie states that the document was issued by the Black Star Line Ltd. The condition sought to be established provided as follows:

"Shipment may be made by conference or non-conference line vessel. If shipment is made by a non-conference line vessel, the shipper must present with the other documents called for in the credit photocopy of a current ship entry notice of the carrying vessel duly signed by the Nigerian Ports Authority."

Thus it is only where the shipment is made by a non-conference line vessel that the alternative is to be resorted to. How then is the confirming or correspondent banker required to establish that "shipment is made by a conference or non-conference line vessel. Appellant’s counsel has suggested a search in the Lloyd’s register of ships, and his witness agreed that it was possible on checking the Lloyd’s Register, or reference to the national shipping line to know whether a particular ship belongs to a conference shipping line. Under cross-examination this witness admitted that the Black Star Line Ltd. is a member of the conference shipping line. The contention of appellant is not only that the ship was not indicated as a conference line vessel, but that no such ship as "Thomas Mann", indicated existed, and that this fact should have been checked by the paying banker.

There was evidence before the trial Judge and accepted by the court below that Black Star Line Ltd. which was indicated as owner of the vessel "Thomas Mann" is a member of the conference line. It therefore shows ex facie from "exhibit D", that such a ship exists and that there was compliance with the condition in "exhibit C."

But counsel cited Banque De La Indochine El-De Suez S.A. v. J.H. Rayner (Mincing Lane) Ltd. (supra) in support of the contention that the special conditions endorsed on the credit must be established as a fact, thus imposing a duty on the respondents over and above the provisions of article 8 of the UCP. It is pertinent to mention that the additional conditions requiring a conference line vessel did not impose any documentary proof as with the case of a non-conference line vessel. Accordingly it seems to me, that relying on "exhibit D" alone was sufficient for this purpose. This has been very well expressed in an identical situation by sir John Donaldson M.R. in Banque Indochine v. J.H. Rayer Mincing Lane Ltd (supra) at p.728 as follows:

"The condition required a state of fact to exist. What the letter of credit should have done was to call for a specific document which was acceptable to the buyer and his bank evidencing the fact that the vessel was owned by a member of a conference. It did not do so and as, accordingly the confirming bank had to be satisfied of the fact, it was entitled to call for any evidence establishing that fact."

Counsel for the appellant has submitted that the burden was on the respondents to show that the vessel "Thomas Mann" existed. I do not think any such responsibility for ascertaining the fact outside the documents required existed. I agree entirely with Chief Williams that article 9 of the UCP affords a conclusive defence. It provides,

"Besides, assume no liability or responsibility for the form, sufficiency, accuracy, genuiness, falsification or legal effect of any documents…"

Respondents were therefore not negligent in regard to the question of whether or not the goods were shipped on a conference line vessel.

Respondents have no responsibility beyond being satisfied that the information ex facie in the documents presented for payment are correct. The case of Singh v. Banque de L’Indochine (1974) 2 A.E.R 754 referred to by counsel to the appellants is completely different and is distinguishable. In that case the issue of forgery which was not apparent on the face of the document was established and the bank observed the specific preconditions for a payment in the letter of credit, and this was stated clearly by Lord Diplock when he said,

"The instant case differs from the ordinary case in that there was , special requirement that the signature on the certificate should be that of a person called Balwart Singh, and that that person should also he the holder of Malayan passport No. E- 13276. This requirement imposed on the bank the additional duty to take reasonable care to see that the signature on the certificate appeared to correspond with the signature on an additional document presented by the beneficiary, which on the face of it, appeared to be a Malayan passport No. E-13276 issued in the name of Belwart Singh. The evidence is that is what the notifying bank had done when the certificate was presented. The onus of proving lack of reasonable care in failing to detect the forgery of the certificate lies on the customer. In their Lordships’ view, in agreement with all the members of the Court of Appeal, the customer did not succeed in making out any case of negligence against the issuing bank or notifying bank which acted as its agent, in failing to detect the forgery."

The bank was accordingly not liable. The instant case is much weaker where there were no preconditions for payment in respect of conference line vessels. There was nothing more for the respondent to do other than satisfy themselves on the document before them that the ship is a conference line vessel. This they have been held to have done since nothing on the face of the document "exhibit D " put them on inquiry. The additional instruction relating to the carrying vessel in my opinion, and on what I have said above did not impose any obligation on the issuing bank and its agent the correspondent bank.

The issue of the authentication of the words "Conference Med " in "exhibit D" is the subject matter of one of the questions for determination before us. The two courts below have found as a fact that there was no alteration in "exhibit D, and that the words were typed in at the time of the making of the document. These are concurrent findings of fact which this court will not lightly interfere with. It is therefore for appellant to adduce substantial reason why these findings should be disturbed. I have found no such reasons either in the brief of argument or in its oral expatiation before us. It seems that the real reason for this contention is to show that respondents should have been put on enquiry by the non -authentication of the words "Conference Med. " typed into ‘exhibit D.’ The contention of appellants is that the words so typed in is a material alteration of exhibit D, " and that in fact "exhibit D", is a forged document purported to have been issued by the Black Star Line which it was shown by evidence did not issue it. Counsel for the respondents has submitted, and I entirely agree with the submission that the onus was on the appellant who alleges an alteration of "exhibit D" after it had been made to establish that fact. Where an alteration is disclosed there is no presumption that it was made after and not before the execution of the bill of lading. The presumption is that the alteration was made in a manner which did not constitute an offence - see S. 127(4) of the the Evidence Act, and Clifford v. Parker 113 E.R. 1012. All the courts below have found that there was no alteration. This court cannot without good and substantial reasons ignore such finding.

Appellant has also contended that respondent by accepting "exhibits E, F AND G", and negotiating the payment of the letter of credit on the basis of these documents which were in the names of a person other than ASDECAMO, used "exhibit C" which is an irrevocable, non-transferable letter of credit as a transferable credit contrary to its terms. article 46 of the UCP defines a transferable credit as "a credit under which the beneficiary has the right to give instructions to the bank called upon to effect payment or acceptance or to any bank entitled to effect negotiation to make the credit available in whole or in part to one or more third parties (second beneficiaries). A credit can only be transferred if it is so expressly designed. I have already outlined in this judgment the primary parties to the contract and the four contracts which arise from that transaction. Again on examination of "exhibit C", that is the letter of credit, it is immediately obvious that it is an irrevocable documentary credit in favour of ASDECAMO, CASE POSTAL 176, CH. 1219 Le Lignon/Geneva, Switzerland, ‘exhibit C is not designated as transferable, and therefore is a non-transferable irrevocable letter of credit in favour of ASDECAMO, the beneficiary. The letter of credit is issued by the respondent bank, at the instance of the appellant, who is the buyer, to B.C. 1, the Swiss Bank, as the confirming bank for payment to ASDECAMO, the seller on the presentation of the documents specified in " exhibit C."

Counsel to the appellants contends that where names other than that in the letter of credit appear in the documents relied upon for the negotiation of the letter of credit and payment is made in respect of such documents this is in effect a use of non-transferable letter of credit as transferable. It is argued that "exhibit C" being non-transferable, it is inconsistent and irregular with its terms to accept exhibits D, E and F’, which contain names extraneous to ‘exhibit C", "exhibit G" is the only document issued by ASDECAMO, the seller. It was submitted that appellant never contracted to accept title from any person other than ASDECAMO. "exhibits D, E, F" issued by Bryanston Italiana is inconsistent when read with "exhibit G". "exhibits D, E, F", are the bill of lading Packing List, and certificate of value, required in "exhibit C". It was urged that this was a breach of "exhibit C". The main argument of respondent was reliance on section 46(a) of UCP and that since the invoice was in the name of ASDECAMO and that the proceeds of the transaction were paid to ASDECAMO, the issue of transfer of credit did not arise The second argument was that Bryanston Italiana whose name appears on "exhibits D, E, and V was an exporter or manufacturer who undertake to play the role of a middle man in the transaction. No credit was transferred to him because all payments were made to the seller - ASDECAMO. Counsel for the appellant in answer to this argument, draw the distinction between assigning the proceeds of credit and the assignment of the credit itself. He argued that merely because ASDECAMO collected the proceeds of the credit did not mean that "exhibit C" has been used as a transferable credit.

I think the fine distinction here made between assignment of credit and assignment of the proceeds of credit is not necessary for the determination whether "exhibits D, E, F," are evidence that "exhibit C" has been used as a transferable credit. The primary documents of title involved in the transaction, such as the proforma invoice, "exhibit G" is in the name of ASDECAMO, "exhibits D, E, F by themselves are not evidence that credit has been transferable to the person designated in them There is nothing to show that there is no other contract between the seller and Bryanston Italiana, outside the contract in ‘exhibit C, ASDECAMO has not asked for a transfer of his credit, and there is no evidence that that was the effect of’ the transaction between ASDECAMO and Bryanston Italiana.

Finally, appellant has contended that respondent cannot rely on exclusion clause in exhibit B, ". It is accepted that the contract between appellant and respondent is in "exhibit B" The relevant clauses excluding liability in exhibit B" areas follows:

(i) ‘It is understood that our engagement to pay shall continue in force notwithstanding any changes in our and/or your constitution and that no responsibility is to attach to yourselves or your correspondents as to the documents beyond seeing that they purport to be in order.

(ii) We agree to hold you and your correspondents harmless and indemnified in respect of any loss or damage that may arise in consequence of error or delay in transmission of your correspondents’ messages or misinterpretations therefore or from cause beyond your or their control."

Counsel for the appellants contention is that the Court of Appeal did not rely on "exhibit B", for the exclusion of respondent liability They relied on articles 9 and 12 of the U.C.P. respondent, it is further argued, has not cross-appealed that the appeal should be dismissed on that ground. For the application of the above exclusion clause counsel submitted that, where respondents are found to be negligent they are not entitled to the protection of the exclusion clauses.  
Professor Kasunmu referred to the recent decision of the House of Lords in Photo Productions Ltd. v. Securicor Transport Ltd. (1980) AC 827 and submitted that that case has affected the law on exclusion clauses in contract only to the extent that it is now a matter of construction of the terms of the contract rather than as a rule of law. The above being the submission, what is to be construed here is the exclusion of liability as provided by the clauses in exhibit B, and the provisions of articles 9 and 12 of UCP. I think article 12, which is particularly relevant provides as follows:

12 (a) "Banks utilising the services of another bank for the purposes of giving effect to the instructions of the applicant for the credit do so for the account and at the risk of the latter –

(b) Banks assume no liability or responsibility should the instructions they transmit not be carried out, even if they have themselves taken the initiative in the choice of such other bank.

(c) The applicant for the credit shall be bound by and liable to indemnify the banks against all obligations and responsibilities imposed by foreign laws and usages."

Now, then, how do the exemption clauses in "exhibit B" apply to exclude the liability of the respondents’? Professor Kasunmu submits in this case they do not operate to exclude respondent’s liability because they are matters in respect of which they were negligent and could have with reasonable diligence avoided. He relies for this proposition on The Law of Bankers Commercial Credits, Gutteridge and Megrah 7th Ed. p.77, and Sarna, Letters of Credit at p.121. On the other hand Chief Williams relies on the opinion of Professor F P. Ellingers, Documentary Letters of Credit, at p. 155 and submits that liability is excluded.

The general rule until the doubt created by Photo Productions Ltd. v. Securicor Transport Ltd. (1980) AC 827 was that a party to a contract may be precluded from relying on the provisions of an exemption clause contained in such contract if he is guilty of the breach of a fundamental term or breach of the contract. According to this rule a fundamental term of the contract or breach of contract cannot be excluded by any clauses however favourably formulated. The terms so protected, are those conditions which are so vital to the continuance of the contract so that their breach will be totally destructive of the obligations of the party in default. This principle was regarded as a rule of substantive law see Spurling (J) Ltd. v. Bradshaw (1956) 1 WLR. 461, 465. The view that this was a rule of law suffered a reverse in 1964 in U. G. S. Finance Ltd. v. National Mortages Bank of Greece (1964) 1 Lloyd’s Rep. 446, 450. it was in this last mentioned case, regarded as a rule of construction based on the presumed intention of the contracting parties. The view was adopted in Suisse Atlantique Societe d’Armement Maritime S. A. v. N. V. Rotterdamsche Kolen Centrale (1967) 1 AC - 361. It was here stated that any statement of the principle of fundamental breach as a rule of substantive law could not be supported in principle in the light of previous authority. Although the rule of law doctrine of fundamental breach appeared to have surfaced again in Harbutt’s Plasticine" Ltd v. Wayne Tank and Pump Co. Ltd. (1970) 1 Q.B. 847 and was applied in subsequent cases during the next few years - see Kenyon, Son AND Graven Ltd. v. Baxter Hoare AND Co. Ltd. (197 1) 1 W. L. R. 519 and Farnwroth Finance Facilities Ltd. v. Attrlyde (1970) 1 W.L.R. 453 suggesting that in certain circumstances it could be applied as a rule of law. In 1980, the House of Lords had the opportunity to and did declare again that the applicability of exclusion clauses is in all cases not a rule of law but one of construction. It was held that whether an exemption clause protected a party to a contract in the event of a breach or what would have been a breach, depended upon the proper construction of the exemption clause of the contract. This was in Photo Production Ltd. v. Securicor Transport Ltd. (1980) A C. 827 This is the applicable decision now.

The liability of the defendants/ respondents will have to be considered in the light of the present state of the law and the exclusion clause in "exhibit B" and exemption clause in "exhibit T", I have already reproduced the applicable provisions. A careful reading of the provisions demonstrates that they were intended to protect the banker from liability arising from errors committed by agents in the discharge of the obligations under the transactions. Thus where the Banker has complied with the instructions of the buyer. the nature of the obligations and its manner of discharge expects that he should be protected from liability arising from errors by others. Hence it is expedient and commercially justifiable to protect the banker from liability for the consequences of events beyond the banker’s control. On the whole, the exemption and indemnity clauses in "exhibit B " can only in my opinion be regarded as subject to and ordinarily qualified by the banker’s contractual duty of strict compliance. - See the Suisse Atlantique etc. v. N. U. Rotterdamsche Kohlen Centrale (1967) A.C. 361.

The finding of the courts has been that respondents did not commit a breach of any of the conditions in exhibit C and have performed the obligation under the contract with the appellant. Respondents are therefore entitled to the benefit of the exclusion clauses in "exhibits B and 7".

Finally, I come to the issue of ‘exhibit J and the failure of appellant to reject the documents of title. Chief Williams, S.A.N. has invited us to vary the finding of the Court of Appeal in favour of appellant "that the learned trial Judge was wrong in holding that exh. J. signed on 18/10/78 was authority for debiting the appellants’ account which was debited on 19/9/78 as per "exh. K". If this were the only authority for debiting the appellants account, I would have decided this point in favour of the appellants."

Counsel for the respondent is now raising the question:

"Whether having arrived at the conclusion that ‘even if exhibit. J" was received by putting pressure on the appellant…..it would be treated as valid until set aside" the Court of Appeal ought to have considered that it would not have treated the said exhibit as sufficient authority to debit the appellant’s account."

It was deposed in evidence by appellant that (at p. 86 of the record of proceeding) exhibit J was a letter to the respondents by the Swiss Bank forwarding the documents presented to them for payment in respect of exhibit C, i.e. the letter of credit. Appellant recounted the circumstances in which he had to sign for the documents to enable him appear before the examining Magistrate in Geneva in connection with an inquiry about the transaction. In signing for the documents he signed over a stamp impression which reads as follows:-

"I/We have examined the documents which I/We hereby affirm to be acceptable in all respects any guarantee held in respect of any discrepancy, noted or not noted may be released. Please debit our account accordingly."

This was signed on the 18th October, 1978. Prima facie this is an affirmation and acknowledgement that appellant has received the documents and that they were acceptable to him. He thereby released the defendants/respondents from any liability and authorised that his account be accordingly debited. It was argued in the Court of Appeal that "exhibit J" was signed under duress. The Court of Appeal concluded that duress merely rendered the undertaking signed voidable. It was valid until set aside. The Court of Appeal accordingly treated it as valid. Having held that "exhibit J" is valid, I agree with Chief Williams that the Court of Appeal was wrong to have held that it did not support the debiting of appellant’s account; even if this was done ex post facto. In Midland Bank Ltd. v. Seymour (1950) 2 Lloyd’s Dep. 147, it was held that if the buyer with knowledge of a breach of his contract by the issuing bank adopts his act, he may be considered as having ratified the act and will be obliged to reimburse the banker. Appellant has not rejected the documents presented in respect of the letters of credit. He had not done so up to the time he brought this action.

It is fairly well settled that where the buyer or the issuing banker has cause to challenge the compliance with the conditions of the letter of credit and desires therefore to repudiate the contract he must act quickly. In Westminister Bank Ltd. v. Banca Nazionale di Credito (1928) 81 LL. Rep. 306 at p. 312, Roche J said,

"if parties keep documents which are sent them .... in consequence of some mandate which they themselves have issued, and keep them for an unreasonable time, that may amount to a ratification of what has been done within their mandate."

See also Bank Metti Iran v. Barclays Bank (D. C. O.) (1951) 2 Lloyds Rep. 367, UBA Ltd. v. A.G. Bendel State FCA/B/109/81 (Unreported decision of Court of Appeal, 10/9/81). Where the delay is normal, the attitude would not be regarded as ratification. In the instant case appellant received the documents and never challenged them even after he discovered the breach. His conduct undoubtedly amounts to a ratification of respondents earlier act of 1978 of debiting his account. I shall conclude this judgment by citing what Lord Diplock said recently, in U.C.M. v. Royal Bank of Canada (1983) A.C - at p. 183. He said:

"The whole commercial purpose for which the system of confirmed irrevocable documentary credits has been developed in international trade is to give to the seller an assured right to be paid before he parts with control of the goods that does not permit of any dispute with the buyer as to the performance of the contract of sale being used as a ground for non-payment or reduction or deferment of payment. This is the rationale behind the rules."

All the grounds of appeal argued having failed, and are dismissed. The appeals against jurisdiction and the main issue are accordingly dismissed without order as to costs.

**KAWU, JSC.:**

My Lords, I am in entire agreement with the judgment just delivered by my learned brother, Eso, J.S.C., a draft of which I had the advantage of reading. I am also of the view that the appeal lacks merit and should be dismissed. It is accordingly dismissed with N300.00 costs to the respondent.

**OPUTA, J.S.C**.:

I have had the privilege of a preview of the marathon judgment just delivered by my learned brother Eso, J.S.C. His statement of facts is lucid, accurate and exhaustive. His exposition of the law (on interlocutory and final decisions) is presented with remarkable precision and succinctness. I am in complete agreement with his reasoning and conclusions, and I hereby adopt these as mine. I, too, will dismiss this appeal. I abide by the other orders made in the lead judgment.

Cases referred to in the judgment

Adegbenro v. Akintola (1962) 1 All N.L.R. 442; (1963) A.C. 614.

Afuwape v. Shodipe (1975) 2 FSC 62.

Agbajo v. A-G Federal Republic of Nigeria (1986) 2 NWLR (Pt. 23) 528.

Alaye of Effon v. Fasan (1958) 3 FSC 68.

American International Insurance Company v. Ceekay Trader Ltd. (1981) 5 S.C. 81; (1981) 1 All NLR 581;

Ardennes (Cargo Owners) v. Ardennes (Owners) (1950), 2 A.E.R. 517.

Asburg Park and Ocean Grove Back v. National City Bank of New York 35 N.Y.S. 2nd 985.

Automatic Telephone v. Federal Military Government (1968) 1 All N.L.R. 429.

Bank Metti Iran v. Barclays Bank D. C. O. (1951) 2 LL. Rep 367.

Banque lndochine v. J. H. Rayner Ltd. (1983) 1 Q.B.711.

Becker v. Marvin City Corporation PC (1977) A.C. 271.

Blay v. Solomon (1947) 12 WACA 175.

Bozsonv. Altrincham (1930) 1 Q.B. 547.

Bronik Motors Ltd. v. Wema Bank (1983) 6 S.C. 158.

Bucknor-Maclean v. Inlaks Ltd. (1980) 8-11 S.C. 1.

D. P. P. v. Obi (1961) 1 All N.L.R. 186.

Equitable Trust Co. of New York v. Dauson Partners Ltd. (1927) 27 U.L.R.49.

Farnworth Finance Ltd. v. Attryde (1970) 1 W.L.R. 453.

Gatoil Inc. v. Arkwright Boston Co. (1985) A.C. 25.

Glynn v, Margetson AND Co. (1893) A. C. 351.

Harbutt’s Plasticine Ltd. v. Wayne Tank and Pump Co. Ltd. (1970) 1 Q.B 847.

Hunt v. Allied Bakeries Ltd. (1956) 1 W. L. R. 1326.

Isaac’sAND Sons v. Salbstein (1916) 2 K. B. 139.

Jammal Steel Structures Ltd. v. A.C.B. Ltd. (1973) 1 All N.L.R. (Pt.2) 208.

Kenyon, Son and Graven Ltd. v. Baxter Hoare AND Co. Ltd. (1971) 1 W.L.R. 519.

Midland Bank Ltd. v. Seymour (1950) 2 LL. Rep. 147.

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