**HIRAT ADERINSOLA BALOGUN**

**V.**

**NATIONAL BANK OF NIGERIA LTD**

IN THE SUPREME COURT OF NIGERIA

9TH MARCH, 1978.

SUIT NO. SC 244/1976.

**LEX (1978) - SC 244/1976**

**OTHER CITATIONS**

2PLR/1978/21 (SC)

(1978) All N.L.R 63

**BEFORE THEIR LORDSHIPS**

DARNLEY ARTHUR ALEXANDER, C.J.N.

MUHAMMED BELLO, J.S.C.

CHUKWUNWIKE IDIGBE, J.S.C.

**BETWEEN**

HIRAT ADERINSOLA BALOGUN – Appellant

AND

NATIONAL BANK OF NIGERIA LTD – Respondent

**ORIGINATING COURT**

HIGH COURT OF LAGOS STATE

**REPRESENTATION**

Mr. A. O.OSIPITAN, Esq for the Appellant.

Mr. R. K. O. ORIADE, Esq (with him J. O. JIMILEHIN and AKIN TAYLOR, Esq) for the respondents.

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

BANKING AND FINANCE LAW:– Banking practices – Banker-Customer Relationship – Duty of bank to honour check - Failure to honour cheque in respect of an account that was in funds – Whether defamation actionable without proof of damages - Attitude of court thereto

BANKING AND FINANCE LAW:– Banking practices – Banker-Customer Relationship – Wrongful dishonour of a customer’s check – Rule in Rolin V. Steward and Gibbon V. Westminster that only ‘traders’ are entitled to presumption of damages without proof of actual damage – Supreme Court restatement of the Rule as to cover ‘Persons in trade/Business’

BANKING AND FINANCE LAW:– Banking practices – Banker-Customer Relationship - The role or predominating business of a bank/banker – Receipt of money from or an account of his customer by a banker – Whether constitutes banker the debtor of the customer - Cheque drawn on the banker by the customer –Legal import of bank’s refusal/failure to honour check – Applicable Rules

CHILDREN AND WOMEN LAW: *Women in Business* – Protection of reputation – Reliefs against wrongful dishonor of check by bank

COMMERCIAL LAW – AGENCY:- Relationship between banker and customer – Whether that of principal and agent– Legal import of bank’s refusal to honour check

COMMERCIAL LAW - LAW OF CONTRACT:– Action for breach of contract – Requirement that plaintiff must always plead and prove his actual loss or be entitled to no more than nominal damages only – Exceptions

COMMERCIAL LAW - LAW OF CONTRACT:– Damages for breach of contract arising from dishonoured bank instrument – Applicable Rules – Damages at large - Whether presumption of damages without proof of actual damages is not restricted to ‘traders’ but extends to ‘persons in trade’ – Whether a Solicitor in business qualifies as a person in trade

ETHICS – LEGAL PRACTITIONER:- Whether lawyer is a trader – Relevance

FAMILY LAW:- Action for breach of promise to marry – Whether plaintiff needs to prove actual damage

TORT AND PERSONAL INJURY – DEFAMATION:- Libel – Where in addition to an act of dishonour of a cheque, bank makes libellous endorsement on the check - Whether entitle customer to both a claim for damages for breach of contract and a claim for damages for Libel – Whether the endorsement “R/D” or “refer to drawer’ upon a dishonoured cheque is defamatory of a customer

TORT AND PERSONAL INJURY – DEFAMATION:- Slander – When actionable - Whether slander exists as much in spoken words as in gestures or actions.

**PRACTICE AND PROCEDURE ISSUES**

COURT:- Defamation arising from wrongful dishonour of check – Actions allowed in law

COURT:- When the Supreme Court may depart from precedent established in a line of decided of cases

WORDS AND PHRASES: “Trader”, “Person in trade” “Person who is engaged in business”, “Business”– Meaning and connections

**MAIN JUDGMENT**

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

The question in this appeal is whether the Appellant is entitled to substantial damages for dishonour of her cheque by the Respondents without any allegation, in her pleadings, of special or actual damage flowing from such dishonour of the cheque and proof of the same? The Appellant who is a barrister and also enrolled as a solicitor of the Supreme Court of Nigeria was, at all times material to the proceedings in the case in hand, actively engaged in practice as a solicitor in this metropolis of Lagos.

The facts which appear, from the record, to be not in dispute are as follows: the Appellant operates two banking accounts with the Respondents; one in her private and personal capacity at the Marina Lagos Branch of the Respondents’ company and the other her practice and clients’ account, at the 40 Balogun Street, Lagos Branch of the said company. On the 6th January, 1972, Appellant drew a cheque on the 40 Balogun Street Branch of the Respondents for N40 in favour of one of her clients - a Mrs. Sandey of Ikeja in the Lagos State. A few days later, Mrs. Sandey returned to the Appellant and produced to her the said cheque which had been marked “Refer to Drawer’ by the Respondents who had refused to make payment of the sum of N40 forty Naira (i.e. the equivalent of £N20 i.e. twenty Nigerian pounds to the payee, Mrs. Sandey. At the time the cheque was presented to the Respondents for payment, the Appellant had enough money - in fact, more than enough -with the Respondents in her clients’ account to meet the cheque for N40 (i.e. forty Naira).

The facts given in evidence by the Appellant, and her witness and which have not, in any way, been challenged are:

(1) On the 31st day of December, 1971 the Appellant whose business account was in credit lodged with the bank for payment into the same account the sum of £93:2:6 (i.e. N186.25k; one hundred and eighty-six Naira and twenty five kobo, the equivalent of Ninety-three pounds two shillings and six pence). (2) The Appellant has not a personal private or other account with the Respondents i.e. at the 40 Balogun Street Branch of the company (hereafter referred to as ’the Respondents’ Branch” or “the branch).

(3) When, a few days after issue of the cheque Exhibit ‘A’ which was (hereafter also referred to as “the dishonoured cheque”) the Appellant immediately telephoned and spoke to the Manager of the branch - a Mr. Adeleke, and complained to him about the unmerited treatment she had received from the branch, Mr. Adeleke was not only impatient with the Appellant but treated the complaint with levity. It is just as well to mention here that on returning the dishonoured cheque to the Appellant, Mrs. Sandey had to say to the Appellant that she was surprised that “a cheque of only £20 from a lady of her type could bounce”; whereupon, annoyed and embarrassed the Appellant immediately paid the sum of E20 to Mrs. Sandey from her resources in the office.

(4) The Appellant thereafter went to the bank and on arrival there was, at her request, shown in the accounts department of the bank, her ledger card from which she was satisfied that she had more than enough money to meet the dishonoured cheque. Thereafter she went back to her office and later sent a written complaint, Exhibit B, to the Respondents which drew a reply Exhibit C, further to Exhibit C, the Appellant sent another letter, Exhibit D, to the Respondents.

(5) The Appellant was not allowed to operate her clients’ account until after ’The matter was sorted out” as per Exhibit F, a letter dated 15th March, 1972 from the Respondents.

(6) When Mrs. Sandey gave evidence she also confirmed to the court that (a) she read the endorsement “Refer to Drawer” on the cheque and (b) she not only was surprised that a cheque for a mere E20 from a lady of the Appellant’s type could bounce but told her so.

(7) At all times material to the issue of the dishonoured cheque the Appellant who practiced under the name of “Balogun AND Alatishe” kept her clients’ ac-count at the Respondents Branch (i.e. 40 Balogun Street, Lagos) under the name of “Balogun AND Alatishe” AND Co: Solicitors

Now, in Exhibit B, the Appellant wrote 21st January, 1972 to the Respondents as follows:

“A/C 0376 Balogun AND Alatishe AND Co. Barristers AND Solicitors

I issued cheque No. H014214 for the sum of £20 dated 6th January, 1972. I have just been informed by the recipient that it was returned unpaid when she presented it on the 17th January to the cashier.

Kindly investigate and let me know your findings.

Yours faithfully,

Mrs. A. Balogun”

By their reply of the same date, the 21st January, 1972 (Exhibit ‘C’), the Respondents wrote to the Appellant as follows:

“M/S Balogun AND Matishe AND Co., 27/29 Martins Street,

Lagos.

Dear Sirs,

Dishonoured Cheques

We refer to your letter dated 21st January, 1972 on above and (sic) will inform you that the balance in your current account as at 17th January, 1972 was £10.5.10, hence we were unable to honour your cheque of £20.

Please be informed that the current balance in your account is now £0.6.5 debit.

(Sgd.) R. Adeleke Manager:

for National Bank of Nigeria Limited”

On the 25th January, 1972 the Appellant wrote again in Exhibit ‘D’ to the Respondents as follows:-

“Mr. R. A. Adeleke,

Manager, National Bank Nigeria Ltd., 40 Balogun Street,

Lagos.

Dear Sir, Account No. 0376

I have received your letter dated 21st January, 1972. It appears that this letter was written without your going through the items of my statement of account.

I paid in a total of £243.2.6 on 31st December, 1971 and 3rd January, 1972. I have only issued cheques up to the value of £165.19.9 against the account. One of your clerks went through the statement with me and discovered the error. Unless one of the two cheques was returned to your bank unpaid (I have no notice of this), I insist that my account is in credit coupled with the fact that I was in credit at the end of December 1971.

Yours faithfully,

Mrs. A. Balogun “

By Exhibit ‘F’ dated 15th March, 1972 (nearly two months later) the Respondents replied to Exhibit ‘D’ thus:

“Mrs. A. Balogun Balogun, Alatishe AND Co. 27/29 Martins Street, Lagos.

Dear Madam,

Current A/C 0376

We refer to your letter dated 25th January, 1972 on our above account and will state that we have discovered the error committed, and your account has been rectified accordingly.

We hereby tender our unreserved apology and we promise that proper care of the account will be taken in future.

Yours faithfully,

R. Adeleke Manager: for National Bank of Nigeria Limited “

On 10th January, 1972 the Appellant, as plaintiff, commenced these proceedings claiming from the Respondents as defendant the sum of N50,000 damages suffered by the plaintiff as a result of the defendants’ breach of contract. It is pertinent, we think, to note that in paragraph (12) of her statement of claim, the Appellant pleaded: “As a result of the defendants’ wrongful refusal to pay the sum of £20, the plaintiff suffered damages in the way of her profession.”

In a reserved judgment by which the learned trial Judge in the court below awarded the sum of N10 (£5) as nominal damages he made the following observations in some of the passages of the said judgment:-

“... I think it is fair to say that by his address Mr. Falodun, learned counsel for the defendants, conceded that the plaintiff was entitled to succeed. He contended, however, that the plaintiff was entitled only to nominal damages especially as she pleaded no special damages. It was submitted that only a trader could obtain substantial damages in like circumstances. In support of Mr. Falodun’s submission .................. reference was made to Gibbons v. WestministerBank Ltd. (1939) 2 K.B. 882 where Lawrence J. at (P.888) concluded:

“...In my opinion this matter should be treated as covered by these authorities, and I hold accordingly that the corollary of the proposition laid down by them, in the law - namely, that a person who is not a trader is not entitled to recover substantial damages for wrongful dishonour of his cheque, unless the damage which he suffered is alleged and proved as special damage...’

That statement of the law is better understood when it is remembered that in an action for breach of contract, as this is, damages are not at large and a plaintiff must always plead and prove his actual loss otherwise he is entitled to nominal damages only. Two exceptions to this general rules are known. One is an action for breach of promise to marry and the other where a trader who is in funds at his bank has cheque dishonoured wrongfully. Lord Atkinson in Addis v. Gramophone Co. Ltd. (1909) A.C. 488 at 495 has said that these exceptions ought not to be extended. Taylor C.J. in Oyewole v. Standard Bank of West African Ltd. (1968) 2 All N.L.R. 32 at 35 Relt unable to extend the exception to include persons other than a trader and I must refuse to so extend in this case. Mr. Osipitan, learned counsel for the plaintiff, invited me to equate a solicitor issuing a cheque in the course of his practice to a trader but i regret that I must decline that invitation ...”

This appeal is from the said judgment of which the passages set out above in quotation form part. A number of grounds of appeal were filed but before us the Appellant had leave of this court to argue that it is erroneous in law to ascribe such a very narrow interpretation to the meaning of the word trader’ as used in the case of Rofin v. Steward (1854) 14 C. B. 595:139 E. R. 245. On the other hand the sum of the argument of learned counsel for the Respondent is that the interpretation given by the case In hand is justified. A solicitor, learned counsel for the Respondent argued, is not a “trader” and, in accordance with the decision of Lawrence J. in Gibbons v. Westminster Bank Ltd. (Supra), he is not entitled to an award of substantial damages in an action, based on breach of contract against his Bankers for wrongful dishonour of a cheque issued by him on his clients’ ac-count unless he alleges and proves actual damage.

We think it is necessary, at this stage, to trace the history of this aspect of the law relating to damages for breach of contract. The role or predominating business of banker is the business of banking which consists in the main in the receipt of monies on current or deposit account and the payment of cheques drawn by, as well as the collection of cheques paid in by, a customer - See also Atkin L.J. in Joachimson v. Swiss Bank Corporation (1922) 3 K. B. 110 at 127. Therefore, the receipt of money from or an account of his customer by a banker constitutes the latter the debtor of the former (Foley v. Hill (1848) 2 H.L. Cap. 28); and the banker undertakes to pay any part of the money thus due from him to the customer against the written orders of the customer Joachimson v. Swiss Bank Corporation (Supra). Accordingly, the relation so constituted is that of principal and agent and, therefore, a cheque drawn on the banker by the customer represents the order of the principal to his agent to pay, out of the principal’s money in his hands, the amount stated on the cheque to the payee endorsed on the cheque. Therefore, it has long been established that refusal by a banker to pay a customer’s cheque when he holds in hand an amount, equivalent to that endorsed on the cheque, be-longing to the customer amount to a breach of contract for which the banker is liable in damages. The only question which arose, in these circumstances, has always been that relating to the quantum or amount of damages. The general rule for measuring or quantifying damages for breach of contract was that established by the leading case of Hadley v. Baxendale (1854) 9 Exch. 341 which is that the party in breach is liable in damages in the amount which flows directly and naturally from his failure to keep his own part of the contract or bargain provided that such damages could reasonably have been within the contemplation of the parties at the time when the contract was made, but it rarely happens that a banker knows the circumstances under which a customer has had to issue a cheque which [he] refused to honour and this makes it very difficult to apply the rule in Baxendale (Supra) in measuring damages in those circumstances. It is on this account that damages awarded for wrongful dishonour of cheques by a banker are generally nominal, save in the instances which the law has come to regard as exceptional; and these constitute the exceptions with which we will deal anon.

Direct and/or natural damage arising from a breach of contract by a banker to honour the cheque of his customer apart, there is, however, also the serious likelihood of considerable danger to the reputation of a customer and generally to his business; (if he - the customer - is engaged in business). People generally, whether or not in business, do not deal with a person whose cheques are not paid, although it is conceded that instances of disinclination to deal with such a person more readily abound in the field of business. As it is always extremely difficult to have an accurate estimate of the extent of damage under this “head”, it has, there-fore, been laid down by a long line of cases beginning with that of Marzetti v. Wil-liams (1830) 1 B AND Ad 415 that damages in such cases are “at large”, which is to say that in such cases a jury may within reason make an award of any such sum as they consider the circumstances of the breach of contract or dishonour of cheque warrant although there has been no proof of any actual loss (i.e. special damage) to the customer. In the case of Marzetti (Supra) in which a trader sued his bankers for wrongful dishonour of cheque although there was no evidence to show that the plaintiff had sustained any injury from the banker’s mistake, Lord Tenterden C.J. remarked:

“I cannot forbear to observe that it is a discredit to a person and therefore injurious in fact, to have a draft refused payment for so small a sum, for it shows that the bankers had very little confidence in the customer. It is an act particularly calculated to be injurious to a person IN trade” (Italics and capitals supplied) (See 109 E.R. 842: and (1830) 1 B Aid. 415 at 424)

Marzetti’s case (Supra) was followed in the case of Rolin v. Steward (1854) 14 C.B. 595, which was a case by the plaintiffs who were in business (they were in fact merchants and shipowners) against the defendant a public officer of a company carrying on the trade and business of bankers in England under the name and style of East of England Bank. The action was for dishonour of three cheques and a dominile bill due to the inadvertence of a clerk in the office of the bankers. The plaintiffs gave no evidence that they actually suffered injury. A jury awarded them £500. It was held that the jury were entitled to give substantial damages, though £500 was, in the circumstances, excessive; £200 was eventually agreed upon. The case of Maretti (Supra), therefore, put it beyond doubt that where a banker without justification dishonours his customer’s cheque, he is liable to the customer in damages for injury to his credit and the case of Rolin v. Steward makes it clear that if the customer is also “in trade” - we prefer to use the actual words of Lord Tenterdenl “in trade” for reasons we will show later - at the time of such dishonour then damages for such injury to the customer’s credit will be at large and a jury may within reason award substantial damages although there is no evidence from such customer of any actual damage suffered by him. It was not until 1939, that there was a decision by a court that the converse is the law i.e. that in an action by a “non- trader” for wrongful dishonour of his cheque by his bankers, only nominal damages should be awarded unless the non- trader pleaded and proved actual damage in which case substantial damages may be awarded in his favour; the decision was given by Lawrence J. in the case of Gibbons v. Westminster Bank a decision which undoubtedly is good law - subject to the reservation which we make in this judgment - has been followed in a number of court decisions and approved by a number of text writers. The judgments in which Gibbons case (Supra) has been followed include such weighty decisions as the News Baker v. Australian and New Zealand Bank Ltd. (1958) N2.L.R. 907 (decided by Shodand J); (2) the Australian case of the Bank of New South (1884) 10 Victorian L.R. (Cases-at-Law) at P.3 decided by Stawell C. J. and Holrovd J. (3) Oyewole v. Standard Bank of West African Ltd. (1968) 32 decided by Taylor C.J. (4) Patel v. National AND Grindlays Bank Ltd. (1968) 3 African Law Reports Commercial at P.249; also in Modern African Banking Cases, (1973) Ed. at 170 decided in the High Court of Uganda (In Patel, Rolin’s case was properly applied to the facts before the court but the statement of Lawrence J. regarding “non-traders” was approved in passing) and (5) LL. Alabi v. Standard Bank of Nigeria Ltd. (1974) 4, East Central State Law Reports 574 decided in the High Court of Kaduna by Wheeler Ag. S.P.J. The above decision are, indeed, weighty and this court has considerable respectful opinion that the fore-going cases, like the case in hand (i.e. the decision on appeal before us), give a far too narrow interpretation to the expression ‘trade’ and/or ‘trader’. Earlier on, we drew attention to the expression “person in trade” (and not ‘trader) used by Lord Tenterden In Marzetti case (Supra). While it is true that a trader is in busi-ness, all persons in business are not necessarily traders; for instance, the ordinary citizen who, daily, exhibits his various articles or stock-in-trade in the market for the purpose of selling for gain is engaged in business and is a trader but the citizen who runs a private school although engaged in business can hardly be referred to as a trader. Although a “person in trade” is a person engaged in business” he is not necessarily a trader; but a trader is necessarily engaged in business. Therefore, we prefer the expression “person in trade” for it refers to persons engaged in some occupation, usually skilled but not necessarily learned, as a way of livelihood. That being the view we take of the expression “persons in trade” a class of people against whom - in the words of Lord Tenterden - a banker’s act of wrongfull dishonour of cheque is “particularly calculated to be injurious” we find it difficult to exclude all “non-traders” that is, all persons who are not traders (and this is, all persons in business” or “persons in trade”) from the ambit of the “exception” enunciated in Rofn v. Steward (Supra) (i.e. that damages in cases of dishonour of a “trader’s” cheque are, in the absence of proof of actual loss, “at large’). We respectfully prefer the view that:

‘the corollary of the proposition laid down by the cases of Marzattl (Supra) and Rolin (Supra) is the law; and it is that a person who is not engaged in business (or who is not in business) is not entitled to recover substantial damages for wrongful dishonour of his cheque, unless the damage which he suffered is alleged and proved as special damages.”

This, indeed, is only a re-statement of the proposition of Lawrence J. in the case of Gibbons (Supra) subject to the qualification that we prefer the expression “person who is not engaged in business” to “person who is not a trader therein stated. It is our view that the expression “not in business in the restated proposition takes care of the principles of law involved, which is that “only in business need recover substantial damage without proof of actual loss because of the damage deemed to be necessarily done to their credit, and/or reputation in business, by the unjustified action of the bankers; per se the act could imply, unjustifiably, insolvency.or dishonesty on the part of the person engaged in business. We will elaborate anon in the next paragraph.

Such, however, is the view we take of the state of the law on the subject that we see no reason why, properly applied, the principles enshrined in the exception (i.e. to the ordinary rule in Baxendale (Supra) for measure of damages in contract, as explained in the foregoing paragraph) should not extend to estate agents, auctioneers, solicitors in practice, stockbrokers and possibly all classes of commercial agents. In our respectful opinion, any other view of the proposition could lead to the absurd - if not ridiculous - situation where a “petty trader” becomes entitled to substantial damages for the dishonour of his cheque per se merely because he is a ‘trader’ whereas a reputable auctioneer or estate agent, or solicitor in practice can obtain only nominal damages unless he can show that actual damage resulted from such act of dishonour of his cheque. However, in this judgment we would confine ourselves to the reasons why we think it is not right to exclude a solicitor in practice from the ambit of the said exception. In Rofn v. Steward (Supra) it was the direction to the Jury by Lord Campbell which was being attacked. There was no evidence in that case that the plaintiffs had sustained any special damage but His Lordship, in leaving the case to the jury told them that they ought not to limit their verdict to nominal damages, but should give the plaintiffs “such temperate damages as they should judge to be reasonable compensation for the injury they must have sustained for the dishonour of their cheques”; and Williams, J. in concurring with the views of Crosswell AND Crowder JJ. had these pertinent observations to make:

“... As to the alleged misdirection, I think it cannot be denied, that if one who is not a trader were to bring an action against a banker for dishonouring a cheque at a time when he had funds of the customer’s in his hands sufficient to meet it, and special damage was alleged and proved, the plaintiff would be entitled to recover substantial damages. And when it is alleged and proved that the plaintiff is a trader, I think is equally clear that the jury in estimating the damages, may take into their consideration the natural and necessary consequences which must result to the plaintiff from the defendant’s breach of contract; just as in the case of an action for slander of a person in the way of his trade, or in the case of imputation of insolvency on a trader, the action lies with-out proof of special damage ...:’

See Williams J. In 139 E.R. at P.250.

The italicized portions of the passage in quotation above underscores the reason why the courts have not insisted that a person whose business credit is damaged by the act of wrongful dishonour of his cheque should either bring a separate action for defamation, or prove actual loss before a jury should award him substantial damage. The sting of damage to the person in business lies, we think, in the slanderous nature and effect of the act of dishonour of the cheque, per se. After all, it is well known that slander exists as much in spoken words in gestures or actions. “Sometimes a mere act may convey a defamatory imputation if it would be so understood by reason of a conventional meaning ... or by reason of the inferences to be drawn from it, whether by the ordinary man, or by some person with special knowledge to whom it was published.” (See Gailey on Libel AND Slander 7th Ed. P. 83 Art.85). Thus it was held in Jefferies v. Duncombe (1809) 2 Camp 3, that it was defamatory to place a burning lantern in front of a person’s private dwelling house during the hours of the day (i.e. daytime) thereby intending to make out the house as a bawdy-house, that is, a brothel; and in Cox v. Cox (1814) 3 M AND S at 114 Lord Ellenborough C.J. was of the opinion obiter, that the act of holding up an empty purse before a crowd and gesticulating in the plaintiff’s direction could be considered defamatory, although there were no slanderous words accompanying the action. It is well known that a customer whose cheque is wrongfully dishonoured can always bring claims for defamation and breach of contract together in one single action. That the courts have not in this class of cases insisted, on the plaintiff bringing a separate action for slander or, on proof of actual loss justifies our view that the raison d’etre for award of substantial damages in such cases is to be found in the view which the law takes of the peculiar nature of the damage which the act of dishonour of cheques per se is deemed to have on the credit of a trader and/or business man, or, on the general reputation of man in business, just as in the case of slander of a person in the way of his trade or business. And when, of course, in addition to an act of dishonour of a cheque the banker, as in the case in hand, makes a libellous endorsement thereon, the customer may in addition to a claim for damages for breach of con-tract bring also in the same action a claim for damages for Libel. Sometimes in such cases the two claims have been dealt with without any marked differentiation; one of the such instances occurred in Allen v. London County AND Westminster Bank (1915) 31 T.L.R. 210.

We are firmly of the opinion that, in view of the explanations we have made in the preceding paragraphs, the exception (established in the case of Rolin v. Steward) should not be limited to “traders” but should extend to persons who are “in business” in the sense that they are engaged in a pursuait upon lines sufficiently commercial to bring them within the expression “business”. We think that some weighty authority also exists for this view of the state of the law; and we refer to the view of Lord Chorley as expressed in his Law of Banking (1974) 6th Edition at P.111 where it is stated as follows:

“Damage to reputation follows as a matter of course, when the customer is in business, unless of course, it can be shown that owing to bankruptcy or some other reason the customer’s credit is of no value. In the case of other persons, however, the loss to reputation may be problematical ... It is that, except in the case of a customer in business, actual damage must be proved before it can be recovered and this view was followed in Gibbons v. Westminster Bank Ltd. There are, however, other classes in the community such as military and naval officers, and professional men, to whom the consequences of a dishonoured cheque may be no less disastrous than to a trader at it seems unjust to limit the right to recover such damages to traders ...:’

Here, Lord Chorley - a renowned authority on Banking and Commercial law - is even suggesting that the exception (i.e. Rolin’s case (Supra) be not limited to “persons in business”, but that it be extended to such classes of persons whose reputation in their various honourable callings and professions are just as likely to be damaged by the wrongful act of dishonour of their cheques per se as by slander in their respective way of trade, calling or profession. And dealing with the same topic the learned author of the 13th Edition of Chalmers on Bills of Exchange observes:-

“... The damages for a breach of such duty to honour a customer’s cheque will be merely nominal unless the customer alleges and proves special damage (a quite unlikely eventuality) or unless the customer is a trader; it may however be that a solicitor, an auctioneer, a stockbroker, an estate agent and possible any kind of commercial agent would be in the same way as a trader...” (See 13th Ed. Chalmers Bill$ of Exchange P.259).

On the same subject the learned authors of Chitty on Contracts‘ 23rd Ed., the Volume on Specific Contracts writes:-

“Apart from the rights that may arise in tort from the nature of the written answer, the wrongful dishonour of a cheque, in itself entitles the customer to damages for breach of contract. Where the customer is a tradesman, or probably, a professional man, it is assumed that the dishonour causes damage to his reputation and, he may be awarded substantial damage without proof of actual damage to his reputation. Where the customer is not a tradesman, or professional man he is, in the absence of proof of actual damage entitled to, nominal damages only.” (Italics supplied)

(See Chitty Contracts: Volume: Special Contracts, 23rd Ed. P.ZI90 Para. 390).

Again, it is to be noted, from the learned authors of Chitty Contracts that the modern trend is to extend the exception (Rolin’s case) to professional men or persons in business and not to limit the exception (as the case of Gibbon V Westminster seems to advocate), ‘to traders.” Indeed, the trend as it appears from modern text books on the subject is towards a preference of the words “persons in business” to “traders” as the class of people to whom the exception (as per Rolin v. Steward (Supra)) applies. Paget on Banking, for instance in dealing with the subject states:

“It is contended that the presumption of serious injury only applied where the customer is a business man, and that at least in all other cases, actual damage must be ...proved”

(See Paget. Banking 8th Ed. P312) the word ‘trader” is not used. In a reference, however, to the case of Gibbons V. Westminster (Supra) the learned author of Paget on the Law of Banking states:

“In a recent case in contract, Gibbions v. Westminster Bank, Lawrence, J. felt himself bound by the authorities, and, further, held that the corollary of the proposition laid by them is the law, that a person who is not a trader is not entitled to recover substantial damages for the wrongful dishonour of his cheque, unless the damage which he has suffered is alleged and proved as special damage”.

We respectfully state that we do not feel bound, on our understanding of the earlier decisions, to the view that the principle of law confirmed in the case of Rolin v. Steward is intended to be limited to ‘traders”.

Earlier on in this judgment, we referred to a number of decisions which followed in the wake of Gibbons V. Westminster (Supra) and these include Bank of New South Wales v. Milvain (Supra), Oyewole V. Standard Bank of West Africa Ltd. (Supra), Alabi v. Standard Bank Nigeria Ltd. (Supra) and Patel v. National Grindlays Bank Ltd. (Supra) (in which case Sheridan J. approved, in Gibbons that all “non- traders” are in an action for wrongful dishonour of their cheques entitled to nominal damages only, and unless they pleaded and proved actual damage substantial damages could not be recovered by them). These, indeed, are weighty decisions but we feel bound to say that, in so far as these decisions seek to exclude the application of the exception in Rolin’s case from “businessman” (i.e. “persons in business”) who are NOT ‘traders”, we, certainly, are unable to associate ourselves with such a view of the law.

This appeal concerns a solicitor in practice, and we will now deal with this specific aspect of the appeal. In the instant case, the plaintiff a solicitor in practice issued a cheque on her business account for her clients with the defendants’ bank. The Legal Practitioners Decree No. 15 of the 1975 recognises that a solicitor in practice may keep such a business account (Sec. 19 of the Decree refer). The learned trial judge in the court below rightly, in our view, declined the invitation of learned counsel for the Appellant that he should regard a solicitor as being in the same category as “a trader’; we, however, take the view that a solicitor in practice is “in business” and for that matter “in commercial business” but that is not to say that he is “a trader’.

“Business is a wider term, and not synonymous with, trade; and means practically anything which is an occupation as distinguished from pleasure. Profit or the intention to make profit is not an essential part of the legal definition of a trade or business; and payment of a profit does not constitute a trade or business that which would otherwise not be such” (See 38 Halsbury’s Laws of Eng-land. Lord Simonds Ed. or 3rd Ed., P.10, 11).

And in the case of Re Wilkinson (1922) K. B. 584 although the court in that case was dealing with the term “business” under the Unemployment Insurance Act of 1920, we consider the observations of Roche, J. pertinent to our consideration. In that case the learned Judge observed:

“My present view is ... that a solicitor’s practice, at any rate in London, is a pursuit upon lines sufficiently commercial to bring it within the term business as distinguished from an occupation such as that of a school-master which is not organised and conducted upon commercial lines” (Italics by the court) (See (1922) I.KB. at 587 Per Roche, J.)

Here then is a case of a solicitor in practice who issues a cheque on the business account of her clients and the same was without justification dishonoured by the respondents. The cheque was for a mere £20 (N40) which she had previously collected on the instructions of her been returned - and endorsed thereon by the bankers “refer to drawer”- to the client to whom it was issued. The client had returned the dishonoured cheque to the Appellant telling her now surprised she was at a solicitor of her type. Although, apparently, a moot point, there is, however, authority for the view that the endorsement “R/D” or “refer to drawer’ upon a dishonoured cheque is defamatory of a customer; that view was certainly taken by Crantham J. in the case of Szek v. Lloyds Bank Ltd. (unreported) but referred to (1) in 1908 Journal of Institute of Bankers P.123 and (2) at Pp. 112 and 113 of the Lord Chorley: Law of Banking Op. Cit. and (3) at P.56 note 65 of Gatley in Libel AND Slander Op. Cit. (That also was the view of the trial judge in Pyke v. Hiberbbman Bank (1905) I.R. 195; and in Milward v. Lloyds Bank - unreported 1924 - Wright J. expressed the opinion, albeit, obiter that the endorsement “R/A”, which means “return to the acceptor”, on a Bill of Exchange could be defamatory).

The imputation in these circumstances form either the very act of wrongful dishonour of the cheque where the customer has enough funds to meet the amount on the cheque, or, the endorsement “R/D” thereon is, indeed, clear and it is that the customer is dishonest and untrustworthy. Can anything affect her credit of reputation, as a “person in business”, and/or a solicitor in practice, more seriously? The unequivocal implication, in the circumstances, is that having collected a debt of £N20 for her client the appellant was unable to make it available to her when she required it. Is it seriously to be contended that is the circumstances the exception - which for convenience, we refer to as the rule in Rolin v. Steward - is not to apply; but that it would have if the solicitor in practice had been “a trader” Gibbon V. Westminster)? Can it be seriously contended that in such cases damage should not be presumed to follow as natural and necessary consequence of the act of wrongful dishonour per se, but that the solicitor must go into the trouble of alleging and establishing actual damage? We feel completely unable to subscribe to the view that is what Rolin v. Steward decided and, we certainly think the answer to both questions must be in the negative. In the words of Williams J. in Rolin’s case “the jury in estimating the damage may take into consideration the actual and necessary consequences which must result to the plaintiff from the defendant’s breach of contract: just as in the case of an action for slender of a person by way of his trade” (See 139 E.R. at 250). It is, of course, well known that slander of a person by way of his trade or business (profession or calling) is actionable without proof of special damage and, substantial damage may be awarded although actual damage was not proved.

On the view which we take of the decision in Rolins V. Steward (Supra) as indicated in this judgment and, applying the diction of Williams J. in Rolin V. Steward, we are satisfied that there is no need for the appellant to plead and prove actual damage in order to be entitled to substantial damage. We would, however, like to observe that although the Respondents in the end apologised for their negligence in dishonouring the Appellant’s cheque by their letter dated 15th March, 1972, Exhibit F some three months after the event, their attitude to the complaints of the Appellant had been extremely cavalier. This observation is only made as a passing remark and has no bearing on the damages that ought to be awarded to the Plaintiff/Appellant.

This appeal succeeds on the question of damages. Accordingly the judgment of the High Court of Lagos State in Suit LD/23/73 dated 26th May, 1975, in so far only as it makes an award of N10 to the Appellant is hereby set aside and in substitution therefore it is ordered that judgment be entered in favour of the Plaintiff (Appellant herein) against the Defendants (Respondents herein) in the sum of N1000. The Appellant shall have costs in the High Court already fixed at N200 and, in this court assessed and fixed at N175.

Appeal allowed.