**EAGLE SUPER PACK (NIGERIA) LTD.**

**V.**

**AFRICAN CONTINENTAL BANK PLC**

IN THE SUPREME COURT OF NIGERIA

ON FRIDAY, THE 8TH DAY OF DECEMBER, 2006

SUIT NO: SC. 86/1998

**LEX (2006) - SC. 86/1998**

OTHER CITATION:

2PLR/2006/79

(2006) 19 NWLR (Pt.1013) 20

(2006) LPELR-SC.86/1998

**BEFORE THEIR LORDSHIPS:**

UMARU ATU KALGO, JSC

NIKI TOBI, JSC

GEORGE ADESOLA OGUNTADE, JSC

MAHMUD MOHAMMED, JSC

FRANCIS FEDODE TABAI, JSC

**BETWEEN**

EAGLE SUPER PACK (NIG.) LTD. – Appellants

AND

AFRICAN CONTINENTAL BANK PLC – Respondents

**ORIGINATING COURT**

COURT OF APPEAL, PORT-HARCOURT DIVISION

HIGH COURT OF IMO STATE, ORLU JUDICIAL DIVISION (ONONUJU, J., PRESIDING)

**REPRESENTATION**

PAT ONEGBEDAN, Esq. (with him, S. IKEZAHU, Esq) - For the Appellants

G. U. ONYIUKE (Ms.) - For the Respondents

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

BANKING AND FINANCE LAW - BANKING PRACTICES:- International letters of credit – Contract of with bank customer – International customs and usages – Duty of Bank to incorporate same – Effect of failure thereto

BANKING AND FINANCE LAW - BANKING PRACTICES:- Uniform Customs and Practice, UCP for Documentary Credit – Nature of – Whether has force of law - Whether is generally applicable in disputes between a banker and its customer on letters of credit – Whether generally applicable in Nigeria even in cases where parties have not expressly incorporated the UCP into their contracts.

BANKING AND FINANCE LAW - BANKING PRACTICES:- Documentary Letters of Credit – Bankers’ performance of duty thereunder – Onus of proof – How discharged – Failure to create an irrevocable letter of credit in favour of the bank-customer’s designated partners abroad – Other relevant considerations

BANKING AND FINANCE LAW - BANKING PRACTICES:- Uniform Customs and Practice, UCP for Documentary Credit – Non-treaty customs and usages of the Banking industry – Duty on banker/Customer to specifically incorporate terms of same into their contracts – Whether can be incorporated in whole or part

INTERNATIONAL LAW – INTERNATIONAL TRADE:- Documentary letters of credit – Applicable customs and usages of international trade – Where not rising to the level of international treaty or customs applicable in a jurisdiction – Duty on parties seeking to relying on same in their contracts to incorporate same specifically – Effect of failure thereto

INTERNATIONAL LAW:– Distinction between international conventions/treaties/customs applicable in a jurisdiction and international trade usages and customs – How to make such usages and customs applicable within the jurisdiction

COMMERCIAL LAW - CONTRACT - EXEMPTION CLAUSE: Whether an exemption clause can avail a party who is in fundamental breach of a contract?

COMMERCIAL LAW - CONTRACT - ACTION IN CONTRACT: Where a plaintiff who brings an action in tort is driven to rely on a contract to sustain his suit – Proper way to view the action - Whether the action must be seen as an action in contract

COMMERCIAL LAW - CONTRACT - EXEMPTION CLAUSE:- Well established principle in the law of contract that a defendant relying on an exemption clause must show that the plaintiff had been made aware of the exemption clause – Legal effect

COMMERCIAL LAW - CONTRACT - DAMAGES:- Basis of compensation and the measure of damages in a case of breach of contract – Meaning and scheme of – Duty of court hereto - Context where damages can be properly described as special' in the conception of contractual awards

COMMERCIAL LAW - CONTRACT - DAMAGES:- The terms general' and special' damages - Ineptitude in the categorization of damages for the purpose of awards in cases of breach of contract – Principle that apart from damages naturally resulting from the breach of contract, no other form of general damages can be contemplated – Implications for categorisation of damages as ‘general’ and ‘special’

**PRACTICE AND PROCEDURE ISSUES**

APPEAL - ISSUES FOR DETERMINATION:- Where an Appellate determines that the question for resolution de[pends on a document before it and no issue of credibility of evidence or witnesses arose in the matter – Duty thereto

APPEAL - ISSUES FOR DETERMINATION:- "When an intermediate appellate Court reaches a conclusion on one or some of the issues raised before it – Need to proceed to consider the other issues bearing in mind that its conclusion may be set aside by a higher court in the hierarchy - Exceptions to the practice

APPEAL:- Where an appellate court reaches the decision to send the case back to the trial court for re-hearing – Duty to refrain from considering other issues raised – Basis of – Whether having ordered a re-hearing in the court below it is proper for the same appellate court to make an order settling any point at issue

COURT - DUTY OF COURT:- Duty of, in the application of precedents – When a Court would rightly invoke precedent – Need to distinguish when facts are material in their content of actuality or reality, and when they are peripheral or auxiliary – Underlying factors for court to consider

COURT - DUTY OF COURT:- Principle of law that a Court is bound by the relief or reliefs sought to the extent that a Court of law cannot give to a party what he did not claim – Basis and justification of in procedural law – Legal implication - Whether a Court has jurisdiction to award less than what a party claims, it has no jurisdiction to award more than what he claims.

COURT - RAISING ISSUE SUO MOTU: Principle that a court of law cannot raise an issue suo motu and resolve it suo motu -

JUDGMENT AND ORDER – CONSEQUENTIAL ORDER:- Meaning of – Principle that a consequential order is appurtenant to the main or principal order – Legal implications of – Whether a clearly fresh order cannot be a consequential one

JUDGMENT AND ORDER – PRECEDENT:- Proper invocation of precedent by court as part of Judge’s procedural duties - Underlying factor a court must consider – Need to determine whether the facts are enough to arrive at the decision of the court one way or the other – Duty of court to avoid surmises and instead be concerned with the facts of the two cases before him: facts of the case being invoked as precedent and facts of the case physically before the Judge for application.

WORDS AND PHRASES - "CONSEQUENTIAL ORDER": Meaning of

**MAIN JUDGMENT**

**OGUNTADE, J.S.C. (Delivering the Leading Judgment):**

The dispute out of which this appeal arose was between a bank and its customer. The appellant was the bank and the respondent the customer. At the Orlu High Court of Imo State, the respondent as the plaintiff claimed against the appellant as the defendant the sum of two million naira being special and general damages. The claim was in negligence and alternatively for breach of contract. The parties are hereinafter referred to as plaintiff and defendant in line with their description before the trial court. The dispute arose in this way. The plaintiff wanted to pay its overseas suppliers based in Japan the sum of US $16,180.00 for raw materials to be imported. It approached the defendant, its banker for the issuance of a letter of credit in favour of the Japanese suppliers. 

In the month of December, 1986, the plaintiff through the defendant sourced from the second tier foreign exchange market the said sum of US $16,180.00 for which it paid N55,699.65. The plaintiff also paid the defendant the charges and commission demanded to enable the defendant effect the transfer of the money to the plaintiff's overseas suppliers.

It would appear that the defendant on 12/12/86 issued a letter of credit which was to remain valid till 13/1/87 in favour of the Japanese supplier. This was after the plaintiff had given to the defendant all the documents needed to enable the transfer to be effected. However, the letter of credit for unascertained reasons did not get to the Japanese company. The plaintiff wrote a number of letters to the defendant complaining that the Japanese company had not received the letter of credit. Plaintiff's solicitors also did the same. The position remained the same. In these circumstances, the plaintiff issued its writ of summons claiming as earlier stated.

The defence of the defendant was that it had merely acted as agent to the plaintiff for the purpose of getting the letter of credit transferred to the Japanese supplier, and that it did all that was required of it as such agent to carry out that duty. It denied being negligent. It pleaded that it was relying on articles 18 and 19 of the Uniform Customs and Practice for Documentary Credit.

The case was tried by Ononuju, J., at the Orlu High Court of Imo State. On 26/11/89, the trial Judge, in his judgment, awarded a total sum of One million, sixty three thousand, five hundred and sixty seven Naira, seventy seven kobo (N1,063,567.77) representing special and general damages in favour of the plaintiff. In coming to this conclusion, the trial Judge took the view that the Uniform Customs Practice for Documentary Credit, (hereinafter referred to as UCP) upon which the defendant had relied, was inapplicable to the case.

The defendant was dissatisfied. It brought an appeal before the Court of Appeal, Port-Harcourt Division (hereinafter referred to as the court below). The court below on 2-6-94 allowed the appeal. It held that UCP applied and relied on some cases for the said conclusion. It ordered that the case be retried de novo. Finally, it ordered the defendant to pay to the plaintiff the sum of US$16, 180.00. Both parties were dissatisfied with the judgment, and have come on a final appeal before this Court.

The defendant in the trial court and appellant before the Court below is the appellant before this court although the brief filed on its behalf by the Chambers of C. O. Akpamgbo, Esq., SAN erroneously described it as the respondent.

In the appellant's brief, the issues for determination were identified as the following –

(i) Was the Court of Appeal right after holding that the learned trial Judge erred in law by holding that exhibit S', the Uniform Customs and Practice Documentary Credit (UCP) was inapplicable, allowed the appeal and remitted the case for trial de novo?

(ii) Was the Court of Appeal right after holding that exhibit 'S' is applicable in Nigeria and in the instant case not to have considered other issues for determination canvassed in the appeal?

(iii) Was the Court of Appeal right after allowing the appeal to order a refund of US $16, I80.00 to the respondent on or before 30 days from today?

The plaintiff before the Court of trial who was the respondent before the court below is the respondent/cross-appellant before this court. In its brief it formulated three issues from the main appeal and two issues from the cross-appeal. The issues in the main appeal are:

(i) Whether it was right for the lower Court to hold that the Supreme Court's decisions in A.M.G. Akinsanya v. U.B.A. (1986) 4 NWLR (Pt. 35) 273; Nasaralai Ent. Nig. Ltd. v. Arab Sank (1986) 4 NWLR (Pt. 36) 409 and A.-G., Bendel State v. U.S.A. (1986) 4 NWLR (Pt. 37) 547 are on all fours with these proceedings without any distinction as to the facts and circumstances of the instant appeal and on this basis decide that the UCP Rules were applicable to this transaction.

(ii) Whether considering all the relevant facts of this appeal, the Court of Appeal exercised its discretion correctly when it made a consequential order for trial de novo of the suit and the refund of $16,180.00 US Dollars value of the letter of credit that was not utilized or paid over to the supplier.

(iii) Whether the Court of Appeal was right (having regard to the pleadings and evidence) in failing to determine all the issues submitted by the patties to this appeal.

I observed above that from its cross-appeal, the respondent formulated two issues. The first of the two issues however is identical with the respondent's first issue on the main appeal. It is therefore unnecessary to reproduce it. The second issue reads: 

Whether the Court of Appeal was right in holding that the respondent/cross-appellant did not join issues with the appellant on the contentious issues of the applicability of the UCP Rules, by its failure to file a reply to the statement of defence.

A perusal of the issues raised by the two parties easily shows a convergence of interest on the issue of the applicability to this case of the Uniform Customs and Practice for Documentary Credit. Appellant's issues one and two and the respondent's issue one in the main appeal and (a) and (b) in the cross-appeal raise more or less the same issue. I intend to consider the same first.

Now, the plaintiff in paragraphs 8 to 11 of its statement of claim pleaded thus:

8. The defendant, pursuant to the oral agreement between the plaintiff and the defendant, on 12th December, 1986 purportedly issued a Documentary Credit No. LRL.4/86 to which was attached

(i) Summary of application to open irrevocable/confirmed I/C No. ORL.4/86 of 12/12/86.

(ii) Exchange control risk indemnity of 12th December 1986

(iii) Form No. IC/Bill-10 dated 12th December 1986.

(iv) Foreign exchange requisition form.

(v) Invoice No. P-108/86E of November 5th 1986 from Musashi Trading Co. Kobe, Japan.

(vi) Bank draft No. 906356 dated 16/12/86 for N55,569.96.

(vii) Form C.188A: advance import duty payment.

(viii) Application to purchase foreign currency Form M.

(ix) The Universal Insurance Company Ltd. receipt for N612.69 being payment for marine insurance proposal.

(x) Certificate of Marine Insurance No. 05800 of 11/12/86.

The plaintiff shall found upon and rely on the above documents and hereby pleads them. The defendant is hereby given NOTICE to produce the above documents. The confirmed letter of credit was to remain valid till 13/1/87.

9. The plaintiff shall at the trial contend that apart from the oral agreement between the plaintiff and the defendant, it is part of the normal duty owned by a bank to its customer to issue confirmed letters of credit in favour of the customer when the customer makes such application and meets with the conditions of the bank.

10. The plaintiff as a customer of the defendant made the necessary applications and satisfied the conditions laid by the defendant for the grant of a confirmed letter of credit. The plaintiff shall contend that the defendant owed the plaintiff the duty to exercise the usual care expected of a commercial bank in such circumstances as in this case.

11. In breach of the said oral agreement and the duty of care which the defendant owed the plaintiff, the defendant negligently refused and/or failed to deliver the confirmed letter of credit to the plaintiff's Overseas suppliers, Musashi Trading Company, Kobe Japan.

In paragraph 5(e) of its amended statement of defence, the defendant pleaded thus:

(e) By yet another telex dated 13/8/87 the defendants informed the Bank of Tokyo, Kobe, Japan the fact that their correspondence bank i.e. National West-Minster Bank New York had informed the defendants that they had asked them (Bank of Tokyo) to advice and confirm on the letters of credit in favour of the sellers. The defendants plead this telex. The defendants have done all that is necessary for them to do according to international documentary credit to see to it that the imported goods are exported and that the beneficiaries are paid and plead Articles 18 and 20 of the Uniform Customs and Practice for Documentary Credits applicable to Nigeria and upon which the relationship between the plaintiffs and the defendants is pegged

Reading through the pleadings filed by both parties, it is apparent that the facts leading to this dispute are not much in dispute. The plaintiff pleaded that it paid charges and commissions to the defendant to enable it open a letter of credit in favour of its Japanese supplier. It also bought the equivalent of US $16,180.00 for the purpose. The defendant admitted that the plaintiff did all these. It further pleaded that it did all that was necessary to ensure that the supplier received the letter of credit but that the letter of credit in spite of all it had done did not get to the Japanese supplier. The defendant then expressed in paragraph 10 of the amended statement of defence a willingness to refund to the plaintiff the sum of N49,036.72 which the plaintiff paid to purchase the US $16,180.00.

On 17-6-88, plaintiff's General Manager testified as PW1. He gave evidence in conformity with the averments on plaintiff's statement of claim. It is remarkable that the defendant's counsel Mr. C.M.I. Egole did not ask PW1 a single question concerning UCP. The only defence witness testified on 7-10-88. He is Mr. Goodluck Chineye Enwe. In his evidence concerning the UCP which was tendered as Exhibit 'S', DW1 said:

We have to go to America to purchase dollars because this is in compliance with Uniform Custom and Practice for Documentary Credit worldwide. We apply this rule in our transaction. This is the document containing the rules which I said are worldwide.

Tendered no objection admitted and marked Exhibit 'S'.

We were not negligent. We were not in breach of any contract.

Articles 18 and 20 of Exhibit 'S' upon which the defendant relied in paragraph 5(e) of its amended statement of defence provide:

18. Banks assume no liability or responsibility for the consequences arising out of delay and/or loss in transit of any messages, letters or documents or for delay, mutilation or other errors arising in the transmission of any telecommunication. Banks assume no liability or responsibility for errors in translation or interpretation of technical terms and reserve the right to transmit credit terms without translating them.

20. (a)Banks utilizing the services of another bank or other banks for the purpose of giving effect to the instructions of the applicant for the credit do so for the account and at the risk of such applicant.

(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(s).

(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.

The DW 1 did not testify that Exhibit 'S', the UCP had previously been shown to the plaintiff. He did not testify that the terms of Articles 18 and 20 in Exhibit 'S' were incorporated into the application form for letter of credit which the plaintiff filled and which covered the particular transaction. By its nature the terms of Articles 18 and 20 of Exhibit 'S' constitute an exemption clause as it seeks to exclude liability for the manner in which the defendant performed its duties.

In his judgment, the trial Judge said concerning Exhibit 'S':

On issue No.4 I shall refer to the case of Nasaralia Ent. Ltd. v. Arab Bank (Nig.) Ltd. (1986) 4 NWLR (Pt.36) 409-427. In the main, it is decided in the case that in the system of documentary credits the parties deal in documents not in goods. It was a case in which the goods were shipped after opening the irrevocable letter of credit. That case is different from the present casewhere no irrevocable letter of credit was opened as agreed and the goods ordered were not shipped. This case did not decide that Exhibit 'S' applied to this particular contract. Exhibit 'S' is Uniform Customs and Practice for Documentary Credits and from the evidence before me it does not apply in this case. I hold the view that it can operate in a country that subscribes to it and there is nothing to show Nigeria has done so.

Even where it operates, it must be incorporated in the agreement to be binding on the parties. This is not the case here. Article 1 of Exhibit 'S' provides inter alia:

The (Uniform Customs and Practice for Documentary Credits) shall be incorporated into each documentary credit by wording in the credit indicating that such credit is issued subject to Uniform Customs and Practice for Documentary Credits 1983, revision ICC Publication No. 400'

This is not so in the instant case where letter of credit was not established by the defendants as agreed. Having caused a breach of a fundamental term of the agreement namely - establish letter of credit within three months, the defendants cannot avail themselves of exemption clause. See Gibaud v. Great Eastern Railway (1921) 2 KB 426 - 435; Dayin Investment (Nig.) Ltd. v. First Bank (Nig.) Ltd. Suit No. ID/1240/871 decided on 21/4/88 - unreported and Chitty on Contract 25th Edition paragraphs 879 & 888 at pages 471 and 485.

The court below, whilst considering the applicability of UCP said at pp.230-2331 of the record:

From the foregoing the crux of this appeal garnered from the issues is whether UCP is applicable in Nigeria and in particular to the transaction which led to the dispute.

The International Chambers of Commerce based in Paris which has been the champion sponsor, originator and founding father of UCP is not shown to be an agency of the United Nations Organisation but an International body that had since 1933 took initiative in having a universal standardization of letter of credit with its current rule to be the one made in 1983 admitted as Exhibit 'S'.

It is not a treaty between nations but an International trade custom or convention. So one may describe Exhibit 'S' (UCP) as International customary practice and usage. Having been so accepted it can be so labeled as International trade customary usage in commercial trade of letters of credit. Can it then be treated as a CUSTOM?.

The importance of letters of credit also called documentary credits are the most frequent method of payment for goods in the export trade that made Donaldson LJ with the concurrence of Ackner LJ said in In Intraco Ltd. v. Notis Shipping Corporation of Liberia the Bhoja Trader (1981) 2LLOYDS Rep. 256:

‘Irrevocable letters of credit and bank guarantees given in circumstances such that they are equivalent to an irrevocable letter of credit have been said to be the life blood of commerce. Thrombosis will occur if, unless fraud is involved, the courts intervene and thereby disturb the mercantile practice of treating rights thereunder as being equivalent to cash in hand.'  
  
See Chapter 24 page 336 Schmitthoff Export Trade, the Law and Practice of International Trade Eighth Edition. and at pp. 233-234, the court below said:  
  
In the instant appeal the cases of Nasaralai Ent. Ltd. v. Arab Bank (Nig.) Ltd. (1986) 4 NWLR (Pt. 36) 409; AM.G. Akinsanya v. United Bank For Africa Ltd. (1986) 4 NWLR (Pt. 35) 273 were decided on the interpretation of the UCP, the issue about its applicability in Nigeria was not in issue, the cases were decided that UCP applied in Nigeria.  
  
In The Attorney-General Bendel State and 2 Ors. v. United Bank for Africa Ltd. (1986) 4 NWLR (Pt. 37) page 547, Coker JSC applied their previous judgment in A.M.O. Akinsanya v. United Bank for Africa supra the issue of applicability of UCP in Nigeria was not raised so it could not have been considered

In order to determine whether or not the court below was right, it is necessary that I closely examine the judicial decisions which were relied upon in the judgment of the court below. In A.M.O. Akinsanya v. united Bank for Africa Ltd. (1986) 4 NWLR (Pt. 35) 273, an appeal on a suit between a banker and customer as in the instant case, this court per Eso, JSC at page 303 said-

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 enters into a simple informal contract known to the common law or, if a statutory provision is involved in the 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 the form provided by the issuing Bank, the respondents, in this case, and though the Uniform Customs 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 is 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 noted however, that non-incorporation of this Uniform Customs in Ex. B., is certainly not this case. The issuing bank (respondent in this case) has a duty to ensure that the letter of credit issued 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. (italics mine)

As made manifest by Eso, JSC in the above passage, the non-incorporation of UCP was not an issue in the appeal. So this court did not have to decide whether or not the UCP is generally applicable in disputes between a banker and its customer on letters of credit. This case was therefore no authority for the proposition that UCP is generally applicable in Nigeria even in cases where parties have not expressly incorporated the UCP into their contracts.

Now in Nasaralai v. Arab Sank (1986) 4 NWLR (Pt. 36) 409, the dispute was between banker and customer concerning a letter of credit issued by the banker at the instance of the customer. Reading through the report, one garners that parties had expressly incorporated the terms of the UCP. I say this because at page 421 of the report, one of the defences put across by the respondent (i.e. the defendant to the suit) was:

(2) that the issuance of the letter of credit was subject to the general conditions for opening of documentary credits by the respondent which the appellant agreed to and executed and that by virtue of the said general conditions the respondent was not liable to the appellant in the claim.

Further at page 424 of the report, Bello, J.S.C. (as he then was) said:

The basic tenor of the law and practice relating to commercial letter of credit is that parties deal in documents not in goods or ships. Article 8(a) of the Uniform Customs and Practice for Documentary Credit 1974 which apply to the letter of credit (exhibit C) in this appeal provides ...  (italics mine)

The tenor of the language in the passage above conveys that this court did not have to decide in the appeal the question whether or not the UCP apply in all disputes involving letters of credit. Clearly therefore the general applicability of UCP was not an issue in the case.

And finally is the case of A.-G. Bendel State v. U.S.A. (1986) 4 NWLR (Pt.37) 547. This was a case between banker and customer. This case certainly did not decide that in all disputes between banker and customers arising from non-compliance with the terms of payment, the UCP necessarily apply. In the report at page 554, the customer specifically agreed to some terms. The relevant passage states:

The application was under a signature stamped Director of Finance, Mid-West Mass Communication Corporation'. This application (Exhibit 4) also contains a very important clause. It reads:

We agree to hold you and your correspondence harmless and indemnified in all respect of any loss or damage that may arise in consequence of error or delay in transmission of your correspondents (sic), messages or misrepresentations thereof or from any cause beyond your or their control'.

One gets the impression from this report that in order to make UCP applicable the banker/customer ought to have specifically incorporated its terms into their contracts. As I observed earlier, Articles 18 and 20 upon which the defendant relied are in the nature of exemption clause. There was no evidence that the articles were incorporated in the forms filled by the plaintiff. (see exhibits AA4). There was no evidence that the plaintiff's attention was at anytime during the negotiation directed to Exhibit 'S'. Clearly, the defendant is caught by the well established principle in the law of contract that a defendant relying on an exemption clause must show that the plaintiff had been made aware of the exemption clause, See Richardson, Spence & Co. & Anor. v. Minnie Rowntree (1894) AC 217 at 220 per Lord Herschell LC and Hood v. Anchor Line (Henderson Bros.) Ltd. (1918) AC 837.

The conclusion is inescapable that the court below was too sweeping in its conclusion that the UCP applies to all transactions relating to letters of credit between banker and customer irrespective of whether or not the parties had adverted their minds to it in the application for the issuance of a letter of credit. It seems to me that the parties themselves may only incorporate any of the provisions of the UCP into their contract if they are so inclined. Indeed, Article 1 of UCP recognizes the optional nature of the applicability of the UCP when it says:

These articles apply to all documentary credits including to the extent to which they may be applicable standby letters of credit are binding on all parties unless otherwise expressly agreed. They shall be incorporated into each documentary credit by wording in the credit indicating that such credit is issued subject to Uniform Customs Practice for Documentary Credits.

It is helpful to call to mind the views of Raymond Jack in the book Documentary Credits 1993 (2nd edition at page 9 para. 1.22 where the learned author writes:

The Uniform Customs consist of 49 Articles which set out provisions which are intended to regulate many aspects of documentary credit operations. They are promulgated by the ICC and are made effective by their incorporation into credits by the banks of countries whose banking associations have accepted them. They are not intended to be a code having the force of law. For the ICC cannot, and does not purport to, legislate. In this respect they are quite different in nature to the many International conventions, such as those on carriage, which have the force of law, in the countries parties to them. In contrast the Uniform Customs must rely upon contract, that is, agreement, for their binding effect in each credit contract where they are incorporated. Their contractual nature is fundamental to their understanding. Secondly, although their coverage is growing more comprehensive with each revision, the Uniform Customs do not purport to cover all questions which may arise in connection with credits.

The title gives an indication of their nature, Uniform Customs and Practice. They do not purport to be a code setting out the law relating to and governing credits in the way, for example, that the English Sale of Goods Act 1893 and its successor of 1979 intended to codify and also in some respects to change the English Common Law relating to sale of goods ... There is therefore a considerable areas which is left to the national courts of whatever country to be called upon to decide a dispute.

It seems to me that the matter falls to be considered under section 74(1)(a) and (1) of the Evidence Act on matters which must be judicially noticed. The section provides:  
  
74(1) The court shall take judicial notice of the following facts:

(a) all laws or enactments and any subsidiary legislation made there under having the force of law now or heretofore in force, or hereafter to be in force, in any pan of Nigeria;

(i) all general customs, rules and principles which have been held to have the force of law in or by any of the superior courts of law or equity in England, the Supreme Court of Nigeria or the Court of Appeal or by the High Court of the State or of the Federal Capital Territory, Abuja or by the Federal High Court and all customs which have been duly certified to and recorded in any such Court.

My humble view is that until a convention acquires the force of law by incorporation into the body of laws of this country or is shown to be a custom or usage of trade which has been regularly recognized and upheld by the superior courts in Nigeria as to acquire general acceptance, a party in a civil suit wishing to rely on it must prove its existence, and the fact that the parties have agreed to their contract to let such convention or custom govern their relationship. A party relying on the terms of an international convention or protocol must show proof that Nigeria has subscribed to such convention. 

In the instant appeal, the defendant in my view woefully failed to show that the terms of the UCP had been incorporated into the application for letter of credit made by the plaintiff so as to make the plaintiff bound by the exemption clause contained therein. It is my firm view that the court below was in error to have concluded that the UCP applied to the letter of credit transaction between the parties.

This conclusion notwithstanding, the plaintiff still had the duty to establish that the defendant negligently failed to perform the contractual duty owed to it. This takes me to appellant's issue No. 2. The court below having arrived at the conclusion that UCP was applicable to the facts of this case proceeded to conclude that its conclusion disposed of all the other issues raised for determination.

When an intermediate appellate Court reaches a conclusion on one or some of the issues raised before it, it should normally proceed to consider the other issues bearing in mind that its conclusion may be set aside by a higher court in the hierarchy. There are recognized exceptions to this practice. Where an appellate court reaches the decision to send the case back to the trial court for re-hearing, it should normally refrain from considering other issues as this may prejudice a fair determination of the issues at the heating. Considering that the court below later sent back the case for re-hearing.  I do not accept that the failure to consider all the outstanding issues as an error. But I find it difficult to understand why the Court below having decided to send the case to the High Court for re-trial later went on to order the defendant to pay US $16,180.00 to the plaintiff.

The next question arising is whether or not the Court below having determined that the UCP was applicable should not have proceeded to determine the appeal on the basis of the conclusion which it reached. The UCP had been tendered at the trial as Exhibit 'S'. Having reached the conclusion that UCP was applicable the court below should have proceeded to determine the appeal on the basis of that conclusion since no issue of credibility of evidence or witnesses arose in the matter. See Chief James Okpiri & Ors. v. Chief Igoni Jonah & Ors. (1961) 1 All NLR 102, (1961) 1 SCNLR 174; Fatoyinbo v. Williams (1956) 1 FSC 67, (1956) 1 SCNLR 274 and Shell-BP Petroleum Development Coy. of (Nig.) Ltd. v. Pere Cole & Ors. (1978) 3 S. C. 183.

In the light of my conclusion that the UCP did not apply, I shall now proceed to consider the outstanding issues. The plaintiff's claim was expressed to be in negligence. However, where a plaintiff who brings an action in tort is driven to rely on a contract to sustain his suit, the action must be seen as an action in contract. In this case, the foundation of plaintiff's claim is the agreement between it and the defendant for the latter to open for plaintiff a letter of credit. The suit is therefore one in contract. In order to succeed, the plaintiff must call evidence of the contract itself and of the breach. There is no doubt in this case that the defendant failed to or was unable to transfer the letter of credit to the Japanese supplier. Given the fact that the Letter of credit was to be valid in the first instance up to 13-1-87, time was certainly of essence in the contract.

Notwithstanding that the time for the defendant to offer performance was extended, the defendant failed and or neglected to get the letter of credit to the Japanese supplier. At pages 85-86 of the record of appeal, the trial court in its judgment said:

On issue (No.2) counsel submitted there was controverted evidence that plaintiffs did all they were expected to do; in executing their own part of the agreement. See exhibits A-A9 and G-G8. There was evidence impliedly admitted by the defendants that the defendants did not at all carry out their own part of the contract. There was no pleading or evidence known to the law why the defendants were in breach of the contract. The agreement was for the defendants to create an irrevocable letter of credit in favour of the plaintiff's customers in Tokyo Japan. This the defendants did not do. No evidence the defendants ever contacted the said beneficiaries in Tokyo Japan. No evidence defendants made inquiries why there was no reaction from the Bank in Tokyo. The beneficiaries wrote they had not received the money exhibits B - B2 and exhibits E & E2. The beneficiaries could not ship the goods ordered unless they received the irrevocable letter of credit (L/C).

The defendants' letters to their bank in New York are self serving evidence not supported by any outside evidence. It is agreed on both sides that the life time of letter of credit is three months. That makes time of essence of the contract. The defendants did not create letter of credit within the said three months or within the extended time. Defendants are liable for breach of contract.

I agree with the trial Court on the conclusion it reached in the above passage.

What is the measure of damages in a case as this? In Omonuwa v. Wahabi (1976) 4 Sc. 37 at pp. 47-48, this court per Idigbe, JSC explained basis of compensation and the measure of damages in a case of breach of contract thus:

In the preparation of the claim for, as well as in the consideration of an award in consequence of a breach of contract, the measure of damages is the loss flowing naturally from the breach and incurred in direct consequence of the violation. The damages recoverable are the losses reasonably foreseeable by the pal1ies and foreseen by them at the time of the contract as inevitably arising if one of them broke Faith with the other. In the contemplation of such a loss there can be no room for claims which are merely speculative or sentimental unless these are specially provided for by the terms of the contract. It is only in this connection that damages can be properly described as special' in the conception of contractual awards and it must be borne in mind that damages normally recoverable are based on the normal and presumed consequences of the breach complained of ... Thus the terms general' and special' damages are normally inept in the categorization of damages for the purpose of awards in cases of breach of contract. We have had to point out this before.... and we must make the point that apart from damages naturally resulting from the breach no other form of general damages can be contemplated ....' (italics supplied by Idigbe, JSC).  
  
(See Swiss-Nigeria Wood Industries Ltd. v. Danilo Sogo HSC. 14/70 of 3rd July, 1970, repol1ed in (1970) 1 A.L.R. 423 at 430-431). And on the same subject, this court in the case of Gregoire Agbale v. Naliona Motors Ltd. observed as follows:

It is undesirable to refer in contract to general and special damages as normally the only damages, other than those arising naturally, flow from consequences specifically provided for by the parties which would not otherwise naturally arise from a breach of the contract...  (italics supplied by Idigbe, JSC). (see SC.20/68 of 13 March, 1970 unreported by see (1970) ALR 266 at 273.

In his evidence in support of the plaintiff's claim, PW1 at page 46 of the record of appeal gave evidence of the special damages suffered by the plaintiff thus:

For special damages we claim the money spent on purchase of 16,180 (dollars) i.e. N55,699.55k for advance of import duty NS,S69.96k, for Marine Insurance Proposal N645.69k for Commissions and charges N1,685.47.

In addition to the above the P.W.1 gave evidence that the plaintiff was claiming N1,936,432.23 as general damages. In a case for breach of contract, a claim for general damages is generally inappropriate. In support of its claim on this head P.W.1 at page 46 of the record said:

If the defendant had handled the letter of credit efficiently and properly, the plaintiff could have made profit of over N750,000.00. The defendant should pay this loss.

The plaintiff did not call evidence to establish the basis upon which it could have made a profit of N750,000.00. The evidence called was that the plaintiff wanted to import raw materials. No attempt was made to prove how the profit of N750,000.00 was to be realized. The total cost of importation including the cost of adding other materials to the raw materials to realize a particular end product was not stated. The selling price of each of the end product was not stated. The claim of a prospective profit of N750,000.00 was clearly not made out. It is in my view speculative.

On the evidence available the plaintiff is only entitled to be compensated for the following:

1. Amount spent to purchase     $16,180.00    N55,699.85

2. Advance of import duty         5,569.96

3. Marine Insurance Proposal      642.69

4. Commission and Charges paid to the defendant                1,685.47

Total           N63,597.97

The PW1 under cross-examination testified that the sum of N55,699.85 earmarked for the purchase of $16,180.00 was not wholly utilized for the purpose and that there was a surplus of N6,662.92 which the defendant paid back into plaintiff's account. This amount must be deducted from N63,597.97 to arrive at the net sum lost by the plaintiff on the transaction. This leaves the sum of N56,935.05 payable to the plaintiffs.

The contention of the appellant in the appeal is that the court below was in error to have ordered that the case be tried de novo after agreeing that the UCP applied to the case. Further, the appellant contended that the court below was in error not to have considered the other issues raised in the appeal; and to have awarded US$16,180.00 to the respondent.

The respondent/cross-appellant on the other hand contended that the court below was wrong to have held that the UCP was applicable to the case.

I have considered the standpoints of the parties together in this judgment. It is my view that the court below was in error to have concluded that the UCP applied to the case and to have awarded a sum of US$16,180.00 to the respondent/cross-appellant whilst at the same time sending the case back for retrial. The truth is that the respondent/cross-appellant did not make a claim for the dollar equivalent of the amount paid for the purchase of the US$16, 180.00. Rather the claim was for N55,699.65.

The result is that the main appeal succeeds in part and the award of US$16,180.00 must be set aside. Similarly the order for retrial is set aside. The cross-appeal also succeeds in that it is my finding that the UCP did not apply to this case.

The final orders to be made are these:

1. The judgment of the court below is set aside.

2. In its place it is ordered that the defendant pay to the plaintiff the sum of N56,935.05 being the amount expended by the plaintiff in the attempt to transfer the sum of US$16,180.00 to plaintiff's overseas supplier through the defendant.

**KALGO, J.S.C.:**

I entirely agree with the leading judgment just delivered by my learned brother. Oguntade, JSC. The main appeal is hereby allowed in part and the cross-appeal also succeeds and is allowed. I abide by the consequential orders made in the judgment including the order as to costs.

**TOBI, J.S.C.:**

On 12th December, 1986, the respondent approached the appellant's Branch Office at Orlu with a pro forma invoice from Kobe Japan for purchase of $16,180 US dollars for importation of raw materials by the respondent. The respondent paid the appellant the naira equivalent of the dollars which the appellant was to transmit by means of a confirmed letter of credit to the respondent's suppliers, Messrs Musashi Trading Company, Kobe, Japan.

On the same date and day, the appellant, pursuant to oral agreement between them, purportedly issued a documentary credit No. ORL.4/86 to which were attached the relevant documents. Musashi Trading Company Kobe, Japan did not receive the confirmed letter of credit on 13th April, 1987 when the life span of the letter expired. Time was extended to 15th July 1987 at the request of the appellant. The letter of credit was still not received. The appellant asked for extension for the second time to 6th October, 1987. The respondent refused. Not able to wait any longer, the respondent sued for damages arising from negligence or in the alternative for breach of contract.

The learned trial Judge gave judgment to the respondent. He found the appellant liable to damages which he awarded in the generally usual two parts:

N63,567.77 special damages and N1,000,000.00 general damages. The appellant appealed to the Court of Appeal. That court allowed the appeal but remitted the case for trial de novo before another Judge of the High Court, Orlu.

In the penultimate paragraph of the judgment, the Court of Appeal said at page 247 of the record:

Having held that Exhibit 'S' (UCP) is applicable to this transaction it is the law under the provision of UCP and as decided in my unreported judgment suit LD/424/77 between Wasuani GMBH v. Best Stores Ltd. delivered on 13th October 1981 that in the application of UCP parties cannot switch the currency of the letter of credit to another currency to wit there cannot be a shift of the currency of the letter of credit in the instant appeal which is American US Dollars 516,180.00 to any other currency this court therefore orders to mitigate the position of the respondent that the appellant refunds to the respondent its fund $16,180.00 on or before 30 days from today.

Aggrieved by the decision, the appellant appealed to the Supreme Court. Briefs were filed and duly exchanged. I will take two issues. First, is whether the Court of Appeal was right in ordering a trial de novo after holding that Exhibit 'S' was applicable in the case? Second, is whether the Court of Appeal was correct in awarding $16,180.00 to the respondent?

It is the argument of learned counsel for the appellant that the Court of Appeal having held Exhibit 'S' is applicable in the case; the court should have held that the appellant was not liable in negligence or breach of contract. He also submitted that the order for the appellant to pay the respondent the sum of US$16,180.00 is not consequential to the order allowing the appeal and therefore an order made without jurisdiction.

Learned counsel for the respondent submitted that the UCP rules are not applicable to the case and that the Court of Appeal was wrong in reversing the decision of the trial court on the issue. She submitted that the order of retrial and refund of the cost of the letter of credit were made by the Court of Appeal in the proper exercise of its discretionary power and the finding was reached after an examination of the facts and circumstances of the case. To set aside the order for retrial or refund of the value of the letter of credit would occasion a greater miscarriage of justice than to grant it, learned counsel submitted.

Exhibit 'S' is the Uniform Customs and Practice for Documentary Credit bearing or wearing the cognomen UPC. The UPC promulgated by the ICC consists of 49 Articles. The Court of Appeal cited the case of Akinsanya v. United Bank for African Limited (1986) 4 NWLR (Pt. 35) 273, particularly where Eso, JSC traced the historical aspect of global and universal standardisation of letters of credit in International trade and commerce at page 300 of the judgment.

Learned counsel for the respondent submitted that the case of Akinsanya v. United Bank for African Limited is inapplicable. She cited the following dictum from the judgment of Eso, JSC:

It is to be noted however, that non incorporation of the Uniform Customs in Ex. B (Application form) is certainly not an issue in this case.

The above is not per se basis for argument that the UPC rules do not apply in Nigeria. If a Judge says that a particular matter is not an issue before him, he should be taken as saying that the matter does not arise in the case. He should not be taken as saying that the matter is not applicable in the case.

It is the argument of learned counsel for the respondent that UPC rules can only apply to transactions if the parties expressly incorporate them in the basic document. She did not see any such incorporation in Exhibit 'S' and therefore faulted the Court of Appeal in holding that the exhibit was applicable in the case. Counsel made brilliant efforts to draw a distinction between the facts of this case and those of Akinsanya. She did not however tell this Court whether in Akinsanya, the UPC rules were incorporated in exhibit B, the standard form.

Learned counsel for the respondent said that this court essentially found for the erring/defaulting issuing banks because of the exemption clauses expressly contained in the application forms for the credit which was canvassed to the advantage and benefit of the issuing banks. With respect. I do not agree with learned counsel. As a matter of fact, Eso, JSC, in his judgment of about 30 pages devoted about two pages to the examination of the exclusion clause raised by Professor Kasunmu. Eso, JSC, had arrived at his conclusions ever before he took the issue of exclusion. And what is more, both parties appealed. The appeals failed and they were dismissed. It is therefore not correct for counsel to say that the issue of exemption was the basis of this court deciding in favour of the erring/defaulting issuing banks.  
  
While learned counsel for the respondent has called the attention of this court to some differences between Akinsanya and this case, there are also similarities. They are, (1) Importation of goods. (2) Letters of credit. (3) Standard form. (4) Special and general damages for negligence and or contract.  
  
    
  
It is difficult to come across two cases of or with exactly the same facts. They may look alike like siamese twins but may not be exactly the same to the last sentences, words and letters. This is because the circumstances leading to the litigation in relation to the facts may be different. The difference could be minute or infinitesimal, but there is a difference. The doctrine of precedent comes into the fore when the facts of two cases are materially similar in their content of actuality or reality. And here the court is concerned with nitty-gritty of the facts in the context of determining the live issues before the court. The court is not concerned with peripheral or auxiliary facts which merely add to the building of the factual structure of the case. While I agree that this is a very difficult exercise in our adjectival law for the courts, courts of law have never been known to deal with cases involving very simple mental exercise. In the exercise, the court will ignore for good what I may wish to call for want of better expression parasitic or inarticulate facts, which the court can comfortably or conveniently avoid, in arriving at a proper decision. Perhaps I can put it in another way for better understanding. While the court has a duty to arrive at when facts are material in their content of actuality or reality, and when they are peripheral or auxiliary, the underlying factor is whether the facts are facts enough to arrive at the decision of the court one way or the other. If they are not that material, then the court should feel free to ignore the promptings of counsel to invoke the doctrine of precedent. In the determination of this aspect of his procedural duties, the Judge should avoid surmises but must be concerned with the facts of the two cases before him; the one forming the baseline and the other physically before the Judge for application.

Taking the above in the context of the decision of this Court in Akinsanya v. U.S.A., I am less with learned counsel for the respondent and I am more with the Court of Appeal. This is because there is more in favour of the use of Akinsanya in this case than not using it. I have been able to enumerate some of the similarities. To my mind, the facts of Akinsanya are more material to this case and are less peripheral and auxiliary. I do not intend to take the other two cases as counsel placed more emphasis on Akinsanya.

If a court nurses the idea of sending a case back for a retrial, the court should not keep the idea to itself but should let the parties know so that they have an opportunity to address the Court on it. It is trite law that a court of law cannot raise an issue suo motu and resolve it suo motu. In this case, none of the parties asked for a retrial. It was the decision of Court of Appeal and that court was under a duty to ask the parties to address it on the retrial before giving judgment. The Court of Appeal was in serious error in raising the issue suo motu in one breadth and resolving it in another breadth.

I go to the second issue. It is in respect of the award of US $16,180.00 to the respondent by the Court of Appeal. It is elementary law that a Court is bound by the relief or reliefs sought, The generosity or charity of a Court of law is confined strictly to the relief or reliefs sought to the extent that a Court of law cannot give to a party what he did not claim. That is completely outside our procedural law. The rational behind this is that a party who comes to Court knows where the shoe pinches him and therefore knows the limits of what he wants. The court, as an unbiased umpire, so to say, cannot claim to know the relief or reliefs better than the party and give him over and above what he has claimed. While a Court has jurisdiction to award less than what a party claims, it has no jurisdiction to award more than what he claims.

In this case, the appellant inter alia claimed damages in naira. It is N55,699.65. The particulars of claim 5(1) were couched as follows:

Refund of money spent in purchasing US$16,180.00 ...N55,699.65.

It is clear that the relief was never in US dollars but was on the Nigerian naira and so the Court of Appeal had no jurisdiction to order that the money should be refunded in US dollars. This is because the appellant did not seek such relief.

Learned counsel for the respondent in some desperation cited the case of Services Europe Atlanlique and (SEAS) v. Slockholms Rederiakliebolag SVEA the Folias (1978) 2 All ER 764. The Court of Appeal in England held that in the award of damages for breach of contract, the award should be made in the currency most truly expressing or reflecting plaintiff's actual loss. In the case, the court held that as the Charteress actual loss was the amount of French francs expended by them in acquiring the cruzeiros necessary to settle the cargo receivers' claim, the award therefore should be expressed in French francs.

The SEAS case is not apposite to this appeal. SEAS had to do with competing currencies of the US dollar and the French francs.

There is no such competition of currency in this appeal. The relief in this appeal was clearly in naira and naira only. It will be wrong to confuse the act of purchasing the dollar as an alternative relief because there is no such relief. Agreed, the respondent bought US dollars but that was not the amount claimed. In the circumstances, the Court of Appeal was in error to order the refund of $16,180.00 on or before 30 days. I do not agree with the Court of Appeal that this is a case where equity will mitigate the position of the respondent because the case does not involve the application of the principles of equity. It is rather a very straightforward matter of tort and or contract and so the Court of Appeal was wrong in trying to push in equity. Hard and ossified the common law is, it remains a separate and distinct branch of our law, separate and distinct from equitable principles. This is not an appropriate case to rope in the principles of equity. Even if one is willing to rope them in, equity will be very reluctant to afford any help to the respondent because it will be a complete stranger in the matter.

Learned counsel for the respondent referred to the orders made by the Court of Appeal for retrial and refund as consequential orders. A consequential order is an order that follows as a result of the earlier one which can be called for this purpose as the main order. It may have an indirect or secondary result in the relief awarding process. A consequential order is appurtenant to the main or principal order. A clearly fresh order cannot be a consequential one. That will certainly throw overboard the English meaning of the word.

While an order of retrial could qualify as a consequential order, I have my strong doubts whether an order of giving judgment in a currency that was not claimed by the plaintiff can qualify as such order. It is clearly a fresh order and has not the slightest element of consequence.

Let me return to the order of retrial which I agree could be consequential. But there is one procedural hurdle to cross by the court ordering a retrial and it is allowing the parties to address it on it, I have said it above. I do not want to go further here. The Court of Appeal did not allow the parties to address it on the retrial. That was a very serious error.

It is in the light of the above I too allow the appeal in part I award N55,699.65 the amount claimed to the respondent. The order of retrial is set aside.

**MOHAMMED, J.S.C.:**

I have had the privilege before today of reading in advance, the lead judgment of my learned brother, Oguntade, JSC which has just been delivered. I am in full agreement with him in the manner he considered and resolved all the issues arising for determination in this appeal and the cross-appeal. I have nothing useful to add to the judgment which I wholly adopt as mine including the order on costs.

**TABAI, J.S.C.:**

I read, in draft the leading judgment prepared by my learned brother, Oguntade, JSC and I agree with the conclusion therein. The facts which are essentially undisputed are clearly restated in the leading judgment and I need not repeat them.

I would, by way of emphasis, however comment briefly on the controversy about the applicability or otherwise of the Uniform Customs and Practice for Documentary Credit. The trial court deliberated on the issue and held that the Uniform Customs and Practice for Documentary Credit only applied to a country that subscribes to it and since there is no evidence that Nigeria has subscribed to it, it does not operate in this case. The court went further to hold that even where it applies, it must be incorporated in the agreement to be binding on the parties. For its opinion the court relied on Nasaralia Ent. (Nig.) Ltd. v. Arab Bank Nigeria Ltd. (1986) 4 NWLR (Pt. 36) 409 and Article 1 of exhibit's' (the Uniform Customs and Practice for Documentary Credit).

The court below relying on Nasaralia Ent. (Nig.) Ltd. v. Arab Bank Nigeria Ltd. (supra) A.M.O. Akinsanya v. U.B.A. (1986) 4 NWLR (Pt. 35) 273 and A.-G., Bendel Slate & Ors. v. U.B.A. (1986) 4 NWLR (Pt. 37) 547 and Court's duty to take judicial notice of customs that have achieved notoriety, held that the Uniform Customs and Practice for Documentary Credit is applicable in this country and also applicable in this case. Counsel for both parties addressed fairly extensively on the applicability or otherwise of the Uniform Customs and Practice for Documentary Credit.

I have read the three cases of this Court. And although in each of the case references were made to the Uniform Customs and Practice for Documentary Credit, none of them decided that for every international trade transaction involving the procurement of letters of credit the issuing bank and confirming bank invariably enjoys immunity provided by the exemption clause in the Uniforms Customs and Practice for Documentary Credit. It is my view that even where they are held to apply in this country, whether or not the parties are bound by its provisions depends on the peculiar facts of each case. This is the necessary deduction from the opinion of Kayode Eso, JSC in the case of Akinsanya v. U.S.A. (supra) at pages 302-303 where, after reproducing Article 12 of the Uniform Customs and Practice for Documentary Credit he said:

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 - RC. Gutteridge and Maurice Megrah are of the view and I am in full agreement that the provisions should not be taken to give banks a carte blanche to do as they please and "if one commits flagrant mistake the responsibility and the loss will not be on 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 delict.

I agree entirely with this opinion which I accordingly adopt. The court below proceeded as though the applicability of the exemption clause embodied in the Uniform Customs and Practice for Documentary Credit was absolute defence for the defendant/respondent. I think that was in error. An exemption clause in a contract may not avail a party who has been guilty of a fundamental breach of the contract. See Chitty on Contract 23 2 Edition para. 732 page 329.

In my view, the whole case is whether or not the defendant/respondent is liable for breach of the contract. At pages 85-86 of the record of appeal the learned trial Judge expressed his assessment of the case of the defendant/respondent in the following terms:

There was evidence impliedly admitted by the defendants that the defendants did not all carry out their own contract. There was no pleading or evidence known to law why the defendants were in breach of the contract. The agreement was for the defendants to create an irrevocable letter of credit in favour of the plaintiff's customers in Tokyo Japan. This the defendants did not do. No evidence the defendant ever contacted the said beneficiaries in Tokyo Japan. No evidence defendants made inquiries why there was no reaction from the bank in Tokyo. The beneficiaries wrote they had not received the money exhibits B-B2 and exhibits E and E2. The beneficiaries could not ship the goods ordered unless they received the irrevocable letter of credit.

The defendants' letters to their bank in New York are self serving evidence not supported by any outside evidence. It is agreed on both sides that the life time of letter of credit is three months. That makes time of essence of the contract. The defendant did not create letter of credit within the said three months or within the extended time. Defendants are liable for breach of contract.  
  
  
  
The reasoning and conclusion above is supported by the evidence on record and there is no assertion of its being perverse. I agree with the learned trial Judge that the defendant/respondent is liable for breach of contract.

For the foregoing and fuller reasons articulated in the leading judgment of Oguntade, JSC, I also hold that the main appeal succeeds. The result is that the judgment of the Court of Appeal is set aside and that the trial court allowing the claim restored. The general damage awarded by the trial court is however set aside. And in its place judgment is entered for the sum of N56,935.05.

Appeal allowed in parts.