**SOUTH TRUST BANK & ORS**

**V.**

**PHERANZY GAS LIMITED & ORS**

IN THE COURT OF APPEAL OF NIGERIA

ON FRIDAY, THE 28TH DAY OF FEBRUARY, 2014

CA/L/122/2012

**LEX (2012) - CA/L/122/2012**

OTHER CITATIONS

2PLR/2012/94 (CA)

**BEFORE THEIR LORDSHIPS**

SIDI DAUDA BAGE, JCA

RITA NOSAKHARE PEMU, JCA

CHINWE EUGENIA IYIZOBA, JCA

**BETWEEN**

1. SOUTH TRUST BANK

2. EXPORT-IMPORT BANK OF UNITED STATES

3. PRIVATE EXPORT FUNDING CORPORATION - Appellants

AND

1. PHERANZY GAS LIMITED

2. CHRIS EZEUDE

3. CYPRIAN EZEUDE

4. OBI EZEUDE - Respondents

**REPRESENTATION**

OLUMIDE AJU Esq. with B. C. AKUNYA Esq. - For Appellant

AND

F. R. ONOJA Esq. - For Respondent

**ORIGINATING STATE**

FEDERAL HIGH COURT, LAGOS DIVISION (Nyako J – Presiding)

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

BANKING AND FINANCE – PROJECT FINANCING:- Project financing and export financing transactions sponsored by foreign government through a Nigerian bank and a bank in sponsor-nation to support manufacturing activities in Nigeria – Nature of banker-customer relationship created – Court with jurisdiction to hear matter arising therefrom

BANKING AND FINANCE - PROMISSORY NOTE: Nature of a promissory note - Whether not only a bill of exchange but also a distinct commitment provided as security for the loan agreements – How promissory note is discharged – Whether cannot be discharged by repayment of the loan itself by any party other than the borrower

BANKING AND FINANCE - PROMISSORY NOTE: Parties: endorser, acceptors and endorsers – The Commitment to pay the principal sums of the loan agreements and the rate of interest accruable as endorsed under a promissory note – Whether an unconditional one assignable by an endorser as if it was the original issuer of the Note

COMMERCIAL LAW - CONTRACT OF GUARANTEE: Meaning and nature of – Rule that a contract of guarantee is independent of the main contract so that a creditor could proceed against the guarantor without joining the debtor as a party to the suit – Whether applicability depends on the actual contract entered into by the parties and not automatic

COMMERCIAL LAW - LAW OF CONTRACT:- Rule that parties are bound by the terms of agreement where embodied in a document - Whether the court or the parties can rewrite the contract or import words to vary the intentions of the parties as written

COMMERCIAL LAW – PRIVITY OF CONTRACT:- Contract of loan between two parties and a guarantor – Unilateral assignment or transfer of loan to an entity not party to the loan or guarantor agreement – Whether an act not contemplated by the parties to the loan agreement and constituting a breach of the terms of the loan Agreement

CONSTITUTIONAL LAW – JURISDICTION OF FEDERAL HIGH COURT OVER BANKING AND FINANCIAL INSTITUTIONS:- Section 251 Of The 1999 Constitution of the Federal Republic of Nigeria – Whether extends to transaction related to both project financing and export finance undertaken by foreign government through a Nigerian bank to support manufacturing activities in Nigeria

DEBTOR /CREDITOR LAW - LOAN AGREEMENT AND CONTRACT OF GUARANTEE:– Nature of – Whether contract of guarantee is independent of the main contract – Whether guarantor has a valid cause of action for the repayments of all sums of money paid on behalf of a borrower upon redemption by him of the loan taken by the borrower

DEBTOR AND CREDITOR – BANK LOAN:- Recovery of bank loan - Rule that primary loan agreement is different and independent from Guarantors agreement – Parties to a guarantor’s agreement – Whether debtor can enforce or take cover under the terms of a guarantor’s agreement - Where guarantor pays off the debt due to default of primary debtor – Whether can recover from primary debtor based on primary Loan Agreement - Whether payment of loan by guarantor changes nature of debt from its original designation as a bank loan to a mere debt – Implication for jurisdiction of Federal High Court under Section 251 of the 1999 Constitution of the Federal Republic of Nigeria

DEBTOR AND CREDITOR – LOAN ASSIGNMENT:- Bank loan backed by guarantee – Whether can be unilaterally assigned/transferred by creditor so long as terms of the loan agreement does not change – Whether transfer/assignment constitutes breach of loan agreement - Repayment of loan value by guarantor to purchaser of loan on default of primary debtor – Right of guarantor to recover from primary debtor

DEBTOR AND CREDITOR – LOAN GUARANTOR:- Rule that guarantor has a valid cause of action for the repayments of all sums of money paid on behalf of a borrower upon redemption by him of the loan taken by the borrower – Where debtor executed a Promissory note as a distinct commitment provided as security for the loan agreements – Whether guarantor is entitled to enforcement of same against debtor even though not originally a party to its execution – Basis

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INTERNATIONAL LAW – INTERNATIONAL TRANSACTIONS:- Project financing agreement between a Nigerian company and foreign banks and guarantors – Where agreement conferred non-exclusive jurisdiction on courts of foreign banks/guarantors and Nigerian company agreed to submit to the competent court of its corporate domicile – Effect

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JURISDICTION – ISSUE OF JURISDICITON:- Where raised suop motu – Duty of court to invite to invite parties to address it on same – Duty of court to base its decision on a judicious consideration of the address of both parties and applicable rules

INTERPRETATION OF STATUTES - LITERAL RULE: Rule that words used in a Statute should be given their ordinary and natural meaning - Where the Statute is divided into parts – Court preference of construing the sections in the part in relation to other sections in that part

INTERPRETATION OF STATUTES:- Primary rule of construction – Literal construction –

INTERPRETATION OF STATUTES:- Section 15 of the Court of Appeal Act 2004 - Section 251 of the 1999 Constitution of the Federal Republic of Nigeria

WORDS AND PHRASES- 'guarantee' – Meaning of

**MAIN JUDGMENT**

**CHINWE EUGENIA IYIZOBA, J.C.A. (Delivering the Leading Judgment):**

This is an appeal against the judgment of Nyako J of the Federal High Court, Lagos Division in suit No FHC/L/CS/1148/2005 delivered on the 21st day of October 2011 in which the learned trial Judge declined jurisdiction to entertain the Counter-claim of the Appellants/Cross-Respondents notwithstanding that he found the Respondents/Cross-Appellants liable to the Appellants/Cross-Respondents in the amount claimed in the Counter-claim.

The 1st Respondent is a company registered in Nigeria. Its registered office is at 31 Ekololu Street Surulere Lagos. It carries on business as Sand-dredgers and dealers in gas products. The 2nd, 3rd and 4th Respondents are all directors of the 1st Respondent Company. Between 2003 and 2004, the 1st Respondent approached and obtained 3 separate loans from two Banks in the United States of America. These Banks are, South Trust Bank (1st Appellant) and PNC Bank. The cumulative principal amount of these loans is US$4,420,091 (Four million, four hundred twenty thousand and ninety one dollars), and they attract various rates of interests. These loan facilities were secured by two types of guarantees.   
In the first instance, the 2nd, 3rd and 4th Respondents issued their personal guarantees to the two American banks that gave the loan, undertaking that, if the 1st Respondent defaults, they will be liable to pay the loan. The other guarantee was provided by Export-Import Bank of United States (2nd Appellant) to the 2 American Banks. Export-Import Bank of the United States (Exim-Bank) undertook to pay the 2 banks as their Insurer/guarantor in the event of the Respondents default on any of the instalment payments. It was then agreed that the 2nd Appellant would automatically step into the shoes of these two Banks, and recover these loans from the Respondents once it redeems the loans. The relationship between Exim-Bank and the two American Banks is governed by two agreements called the Master Guarantee Agreement, respectively. They were tendered at the trial as Exhibit "DH" and "DK". The Respondents are not parties to these agreements, but they were aware of the relationship between Exim-Bank and the Banks. In 2005, the 1st Appellant (South Trust Bank) did an internal restructuring. Some of its loan portfolio was sold to a company called Private Export Funding Corporation (PEFCO), i.e. the 3rd Appellant herein. This restructuring did not affect the contractual terms and conditions governing the loan facilities between the 1st Appellant and the 1st Respondent; the rate of interest and the time of repayment of these loans were not altered. The South Trust Bank loans were merely transferred to PEFCO.

Under the terms which the 1st Respondent took the loans from the banks, the repayment plan was to be biannually (i.e. every 6 months) with total payment to be made over a 6 year period. The first repayment was due to be made on 25th September 2004 (Page 1045 of the Record) whilst full repayment of all the loans with accrued interest should have been completed on 25th January 2010 (Page 1153 of the Record of Appeal). The 1st Respondent defaulted on all the three loans when they fell due for payment. As a result of this default the two American Bank called on the Insurance/Guarantees given to them by Exim-Bank (2nd Appellant). The 2nd Appellant settled the two American Banks and obtained an assignment of the loans from the Banks. All rights accruing on the loans were then transferred to the 2nd Appellant. The 2nd Appellant then demanded repayment of these loans from the Respondents; instead of paying the loans, the Respondents responded to these demands by instituting an action at the Federal High Court Lagos on 1st November 2005. In the action, the Respondents admitted taking all the loans totaling US$4,420.091 (Four million, four hundred twenty thousand and ninety one dollars) but sought a declaration that because of the assignment of some of the loans to the 3rd Appellant, the court should make an order allowing them to withhold repayments on all the three loans. There was no allegation in the Respondents' pleading, and no evidence was led at the trial, that by that assignment, the terms and conditions under which the loans were granted to the Respondents were altered.

The 2nd Appellant filed its defence to the suit, and also made a Counterclaim for the entire amount of all the loans with accrued interest being the assignee of the loans. At the end of trial, the learned trial judge held that Respondents were unable to prove their claims. The entire reliefs in the Statement of Claim were therefore dismissed. On the counter-claim, the trial court found that there was a valid assignment of the loans by the two American Banks to the 2nd Appellant, and that the Respondents were liable to pay the entire loan with accrued interest as claimed in the Counterclaim, but that the proper venue for litigation in respect of the Counterclaim is the state of New York, USA. The trial court gave no reason for its decision on jurisdiction.

Dissatisfied with the part of the judgment of the trial court declining jurisdiction to entertain the Counterclaim, the appellants filed a Notice of Appeal against same. The Respondents, equally dissatisfied by the judgment on the 7th November 2012 filed a Cross Appeal vide a Notice of Cross Appeal filed pursuant to the leave of this Honourable court made on 6h November 2012.  
The Appellants' Notice of Appeal has 4 grounds, out of which they distilled the following two issues:

*1. Whether the decision of the trial judge declining jurisdiction to entertain the Counterclaim is valid, proper and can be sustained in law? (Grounds 1, 2 & 3)*

*2. Whether, having regard to the state of the evidence and the findings of the trial judge, judgment should not have been entered in favour of the 2nd Appellant as per the Counterclaim? (Ground 4)*

The Respondents/Cross appellants from the four grounds of Appeal in the main Appeal, and the four grounds in the Notice of Cross-Appeal formulated the following issues for determination:

*(1) Whether the Appellants/Cross-Respondents have suffered any miscarriage of justice by the refusal of the trial Court to entertain the Counter-claim for reason that the suit should be instituted before the Court of the State of New York (Distilled from grounds 1, 2 and 3 of the Notice of Appeal).*

*(2) Whether having regards to the provision of Section 251 of the Constitution of the Federal Republic of Nigeria 1999 as Amended, the lower Court has jurisdiction to entertain the counterclaim. (Distilled from ground 3 of the Notice of Cross Appeal).*

*(3) Whether having regards to the doctrine of privity of contract and particularly the fact that the 2nd Appellant/Cross Respondent has repaid the loans with interest, the 2nd Appellant/Cross Respondent is entitled to the reliefs claimed in the Counter-claim. (Distilled from ground 4 Notice of Appeal and grounds 1, 2 and 4 of the Notice of Cross -Appeal).*

The Appellants/Cross Respondents in their reply brief to the Respondents/Cross Appellants' brief raised a preliminary objection to the competence of Issue 1 of the cross appellants' brief. Their contention is that issue 1 did not as indicated in the brief arise from Grounds 1, 2 and 3 of the Appellant's Notice of Appeal. Since the Respondents/Cross appellants argued their Respondent's brief to the main appeal and the cross-appeal together, I shall take the preliminary objection against issue 1 of the cross-appeal at this point.

**ARGUMENTS IN SUPPORT OF THE PRELIMINARY OBJECTION**

The contention of the Appellants/Cross Respondents is that Issue 1 formulated by the Cross Appellants in the Respondents/Cross Appellants brief of Argument did not arise from the Appellants Grounds of Appeal. It was submitted that Ground 1 of the Appellants' Notice of Appeal complains about the lower court's refusal to entertain the Counterclaim on the alleged ground that the Court in the State of New York United States of America has jurisdiction, without considering the provisions of any law of contract or giving reasons for his decision. Ground 2 complains about the impropriety of the lower court assuming jurisdiction to hear and determine the Statement of Claim based on evidence led and decline jurisdiction to enter judgment based on the Counterclaim, having rightly found that the Cross Appellants were indebted and liable to the Cross Respondents for the loans given to them. Ground 3 complains about the failure of the lower court to consider the issue whether it has jurisdiction to entertain the Counterclaim or not, having raised the issue *suo motu* and having been addressed by Counsel to the parties who also filed written submission on this issue. Counsel submitted that the issue of miscarriage of justice formulated in issue 1 from these grounds is incompetent because the said issue of miscarriage of justice did not arise from Grounds 1, 2 and 3 of the Appellants/Cross Respondent' Notice of Appeal dated 6th January 2012 at pages 1400 - 1403 of Volume III of the record of Appeal. Counsel further submitted that where an issue for determination is not predicated on a ground of appeal, it is incompetent and liable to be struck out. West African Examinations Council v. Adeyanju (2008) 9 NWLR (Pt.1092) 270 @ 291 C-E; Lambert v Nigerian Navy (2006) 7 NWLR (Pt.980) 514 @ 532 E-G. Learned counsel urged the Court to strike out Issue 1 formulated by the Cross Appellants and to disregard all arguments canvassed in support thereof.

The Respondent/Cross-Appellant in their reply brief of argument in response to the preliminary objection submitted that their issue number one was derived entirely from the Appellant's grounds of Appeal (and not the Cross-Appeal) which complained bitterly of the decision of the learned trial Judge declining jurisdiction to entertain the matter. Counsel submitted that the issue simply made the argument that the decision of the learned trial Judge was right or that the Appellants/Cross-Respondents have not suffered miscarriage of justice in any way by the decision. In the premise, counsel submitted that the issue is proper and appropriate in addressing grounds 1, 2 and 3 of the Notice of Appeal. Learned counsel urged the court to dismiss the Preliminary Objection.

It is indeed trite and a correct statement of the law that issue for determination must be distilled from the grounds of appeal and that any issue which did not arise from the grounds of appeal is incompetent and liable to be discountenanced or struck out. In the case of West African Examinations Council v. Adeyanju (2008) 9 NWLR (Pt.1092) 270 at 291 paras C-E referred to by learned counsel, the Supreme Court held as follows:

"...Taking the complaint of the respondent on the appellant's issue number 4 which is predicated on the question of public policy, there is no doubt whatsoever that the matter concerning public policy was not raised in any of the grounds of appeal filed by the appellant. The position of the law in this respect regarding the status of such an issue is that it is incompetent because an appellate court can only decide all appeal on issues raised on the grounds of appeal filed. See Management Enterprises v. Otusanya (1987) 2 NWLR (Pt.55) 179 and Onifade v. Olayiwola (1990) 7 NWLR (Pt.161) 130 @ 157. In this respect, any argument in the brief of argument in support of such issues not arising from the grounds of appeal, will be discountenanced by the court in the determination of the appeal as stated in Momodu v. Momoh (1991) 1 NWLR (169) 620-621. In line with the requirement of the law, issue number 4 in the appellant's brief of argument together with all the arguments in support thereof shall be discountenanced in the determination of this appeal." See also Unity Bank Plc v. Bouari (2005) 7 NWLR (Pt.1086) 372 @ 400.  
See generally Cross River State Newspaper Corp. V. Oni (1995) 1 NWLR (Pt.371) 270; Onia v. Onia (1989) 1 NWLR (Pt.99) 514 @ 529; Complain Comm. & Ind. Spr Ltd. v. Ogun State Water Corp. & Anor (2002) 9 NWLR (Pt.773) 629; Lambert v. Nigerian Navy (2006) 7 NWLR (Pt.980) 514 @ 532 E - G.

I have closely examined the grounds of appeal as formulated by the appellant in their notice of appeal dated 6th January 2012 at pages 1400 - 1403 of Volume III of the record of Appeal, I am satisfied that issue 1 as formulated by the Cross Appellant did not per se arise from any of the grounds therein stated or even from the judgment of the lower court. No issue arose as to whether or not the decision of the lower court led to a miscarriage of justice on the appellants. I appreciate the angle from which the Cross Appellants are seeing the matter. All they are saying is that the lower court was right in its decision that it had no jurisdiction and that it is the United States Court that has jurisdiction. It went further to air the view that the Appellants did not thereby suffer any miscarriage of justice. This however is not a point around which to formulate an issue because it was not directly canvassed in the case and no decision was taken on the point. It is a mere argument which the Cross-Appellants can use to wrap up whatever submissions they may have made regarding the decision of the lower court that it had no jurisdiction. The preliminary objection is upheld. The issue and all arguments pertaining thereto are struck out.

I shall now proceed to deal with the arguments in the main appeal and thereafter with the cross-appeal separately.

**MAIN APPEAL**

**ISSUE 1:**

Whether the decision of the trial Judge declining jurisdiction to entertain the Counterclaim is valid, proper and can be sustained in law?

**APPELLANT'S ARGUMENTS:**

On this issue, learned counsel submitted that the decision of the trial Judge declining jurisdiction to entertain the Counterclaim is improper, irregular and cannot be sustained in law. It was submitted that the method by which the learned trial judge arrived at that decision was arbitrary. The decision therefore fell short of the requirements of what a decision or judgment of a court should be. Counsel submitted that there was no reasoning or analysis given by the trial judge in any part of his judgment to rationalize his decision declining jurisdiction to entertain the Counterclaim. The decision was therefore not a proper outcome of a full consideration of the issues raised and argued by the parties. Counsel relied on Agbanafo v. UBN Ltd (2007) NWLR (Pt.666) 534 @ 557 and Ojugbue & Anor v. Nnubia & Ors (1972) ALL NLR 664 @ 669.

Learned counsel submitted that in the course of trial, all the loan agreements between the Appellants and the Respondents were tendered; that these agreements contained clauses dealing with the court vested with jurisdiction to entertain any dispute between the parties; that notwithstanding this bundle of evidence, the learned trial judge failed to consider any of the provisions of these agreements and did not analyse any legal principle before coming to his decision declining jurisdiction on the Counterclaim. Counsel submitted that the arbitrariness of the decision of the trial judge is more obvious, when it is discovered that the same court, assumed jurisdiction on the Statement of claim, dismissed it for lack of reasonable cause of action, and went further to reach a finding that the Respondents are liable to the 2nd Appellant to the tune of US$4,420,091 (Four million, four hundred and twenty thousand and ninety one dollars) with interests in the same suit. Counsel submitted that the question therefore is, upon what basis did the learned trial judge assume jurisdiction on the Statement of claim and came to a different decision, declining jurisdiction on the Counterclaim when the pleadings and facts are the same? Counsel suggested that it explains why the trial court failed to give reasons for its action. He urged the Court to set aside the decision of the lower court on jurisdiction.

Counsel further submitted that the learned trial Judge *suo motu* raised the issue whether he had jurisdiction to entertain the matter having regard to the provisions of certain documents tendered at the trial and then requested Counsel to address him on this issue. Both parties filed their respective written submission (pages 866 to 877 of the record) and these arguments were also adopted at the proceedings of the court of 11th May 2011 (page 878 of the Record). The issue of jurisdiction then became one of the issues which the learned trial judge was mandatorily required to consider, and determine in the judgment. Surprisingly the learned trial judge did not refer to any of the submissions of the parties on jurisdiction in his judgment; he did not also identify the issue of jurisdiction as one of the issues to be considered but nonetheless predicated his refusal to enter judgment for the 2nd Appellant as per the Counterclaim, solely on his lack of jurisdiction. Counsel referred to NBC Vs Borgundu 1992 NWLR pt 591 pg 408 at 425 where the Court of Appeal per Edozie JCA (as he then was) held as follows

"A judgment of the trial court must demonstrate a full and dispassionate consideration of the issue raised and heard and must reflect the result of such exercise"

Counsel submitted that the decision of the learned trial judge declining jurisdiction to entertain the Counterclaim did not reflect a full consideration of all issues argued before the court, and that this occasioned a miscarriage of justice. He urged Court to set aside the decision accordingly. Counsel however urged the court not to follow the normal course which is to remit the case back to the lower court. But to proceed and determine the issue pursuant to the powers conferred on the court by virtue of S.15 of the Court of Appeal Act, Cap C36, Laws of the Federation of Nigeria 2004. Counsel submitted that the issue is strictly a question of law, which requires no further evidence. He submitted that all the documentary evidence required to enable the Court determine the issue was tendered at the trial, and forms part of the Record of Appeal in the matter. Furthermore, counsel submitted both Counsel to the parties had argued the issue by way of Written Submission before the Lower Court, and the submissions are on pages 866 to 877 of the Record of Appeal. There is therefore a proper basis for the invocation of S.15 of the Court of Appeal Act. Counsel submitted that the pleadings in respect of the Counterclaim appear on pages 388 to 390 of the Record of Appeal. The documentary evidence pleaded in support of the Counterclaim and upon which the 2nd Appellant predicated its cause of action is in paragraph 40 of the pleadings (page 388). These documents were identified as various approval letters, promissory notes, Letters of Agreement and Personal Guarantees tendered at the trial as Exhibits DD, DE and DG, at pages 1040 to 1069 of the Record of Appeal. The jurisdiction clause in these agreements is contained in the Letters of Agreements, and they are all similar for the 3 loans. The clause is at page 1050 of the Record of Appeal and provides as follows:

**"The company irrevocably:**

1. Submits to the non exclusive jurisdiction of any Federal District Court of the United State of America in New York or the District of Colombia, United States of America in connection with any suit action or proceeding arising out of relating to this letter Agreement or the Note and further submit to the competent court of its corporate domicile or proceedings against it.

2. Waives to the fullest extent permitted by law the defence of inconvenient forum".

Counsel submitted that the company referred to in the above provision is Pheranzy Gas Limited i.e. the 1st Respondent in this appeal. Counsel further submitted that the 1st Respondent acknowledged in the Statement of Claim filed in this matter that its corporate domicile is at No 31 Ekololu Street Surulere Lagos. (Page 11 of the Record of Appeal). This clause gave both the court in the United States of America as well as the court in which the corporate domicile of the 1st respondent is situated jurisdiction in respect of any suit arising out of the loans. Counsel submitted that it is now firmly established by the Supreme Court, that in a Banker/Customer relationship of this nature, the Federal High Court has jurisdiction to entertain the matter. NDIC v. Okem Enterprises Ltd (2004) 10 NWLR (Pt 880) 107. Counsel argued that the Respondents submitted to the jurisdiction of the Federal High Court to entertain the Counterclaim and also waived any defence of inconvenient forum by instituting this action before the trial court and filing a defence to the Counterclaim. Counsel submitted that unfortunately the learned trial judge did not consider this provision of the contract, before coming to his decision that it had no jurisdiction on the Counterclaim. Counsel submitted that having regards to all the surrounding circumstances of this case i.e. the fact that the contract between the parties was entered into in Nigeria, the goods and equipments forming the subject matter of the loan were supplied and delivered in Nigeria and the defaulting borrower is resident in Nigeria, the lower court should not have declined jurisdiction to entertain the Counterclaim. Counsel submitted that the parties having by their agreement conferred jurisdiction on the trial court, it was wrong of the trial Judge to refuse jurisdiction. He urged the court to hold in respect of this first issue that the decision of the trial court declining jurisdiction on the Counterclaim is perverse, and to set aside the decision. Counsel finally urged the Court having regard to the power conferred on the court by Section 15 of the Court of Appeal Act 2004 to hold that the Federal High Court had jurisdiction to entertain the Counterclaim.

**RESPONDENTS' ARGUMENTS:**

Learned counsel for the Respondents/Cross-Appellants responded to this issue in issues 1 & 2 of their brief. Although I have expunged the aspects touching on whether the decision of the lower court led to a miscarriage of justice, I shall go ahead to give a brief summary of counsel submissions on the issues as they relate to the Appellant's issue I. The Cross-Appellants in their brief submitted that the bitter complaints of the Appellants/Cross Respondents on the matter of the lower court's decision on jurisdiction is surprising, considering that it is the same Appellants/Cross Respondents who first invited the Court to decline jurisdiction on the ground that the proper venue for the trial is the Court of New York. On their issue 2, whether having regard to the provision of Section 251 of the Constitution of the Federal Republic of Nigeria 1999 as amended, the Lower Court has jurisdiction to entertain the counter-claim, counsel submitted that the Counter-claim of the 2nd Appellant/Cross Respondent at the lower Court is a simple action to recover a simple debt. Counsel argued that the counter-claim is based on the premise that they had repaid the Respondents' debts to the 1st Appellant/Cross-Respondent and one PNC Bank acting pursuant to Exhibits DH and DK. Counsel further argued that the 2nd Appellant/Cross Respondent having repaid the loans, the debts became extinguished. He contended that the Counter-claim is an effort by the 2nd Appellant/Cross Respondent to enforce the provisions of Exhibit DH and DK which as its title suggests are Master Guarantee/Insurance Agreements; the Counter-claim therefore was not an action that is connected with or pertains to Banking but is in the nature of an insurer enforcing its right under an insurance agreement. Counsel argued that it is also not an action between a Bank and its individual customer and that the 2nd Appellant/Cross Respondent who instituted the Counter-claim is not a Bank within the meaning and intendment of Section 251 of the Constitution. Further that the subject matter of the Counter-claim itself is not an action that is connected with, or pertains to Banking. Counsel argued that the Federal High Court lacks the jurisdiction to entertain the Counter-claim as the claims do not fall within the exclusive jurisdiction conferred upon the Federal High Court by the provisions of Section 251 of the Constitution of the Federal Republic of Nigeria 1999 as amended. Counsel cited the cases of Nospetco Oil and Gas Ltd v Olorunnimbe (2012) 10 NWLR (Pt.1307) 115 @ 160 H, and Adetayo v. Ademola (2010) 15 NWLR (Pt.1215) 169 @ 189 D-E. Learned counsel urged the court to strike out the counter-claim on the ground that the Federal High Court lacks the jurisdiction to entertain it having regards to the parties and subject matter.

**RESOLUTION OF ISSUE 1:**

I have considered carefully the processes filed by the parties in this appeal. They are (1) The Appellants' brief of argument (2) The Respondents/Cross-Appellants' brief of argument (3) Appellants' Reply and Cross/Respondents' brief of argument (4) Respondents/Cross-Appellants' Reply Brief of Argument.

Before I go into the issue of whether or not the lower court was right in its decision that it had no jurisdiction, it seems to me that the initial grouse of the appellant which the Respondent appears to have glossed over is the fact that the lower court decided it had no jurisdiction without considering that it had suo motu raised the issue of jurisdiction and asked the parties to address the Court on it. The decision of the trial Court on which this appeal is based is barely four lines at page 1399 of the Record:

"On the counter claim, I find that even though the 2nd Defendant is entitled to payment of the guaranteed repaid loan, this Court is not the proper venue for the claims. The 2nd Defendant should institute its suit before the Court of State of New York. I so hold."

In coming to this conclusion, the court did not consider the addresses of counsel at pages 866-877 and did not consider the oral or documentary evidence tendered in court. The Court simply did not give any reasons whatever for its conclusion. Learned counsel for the Appellant on this referred to two judgments, with which I totally agree with. The judgments and the relevant quotations are as follows: Agbanelo V UBN Ltd (2000) 7 NWLR (Pt 666) 534 @ 557 where the Supreme Court, per Karibi Whyte JSC held as follows:

"It is an elementary and essential ingredient of the judicial function that reasons are to be given for decision. It is more the case where appeals lie from the decision. In any case the reasons for decisions enable the determination on appeal whether the decision was merely intuitive and arbitrary or whether it is consistent with established applicable principles. If judgments were to be delivered without supporting reasons it will be an invitation to arbitrariness, a rule of merely tossing the coin and the likelihood to result in judicial anarchy"

There is also the case of Ojugbue & Anor V Nnubia & Ors (1972) ALL NLR 664 @ 669 where Coker JSC held as follows:-

"It is true that the learned trial Judge gave judgment in favour of the defendants but it is equally true that throughout the judgment he made no clear findings in which he had unequivocally held as against claims of the Plaintiffs ...The result is that we cannot see the basis on which the Plaintiffs case was dismissed nor what is worse, the grounds on which the learned trial judge had proceed to enter judgment for the defendants. A judgment of the court must demonstrate a full dispassionate consideration of the issues properly revised and heard and must reflect the results of such exercise. We are unable to say that the judgment in this case as it stands did this and we cannot allow it to stand."

See also Ogboru v Uduaghan (2012) LPELR-8287(SC); Williams v. Voluntary Funds Society (1982) 1-2 SC 145; Abacha v. Fawehinmi (2002) FWLR (Pt 4) 568.

The arbitrariness reflected in the bare conclusion of the trial court that it had no jurisdiction without giving due consideration to all the evidence, oral and documentary led in the case is worsened by the fact that the court had assumed jurisdiction with respect to the claim of the Plaintiff/Cross Appellant and determined same while refusing jurisdiction with respect to the counterclaim when the facts that gave rise to the two claims are basically the same or are interwoven. In view of decided authorities on the point especially NBC v. Borgundu (7992) NWLR (Pt 591) 408 @ 425 cited by Learned counsel for the Appellant, the decision of the learned trial Judge is bound to be set aside on the ground that the decision did not arise from a consideration of the issues argued by the parties. In the case of Onyero & Anor v Nwadike (2011) LPELR-8147 (SC) it was held that where a trial court fails to properly evaluate evidence and make findings on matters on which the parties have joined issues, the appropriate order is that of a retrial.

Learned counsel for the Appellant has however urged us on the basis of the power conferred on us by Section 15 of the Court of Appeal Act 2004 to look at the evidence in the record, evaluate same and determine whether or not the court had jurisdiction to hear the counter claim. Section 15 of the Court of Appeal Act confers on this Court legal power to make any order which the court below could have made in resolving the suit between the parties. There are certain conditionalities which must exist for this court to be able to exercise the power. They are:

1. Availability of the necessary materials to consider and adjudicate in the matter;

2. The length of time between the disposal of the action at the trial court and the hearing of the appeal; and

3. The interest of justice by eliminating further delay that would arise in the event of remitting the case back to the trial court for rehearing and the hardship such an order would cause on either or both parties.

See Inakoju v. Adeleke (2007) 4 NWLR (Pt.1025) 423 @ 691-692 E-D; Garuba v KIC Ltd (2005) 5 NWLR (Pt 917) 160; Yusufu v Obasanjo (2003) 16 NWLR (Pt. 847) 554; A.G Anambra State v Okeke (2002) 12 NWLR (Pt 782) 575; Jadesinmi v Okotie-Eboh (1986) 1 NWLR (Pt.16) 264.

All the necessary conditions are in my view satisfied in this case. All materials necessary to determine the issue are available in the record. This case was instituted in the lower court in 2005, nine years ago. It is in the interest of justice to eliminate any further delay that will arise by not remitting this case back to the lower court for rehearing. It is not in doubt that sending the case back would cause severe hardship on both sides.

The Master Guarantee Agreement Exhibit "DH" which was entered into between the 1st and 2nd Appellants regulates the relationship of the two parties in respect of the assignment of the various loans. Paragraph 10.1 provides that the agreement shall be governed by and construed in accordance with laws of the State of New York, U.S.A. The Respondents are not parties to this agreement and cannot therefore rely on any of its terms. The relevant documents for the determination of jurisdiction of the Court are the Letter Agreement Exhibits "D", "S" and "N". The jurisdiction clause in each of the Exhibits is the same and provide thus:

**"The company irrevocably:**

3. Submits to the non exclusive jurisdiction of any Federal District Court of the United State of America in New York or the District of Colombia, United States of America in connection with any suit action or proceeding arising out of relating to this letter Agreement or the Note and further submit to the competent court of its corporate domicile or proceedings against it.

4. Waives to the fullest extent permitted by law the defence of inconvenient forum".

The Company referred to above is the 1st Respondent. The jurisdiction conferred on the United States Court is non exclusive and the company by the terms agreed to submit to the competent court of its corporate domicile. The corporate domicile of the 1st Respondent is Lagos Nigeria as averred in paragraph 1 of its Statement of Claim. The facts are clear and indisputable. By their agreement the parties conferred jurisdiction of the Courts of the corporate domicile of the Respondents.

The Respondents however in their written address on jurisdiction at page 874 of the Record argued that the jurisdiction of the Federal High Court would be ousted where the suit or claim is in "connection with any suit, action or proceeding arising out of or relating to the Letter Agreement Exhibits D, S and N or the Note. They argued that the Federal High Court had jurisdiction in respect of their Statement of claim because it related to the sale, assignment or transfer of the loan to the 3rd Defendant by the 1st Defendant. Their contention was that the sale, assignment or transfer of the loan to the 3rd Defendant by the 1st Defendant was never contemplated by the parties to the loan agreement, and that gave the Federal High Court jurisdiction to entertain the Plaintiff's suit challenging the breach of the terms of the Letter Agreement. With respect to the counterclaim, the Respondents argued that the Federal High Court had no jurisdiction based on the first paragraph of the clause in Exhibits D, S and N which gave non exclusive jurisdiction to the New York Court and also Clause 10.1 of the Master Agreement, Exhibit DC which stated that the agreement is to be governed by the Laws of the State of New York. With due respect, in these arguments, the Respondents appear to have thrown overboard all known rules and canons of interpretation of statutes. The primary rule of construction is the literal construction which requires that words used in a Statute be given their ordinary and natural meaning, omitting no words and adding none. Nwakire v. C.O.P. (1992) NWLR (Pt.241) 289. Where the Statute is divided into parts, it better to construe the sections in the part in relation to other sections in that part. Savannah Bank of (Nig) Ltd v. Ajilo (1989) 1 NWLR (Pt.97) 305.  With due respect, a literal interpretation of the jurisdiction clause in each of the Exhibits of the Letter Agreement Exhibits "D", "S" and "N" show clearly that the Federal High Court has jurisdiction in respect of both the Respondents' statement of Claim and the Appellant's Counterclaim. Exclusive jurisdiction was not given to the New York Court and jurisdiction was by the later phrase which the Respondents chose to ignore in their argument given to the competent court of its Corporate domicile. The corporate domicile of the Company, the 1st Respondent is Lagos Nigeria. Whatever right of action the Respondents have must derive from the Letter Agreement as they are not parties to the Master Agreement Exhibit DC and cannot therefore enforce any of its terms. The 2nd Appellant can only maintain an action against the Respondents based on the fact that it stepped into the shoes of the 1st Appellant by reason of having acquired the rights of the 1st Appellant as against the Respondents under the Letter Agreements. The rights under the Master Agreement are between the parties to the agreement. It was wrong of the Respondents to bring in the terms of the Master Agreement in the suit between themselves and the 2nd Appellant when they are not parties to that agreement.

The contention of the Respondents in their written address on jurisdiction at page 873 that Section 251 (1)(d) of the 1999 Constitution of the Federal Republic of Nigeria clothes the Court with jurisdiction to entertain the Plaintiff's suit applies with equal force to the counter claim. After all at paragraph 2.2 page 7 of their brief of argument, the Respondents/Cross Appellants admitted that facts supporting the Plaintiffs' claim and the Counter-claim at the lower Court are the same and interwoven. If that is the case, why would the court have jurisdiction to entertain the Plaintiffs' Claim and then not have jurisdiction to entertain the Counter Claim. The argument of the Respondents that people are bound by their pleadings and that the Appellants having averred in their statement of Defence that the court has no jurisdiction to entertain the plaintiff's claim cannot now resile from it is not well founded. The Appellant maintained that the averment must be deemed abandoned since no evidence was led on it. The contention of the Respondents that the counter claim is a simple action to recover a simple debt and not a banking transaction is far from the case. Although the loan had been paid, it does not stop the action from being one for recovery of bank debt for that is precisely what it is. The 2nd Appellant merely stepped into the shoes of the 1st and 3rd Appellants. Learned Counsel for the Respondents had further submitted that the counterclaimant and the other Appellants are not Banks within the meaning, definition and intendment of Nigerian Law. The argument is misconceived. Section 251 of the 1999 Constitution of the Federal Republic of Nigeriaprovides:

1. Notwithstanding anything to the contrary contained in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in civil cases and matters -

a. .................................

b. .................................

c. .................................

d. Connected with or pertaining to banking, banks, other financial institutions, including any action between one bank and another, any action by or against the Central Bank of Nigeria arising from banking, foreign exchange coinage legal tender, bills of exchange letters of credit, promissory notes and other fiscal measures:

Provided that this paragraph shall not apply to any dispute between an individual customer and his bank in respect of transactions between the individual customer and the bank;

e. .................................

f. .................................

g. .................................

h. diplomatic, consular and trade representation;

Section 66 of the Banks and Other Financial Institutions Act, Cap B3 Laws of the Federation of Nigeria, 2004,defines "other financial institution" to mean:

"Any individual, body, association or group of persons, whether corporate or unincorporated, other than the bank licensed under this Act which carries on the business of discount house, finance company and money brokerage and whose principal object include factoring, project financing, equipment leasing, debt administration, fund management, private ledger services, investment management, Local Purchases Order financing, export finance, project consultancy, financial consultancy, pension fund management and such other business as the bank may, from time to time designate."

It is clear then from the above provisions that jurisdiction is conferred on the Federal High Court, not only in respect of Banks but also financial institutions as defined above. The transaction giving rise to this action is both project financing and export finance undertaken by the United States Government through Export-Import bank and a local U.S. bank to support manufacturing activities in Nigeria. The fact is that Section 251(1) (d) of the 1999 Constitution gives jurisdiction to Federal High Court in respect of any matter connected to banks, banking and other financial institutions. The Supreme Court while considering the import of the proviso in S.251 (1)(d) in the case of NDIC v Okem Enterprises Ltd (2004) 10 NWLR (Pt.880) 107 held that by the proviso both the Federal High Court and the State High Court has jurisdiction in disputes between an individual customer and his bank, It is now firmly established by the Supreme Court, that in a Banker/Customer relationship of this nature, the Federal High Court has jurisdiction to entertain the matter. It is also not in doubt that the 2nd Appellant qualifies as a financial institution under the combined provisions of the Bankers and Other Financial Institutions Act, 2004 (Section 66) and Section 251(1) (h) of the 1999 Constitution. The decision in Adetayo v. Ademola (2010) 15 NWLR (Pt.1215) 169 at 189 cited by the Appellants dealt with the jurisdiction of the Federal High Court to hear land matters in which the Federal Government or any of its agency is a party. It has no relevance whatever to this appeal. In the result, this issue is resolved in favour of the Appellants and against the Respondents. I hold that the decision of the trial Judge declining jurisdiction to entertain the Counterclaim is invalid, improper and cannot be sustained in law. The Federal High Court has jurisdiction to entertain the suit.

**ISSUE 2:**

Whether having regard to the state of the evidence and the findings of the trial judge, judgment should not have been entered in favour of the 2nd Appellant as per the counterclaim.

**APPELLANTS' ARGUMENTS:**

Mr. Aju for the Appellants on issue 2 submitted that, having regard to the state of evidence led in this case, the learned trial Judge was wrong not to have entered judgment in favour of the 2nd Appellant as per the Counterclaim. He submitted that both the pleadings and the evidence led revealed that the Respondents admitted their liability to the 2nd Appellant for both the principal amount and the interests claimed in the Counterclaim. The Respondents further admitted that by 2009 (i.e. long before the date of the judgment of the trial court) they were required to have repaid all the loans. Learned counsel submitted that upon a proper review of the evidence in this matter, the appropriate decision which the trial court should have reached is that the Respondents had admitted the 2nd Appellant's Counterclaim in full, and judgment should have been entered in their favour for this amount. He urged the court to invoke its powers under Section 15 of the Court of Appeal Act 2004 to enter judgment for the Appellants as per their counter claim.

**RESPONDENTS' ARGUMENT:**

Mr. Onoja in the Respondents/Cross Appellants brief on their issue 3 which also covered the cross appeal submitted that the Appellants/Cross Respondent's counter claim should be dismissed in its entirety because the debt sought to be recovered has been liquidated and extinguished by the payments made pursuant to Exhibits DH and DK, the guarantee agreements between the 2nd Appellant and the two US Banks. Counsel's contention is that the loan having been paid off, the Appellants cannot under Exhibits DH and DK seek to recover the already paid loan from the Respondents as they are not parties to the agreements Exhibits DH and DK and that their terms cannot be enforced against the Respondents.

**RESOLUTION ISSUE 2:**

In the case of Chami V. U.B.A. Plc (2010) 6 NWLR (Pt.1191) 474, the word 'GUARANTEE' was "defined as a written undertaking made by one person to another to be responsible to that other if a third person fails to perform a certain duty e.g. payment of debt. Thus where a borrower i.e. a third party fails to pay an outstanding debt, the guarantor (or surety as he is sometimes called) becomes liable for the said debt." Generally a contract of guarantee is said to be independent of the main contract so that a creditor could proceed against the guarantor without joining the debtor as a party to the suit. However, everything depends on the actual contract entered into by the parties. Apart from the Master Guarantee Agreements Exhibits DH and DK executed by the U.S. Banks in favour of the 2nd Appellant, Ex-Im Bank; there are other agreements. There are the Letter Agreement and the Promissory Note Exhibits S and D1 both dated 1/6/04 and the Guarantee executed by Chris U. Ezeude, Exhibit DG. By these agreements and similar others in respect of the other loans, the Respondents committed themselves to repay the loan and interests as and when due. By the Master Guarantee Agreements, the U.S. Banks assigned to the 2nd Appellant all their rights in the agreements executed by the Respondents in their favour. On default by the Respondents and payment of the loan by the 2nd Appellant, Ex-Im Bank, the 2nd Appellant by virtue of the assignment steps into the shoes of the U.S. Banks and can sue for recovery of the debt as though they were the bank. In the face of these agreements, how can the Respondents contend that the loan having been paid off, the Appellants cannot under Exhibits DH and DK seek to recover the already paid loan from the Respondents as they are not parties to the agreements? They signed agreements committing themselves to pay the loans plus interest and the rights of the bank under these agreements were assigned to the 2nd Appellant. Once terms of a contract are embodied in documents, the parties are presumed to intend what they have written down.

The words used are given their ordinary and plain meaning. Neither the court nor the parties can rewrite the contract or import words to vary the intentions of the parties as written. Union Bank of Nigeria Ltd V. Nwaokolo (1995) LPELR-3385(SC).

The truth therefore is that the pleadings and the evidence led revealed that the Respondents even at the time they signed all the necessary documents pertaining to the loans knew that the loans were guaranteed by the 2nd Appellant and that if the 2nd Appellant paid off the loan on their default, they are still bound to pay the loan and interests to the 2nd Appellant. In the Court below they admitted their liability for both the principal amount and the interests claimed in the Counterclaim. The Respondents further admitted that they were required to have repaid all the loans by 2009. So, what then is their case? The learned trial Judge had with respect to their claim ruled that the 1st Appellant had the right under the agreement to sell two of the loans to the 3rd Appellant; and that there was no breach of the terms of the agreement entitling the Respondents from reneging on their agreement to pay the instalments as and when due. On the counterclaim, he held that even though the 2nd Defendant/Appellant was entitled to payment of the guaranteed repaid loan, the court was not the proper venue for the claims. I have already ruled that the trial Judge erred in coming to that conclusion and that the lower Court had the jurisdiction to determine the counterclaim of the 2nd Appellant. Issue 2 is resolved in favour of the Appellants and against the Respondents. Relying on the power conferred on this Court under Section 15 of the Court of Appeal Act 2004, I hold that the 2nd Defendant/Appellant is entitled to the claims as set out in paragraph 53 (2), (3) and (4) of the 2nd Defendant's Amended Statement of Defence and Counterclaim at page 389 of the Record of Appeal.

In the final result, this appeal succeeds. It is hereby allowed. The judgment of Nyako J of the Federal High Court, Lagos Division in suit No.FHC/L/CS/1148/2005 delivered on the 21st day of October 2011 in which the learned trial Judge declined jurisdiction to entertain the Counter-claim of the Appellants on the ground that it is the Court of the State of New York that has jurisdiction is set aside. In its place, judgment is entered in favour of the 2nd appellant as per his counterclaims in paragraph 53 (2), (3) and (4) of the 2nd Defendant's Amended Statement of Defence and Counterclaim at page 389 of the Record of Appeal. Cost assessed at N50,000.00 in favour of the Appellants against the Respondents.

**CROSS APPEAL**

Out of the Appellants grounds of appeal and the four grounds of appeal in the notice of cross-appeal dated 6/11/12 and filed on 7/11/12, Mr. Onoja, learned counsel for the Cross/Appellants formulated three issues already set out above. Issues 1 and 2 have been dealt with in the main appeal and their resolution more or less determined the cross appeal. For completeness Issue 3 of the Respondents/Cross Appellant's brief of argument will be considered here.

**ISSUE 3 OF THE CROSS APPEAL**

Whether having regards to the doctrine of privity of contract and particularly the fact that the 2nd Appellant/Cross Respondent has repaid the loans with interests, the 2nd Appellant/Cross Respondent is entitled to the reliefs claimed in the Counter-claim. (Distilled from ground 4 Notice of Appeal and grounds 1, 2 and 4 of the Notice of Cross -Appeal.

Mr. Onoja in the brief of argument submitted that the learned trial Judge having found as a fact that the loans *have been repaid and liquidated*, he found it difficult to comprehend how the 2nd Appellant/Cross Respondent can be entitled to the payment of same. He submitted that the counter-claim is not competent in its entirety because it does not disclose any reasonable cause of action against the Respondents/Cross Appellants as the 2nd Appellant/Cross-Respondent cannot bring a Counter-claim against the Respondents/Cross-Appellants, *to claim a debt which has been liquidated*. Counsel argued that once a debt has been liquidated, it becomes extinguished and cannot be the foundation of any claim. Learned Counsel submitted that the allegation that the debt has been assigned to the 2nd Appellant/Cross-Respondent is even the more ridiculous, considering that there was *nothing to 'assign'*to begin with. He argued that the law does not "recognize the assignment of a debt that has been discharged or liquidated. In other words the law governing assignments of choses in action generally and debt in particular applies only where there is an existing debt which can be the subject of an assignment or transfer. Where the debt had been repaid as in the instant case, there will be nothing to assign. Counsel submitted that the arguments above are re-inforced by the fact that in Exhibit DH and DK (which are similar in content and form) Article 8.05 (e) states as follows:

"Except for payments due under a Payment Certificate, all payments of the Guaranteed amount due under this Agreement shall be made by Ex-Im Bank to the lender for the benefit of the relevant Note holders, and such payments to the Lender shall discharge fully and completely Ex-Im Bank's liability to such Note holders."

Counsel contended that they are at a loss as to where the 2nd Appellant/Cross Respondent derived the right under Exhibits DH and DK to sue the Respondents /Cross Appellants (who are not parties to the agreements) for a debt which has been completely discharged. Counsel argued that under Nigerian law even if the 2nd Appellant/Cross-Respondent enjoys a right under Exhibits DH and DK to sue for the repaid loan, the fact that the Respondents/Cross-Appellants are not parties to the Exhibits DH and DK mean that the said agreements cannot be enforced against them. Counsel submitted that the finding of the learned trial Judge that the 2nd Appellant/Cross Respondent is entitled to the 'payment of the Guaranteed Repaid Loan' is perverse because it is not supported by the evidence on record. He urged the court to resolve this issue in favour of the Respondents /Cross Appellants and to invoke the powers of this Honourable Court to dismiss the Counter-claim in its entirety.

With due respect I am of the view that the response to this issue by the Appellants/Cross Respondents in their Reply/Cross Respondents' brief of argument answers most adequately the points raised. I agree with the Cross Respondents that the argument of the Cross Appellants is very curious in view of all the agreements they executed and the fact that they are not disputing their indebtedness. The submissions of the Cross Respondents with which I totally agree with are as follows: The subsequent assignment of all the three loans to the 2nd Cross Respondent, who insured all the loans and repaid the three (3) loans to both the 1st Respondent and PNC Bank is governed by contractual obligations which the Cross Appellants freely entered into with the 1st and 2nd Cross Respondents. The Promissory Notes executed by the Cross Appellants for the three loans, Exhibits DD, DF and DI duly recognized the 2nd Cross Respondent as their guarantor. Pages 1040 - 1052, 1056 - 1067 and 1149 - 1159 of Volume III of the records. The promissory Notes provide as follows:

*"Notwithstanding the fourth paragraph hereof, beginning on the date (the "Ex-Im Bank claim payment Date) on which the Export-Import Bank of the United States ('Ex-Im Bank) makes a claim payment to the lender under the Master Guarantee Agreement (Medium Term Credits Electronic Compliance Program), dated as of March 1, 2001 between the lender and Ex-Im Bank (the "MGA"), in the event of any amount of principal of, or accrued interest on, this Note owing to Ex-Im Bank is not paid in full when due (whether at stated maturity, by acceleration or otherwise), the Maker shall pay to Ex-Im Bank on demand interest on such unpaid amount (to the extent permitted by applicable law) for the period from the date such amount was due..."*

*Upon default in the prompt and full payment of any installment of principal hereof or interest on this Note the entire outstanding principal amount hereof and interest on the note to the date of payment shall become due and payable shall become due and payable of the option and upon demand of Ex-Im Bank".*

The Promissory Notes duly executed by the Cross Appellants expressly incorporate the content of Exhibits DH and DK (Master Guarantee Agreement dated 15th March 2001 and March 21, 2001 between South Trust Bank and Ex-Im Bank and between PNC Bank, National Association Bank and Ex-Im Bank respectively). Pages 1070 - 1116 and 1117 - 1148 of Volume III of the records of appeal. The background recitals to Exhibit DH and DK state as follows:

*"The lender intends to establish export financing Medium Term Credits, pursuant to which the lender shall extend financing guaranteed by Ex-Im Bank for the benefit of the Borrowers approved by Ex-Im Bank under transactions, each of which (i) shall provide for the purchase of goods and/or services in the united States for export to the Purchaser's country; (ii) may provide for the purchase of local goods and services in the Purchaser's Country; and (iii) may provide for the payment of related exposure fees."*

The Cross Appellants argument that the 2nd Cross Respondent cannot enforce Exhibits DH and DK against the Cross Appellants because they are not parties is therefore unfounded and baseless. All the cases cited by the Cross Appellants on the issue of non enforcement of agreement on non parties are not apposite. The Promissory Note which is a bill of exchange, subject to endorsement is a separate obligation to unconditionally pay to the order of South Trust Bank and PNC Bank the principal sum due together with interest to LIBOR. To evidence the Cross Appellants' obligation to repay the loans, the Cross Appellants (Company) undertook to execute and deliver to SouthTrust Bank (2) two promissory Notes ("the Notes") in the principal sums of US$770,168.00 and US$1,140,031.00 and PNC Bank one (1) promissory Note ["the Note"] in the principal sum of US$2,509,892.00 or so much as shall be disbursed. The Cross Appellants authorized both SouthTrust Bank and PNC Bank to complete the Notes and these agreements by filling in the appropriate dates. In the event of a conflict between the terms of this Note and the terms of this Letter Agreement, the terms contained in the notes shall govern."

The Promissory Note is not only a bill of exchange but a distinct commitment provided as security for the loan agreements. It is not discharged by the loan itself being discharged by any party other than the borrower. The commitment to pay the principal sums of the loan agreements and the rate of interest accruable therein is an unconditional one assignable by an endorser as if it was the original issuer of the Note; the original maker, in this case is the Cross Appellant, 1st Cross Respondent and PNC Bank are the acceptors and the endorsee in this case, the 2nd Cross Respondent is the payee. See Black's Law Dictionary, 6th edition page 1214.

The guarantor, such as the 2nd Cross Respondent has a valid cause of action for the repayments of all sums of money paid on behalf of a borrower upon redemption by him of the loan taken by the borrower. Adeosun v. Jibesin (2001) 11 NWLR Part 724 Page 290; Onwukeme v. Onwuegbu (1970) N.C.L.R. page 399 at page 401.

Even without an assignment of the loans in favour of the guarantor, the obligation of the borrower to repay the loans to the guarantor is immediate. Counsel urged the Court to hold each of the Cross Appellants jointly and severally liable to the 2nd Cross Appellant for these loans. Counsel submitted that the most ridiculous part of the Cross Appellants argument on this issue is that a borrower who borrowed millions of dollars from two banks, agreed with a guarantor/insurer to step in the gap for him if he is not able to meet some of the installment payments, and having undertaken to pay back the guarantor, now turns round upon redemption of the loans by the guarantor to say that he is not liable to the guarantor on the loans. To accede to the Cross Appellants on this issue will be laying a very bad precedence, which will potentially destroy the whole concept of banking business. I cannot agree more. The arguments are indeed ridiculous! Mr Onoja in contending that the debt had been paid and there was nothing to assign forgot that all the agreements including the ones assigning the debt were executed even before the disbursement of the loans. Without any further ado, the truth is that the promissory note is not discharged by repayment of the principal and interest of the loan by the guarantor. It is only when the loan is fully repaid by the borrower that the promissory note will be discharged. This accords with common sense. The entire loan package was from the very beginning designed in such a way that the 2nd Cross Respondent would repay the loan if the Cross Appellants defaulted and it would then go after the Cross Appellants for payment. The Cross Appellants did not obviously take out time to study and understand the nature of the loan packaged for them or their obligations thereunder. It appears that what they are saying is that the 2nd Cross Respondent should not be suing for payment of the loan but should be taking another suit for recovery of the money as a debt the Cross Appellants owe it. This cannot be because of the way the loan packages were structured. Even aside from the agreements, what difference does it make? The Cross Appellants borrowed money from banks. They have not paid back the money. The guarantor paid and says they should pay back. How can any Court support their case that they should not repay loans they duly borrowed and utilized for their business? The Cross Respondents are definitely entitled to their counter claim. This issue is resolved against the Cross Appellants and in favour of the Cross Respondents. The cross appeal consequently lacks merit and is hereby dismissed. I commend learned counsel for the Appellants/Cross Respondents for his well researched and well written briefs.

**SIDI DAUDA BAGE, J.C.A.:**

My learned brother **CHINWE EUGENI IYIZOBA, JCA**, dealt with the issues in this appeal thoroughly and well, and left no space for further contribution, for the above reasons and the more detailed reasons given in the lead judgment, I too join my learned brother in holding that this issue is resolved against the cross Appellants and in favour of the cross Respondents.

The Cross Appeal consequently lacks merit and is also hereby dismissed by me.

**RITA NOSAKHARE PEMU, J.C.A.:**

I had the advantage of reading in draft the lead Judgment just delivered by my brother **CHINWE EUGENIA IYIZOBA JCA** and I agree with his opinion and conclusion in the main appeal and indeed the cross appeal.

I adopt the opinion and conclusion as mine. I allow the appeal and dismiss the cross appeal.

I subscribe to the consequential order made in the main appeal as to costs.