**WEMA BANK PLC**

**V.**

**ALHAJI SOLA OLOKO**

IN THE COURT OF APPEAL OF NIGERIA

ON THURSDAY, THE 27TH DAY OF FEBRUARY, 2014

CA/I/88/2009

**LEX (2014) - CA/I/88/2009**

**OTHER CITATIONS**

3PLR/2016/62 (CA)

(2014) LPELR-22574(CA)

**BEFORE THEIR LORDSHIPS**

MONICA BOLNA'AN DONGBAN-MENSEM, JCA

CHIDI NWAOMA UWA, JCA

HARUNA SIMON TSAMMANI, JCA

**BETWEEN**

WEMA BANK PLC - Appellant(s)

**AND**

ALHAJI SOLA OLOKO - Respondent(s)

**ORIGINATING COURT(S)**

OGUN STATE HIGH COURT OF JUSTICE, HOLDEN AT SAGAMU JUDICIAL DIVISION (Justice N. I. Saula., Prsiding)

**REPRESENTATION**

WALE TAIWO - For Appellant

AND

MUYIWA OBANEWA with him N. ANYAOGU (Miss) and O. SONAIKE (Mrs.) - For Respondent

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

BANKING AND FINANCE LAW - BILL OF EXCHANGE: Nature of a bill of exchange - Whether a bill of exchange would command the weight of a bank draft

BANKING AND FINANCE LAW:- Banker-customer relationship - When money is paid by a customer into the bank -Whether there is a contract between the banker and the customer in which the banker receives the money as a loan from a customer against the promise by the banker to honour the customer's cheque or orders of the customer – Whether gives rise to duty on bank to honour issued by customer – Effect of failure thereto

BANKING AND FINANCE LAW:- Cheque and a draft – Whether there is a difference between both - Whether 'the word draft no doubt includes a bill of exchange as well as a cheque' – Whether draft is a nomen generale which embraces every request by the drawer upon the drawee to pay money – Effect

BANKING AND FINANCE LAW:- Bank – Nature of - Head office and its branches – Whether constitute one legal person or entity

BANKING AND FINANCE LAW:- Banker's draft and the Bill of Exchange Act– Section 3 - Whether banker’s draft should not be regarded as a cheque since it is not really addressed by one person to another as required under the Act – Whether banker’s draft is drawn on behalf of a bank upon itself, whether payable at the head office or, at some other branch of the bank and at law – Implication for customers under whose request it was drawn

BANKING AND FINANCE LAW:- Banker’s draft – Nature of – Whether not a bill of exchange but an instrument larger than a bill of exchange which however incorporates a bill of exchange - Where a customer request his banker to provide him with a banker’s draft – Nature of contract created - Whether customer needs to enclose with his request a cheque covering the amount – Whether amount so paid in via check by the customer becomes the bank's money and when paid out, still that of the bank, but paid, out pursuant to the contract

BANKING AND FINANCE LAW:- Bill of exchange as an unconditional order in writing - A bank draft as much more than "an unconditional order in writing", but rather liquid cash for instant payment in fulfilment of a financial obligation to the tune of the sum in the bank draft - Bank draft bought with cash and not issued by an unconditional writing – Whether follows that a bill of exchange is a less compelling form of a bank draft and would not command the weight of a bank draft

BANKING AND FINANCE LAW:- A breach of contract involving the honouring of a bank draft – Whether of much more serious consequence than a breach of compliance with the terms of a bill of exchange – Where consideration for "bank draft" was cash, paid in full by customer - Whether makes the bank draft the property of bank customer placed in the custody of the banker for instant transmission at customer’s terms

BANKING AND FINANCE LAW:- Liability for breach of contract arising out of a bank draft bought with cash – Whether the applicable law for determining the extent of liability is not stricto sensu the Bill of Exchange Act

COMMERCIAL LAW - CONTRACT - DOCTRINE OF FRUSTRATION: Nature of the doctrine of frustration

**PRACTICE AND PROCEDURE ISSUES**

APPEAL - INTERFERENCE WITH AWARD OF DAMAGES: Whether an appellate court can interfere with the award of damages by a trial court

COURT - INHERENT POWERS OF COURT: Whether the High Court has an inherent power to make Orders even if not sought for

JUDGMENT AND ORDER:- Monetary judgment - Whether attracts appropriate interest even where none is claimed

JUDGMENT AND ORDER:- High Court - Whether has inherent power to make Orders even if not sought where such orders, are "incidental" to the prayers sought

WORDS AND PHRASES:-“Bank draft” - “Bill of Exchange” – Meaning and nature of

**MAIN JUDGMENT**

**MONICA BOLNA'AN DONGBAN-MENSEM, J.C.A**.: (Delivering the Leading Judgment):

This is an appeal against the judgment of the Ogun State High Court of Justice holden at Sagamu Judicial Division coram Hon. Justice N. I. Saula (J). The judgment delivered on the 19th May, 2008 was against the Appellant as Defendant and in favour of the Respondent as Plaintiff.

The parties shall hereafter be referred to simply as appellant and Respondent respectively.

I find the facts of this case as presented by the Respondent as more precise and are hereby restated with modification as follows:-

The Respondent as a customer of the Appellant had on the 17th day of March, 2006 at the Appellant's Sagamu branch applied for a bank draft in the sum of (N695,000.00) naira in order to meet up some business obligation to Texaco Nigeria Plc. A bank draft is said to have been issued and paid into Texaco Nigeria Plc account No. 911522942 with the Union Bank Plc, Sagamu on the same date i.e. 17th March, 2006, upon the lodgments of the said draft, Texaco Nigeria Plc supplied petroleum products (11 thousand litres of PMS) (petrol) to the Respondent.

On the 29th day of March, 2006 the Union Bank Plc called up the Respondent by Phone and notified him of the return of the Wema Bank draft unpaid, that Wema Bank was equally informed of the return of the said Bank draft. Following the return of the bank draft, Texaco Nigeria Plc sent his officials to caution the Respondent and threaten an outright cancelation of the Respondent's business with Texaco Nigeria Plc if such incident (of dishonoured draft) reoccurred.

The Respondent immediately instructed Union Bank Plc to pay up to Texaco Nigeria Plc account the value of the said draft of N695, 000.00 from his personal savings account with the Union Bank.

The Respondent next wrote a letter to the Sagamu Branch of the appellant demanding to know their reason for dishonouring his draft. The Sagamu branch manager of the Appellant responded in these words inter alia

"...you will recall that the restriction of the movement as announced by the state Government was expected to be strictly complied with and as such our clearing staff was not able to bring that and other monetary instrument to our branch at Sagamu from Abeokuta."

Obviously distraught with the reply, the Respondent successfully took out an action against the Appellant at the High Court for redress against the Appellant.

The Respondent's writ of summons and statement of claim dated 27th April, 2006 and 17th May, 2006 respectively are at pages 6-11 of the record, while the statement of defence is at page 19, 20 of the record. The Respondent's claims against the Appellant the following:-

(a) The sum of fifty Million Naira (N50, 000,000.00) being special and general damages suffered by the Plaintiff as a result of the Defendant wrongfully dishonouring the Plaintiff's bank draft No. 41660424 dated 17th March, 2006 for the sum of N695,000.00

(b) An order for the immediate return and/or crediting the plaintiffs account with the Defendant with the said sum of N695,000.00 as well as other Bank charges with all accrued interest payable at the current Bank rate.

The Respondent also filed a reply on the 14th January, 2006 dated 11th September, 2009 (pages 21-22 of the record). Pleadings having been filed were exchanged, and the suit proceeded to hearing. Judgment was entered in favour of the Respondent. (pages 83-111 of the record).

The Appellants felt agitated with the decision of the learned trial Judge and filed a notice of appeal dated 15th day of July, 2008 and filed on the 14th January, 2009 with seven (7) grounds of appeal with particulars (pages 112-116 of the record).

The learned Counsel for the Appellant Chief Wole Taiwo marshaled his arguments under 4 issues for the determination of this court as follows:-

1. Whether the transaction that gave rise to this case between the Appellant and the Respondent was not caught up by the doctrine of frustration (Grounds 1 & 4 of the Notice of Appeal)

2. Whether for the purpose of determining the issue in controversy between parties in this case, the draft, "Exhibit A", is not a Bill of Exchange which then makes it subject to the provisions of Section 57 of the Bill of Exchange Act, Cap. B. 8 LFN 2004. (Ground 2 of the Notice of Appeal)

3. Whether the trial court was right to have awarded substantial damages in the sum of N550, 000.00 in favour of the Respondent when the Respondent did not suffer any loss/damage in the course of the transaction. (Ground 3 of the Notice of Appeal)

4. Whether the trial court was right to have awarded interest in the sum on the draft, as well as an order to credit the Respondent's account with the charges deducted from the account, interest and bank charges not having been specifically pleaded and proved. (Grounds 5 & 6 of the Notice of Appeal)

The learned Counsel for the Respondent Olumuyiwa Obanewa Esq., made out 4 issues with a slight variation from those of the Appellant as follows:-

1. Whether the doctrine of frustration is applicable to this instant case.

2. Whether the Bank Draft, "Exhibit A" is a Bill of Exchange subject of the provisions of the Bill of Exchange Act, Cap. B 8 Laws of the Federation 2004.

3. Whether the award of N500, 000.00 damages to the Respondent was proper.

4. Whether the trial Court was right to have awarded interest as well as an order to credit the Respondent's account with the charges deducted from his account.

This appeal will be determine on the issues as marshaled out by the Appellant.

Issue one

Whether the transaction that gave rise to this case between the Appellant and the Respondent was not caught up by the doctrine of frustration.

The learned Counsel for the Appellant cites the evidence of DW1 (Mr. Salisu Mustapha Abimbola) the only witness for the Appellant as Defendant at the trial court to the effect that the Federal Government of Nigeria had given a directive vide a media broadcast restricting the movement of persons between the 21st to 27th day of March, 2006.

The period is said to have earmarked for the conduct of the 2006 National Census exercise. The nexus between the said period and the case is that the directives of the Federal Government was implemented by the management of the Appellant thereby forcing its branches, including the Sagamu branch which issued the Bank draft (Exhibit A) not to open for business.

That DW1 explained that the skeletal staff of the clearing unit at Abeokuta branch of the Appellant's bank who received the Bank draft were unable to confirm the genuineness or otherwise of the draft because the branch that issued it was not open for business in compliance with Federal Government directive for restriction of movement. That the skeletal staff at the Abeokuta branch who attended to the draft were at the Bank only on account of the invitation sent to it by CBN superintendent on the 21st of March, 2006 for a special clearing session.

The learned Counsel for the Appellant Chief Wole Taiwo submits that the restriction of movement was responsible for the Appellant's inability to confirm and give value to the draft and therefore constitute an intervening event beyond the contemplation of parties when they first entered into the contract. That without such intervening circumstance, the Appellant would have been able to confirm the genuineness or otherwise of the draft so as to give value to it. That the plea of the doctrine of frustration should therefore have been accepted by the trial court.

Counsel also submits that the fundamental presumption that value will be given to the draft within a reasonable time was destroyed by the supervening event which is the restriction of movement of persons within the period in question and thereby hampered normal work in the Appellant at Abeokuta and Sagamu.

The learned Counsel relied on the doctrine of frustration at the trial court. (Refers Mazim Eng. Ltd v. Tower Aluminium (1993) 5 NWLR (Pt.295) @ 532, NBCI v. Standard (Nig) Eng. Co. Ltd (2002) 8 NWLR (Pt.768) @ Page 110 R 6)

The learned Counsel derides the decision of the learned trial Judge as not based on the facts before the court but as based "principally on the intuition or conjecture or what the learned trial Judge, untrammeled by the evidence, conceives to be a fair conclusion"

The learned Counsel contends that the learned trial Judge thereby erred in his decision as it is not the business of the trial court to make out the case for the parties. (Refers Unoka V. Agili (2007) 11 NWLR (pt. 1044) @ 145, Sagay v. Sa Jere (2000) 6 NWLR (Pt. 661) @ 371).

Olumuyiwa Obanewa Esq., of learned Counsel for the Respondent submits that by the contradiction in the case made out by the Appellant, the doctrine of frustration finds no application in the case of the Appellant.

The learned Counsel cites the evidence of DW1 (Salisu Mustapha) at pages 55-56 of the record and "Exhibit F" being the letter of the Sagamu branch manager as stating conflicting reasons for the failure of the Appellant to give effect to the bank draft. Learned Counsel submits further that there was nothing to show that the Appellant's Sagamu branch did not open for business on the alleged date to allow for confirmation of the draft by the clearing staff of the Appellant, that the learned trial Judge highlighted these contradictions in the Judgment at page 101 of the record.

Counsel submits that for the doctrine of frustration to apply there must have been the occurrence of an intervening event or change of circumstances so fundamental as to be regarded by law both as striking at the root of the agreement, and as entirely beyond what was contemplated by the parties when they entered into the agreement.

The condition requisite for the application of the doctrine of frustration must be such that are totally out of the control of the parties none of which exist in the instant appeal and that it is not for the parties but for the court to declare what constitute a frustrating event.

In this appeal, submits the learned Counsel the leaned trial Judge did make a finding at page 103 of the record that "...it is apparent that the doctrine of frustration is not applicable to this situation".

Learned Counsel submits further that "Exhibit A" was presented on 21st March, 2006 a day, purportedly declared as work free day by both State and Federal Governments for National Census exercise.

The learned Counsel to the Respondent submits further that "Exhibit F" shows that Sagamu branch of the Appellant was working and they cannot hide under the doctrine of frustration to escape liability for the wrongful act.

The learned Counsel for the Respondent contends that the Appellant's argument that the directive given to the Union Bank to represent the draft for clearing is not supported by any fact in the statement of defence.

That evidence given by a party in respect of issues not pleaded without an amendment to that effect is worthless, inadmissible and goes to no issue. (Refers Adenle v. Olude (2003) FWLR (Pt.157) 1074 @ 1087, Ezekwesili & ors v. Agbapuonwu & Ors (2003) FWLR (Pt.162) 2016 @ 2049).

Both learned Counsel for the Appellant and the Respondent addressed the doctrine of frustration and as correctly stated by each of the learned Counsel, frustration is the premature determination of a legal agreement between two parties. (NBC v. Standard (Nig) Ltd. Co. Ltd (2002) 8 NWLR (Pt.768) @ 124, Diamond Bank Ltd v. Prince Alfred Amobi (2007) 10 CLRN @ 99). The case of Taylor v. Caldell (1861-73) ALL ER 24 is cited as the root for the doctrine of frustration where Blackburn J held that:-

"where from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless, when the time for the fulfillment of the contract arrived, some particular specified thing continue to exist, so that when entering into the contract they must have contemplated such continue existence as the foundation of what was to be done, then, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract but as subject to an implied condition that the parties shall be excuse in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor".

Thus, frustration can be defined as an abrupt end to a transaction between two parties owing to the occurrence of an intervening event or change of circumstance totally unforeseen by either party and striking at the root of a transaction. In such circumstances, the law recognizes that the premature determination of the transaction is without any default of either party and thereby renders a contractual obligation incapable of performance and conclusion/enforcement.

Was this the situation under consideration in this appeal?

The courts have maintained, that what constitutes frustration must be totally or entirely beyond the mutual contemplation of the contracting parties at the time of entering into the said agreement. (Refers Mazin Engineering Ltd v. Tower Aluminium (Nig) Ltd (1993) 6 SCNJ (Pt. 11) 176 @ 182).

Is submission of the learned Counsel for the Appellant upon the authority of Mazin v. Tower Aluminum (Nig) Ltd (supra) inapplicable in this appeal? For the avoidance of doubt, the Mazin case held that where complete or subsequent performance of an agreement becomes impossible by reason of some act which occur subsequent to the formation of the contract, the supervening event will in most cases automatically determine the contract and discharge the parties from further liability hereunder.

The learned Counsel for the Appellant has cited part of the evidence of the sole witness of the Appellant Salisu Mustapha (pages 55-56 of the record) as follows:-

"...on the 21st March 2006, the bank draft came for clearing.

Between 21st and 27th March, 2006, there was National Census being undertaken throughout the country and there was restriction of movement throughout the Country.

Sagamu inclusive. Because of this restriction all our Branches Nationwide did not open for business including Sagamu branch. The skeletal staff of our clearing unit who received the bank draft from clearing house Abeokuta were not able to confirm the genuineness or authenticity of the bank draft and this is because Sagamu branch did not open for business in line with Federal Government directive of no movement" (Emphasis mine)

and the letter of the branch manager exhibit F, which inter alia is as follows:-

"...you will recollect that the restriction of the movement as announced by the state Government was expected to be strictly complied with as such our clearing staff was not able to bring that and other monetary instruments to our branch as Sagamu from Abeokuta..." (See page 118 of the record)

The above stated pieces of evidence are contradictory in terms on the issue of whether or not the Appellant branches observed in full if at all the directives or restriction of movement within the relevant period. Whereas the DW1 testifies to a complete compliance i.e. as to non-movement, the Sagamu branch Manager per "Exhibit F" says that Sagamu branch was capable of receiving instruments for clearing but the clearing staff of Abeokuta branch were unable to bring same. The learned Counsel for the Respondent therefore rightly submits that there is nothing to show on "Exhibit F" that the Sagamu branch did not open for business on the alleged date to allow for confirmation of the draft by the clearing staff of the Appellant. The principle in Mazim does not therefore apply in the instant appeal.

Contrary to the submission of the learned Counsel for the Appellant that the decision of the trial court was not based on the evidence before the court, but on the intuition or conjecture of the learned trial Judge, the learned trial Judge highlighted the contradiction in the Appellant's case as follows (page 101 of the record):-

"...He said he wrote to the Defendant on 29th March, 2006 seeking an explanation for same. By a letter dated 31st March, 2006, the Defendant informed him that the return had to do with the restriction of movement between 21st and 25th March. That it was because their clearing staff was not able to bring the draft and other monetary instruments to their branch at Sagamu from Abeokuta. In his own evidence before the court the 1st DW the only witness for the Defendant (who happened to be the officer that handled the draft at their clearing unit in Abeokuta) said that he was unable to confirm the draft was issued by the Sagamu Branch because the Sagamu Branch did not open for business. According to him all their branches nationwide did not open for business including Sagamu Branch. This will however appear to be contradicting himself. If all their branches nationwide did not open for business, is Abeokuta not one of their branches how come it opened and he was able to deal with the draft? If there was skeletal service in Abeokuta why was there none in Sagamu since both are branches? (Emphasis mine)

The reason given by the letter Exhibit F written by the Manager of the Sagamu Branch contradicts the reason given by the Defendant's witness. From the tone of the letter from the source of the draft, the branch was definitely open for business, it was Adeokuta that could not bring it for confirmation whereas the witness said he could not confirm it because the Sagamu Branch did not open." (Emphasis mine).

In determining issues raised before a court the Judge has the inherent powers to draw inference from the facts placed before it and the conduct of the witnesses who testify before the court.

The argument back and forth by both learned Counsel about the evidence of PW1 Mr. Adetutu Odutayo as to the National Census exercise adds no value to the case of the Appellant. However, it is acknowledged that the Appellant did plead in paragraph 5 & 6 of the statement of defence (page 19 of the record) the fact of the holding of the National Census therefore questions put to the PW1 by the Appellant under cross-examination were properly done. The principle in the case of Shell Petroleum Dev. Co. Ltd v. Anaro (2001) FWLR (pt. 50) 1815 @ 1821 is not applicable. It should however be stated that in fact what the PW1 said under cross-examination is that he was not aware that movement was restricted because he went to work throughout the said period.

In the circumstance the findings of the learned trial Judge that the principle of the doctrine of frustration are non-existent in the case of the Appellant is hereby affirm.

Issue 2

Whether for the purpose of determining the issue in controversy between parties in this case, the draft, Exhibit A, is not a Bill of Exchange which then makes it subject to the provisions of Section 57 of the Bill of Exchange Act, Cap. B. 8 LFN 2004.

It is the submission of learned Counsel for the Appellant that by the provisions of section 2(1)(c) & 3 (1) of the Bill of Exchange Act 2004 the transactions between the parties should be guided by the provision of the Bill of Exchange Act as the draft in issue comes within the purview of the definition of a bill of exchange under the Act.

That contrary to the holding of the learned trial Judge premised on the provision of section 60 (2) of the Act to the effect that the bank draft shall not be deem to be a bill that the definition of a Bill of Exchange by section 3 (1) of the Act envisages the drawer of the bill and the drawee to be two different persons and that in the instant appeal the drawer and drawee of the bank draft in issue, "Exhibit A" are two different entities. The drawer is Wema Bank Plc, the Appellant herein while the drawee is Union Bank of Nigeria Plc.

Learned Counsel therefore maintains that the decision of the learned trial Judge is "a total and thorough misconception and misapplication of the law". The provisions of the Bill of Exchange Act is very clear as to when a draft should be considered to be a bill under the Bill of Exchange Act. That his lordship thereby erred in law in holding that it is only for the purpose of payment on draft with forged endorsement that the draft should be deemed to be a bill. Learned Counsel therefore urges the Court to hold that "Exhibit A" is a bill under the Bill of Exchange Act.

It is the alternative argument of the learned Counsel for the Appellant that in the absence of the doctrine of frustration the applicable law for determining the extent of liability of parties herein should be the Bill of Exchange Act as provided under section 57 of the bill of exchange Act.

In answer to the submission of the learned Counsel for the Appellant, the learned Counsel for the Respondent cites the provision of Order 25 Rule 4 (1) of the Rules of High Court of Ogun State 1988 and the case of Okenwa v. Military Governor, Imo State & Ors (1996) 6 SCNJ 221 @ 235, Onamade v. Africa Continental Bank Ltd (1997) 1 SCNJ 65 @ 87-88, Metal Construction (W.A) Ltd v. Chief Aboderin (1998) 6 SCNJ 161 @ 171 in challenge of the competence of that issue.

It is the submission of the learned Counsel that the fact of whether the Bank draft is a bill of exchange and the limit of the damages to be awarded under the bill is a material fact which ought to have been pleaded by the Appellant in the statement of defence.

Learned Counsel submits that nowhere in the statement of defence of the Appellant at pages 19-20 of the records is any material fact pleaded before the lower court regarding this issue being canvassed at the address stage and now before this Court by Counsel to the Appellant. Learned Counsel therefore urges the Court to strike out the ground of appeal and issue as incompetent.

The alternative response of the learned Counsel for the Respondent is that the bank draft is not a bill of exchange and by the Interpretation of section of the Bill of Exchange Act in section 2 (1), a draft is a prescribed instrument, rather than being a bill of exchange.

Learned Counsel submits that by the provision of section 3 (2) of the Bill of Exchange Act not all instruments are bill of exchange.

Learned Counsel contends that even if the bank draft were held to be a Bill of Exchange that the award made by the lower court being the sum of N550, 000.00 is not in excess of the provisions of section 57 of the Act and the said award being expenses incurred by the Respondent following his protest on the dishonouring of his bank draft.

Issue 3

The learned Counsel for the Appellant challenges the award of damages made by the learned trial Judge. It is the submission of the learned Counsel that the only damage recoverable and awardable are those stated under the provisions of section 57 of the Bill of Exchange Act.

That the measure of or category of damages as interpreted on a dishounoured bill are only enumerated under the Act and no more. Therefore the only damage to which the Respondent was entitled to in the transaction that gave rise to this suit was damages as contemplated under sections 57 of the Bill of Exchange Act. Learned Counsel cites the case of UBN Ltd v. Ademuyiwa (1999) 11 NWLR (pt. 628) @ 592.

Submits further that the Respondent having sustained no loss cannot be awarded damages for breach of contract. Cited are the evidence of PW2 and the cases of FBN Plc v. Associates Motors Co. Ltd (1998) 10 NWLR (pt. 570) 441 @ 446, Omonuwa v. Wahabi (1976) 4 SC @ 62, C.C.B Ltd v. Nwokocha (1998) 9 NWLR (pt. 564) page 98 @ 127 in support of the submission.

It is the further submission of learned Counsel that the award of N550, 000.00 made by the learned trial Judge was not based on sound legal principle and excessive and the court was too generous in the award and converted itself to a Father Christmas. Counsel Refers to the cases of Odumosu v. African Continental Bank Ltd (1976) 11 SC 55, UBN Ltd. v. Ademuyiwa (supra) and thereby urges the Court to set aside the sum of N550, 000,00 general damages granted by the trial court.

Learned Counsel for the Respondent in response on the issue submits, upon the authority of Rockonoh Property Co. Ltd v. NITEL & 1 or (2001) 7 NSCOR VOL. 7171 @ 183 that the quantum of general damages is that which is consider adequate loss or inconvenient flowing natural from the act of the defendant and is not dependent in strict calculation from specified items.

Learned Counsel submits that by paragraph 1 of the statement of claim and at page 38 of the record that the Respondent pleaded and testifies that he is a businessman and that the said deposition and evidence was not challenge. In the circumstance the law presume injury to the Respondent being a trading customer and he is entitle to substantial damages although he neither pleaded nor proof actual damage. (Refers Allied Bank of Nigeria Ltd v. Akabueze (1997) 6 SCNJ 116 @ 141 per Iguh JSC.

The learned Counsel Contends that it has long been established that refusal by a banker to pay a customer cheque when it holds in hand in the relevant account, an amount equivalent to or more than that endorsed on the cheque belonging to the customer amounts to a breach of contract for which the banker is liable in damages.

Counsel urges the court not to interfere with the award made by the learned trial Judge.

Issue 4

Learned Counsel contends that the respondent did not prove the claim for interest nor the rate of interest to the standard required by law. That in the case of A-G Ogun State V. A-G (Fed) (2002) 18 NWLR (pt.798) 232 @ 246, the Supreme Court held that:-

"where a particular relief sought by a party is too wide, or vague, or unmanageable, or unspecific the court will refuse to grant such a relief. An order should not be made in vacuo"

The learned trial Judge erred in law in by awarding the interest and the rate were not established and ordering refund on charges deducted from the Respondent account.

Upon the authority of Katto v. CBN (1999) 6 NWLR (pt.607) page 390 @ 407, Ogige v. Obiya (1997) 10 NWLR (pt. 524) page 179 @ 194 the Appellant urges the court to invoke its power under the provisions of section 16 of the Court of Appeal Act to order the Respondent to return to the Appellant the sum of N1, 250,540.00 less the sum of N695, 000.00 being the sum in the draft (Exhibit A).

Learned Counsel for the Respondent submits upon the authority of Veepee Industries Ltd v. Cocoa Industries Limited (2008) 3 FWLR (pt. 437) 5431, Muhammad JSC that contrary to the argument of the Appellant, the interest awarded by the lower court was not an award claimed separately but as a compensation for the return of the dishonoured bank draft Exhibit A.

Counsel also submits that contrary to the argument of the Appellant, there was evidence before the lower court on the charges deducted from the Respondents account by the Appellant. (Paragraph 8 of the statement of claim at page 8 of the record) that this averment of the Respondent was admitted by the Appellant in paragraph 1 of the statement of defence at page 19 of the record. That whatever is admitted needs no further proof. (Refers FBN Plc v. Tsokwa (2003) FWLR (Pt. 153) 205 @ 228).

Counsel further refers this court to Exhibit D, the Respondent's evidence at page 44 of the record and submits that there was actually deduction from his account for the payment of the bank charges for the bank draft. That the claim as couched and granted by the lower court is neither vague nor imprecise.

Issues 2, 3 & 4 although argued separately shall be determined together because they are interwoven and were just fragmented for the purpose of argument.

Section 3 (1) of the Bill of Exchange Act. Cap. B. B LFN 2004 provides that:-

"a bill of exchange is an unconditional order in writing addressed by one to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money or to the order of a specified person or to bearer."

The Apex court has given a considerable pronouncement on the nature of a bill of exchange, It was the case of Diamond Bank Ltd v. Partnership Investment Company Ltd & Anor (2009) LPELR - 939 (SC). The Supreme Court held thus:-

"Apart from the apparent proposition of law that "drafts" must to be honoured and ordinary "cheques" payable on demand, there is not much to be said immediately about the two instruments based on the premises of the above definitions. However, the peculiarities of the two instruments have been brought out in a succinct manner by Idigbe J. (as he then was) in the case of R. v. Okon 1933 - 19066) 1 NBLR at 241 at 253-254 and I quote with approval His Lordship on this aspect of the matter thus; "When money is paid by a customer into the bank, there is a contract between the banker and the customer in which the banker receives the money as a loan from a customer against the promise by the banker to honour the customer's cheque or orders of the customer. In this connection there is hardly any difference between a cheque and a draft. As was said by Pallock C. B. 'the word draft no doubt includes a bill of exchange as well as a cheque'. 'it is a nomen generale which embraces every request by the drawer upon the drawee to pay money.' See Hunter v. boywer (1950) 15 LT05 281 at 282. A banker's draft however is not to be regarded as a cheque since it is not really addressed by one person to another as required by the bill of exchange Act Cap, 21 (section 3). It is drawn on behalf of a bank upon itself, whether payable at the head office or, at some other branch of the bank and at law; the Head office and its branches constitute one legal person or entity (see Capital and Counties Bank Ltd v. Gordon (1903) AC 204). All the same where as in the instant case a customer request his banker to provide him with a banker's draft the amount in respect of which is to be debited to his account; he ought ordinarily to enclose with his request a cheque covering the amount. The amount so paid in by the customer becomes under the principle above described the bank's money and when paid out, still that of the bank, but paid, out pursuant to the contract above described". Chukumah-Eneh JSC (pp. 36-37)

By the above authority the bank draft is not a bill of exchange but it is larger than a bill of exchange as it incorporates a bill of exchange.

By the definition of a bill of exchange as an unconditional order in writing, and the authority of Diamond Bank Ltd v. Partnership Investment Company Ltd & Anor (2009) (supra), it appears to me that a bank draft is much more than "an unconditional order in writing", it is rather liquid cash for instant payment in fulfillment of a financial obligation to the tune of the sum in the bank draft. A bank draft is bought with cash and not issued by an unconditional writing. It follows in my humble opinion, that a bill of exchange is a less compelling form of a bank draft and would not command the weight of a bank draft. A breach of contract involving the honouring of a bank draft is therefore of much more serious consequence than a breach of compliance with the terms of a bill of exchange. I should state further that unlike the situation in the Diamond Bank Ltd v. Partnership Investment Company Ltd & Anor (2009) (supra), where a cheque was required to accompany the draft, being a banker's draft, in the instant appeal the "bank draft" was cash, paid in full by the Respondent. The bank draft was thus the property of the Respondent, placed in the custody of the Appellant for instant transmission to Texaco Nigeria Plc account in fulfillment of the Respondent's financial obligation to the Texaco Nigeria Plc. The failure of the Appellant to comply with the said (paid) instructions of the Respondent constitute a contractual breach.

The argument of the learned Counsel for the Appellant situating the "Exhibit A" (bank draft) within the purview of section 57 of the Act is therefore misconceived. The learned trial Judge was right in holding that the applicable law for determining the extent of liability cannot stricto sensu be the Bill of Exchange Act. In the case of Augustine F. I. Ibama v. Shell Petroleum Development Co. or Nigeria Ltd (1998) 3 NWLR (Pt.542) 493 @ 500 C.A. the court held that:-

"the general rule, is that monetary judgment, attracts appropriate interest even where none is claimed."

(See also Rockonon Property Co. Ltd v. NITEL & 1 or (2001) 7 NSCQR vol. 7 171 @ 183)

This court does not form the habit of interfering with the award of damages made by the learned trial Judge except where the decision is perverse and out of tune with the facts and the law before the learned trial Judge. The case of UBN Ltd v. Odusote Books Stores Ltd (1995) 9 NWLR (Pt.421) 558 is not supportive of the Appellant's as the reasons adduced vide the above cited authority as to when the court can interfere in the award of damages were missing in the instant case. In the case of UBN Plc v. Ajabule & Anor (2011) LPELR - 8239 (SC) @ pp 32-33 my lord Fabiyi JSC held that:-

" ...an appellate court will interfere with an award by a trial court where it is clearly shown that

i. That the trial court acted upon wrong principle of law,

ii. That the amount awarded by the trial court is ridiculously too high or too low

iii. That the amount was an entirely erroneous and unreasonable estimate having regards to, the circumstances of the case."

From the judicial authorities cited vis-a-vis the circumstances of the facts of this case, it is clear that the decision of the learned trial Judge of the award of general damages to the tune of N550, 000.00 is not perverse nor based on wrong principle of law as contended by the learned Counsel.

I prefer the argument of the learned Counsel for the Respondent that the learned trial Judge was right to have applied the inherent powers of the court to award damages in favour of the Respondent. This was not an exercise of power at large. The case of Diamond Bank Ltd v. Partnership Investment Company Ltd & Anor (2009) LPELR-939 (SC) affirms the existence of such power when it held:-

"it is also settled that the High Court, has an inherent power to make Orders even if not sought where such orders, are "incidental" to the prayers sought. In Other words, a Plaintiff may be given such equitable relief as he may be entitled to even though he has not specifically asked for one. Per Ogbuagu JSC @ p30

In this appeal, indeed the Respondent laid claim to damages suffered. The injury the Respondent suffered is borne out by the continued retention of the sum of N695, 000.00 by the Appellant for the ridiculous reason of not making double payment to the Respondent. The Respondent paid for services which were not rendered and is entitled to refund of all such charges made.

I hereby affirm the decision of the learned trial Judge in its entirety and for the avoidance of doubt reproduce anon, the order made by the learned trial Judge to wit:

"(a) ...in effect, the Plaintiff is entitled to substantial damages which I assess as N550,000.00 (page 110 lines 8-9 of the record)

(b) I believe it is only equitable and just that interest be paid on the value of the draft i.e. N695,000.00 at either the Bank interest rate prevailing at the time of the transaction or the current rate whichever is lower..." (Page 111 of the record).

I also award a cost of N50, 000.00 to the Respondent and against the Appellant.

It is hereby so ordered.

**CHIDI NWAOMA UWA, J.C.A**.:

I read in advance the draft of the judgment just delivered by my learned brother, M. B. DONGBAN-MENSEM, JCA. I agree with the reasoning and conclusion arrived at in affirming the judgment of the lower court.

I would add a few words concerning the award of damages. No doubt the Respondent as plaintiff in the lower court in his Statement of claim claimed damages for the injury suffered and caused by the actions of the Appellant who retained the Respondent's funds. Therefore, the issue of the lower court awarding the Respondent what he did not claim as argued by the learned counsel to the Appellant did not arise.

The essence of the award of general damages was explained in the case of YALAJU-AMAYE V. ASSOCIATED REGISTERED ENGINEERING CONTRACTORS LTD. & ORS. (1990) NWLR (PART 145) 422, (1990) 6 S.C. 157 in the following terms per Karibi-Whyte, J.S.C. at page 47, paragraphs A-B.

"It is well settled law that general damages is the kind of damage which the law presumes to now flow from the wrong complained of. They are such as the court will award in the circumstances of a case, in the absence of any yardstick with which to assess the award except by presuming the ordinary expectations of a reasonable man. See Lar v. Stirling Astaldi Ltd. (1977) 11/12 S.C. 53; Omonuwa v. Wahabi (1976) 4 S.C. 37."

Further, at paragraphs C-E as to when and why the award is usually made:

"General damages may be awarded to assuage such a loss which flows naturally from the defendant's act. It need not be specifically pleaded. It arises from inference of law and need not be proved by evidence. It suffices if it is generally averred. They are presumed by law to be the direct and probable consequence of the act complained of. Unlike special damages it is generally incapable of substantially exact calculation."

The respondent established the wrong done to him by the Appellant and naturally is entitled to general damages as rightly awarded by the trial court. In respect of award of damages by a trial court, his Lordship Nnamani, J.S.C. in WILLIAMS V. DAILY TIMES OF NIGERIA LTD. (1990) 1 ALL, NLR 1; (1990) 1 S.C. 23, AT PAGES 84-85, PARAGRAPHS G - B had this to say:

"It is well settled that the award of damages by a trial court can only be upset by an appellate court if that court feels that the trial court acted on wrong principles of law or that the amount awarded by the trial court is extremely high or low. The appellate court ought not to upset the award of damages by a trial court merely because if it had tried the matter it would have awarded a lesser amount. See Flint v. Lavel (1935) 1 K.B. 354; 300, James v. Mid Motors (Nigeria) Ltd. (1978) 12 S.C. 31."

Similarly, in ADIM V. NBC & ANOR. (2010) 9 NWLR (PART 1200) 543, the Apex Court held thus:

"An appellate court may only interfere with an award of damages when the award is manifestly too high or too low or is based on the wrong principles of law. See African Newspapers Ltd. vs. Ciroma (1996) 1 NWLR (part 423) 156. It is also the law, that the appellate court ought not upset an award of damages merely because if it had tried the matter it would have awarded a higher or lesser amount. See, James v. MIDMOTORS (NIG.) LTD. (1978) 11 - 12 S.C. 31."

In the present circumstance, the lower court was therefore right to have awarded damages in favour of the respondent and same cannot be faulted by this court.

On the award of interest in the sum of the draft, crediting the account of the respondent with charges deducted, amongst other reliefs sought by the respondent, it was erroneous for the learned counsel to the appellant to have argued that these were not claimed. The second relief in the respondent's statement of claim covered the reliefs granted by the trial court.

It is without doubt that a period of almost two years elapsed between the date the writ was taken out by the respondent and the date judgment was given in favour of the respondent. It would therefore not be reasonable that the exact amount of the draft be credited to him when if the same amount was invested or fixed in the bank, the respondent would have made extra money in two years. There was nothing wrong with the interest to be paid on the various sums.

As a whole, I also affirm the judgment of the learned trial judge, N. I. Saula, J. of the Ogun State High Court, sitting at Sagamu Judicial Division, delivered on the 19th May, 2008, in Suit No. HCS/35/2006. I abide by the orders made as to costs.

**HARUNA SIMON TSAMMANI, J.C.A**.:

My learned brother, M. B. Dongban-Mensem, JCA gave me the privilege of reading in advance the judgment just delivered by him.

My learned brother comprehensively considered and resolved all the pertinent issues that presented themselves for determination in this appeal. I agree with the reasoning and conclusion arrived at by my learned brother. I have nothing else to say that will add value to the conclusion reached therein.

In the circumstances, I am also of the view and do hold that this appeal is lacking in merit. Accordingly, I affirm the judgment of the learned trial judge in this case delivered on the 19th day of May, 2008.

I abide by the order on costs.